
VIRGINIA LAW REVIEW

VOLUME 90

MARCH 2004

NUMBER 1

ARTICLES

CONSTITUTIONAL DECISION RULES

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[T]he law cannot hope to sustain [its] compound burden of stability, flexibility, and transparency unless it pays scrupulous attention to its own taxonomy [T]he understanding of the natural world has depended on patient, self-critical classification. Lawyers deceive themselves if they think they are exempt from the same elementary intellectual burden. This was already obvious to Gaius in the second century and still obvious to Blackstone in the 18th. The law simply could not be understood unless it took care to classify itself ‘methodically.’ If it did not properly understand itself, its decision-making would be erratic and doomed to ridicule.¹

INTRODUCTION

FOR generations, American constitutional theorists and judges have struggled with problems of constitutional interpretation, exploring how meaning is properly derived from the Constitution and, insofar as the answer may be different, how *courts* ought to derive such meaning. Recent years, however, have seen an upsurge in scholarship addressed to a related but distinct subject. Without entirely abandoning debates over constitutional interpretation, constitutional theorists have started increasingly to wonder about those judicial outputs that feature in the enterprise of constitutional adjudication and yet are something other than a court’s determination as to what any given provision of the Constitution means. Theorists have turned their attention from constitutional *meaning* to what we may call, at least on a first pass, constitutional *doctrine*.

Obviously, constitutional scholars have always been interested in doctrine in the sense of caring to elucidate, clarify, rationalize, or propose revisions to the rules governing some area of constitutional law. This describes the dominant mode of constitutional scholarship for most of the history of the field. And although arguably endangered, it is far from extinct. Think of, say, Douglas Laycock, Donald Regan, David Shapiro, and, in much of his work, Laurence Tribe.² But the previous paragraph aims to draw atten-

¹ Peter Birks, *Rights, Wrongs, and Remedies*, 20 *Oxford J. Legal Stud.* 1, 3 (2000).

² To name names in this context is perilous, of course, because the scholars who could with equal or even greater justice be included on such a list must number in the

tion to a different genre of scholarship. The growing genre that I will contrast with scholarship dedicated to methods of constitutional interpretation examines, not any given body of doctrine (such as First Amendment doctrine or Commerce Clause doctrine), but some of the potentialities and challenges that arise from the claimed existence of doctrine, conceived as a category of judicial work product—interpretations, reasons, mediating principles, and implementing frameworks—more comprehensive than judge-interpreted constitutional meaning.³ Insofar as this strain of scholarship concerns itself with the *fact* of doctrine but not with its particular *content*, we may fairly term it metadoctrinal.

Especially notable early examples of metadoctrinalism were Henry Monaghan's 1975 *Harvard Law Review* Foreword, "Constitutional Common Law,"⁴ and, following two volumes later in the same journal, Larry Sager's "Fair Measure."⁵ Monaghan's Foreword had two basic objectives: to draw attention to the fact "that a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions;"⁶ and to argue for this body's legitimacy.⁷ Sager

dozens. I provide these illustrations simply to make clearer the nature of the contrasts I wish to draw.

³ See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 *Harv. L. Rev.* 26, 79 (2000) ("Article III proclaims that the Constitution is to be enforced as justiciable law in ordinary lawsuits. The document thus envisions that in deciding cases arising under it, judges will offer interpretations of its meaning, give reasons for those interpretations, develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law. These interpretations, reasons, principles, and frameworks are, in a word, doctrine.") (internal citations omitted); Charles Fried, *Constitutional Doctrine*, 107 *Harv. L. Rev.* 1140, 1140 (1994) (describing "constitutional doctrine" as the "rules and principles of constitutional law . . . that are capable of statement and that generally guide the decisions of courts, the conduct of government officials, and the arguments and counsel of lawyers"); David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 883 (1996) (defining "doctrine" as "an elaborate structure of precedents built up over time by the courts").

⁴ Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1 (1975).

⁵ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 *Harv. L. Rev.* 1212 (1978).

⁶ Monaghan, *supra* note 4, at 2–3.

⁷ *Id.*

brought a different focus to essentially the same phenomenon by examining what is entailed by the existence of “underenforced constitutional norms”—the fact that judge-made constitutional doctrine could be less extensive than constitutional meaning.⁸ Yet, despite the wide audiences that these articles deservedly won, for many years the field that they combined to help mark attracted little sustained attention from constitutional theorists who continued to struggle principally with problems of interpretation as debates raged under such broad banners as “interpretivism,” “originalism,” “textualism,” and “representation-reinforcement.”

Seeds of change may be in the air, for much of the most provocative recent work in constitutional theory is centrally concerned with problematics of constitutional doctrine—what it is, how it compares to constitutional meaning, whether it is legitimate, how it should be employed, and what consequences follow. Though this is not a claim that could be substantiated in short order, even a cursory review of recent *Harvard Law Review* Forewords⁹ suggests metadoctrinal ascendance. No doubt the most conspicuous example is Richard Fallon’s 1997 Foreword, “Implementing the Constitution,” subsequently developed into a book of the same name.¹⁰ “[T]he central focus” of Fallon’s Foreword is to draw attention to the fact that “[i]dentifying the ‘meaning’ of the Constitution is not the Court’s only function. A crucial mission of the Court is to *implement* the Constitution successfully. In service of this mission, the Court often must craft doctrine that is driven by the Constitution, but does not reflect the Constitution’s meaning precisely.”¹¹ But if

⁸ Sager, *supra* note 5, at 1213. For a contemporary exploration in a similar vein see Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 *Stan. L. Rev.* 585 (1975).

⁹ “Within the community of scholars of constitutional law the ‘Forewords’ are widely taken to be good indications of the state of the field. The Foreword project defines a vision of the field of constitutional scholarship.” Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 *Const. Comment.* 463, 463 (1994–95). This is not inconsistent with the authors’ further observation that “[t]he constraints of the selection process and of time mean that Forewords are systematically likely to be disappointing.” *Id.* at 470.

¹⁰ Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 *Harv. L. Rev.* 54 (1997) [hereinafter Fallon, *Harvard Foreword*]; Richard H. Fallon, Jr., *Implementing the Constitution* (2001) [hereinafter Fallon, *Implementing the Constitution*].

¹¹ Fallon, *Harvard Foreword*, *supra* note 10, at 57.

Fallon's article is a particularly clear instance of metadoctrinalism, it is not a lonely one. Metadoctrinalism is close to the surface of Cass Sunstein's 1996 Foreword, "Leaving Things Undecided,"¹² which introduced and defended the concept of judicial "minimalism" ("the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided"¹³); Michael Dorf's 1998 contribution, arguing that the Court should "worry less about finding the 'true' meaning of authoritative texts [statutes and the Constitution], and instead—while sensitive to its own institutional limitations— . . . focus on finding provisional, workable solutions to the complex and rapidly changing legal problems of our age";¹⁴ and "The Document and the Doctrine,"¹⁵ Akhil Amar's 1999 exhortation that scholars and judges shift their focus from the body of judicial precedent construing and implementing the Constitution back to the Constitution itself.¹⁶

Moreover, heightened sensitivity to the complexities of the relationship between constitutional meaning and constitutional doctrine has not been limited to the academy. To the contrary, the United States Supreme Court has divided precisely over issues that can best be understood as metadoctrinal in several important and seemingly disparate recent decisions. In *Dickerson v. United States*,¹⁷ for example, the Court reaffirmed *Miranda v. Ari-*

¹² Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4 (1996) [hereinafter Sunstein, Leaving Things Undecided]. This was developed into Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999) [hereinafter Sunstein, Judicial Minimalism].

¹³ Sunstein, Leaving Things Undecided, supra note 12, at 6.

¹⁴ Michael C. Dorf, The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation, 112 Harv. L. Rev. 4, 9 (1998) (internal citations omitted).

¹⁵ Amar, supra note 3.

¹⁶ This is a representative but far from exhaustive list of influential recent works that exhibit significant concern with the fact that the judicial work product in constitutional law is much more complex and multifaceted than references to constitutional interpretation would indicate. For an additional example of this interest among recent *Harvard Law Review* Forewords, see Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 26 (1992) (attributing divisions on the Court to, in substantial part, varying preferences among the Reagan and Bush appointees for rules versus standards, and particularly observing that the debate over rules versus standards "occurred at three levels: first, what force to give constitutional precedent; second, how to read the Constitution; and third, how to fashion the operative constitutional doctrines, tests, and formulas that guide the lower courts and the Court itself in future cases"); id. at 83–95.

¹⁷ 530 U.S. 428 (2000).

zona's¹⁸ warnings requirement¹⁹ over Justice Scalia's passionate charge that *Miranda* had announced an illegitimate "prophylactic" rule, instead of having engaged in bona fide constitutional interpretation.²⁰ In *Board of Trustees of the University of Alabama v. Garrett* the Court held that Congress lacked power under Section 5 of the Fourteenth Amendment to enact the Americans with Disabilities Act,²¹ over Justice Breyer's insistence that the Court misapplied the congruence and proportionality test of *City of Boerne v. Flores*²² because it confused equal protection doctrine for equal protection meaning.²³ And in *Atwater v. City of Lago Vista*, Justice O'Connor's dissent accused the majority of inappropriately employing doctrine to underenforce the Fourth Amendment's correct meaning.²⁴

This growing attention to the judicial creation and manipulation of constitutional "doctrine" provides a much-needed corrective to an at-times obsessional focus on the judicial production of constitutional "meaning" precisely because, as Fallon has persuasively argued, courts are engaged in a project of constitutional implementation broader than what references to constitutional interpretation seem to signify.²⁵ And yet, constitutional scholars' collective understanding of the taxonomy, or conceptual structure, of constitutional doctrine has been little advanced. Monaghan, as we have seen, described constitutional common law in terms of "substantive, procedural, and remedial rules,"²⁶ but this was plainly just a way of gesturing toward the breadth of what he considered constitutional common law. He made no effort to explain what principles distin-

¹⁸ 384 U.S. 436 (1966).

¹⁹ *Dickerson*, 530 U.S. at 432.

²⁰ *Id.* at 445–46 (Scalia, J., dissenting).

²¹ 531 U.S. 356, 374 (2001).

²² 521 U.S. 507 (1997).

²³ *Garrett*, 531 U.S. at 385–87 (Breyer, J., dissenting).

²⁴ 532 U.S. 318, 360–62 (2001) (O'Connor, J., dissenting).

²⁵ To see the point in another light, consider Laurence Tribe and Michael Dorf's valuable book, now more than a decade old, *On Reading the Constitution* (1991). Tribe and Dorf begin by asking: "What does it mean to *read* this Constitution? What is it that we do when we *interpret* it? Why is there so much controversy over *how* it should be interpreted[?]" *Id.* at 3. Those are appropriate questions. Sensitivity to constitutional doctrine spurs us to raise an additional question, however: How should the Court create doctrine to implement its interpretation of the Constitution?

²⁶ Monaghan, *supra* note 4, at 2–3.

guished one sort of rule from another or why the distinctions might matter.²⁷ Fallon sorted constitutional doctrine into a large number of categories—balancing tests, “suspect-content” tests, purpose tests, and the like²⁸—but candidly acknowledged that his laundry list was “a bit of a hodgepodge” of no particular conceptual significance.²⁹

This Article is animated by the belief that, now that scholars and courts have come increasingly to appreciate that judge-created constitutional doctrine is not identical to judge-interpreted constitutional meaning (or at least *may* not be), it is high time to concentrate on developing a functional taxonomy of that doctrine.³⁰ Let me caution at the outset, however, that this Article does not purport to have accomplished that imposing task—in part because the

²⁷ Future work did not make attention to this trichotomy look like a promising way to conceptualize constitutional doctrine. Is the exclusionary rule substantive or remedial? Are the standing doctrines substantive or procedural? What about rebuttable presumptions? While some commentators pay little attention to these difficulties, others try to resolve them by proposing their own idiosyncratic definitions. Thus Daryl Levinson defines “[r]emedies” simply and expansively “as rules for implementing constitutional rights and preventing or punishing their violation,” Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 861 (1999) (internal citation omitted), a definition that would seem to moot any other categories of constitutional common law. See also *id.* at 869 n.47 (reiterating that “‘remedy’ . . . encompass[es] the implementation, detection, and prevention of constitutional violations (as distinct from identifying the scope of the constitutional right at stake)”). Dan Coenen, to take another example, would label a rule “substantive” if it “foreclose[s] to the government a substantive policy choice” rather than allowing (as a “structural” rule would do) that the government try again so long as it exhibits the proper sort of deliberation and clarity. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *Wm. & Mary L. Rev.* 1575, 1596 (2001). The difficulties that the substance/procedure distinction have posed for operationalizing the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), hardly require mention. See generally 19 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction and Related Matters* §§ 4508–10 (2d ed. 1996) (summarizing the cases in which the Court has dealt with and developed the *Erie* doctrine).

²⁸ Fallon, *Implementing the Constitution*, *supra* note 10, at ch. 5.

²⁹ *Id.* at 77.

³⁰ Cf. Michael Conant, *Constitutional Structure and Purposes: Critical Commentary* 6 (2001) (arguing that “the progress characteristic of the natural and physical sciences in the last 100 years could not occur in legal reasoning, because of its epistemic inadequacies,” and attributing those inadequacies, in part, to the paucity of discussion in legal scholarship “on the meaning of basic terms and primary relationships that is necessary for one generation of scholars to build on the published learning of previous generations”).

job is immense, and in part because taxonomies are always, in any event, works in progress. A taxonomy is a tool. Its utility, and therefore its truth, is a function of, among other things, the needs of its consumers, the features of the phenomenon being taxonomized, and the characteristics of its social and institutional context. No taxonomy of a subject as complex and vibrant as constitutional law, then, can hope to survive unchanged for very long. For this reason alone (although surely there are others), contributions to a taxonomy of constitutional doctrine may well prove valuable even if piecemeal. With the hope this will prove true, this Article will offer a first cut.

That cut will dis sever constitutional doctrines that are simply judicial determinations of what the Constitution means from those conceptually distinct doctrinal rules that direct how courts—faced, as they inevitably are, with epistemic uncertainty—are to determine whether the constitutional meaning has been complied with. To coin some terms, let us call constitutional doctrines that represent the judiciary’s understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision “constitutional operative propositions”; doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied I will term “constitutional decision rules.”³¹

An example will help. The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”³² The courts are called upon, in the process of adjudication, to determine what this provision means. In performing that task, the courts may rely on any number of interpretive considerations, including such “modalities” as text, history, precedent, structure, moral judgment, and the like.³³ Suppose the federal judiciary interprets the provision to mean that government may not classify individuals in ways not reasonably designed to promote a legitimate state interest. Such, then, is the con-

³¹ There are reasons for this vocabulary. See *infra* note 192. For the moment it is enough to caution that what I will call a “constitutional decision rule” is *not* the same as a “rule of decision” for purposes of the Rules of Decision Act, The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92.

³² U.S. Const. amend. XIV, § 1.

³³ See generally Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982) [hereinafter Bobbitt, *Constitutional Fate*]. The term “modality” is introduced in Philip Bobbitt, *Constitutional Interpretation* 11 (1991).

stitutional operative proposition.³⁴ But that is not the whole of judge-made constitutional doctrine. A court cannot implement this operative proposition without some sort of procedure (perhaps implicit) for determining whether *to adjudge* the operative proposition satisfied when, as will always be the case, the court lacks unmediated access to the true fact of the matter.³⁵ It needs, that is to say, a constitutional decision rule.

The most obvious decision rule—indeed so obvious as to be almost invisible—is simply the preponderance of the evidence standard of review.³⁶ Applied to this imagined judicial determination of the meaning of the constitutional guarantee of equal protection, such a standard would amount to a direction that courts should conclude that the challenged action classifies individuals in ways not reasonably designed to promote a legitimate state interest if and only if they believe it more likely than not that the action classifies individuals in ways not reasonably designed to promote a legitimate state interest. But—and this is the crucial point—it is not conceptually necessary that the constitutional decision rule must be the simple preponderance standard. Moreover, even if the prepon-

³⁴ As is true in this example, the constitutional operative proposition is very rarely identical to the constitutional text—at least outside the Constitution's housekeeping provisions. Where, for instance, the Constitution itself provides that "Congress shall make no law respecting an establishment of religion," U.S. Const. amend. I, the constitutional operative proposition will necessarily furnish some elaboration of what a "law respecting an establishment of religion" means. I will therefore treat "constitutional operative proposition" and "judge-interpreted constitutional meaning" synonymously.

³⁵ A caution: It is the fact of epistemic uncertainty that makes decision rules (or something functionally equivalent) unavoidable. But it does not follow that decision rules must be designed for the sole purpose of minimizing the total adjudicatory errors that epistemic uncertainty produces. Whether courts should have legitimate authority to consider values other than error minimization when crafting decision rules is a matter I take up later. See *infra* Section IV.A.2.a. Even if the better answer to that question is "no," however, that answer must be supported by argument; it does not flow as a mere logical entailment of the conditions that necessarily produce decision rules in the first place.

³⁶ The preponderance of the evidence standard is, of course, directed to fact finders. As we will see, though, the questions that must be answered in order to apply judicially interpreted constitutional meanings are very often matters resolved by courts as though they were matters of law. I would say that they are "constitutional facts," except that that term is generally used to refer to circumstances in which appellate courts ought not accord deference in their review of trial court findings. See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229 (1985) (exploring such situations).

derance standard does serve as a general *default* decision rule, it is possible for the courts (most notably the Supreme Court) to displace this default decision rule with a different decision rule crafted for a particular context. To return to our example, the decision rule of equal protection doctrine could direct courts to conclude that a challenged action classifies individuals in ways not reasonably designed to promote a legitimate state interest if and only if persuaded of this by clear and convincing evidence.

Or, to make matters still more interesting, the decision rule could correspond to the operative proposition in a rather different way. Instead of simply announcing the amount of confidence a court need have before it may conclude that the operative proposition is satisfied (or violated), the decision rule could articulate some different proposition that, if adjudged satisfied by a specified degree of confidence, will permit or require a particular conclusion with respect to the operative proposition. Suppose, for example, that the Court believes each of the following: (1) that racial classifications are often designed—that is, actually intended—to promote illegitimate interests; (2) that such classifications will nonetheless almost always further some conceivable legitimate interest too; and that (3) reviewing courts are generally unable on a case-by-case basis to determine when the permissible interest to which the classification reasonably relates was the real one. Under such circumstances, the Court might direct, as a decision rule, that courts conclude that the equal protection operative proposition is violated (i.e., that the state has discriminated among individuals in a manner not reasonably designed to promote a legitimate state interest) if persuaded by a preponderance of the evidence either (a) that this is so, or (b) that the challenged action contains a facial racial classification which is not narrowly tailored to promote a compelling governmental interest.³⁷

³⁷ This, of course, was Ely's rationalization of equal protection doctrine. See John Hart Ely, *Democracy and Distrust* 145–48 (1980). Unlike Ely, however, I mean to express no views at present regarding whether strict scrutiny is best understood as the conjunction of the particular operative proposition and decision rule hypothesized in the text. The discussion in the text assumes a posture of *forward-engineering*: It shows how the Court could come to create different sorts of decision rules as part of its constitutional doctrine. The point, in other words, is that *if* the Court were to interpret the Equal Protection Clause to mean that government may not classify persons in ways not reasonably designed to promote a legitimate state interest, it *could* imple-

As this example illustrates, we should resist the temptation to naturalize the preponderance standard as an inevitable constitutional decision rule. As a conceptual matter, the number and variety of options in the making of constitutional decision rules is limited only by judicial imagination and by the (ever-changing) constraining norms of professional practice. And as a positive matter, I will argue, this imagination has indeed been exercised: Much of existing constitutional doctrine is better understood not as judicial statements of constitutional meaning (i.e., as constitutional operative propositions) but rather as judicial directions regarding how courts should decide whether such operative propositions have been satisfied (i.e., as constitutional decision rules).

This distinction between operative propositions and decision rules would not, I reiterate, comprise the whole of a useful taxonomy of constitutional doctrine. The dichotomy is likely to be supplemented, at the least, by remedial rules that direct what a court should do when application of a decision rule yields the conclusion that the operative proposition has been, or will be, violated. And the taxonomy could become a great deal bushier or more nuanced. It is not necessary to speculate along these lines now, however, for this single conceptual distinction—between operative propositions

ment that operative proposition by means of a decision rule markedly different from the simple preponderance-of-the-evidence decision rule. But determining how *existing* doctrine is best unpacked is an exercise in *reverse-engineering*. It is undeniable both that the present judge-announced equal protection doctrine could be unpacked in ways different from those described in the text and that the Court has in fact sent conflicting signals. See Amar, *supra* note 3, at 46 n.64. For example, even if the strict scrutiny that current doctrine commands for racial classifications is best understood as a decision rule, it could be in service of somewhat different operative propositions. Ely seems to assume, for example, that (what I am calling) the equal protection operative proposition demands merely that every classification have been rationally chosen to promote a legitimate state interest. But the operative proposition could itself demand that every classification be justified on the strength of an end, and a fit, commensurate with the social harm that it imposes—which is essentially Justice Stevens's long-standing position. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring); *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring). And I am not prepared even to rule out that strict scrutiny for racial classifications is itself part of the operative proposition. I will revisit the strict scrutiny component of equal protection doctrine, *infra* notes 252–55 and accompanying text. For now, readers would do well to keep in mind the difference between forward- and reverse-engineering; a taxonomy of constitutional doctrine might prove useful going forward even if correct classification of any existing doctrine according to that proposed taxonomy remains contested.

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Constitutional Decision Rules

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and decision rules—is likely to lie at the core of any sensible taxonomy of constitutional doctrine drawn on functional principles, and is of sufficient importance alone to warrant careful elaboration and defense. Or so I will maintain. Put another way, I will argue that judges, scholars, and litigators should make greater efforts to distinguish whether a constitutional rule is an announcement of constitutional meaning (i.e., a constitutional operative proposition) or, instead, is a constitutional decision rule, and should pay attention, in the making of constitutional decision rules, to the particular considerations that might justify its construction.

This argument does not reflect a mere fetish for conceptualism. Attention to the distinction promises substantially to improve the project of constitutional adjudication and can richly enhance our understanding of it. For example, courts will be enabled to more sensibly revise and refine their own doctrines if they pay attention to the respects in which such doctrines communicate a decision rule as opposed to an operative proposition. Moreover, the scope of legitimate action for legislators and executive agents should depend not so much on judge-announced constitutional doctrine full stop, but on the particular content of one *component* of that doctrine, namely the judge-announced operative propositions.

As the preceding remarks may suggest, the ambition of this Article is to integrate theory and practice, the abstract and the concrete. The structure of argument, however, is neither simply top-down nor bottom-up.

Part I will seek to motivate the inquiry into doctrinal conceptualization in a very concrete fashion by introducing what is, jurisprudentially, very possibly the single most important constitutional decision in a generation. That decision is *Dickerson*. *Miranda* itself had a claim to being among the most important decisions of a prior generation. Although the debate over *Miranda*'s legitimacy had proceeded along a variety of argumentative lines, battle had been joined most relentlessly on the question of whether *Miranda* announced a “prophylactic rule” in lieu of having engaged in constitutional interpretation. By the time of *Dickerson*, many constitutional theorists had become persuaded by David Strauss's careful and powerful argument that prophylactic rules indistinguishable

from *Miranda* are ubiquitous and legitimate.³⁸ Nonetheless, Justice Scalia (joined by Justice Thomas) objected, saying that prophylactic rules were unconstitutional. Justice Scalia, it is true, wrote in dissent. But the majority conspicuously failed to defend prophylactic rules as such, choosing instead to reaffirm *Miranda* solely on grounds of stare decisis. *Dickerson* thereby left open a question of profound importance. If *Miranda* announced a prophylactic rule and if prophylactic rules are both prevalent and illegitimate, a potential ocean of constitutional doctrine was at risk.

To resolve the debate left hanging from *Dickerson*, we need to know, of course, what prophylactic rules are, a question that will be explored in Part II. Because the term is susceptible to a great many interpretations, a clarification is needed at the outset. We will not be searching for the “true” meaning of “prophylactic rules,” or even the most common or most useful definition. We need to know what a “prophylactic rule” means to those—Justices Scalia and Thomas among them—who believe that to properly classify particular constitutional doctrine as a prophylactic rule is inconsistent with its legitimacy.

Happily, discovering what Justice Scalia meant by the term is not difficult. He seemed to understand prophylactic rules as a species of what Monaghan had dubbed “constitutional common law” (in contradistinction to a “constitutional interpretation”), or what Sager had termed a “constitutional rule” (in contradistinction to a “constitutional norm”), or what Fallon had called “constitutional doctrine” (in contradistinction to “constitutional meaning”). In particular, Justice Scalia seemed to treat prophylactic rules as that species of constitutional common law or constitutional rule or constitutional doctrine that overprotects or “overenforces” judge-interpreted constitutional meaning. For Strauss and his followers, however, the basic conceptual distinction upon which the Scalia position rested—a distinction that would divide the universe of “constitutional doctrine” into “constitutional meaning” and something else of a materially different character—was itself illusory. Because “constitutional interpretation” was shot through with judicial attention to practical, policy-oriented, and interest-balancing

³⁸ David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190 (1988). See *infra* note 76.

sorts of considerations, they seemed to argue, no important conceptual distinctions could be drawn within the general domain of constitutional doctrine. The upshot of Part II, then, is that the debate over prophylactic rules is as much conceptual as normative. It is, in the first instance, a debate over the logical structure of constitutional adjudication or, put another way, over the taxonomy of constitutional doctrine—whether that doctrine consists of meaningfully different sorts of judge-announced rules.

The core insight of this Article, which will be introduced, developed and defended in Parts III and IV, is that we can resolve this taxonomic challenge by carving constitutional doctrine at a new joint—the joint that separates constitutional operative propositions (judicial statements of *what the Constitution means*) from constitutional decision rules (judicial statements of *how courts should decide* whether the operative propositions have been complied with). Put another way, my central claim is that taxonomists like Monaghan, Sager, and Fallon were on the right track in seeking to disaggregate “constitutional doctrine” into conceptually distinct components, but that the great value of doing so will become apparent only once we execute that disaggregation in a somewhat different way. In brief, these two Parts will show: first, that constitutional decision rules are a ubiquitous feature of constitutional doctrine; second, that to recognize the distinction between operative propositions and decision rules does not depend upon (though is not incompatible with) an assumption that courts derive “constitutional meaning” in a fashion uninfluenced by pragmatic or instrumental calculations; and third, that the classificatory exercise has substantial—though of course limited³⁹—practical value.

Perhaps the most obvious dividend of my proposed distinction—yet far from the only one—is that intelligent *extra-judicial* discussions about constitutional governance will be much advanced by separating out from the great complex mass of judge-announced constitutional doctrine those doctrines—the operative proposi-

³⁹ This point merits emphasis lest the reader conclude that I think the conceptualization advanced in this Article is a hammer and the world of constitutional law a nail. I do not. I will strive to demonstrate that the operative proposition/decision rule distinction is illuminating and useful. But when an attempt to categorize any particular doctrine in these terms appears unilluminating and/or useless, I do not recommend that anyone persist in the effort.

tions—that embody what the courts think the Constitution *means*. Of course, persons anticipating litigation, be they citizens, legislators, or executive agents, need to know how courts will resolve the constitutional disputes that reach them. So they need to know the full doctrines—the operative propositions *and* the decision rules (and any other sorts of doctrine, such as the remedial rules). But given the singular role that the Constitution plays in our political culture, collective interest in constitutional meaning is not limited to predictions about the outcome of litigation. That is, we do not want the actual, predicted, or imagined outcome of litigation to be conclusive of our arguments about whether any particular, actual, or proposed course of governmental action conforms to constitutional demands. And yet, many people might think they can benefit from, and maybe even defer to, the courts' expert judgments on constitutional meaning. If that is so, we might find our political culture enriched by being able to contemplate constitutional operative propositions alone, divorced from the constitutional decision rules which are designed solely to govern litigation.

What about constitutional doctrine even as it operates in the courts? In a variety of ways, distinguishing operative propositions from decision rules can help here too. Consider, for one thing, the perpetual debate over how much the courts ought to defer to constitutional judgments reached by the coordinate branches. Outside of a few limited contexts, the Court has tended to accord little or no deference to other branches' constitutional interpretations, and has made clear that it will not give effect to legislation "which alters the meaning" of a constitutional provision, as the Court has construed it.⁴⁰ But this stance, whether right or wrong, does not resolve the separate questions of whether, and under what circumstances, Congress should be entitled to substitute its judgment for the courts' regarding how best to *implement* court-interpreted meaning. Perhaps judicial judgments about the shape of constitutional decision rules ought to be congressionally defeasible in ways that the operative propositions are not. To carefully separate judge-announced constitutional doctrine into operative propositions and decision rules, then, is a first step toward identifying the

⁴⁰ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

full latitude that Congress should rightly enjoy in the shaping of in-court doctrine.

Furthermore, courts should reasonably care whether particular aspects of doctrine are better understood in operative or decisional terms even when not contemplating inter-branch dialogue and cooperation. This matter is complex. To note just one example, however, it is plausible (though admittedly not inevitable) for courts to come to think it appropriate to accord differential stare decisis weight to the two sorts of doctrine.

Part V will return to the beginning by showing that the *Dickerson* majority could have responded to Justice Scalia's dissent by dividing the complex doctrine announced by the *Miranda* Court into an operative proposition to be administered via a decision rule: The operative proposition providing that courts may not admit extra-judicial statements that state agents had compelled from the criminal defendant, the decision rule directing that courts must presume unwarned statements made during custodial interrogation to have been compelled (in the constitutionally relevant sense).⁴¹ Although *Miranda* contains too many ambiguous and even contradictory elements to permit us ever to be certain just what Chief Justice Warren intended to convey,⁴² this characterization of *Miranda* is, I will argue, more faithful to that decision than are any other of the other leading contenders. Additionally, this characterization has cash value. To understand *Miranda* in this way both buttresses its legitimacy (which is not to say its wisdom) and bears upon various of *Miranda*'s progeny, such as cases that address the admissibility of "fruits of a *Miranda* violation"⁴³—an issue that the Court will revisit, in light of *Dickerson*, this upcoming Term⁴⁴—and

⁴¹ It is true, but not directly relevant, that the Court specified that a different decision rule could apply if Congress or a given state took other steps to reduce the possibility that courts would admit compelled statements into evidence. See *infra* note 324.

⁴² See, e.g., Albert W. Alschuler, A Peculiar Privilege in Historical Perspective: The Right to Remain Silent, 94 Mich. L. Rev. 2625, 2629 (1996) ("No one really knows what *Miranda* means.").

⁴³ E.g., *Oregon v. Elstad*, 470 U.S. 298, 308 (1985); *Michigan v. Tucker*, 417 U.S. 433, 445 (1974).

⁴⁴ *United States v. Patane*, 304 F.3d 1013 (10th Cir. 2002) (holding that *Dickerson* overturns the *Elstad-Tucker* doctrine on fruits of un-Mirandized interrogations), cert. granted, 123 S. Ct. 1788 (2003); *Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002) (en banc), cert. granted 123 S. Ct. 2091 (2003) (holding that a deliberate failure to issue

that announce an emergency exception.⁴⁵ By journeying in this roundabout fashion, from the concrete problem presented by *Miranda* and *Dickerson*, to the theoretical or abstract, and back to the concrete, this Article hopes both to reinforce the general importance of conceptualizing constitutional doctrine taxonomically and to demonstrate some of the value of beginning such a taxonomy by distinguishing operative propositions from decision rules.

I. *DICKERSON*, *MIRANDA*, AND THE PROPHYLACTIC RULES DEBATE

In 1966, the Supreme Court decided *Miranda v. Arizona*.⁴⁶ The case held that a criminal defendant's statements made during custodial interrogation could not be admitted into evidence against him unless police officers issued the now-famous *Miranda* warnings.⁴⁷ Like *Brown v. Board of Education*⁴⁸ before it and like *Roe v. Wade*⁴⁹ to follow, *Miranda* excited passionate political and social criticism. Also like *Brown* and *Roe*, *Miranda* presented a jurisprudential puzzle, even for its sympathizers. Much as Herbert Wechsler questioned the neutrality of *Brown*⁵⁰ and John Hart Ely was to challenge the legitimacy of *Roe*,⁵¹ even political liberals like Judge Henry Friendly doubted the propriety of *Miranda*.⁵² This Part sketches the jurisprudential debate and demonstrates that despite the Court's reaffirmance of *Miranda* in *Dickerson v. United States*,⁵³ the case for *Miranda*'s legitimacy remains surprisingly unclear. In effect, this Part employs *Dickerson* as a particularly salient illustration of Peter Birks's claim that constitutional doctrine "simply [can] not be understood unless it [takes] care to classify itself 'methodically.'"⁵⁴

Miranda warnings requires suppression of statements elicited during a second interrogation that was preceded by warnings).

⁴⁵ See, e.g., *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

⁴⁶ 384 U.S. 436 (1966).

⁴⁷ *Id.* at 444–45.

⁴⁸ 347 U.S. 483 (1954).

⁴⁹ 410 U.S. 113 (1973).

⁵⁰ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 31–34 (1959).

⁵¹ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *Yale L.J.* 920 (1973).

⁵² Henry J. Friendly, *A Postscript on Miranda*, in *Benchmarks* 266 (1967).

⁵³ 530 U.S. 428 (2000).

⁵⁴ Birks, *supra* note 1, at 3.

A. The Miranda Controversy in a Nutshell

As we will see in Part V, the *Miranda* decision is rife with ambiguity. For present purposes, it is enough to observe that *Miranda* announced a new rule governing the admissibility of statements made during custodial interrogation. Before initiating any such interrogation, the Court declared, police should warn the suspect,

[T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.⁵⁵

If the police failed to issue these warnings, or if the protections they announced were not validly waived, the Court held, the Fifth Amendment's privilege against self-incrimination would render any statements the suspect thereafter made inadmissible against him at his subsequent trial.⁵⁶

The decision provoked a hailstorm of protest from law enforcement officials who predicted that the rule would "handcuff the police," and from academic critics who charged that the decision was a wholly illegitimate exercise of judicial power. This is not constitutional interpretation, opponents decried, but legislation from the bench.⁵⁷ In almost immediate response,⁵⁸ Congress enacted 18 U.S.C. Section 3501, which provided that, in federal criminal prosecutions, a confession shall be admissible if voluntary

⁵⁵ *Miranda*, 384 U.S. at 479.

⁵⁶ *Id.*; U.S. Const. amend. V (providing that no person "shall be compelled in any criminal case to be a witness against himself"). The Court had made the privilege applicable against the states just two years earlier in *Malloy v. Hogan*, 378 U.S. 1 (1964), thereby overruling two earlier refusals to do so. See *Adamson v. California*, 332 U.S. 46, 50–51 (1947); *Twining v. New Jersey*, 211 U.S. 78, 114 (1908).

⁵⁷ Justice Harlan had pressed this view in his *Miranda* dissent. See 384 U.S. at 504–14 (Harlan, J., dissenting). Other especially prominent assaults included Fred P. Graham, *The Self-Inflicted Wound* (1970); Sam J. Erwin, Jr., *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 *Am. Crim. L.Q.* 125, 128 (1967) ("*Miranda* has left the police handcuffed."); Raymond L. Spring, *The Nebulous Nexus: Escobedo, Miranda, and the New 5th Amendment*, 6 *Washburn L.J.* 428, 442 (1967) ("[T]he court has allowed its moral judgment to force it beyond interpretation of the Constitution and into the realm of amendment.").

⁵⁸ For a good discussion of the context and legislative history, see Yale Kamisar, Can (Did) Congress "Overrule" *Miranda*, 85 *Cornell L. Rev.* 883, 887–906 (2000).

and that “[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession.”⁵⁹ But Section 3501 was widely perceived as an effort to legislatively overrule *Miranda*, hence invalid under *Marbury v. Madison*,⁶⁰ and was therefore disavowed by the Department of Justice and ignored by the courts.

Without the benefit of Section 3501, law enforcement concerns were accommodated in two ways. First, police were surprised to learn that they could live with *Miranda*, for a great many suspects confessed notwithstanding having been warned of their rights to remain silent and to an attorney.⁶¹ Second, the Burger and then Rehnquist Courts pared down *Miranda*'s scope or curbed its potential. For instance, the Court held that custodial statements taken without warnings could be used by the state for impeachment purposes;⁶² grafted a “public safety” exception onto the requirement that warnings be given as a precondition to admissibility;⁶³ and strongly suggested (without squarely holding) that the fruits of unwarned custodial statements were generally admissible.⁶⁴

⁵⁹ 18 U.S.C. § 3501(b) (2000). The statute proceeded to offer a nonexhaustive list of factors that warranted consideration, and emphasized that this was an all-things-considered analysis by concluding that “[t]he presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession.” *Id.*

⁶⁰ 5 U.S. (1 Cranch) 137 (1803).

⁶¹ One careful study found that seventy-eight percent of suspects waived their rights. Richard A. Leo, *Inside the Interrogation Room*, 86 *J. Crim. L. & Criminology* 266, 276 (1996). This is not to assert, however, that *Miranda* was socially costless, a question that has been vigorously debated, and with respect to which this Article takes no position. Compare, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement*, 50 *Stan. L. Rev.* 1055 (1998), and Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of *Miranda*'s Defenders*, 90 *Nw. U. L. Rev.* 1084 (1996), with Stephen J. Schulhofer, **Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 *Nw. U. L. Rev.* 500 (1996).

⁶² *Oregon v. Hass*, 420 U.S. 714, 723–24 (1975) (holding statements given in response to police questioning after suspect had received warnings and had asserted right to lawyer admissible for impeachment); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding statements made after receipt of defective *Miranda* warnings admissible for impeachment).

⁶³ *New York v. Quarles*, 467 U.S. 649, 655 (1984).

⁶⁴ *Oregon v. Elstad*, 470 U.S. 298, 317–18 (1985) (holding that fact of a first custodial statement given without warnings does not render inadmissible subsequent statement given after *Miranda* warnings properly administered); *Michigan v. Tucker*, 417 U.S. 433, 450–51 (1974) (holding that poisonous fruits doctrine does not bar testimony of

Of course, these decisions were not greeted everywhere with approval. But it was not only the results that dismayed *Miranda* supporters. Equally or more inflammatory was the language these cases used to describe *Miranda*. For example, when holding admissible the testimony of a witness whose identity was discovered as a result of an unwarned custodial statement, the Court in *Michigan v. Tucker*, per then-Justice Rehnquist, deemed it critical that “the police conduct at issue here did not abridge respondent’s constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.”⁶⁵ And Justice O’Connor observed for the *Oregon v. Elstad* Court that “[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.”⁶⁶

Partisans on both sides seemed to recognize that the language of prophylaxis threatened *Miranda*’s legitimacy. For example, Justice Douglas, dissenting in *Tucker*, rejected the majority’s characterization of *Miranda* as having announced “prophylactic standards,” insisting instead that “[t]he Court is not free to prescribe preferred modes of interrogation absent a constitutional basis.”⁶⁷ Justice Stevens similarly denied in his *Elstad* dissent that *Miranda* sweeps more broadly than the Constitution:

This Court’s power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal juris-

witness whose identity was discovered as result of custodial statement obtained without warnings, where the custodial interrogation had occurred prior to the *Miranda* decision).

⁶⁵ 417 U.S. at 445–46.

⁶⁶ 470 U.S. at 306. These are not isolated examples. Others are canvassed in Richard H.W. Maloy, Can a Rule Be Prophylactic and Yet Constitutional?, 27 Wm. Mitchell L. Rev. 2465, 2471–74 (2001).

⁶⁷ 417 U.S. at 462 (Douglas, J., dissenting); see also *id.* at 465–66 (“*Miranda*’s purpose was not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated ‘constitutional standards for protection of the privilege’ against self-incrimination.”) (internal citation omitted).

prudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.⁶⁸

Echoing this sentiment, academic defenders of the warnings requirement complained that the language of prophylaxis “cut the doctrinal heart out of *Miranda*.”⁶⁹ For long-time *Miranda* critic Joseph Grano, by contrast, the prophylactic characterization of *Miranda* was both correct and fatal.⁷⁰

The general consensus that viewing *Miranda* in prophylactic terms was inconsistent with its legitimacy was challenged fifteen years ago by David Strauss. In “The Ubiquity of Prophylactic Rules,”⁷¹ Strauss accepted that *Miranda* announced a prophylactic rule but denied that it mattered. “[P]rophylactic’ rules are not exceptional measures of questionable legitimacy,” he argued, “but are a central and necessary feature of constitutional law. Indeed, constitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate, but that have the same ‘prophylactic’ character as the *Miranda* rule.”⁷² “‘Prophylactic’ rules are, in an important sense, the norm, not the exception,” Strauss explained, because the intensely practical considerations upon which they are thought to rely undergird all of constitutional doctrine.⁷³ “As a theoretical exercise, one could try to identify what the real, noumenal Constitution would require if governments had different tendencies or the courts had different

⁶⁸ 470 U.S. at 370–71 (Stevens, J., dissenting).

⁶⁹ Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 Ohio St. L.J. 733, 740 (1987); see also, e.g., Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *The Burger Years* 143, 152–57 (Herman Schwartz ed., 1987) (arguing that language in *Tucker*, *Quarles*, and *Elstad* may have paved the way for overruling *Miranda*); Larry J. Ritchie, *Compulsion that Violates the Fifth Amendment: The Burger Court’s Definition*, 61 Minn. L. Rev. 383, 417–18 (1977) (arguing that *Harris v. New York* and *Tucker* can be seen as cautious steps toward overruling *Miranda*); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 Sup. Ct. Rev. 99, 119–20, 123 (describing *Tucker* as laying the groundwork for overruling *Miranda*).

⁷⁰ See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. Rev. 100 (1985).

⁷¹ Strauss, *supra* note 38.

⁷² *Id.* at 190.

⁷³ *Id.* at 195.

capacities. But usually that would be a pointless task.”⁷⁴ In short, “in deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: courts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities.”⁷⁵

B. Dickerson’s Failure to Resolve Miranda’s Status and Legitimacy

Strauss’s argument won an enthusiastic reception,⁷⁶ but did not persuade everyone.⁷⁷ Thirty years after *Miranda*, accordingly, doubts about that decision’s legitimacy had found themselves on the back burner but not fully resolved. They were revived four years ago in *Dickerson*.⁷⁸ In 1999, in an otherwise insignificant case, the Fourth Circuit dusted off Section 3501 to hold a defendant’s confession admissible despite the district court’s finding that the police had elicited the confession during custodial interrogation without having first issued the warnings required by *Miranda*.⁷⁹ The panel held that the confession was nonetheless “voluntary,” all things considered, and hence admissible under Section 3501.⁸⁰

⁷⁴ Id. at 207–08.

⁷⁵ Id. at 207 (emphasis in original).

⁷⁶ For a sampling of scholars who appeared to have become persuaded of the prevalence and legitimacy of “prophylactic rules,” see Fallon, Implementing the Constitution, *supra* note 10, at 141 n.34; David Cole, The Value of Seeing Things Differently: *Boerne v. Flores* and Congressional Enforcement of the Bill of Rights, 1997 Sup. Ct. Rev. 31, 55–56; Dorf, *supra* note 14, at 71; David Huitema, *Miranda*: Legitimate Response to Contingent Requirements of the Fifth Amendment, 18 Yale L. & Pol’y Rev. 261, 263–64 (2000); John C. Jeffries, The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 113 n.98 (1999); Yale Kamisar, Confessions, Search and Seizure, and the Rehnquist Court, 34 Tulsa L. Rev. 465, 471 (1999); Levinson, *supra* note 27, at 904.

⁷⁷ Grano, for one, remained unconvinced. See Joseph D. Grano, Confessions, Truth, and the Law 173 (1993) [hereinafter Grano, Confessions]; Joseph D. Grano, *Miranda’s* Constitutional Difficulties: A Reply to Professor Schulhofer, 55 U. Chi. L. Rev. 174, 187 (1988) [hereinafter Grano, *Miranda’s* Constitutional Difficulties].

⁷⁸ *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), rev’d, 530 U.S. 428 (2000).

⁷⁹ Id.

⁸⁰ *Dickerson* himself had not mentioned § 3501, and the United States, following long-standing practice, contended that the statute was unconstitutional. The Fourth Circuit granted the motion of amicus curiae Professor Paul Cassell, a long-time critic of *Miranda*, to share oral argument time with the government for the purpose of de-

In the last week of the 1999 Term, the Supreme Court reversed the Fourth Circuit by the surprisingly wide margin of 7-2.⁸¹ In a further surprise, Chief Justice Rehnquist, long a critic of *Miranda*, wrote the majority opinion. The case, he wrote, raises the question “whether Congress has constitutional authority to . . . supersede *Miranda*.”⁸² And the answer “turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority [over the federal courts] to regulate evidence in the absence of congressional direction.”⁸³ Section 3501 is valid law if the latter because supervisory rules are subject to ultimate control by Congress. But if the former, then Section 3501 runs afoul of *Marbury*.

Chief Justice Rehnquist conceded that language from *Miranda* could be found to support either view. The decisive factor demonstrating “that *Miranda* is a constitutional decision,” however, “is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts.”⁸⁴ Furthermore, the Court had consistently applied *Miranda*’s rule to state courts thereafter, both on direct review and on habeas.⁸⁵ Deeming it “beyond dispute that we do not hold a supervisory power over the courts of the several States,”⁸⁶ the majority felt compelled to conclude “that *Miranda* is constitutionally based.”⁸⁷ Congress, therefore, lacked constitutional power to supersede it by legislation. Section 3501 was invalid.

Writing for himself and Justice Thomas, Justice Scalia dissented. Whereas the majority essentially presumed that *Miranda* was le-

fending the statute’s constitutionality. See 166 F.3d at 680 n.14. For one debate over whether the Fourth Circuit, and then the Supreme Court, acted appropriately in considering § 3501, compare Neal Devins, Asking the Right Questions: How the Courts Honored the Separation of Powers By Reconsidering *Miranda*, 149 U. Pa. L. Rev. 251 (2000), with Erwin Chemerinsky, The Court Should Have Remained Silent: Why the Court Erred in Deciding *Dickerson v. United States*, 149 U. Pa. L. Rev. 287 (2000).

⁸¹ *Dickerson*, 530 U.S. at 430.

⁸² *Id.* at 437.

⁸³ *Id.*

⁸⁴ *Id.* at 438.

⁸⁵ *Id.* at 438, 439 n.3.

⁸⁶ *Id.* at 438.

⁸⁷ *Id.* at 440. In the Fourth Circuit, Judge Michael had made the same point in dissent. *Dickerson*, 166 F.3d at 697 (Michael, J., dissenting in part). The panel majority, however, had brushed it away with the observation that it raised “an interesting academic question.” *Id.* at 691 n.21.

gitimate and then concluded, by process of eliminating the possibility that it was a supervisory rule over the federal courts, that it must be a “constitutional rule,” Justice Scalia worked from the ground up. The first question, he said, was whether the *Miranda* warnings are true *Marbury*-shielded constitutional interpretation.

The Court today insists that the *decision* in *Miranda* is a “constitutional” one; that it has “constitutional underpinnings”; a “constitutional basis” and a “constitutional origin”; that it was “constitutionally based”; and that it announced a “constitutional rule.” It is fine to play these word games; but what makes a decision “constitutional” in the only sense relevant here—in the sense that renders it impervious to supersession by congressional legislation such as § 3501—is the determination that the Constitution *requires* the result that the decision announces and the statute ignores.⁸⁸

Justice Scalia concluded that the majority does not say that *Miranda* was “constitutional” *in that sense* because they do not believe it.⁸⁹ That, at least, was a good thing, for “the decision in *Miranda*, if read as an explication of what the Constitution *requires* is preposterous.”⁹⁰

If *Miranda* is not constitutional interpretation (even wrong constitutional interpretation), the next question is whether it is otherwise supportable. But if it is, Justice Scalia asserted, “the only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful ‘prophylactic’ restrictions upon Congress and the States.”⁹¹ In response to the Straussian contention advanced by Dickerson and by the United States “that there is nothing at all exceptional, much less unconstitutional, about the Court’s adopting prophylactic rules to buttress constitutional rights, and enforcing them against Congress and the States,”⁹² Justice Scalia concluded that it was both exceptional and

⁸⁸ *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting) (internal citations omitted).

⁸⁹ *Id.* at 445 (Scalia, J., dissenting).

⁹⁰ *Id.* at 448 (Scalia, J., dissenting).

⁹¹ *Id.* at 446 (Scalia, J., dissenting).

⁹² *Id.* at 457 (Scalia, J., dissenting).

unconstitutional: “That is an immense and frightening anti-democratic power, and it does not exist.”⁹³

Unfortunately, the majority did not engage Justice Scalia’s attack.⁹⁴ After noting the dissent’s argument “that it is judicial overreaching for this Court to hold Section 3501 unconstitutional unless we hold that the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements,” the majority rejoined lamely that they “need not go further than *Miranda* to decide this case.”⁹⁵ Noting more candidly than the Fourth Circuit had done⁹⁶ that Section 3501

⁹³ Id. at 446 (Scalia, J., dissenting). Justice Scalia thereby goes further than did the Fourth Circuit. Under his view, *Miranda*’s warnings requirement is not merely “over-ruled” by statute, but invalid *ab initio*—at least as applied against the states.

⁹⁴ This is a wholly unoriginal observation, one frequently expressed by those who applaud, as well as by those who decry, the outcome in *Dickerson*. See, for example, most of the contributions to Symposium: *Miranda* After *Dickerson*: The Future of Confession Law, 99 Mich. L. Rev. 879–1247 (2001). Donald Dripps archly captured the frustration of many commentators: “Once the Court granted the petition in December of 1999, court-watchers knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent. The Supreme Court of the United States, however, doesn’t “have to” do anything, as the decision in *Dickerson* once again reminds us.” Donald Dripps, Constitutional Theory for Criminal Procedure: *Dickerson*, *Miranda*, and the Continuing Quest for Broad-But-Shallow, 43 Wm. & Mary L. Rev. 1, 33 (2001). Chief Justice Rehnquist’s reticence was especially noteworthy because he had previously been among the most aggressive of the Justices in characterizing *Miranda* as a prophylactic rule. See, e.g., *Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Michigan v. Jackson*, 475 U.S. 625, 638–41 (1986) (Rehnquist, J., dissenting); *New York v. Quarles*, 467 U.S. 649, 653–54, 657 (1984); *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers on application for stay); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974).

⁹⁵ *Dickerson*, 530 U.S. at 442.

⁹⁶ To be sure, the Fourth Circuit majority did frankly (and fairly) deem it “perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court.” *Dickerson*, 530 F.3d at 686. But that court’s further assertions that “Congress did not completely abandon the central holding of *Miranda*, i.e., the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination,” id. at 686–87, and “that Congress . . . acted in response to the Court’s invitation,” id. at 691, are hard to take seriously, as was the court’s claimed inability to “say that Congress’s decision to eliminate the irrebuttable presumption created by *Miranda* lessens the protections afforded by the privilege.” Id. Indeed, given the Fourth Circuit’s plain intimation that § 3501 was the product of a constitutionally responsible Congress, I hope it not too parochial to note that “not a single constitu-

merely reinstated the totality test for voluntariness that *Miranda* had rejected as inadequate, the majority concluded that the statute “cannot be sustained if *Miranda* is to remain the law.”⁹⁷ And whether *Miranda* is to remain the law presented, for the majority, simply a question of stare decisis. “Whether or not we would agree with *Miranda*’s reasoning and its resulting rule,” Chief Justice Rehnquist explained, “the principles of stare decisis weigh heavily against overruling it now.”⁹⁸

But the force of stare decisis in this case is debatable. Agreeing with the majority’s view that precedents are properly overruled when “intervening development of the law . . . ha[s] removed or weakened the conceptual underpinnings from the prior decision,”⁹⁹ Justice Scalia argued that the insistence by *Miranda*’s progeny that *Miranda* was not constitutional interpretation worked precisely such a change.¹⁰⁰ Furthermore, although Justice Scalia does not explicitly develop this argument, one implication of his interpretation of *Miranda* might present a more profound challenge to the majority’s reliance on stare decisis. After all, Justice Scalia had not merely challenged *Miranda*’s reasoning. He had insisted that the *Miranda* Court had lacked constitutional power to announce its rule (at least once the true nature of that rule as extraconstitutional is acknowledged). And if that Court had acted ultra vires, its rule might be deemed invalid *ab initio*, rendering stare decisis analysis consequently inappropriate.¹⁰¹

tional law professor or criminal law professor had been given an opportunity to testify [at the subcommittee hearings on the Crime Bill of which § 3501 was a part] on the wisdom or constitutionality of this proposal.” Kamisar, *supra* note 58, at 901. Whether this fact has any bearing on the likely constitutionality of § 3501 I leave to the reader’s unbiased judgment.

⁹⁷ *Dickerson*, 530 U.S. at 443.

⁹⁸ *Id.*

⁹⁹ *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (cited by the majority in *Dickerson*, 530 U.S. at 443).

¹⁰⁰ *Dickerson*, 530 U.S. at 462–63 (Scalia, J., dissenting); see also Grano, *Confessions*, *supra* note 77, at 204–06. As Joseph Grano argues, the prophylactic interpretation of *Miranda* contradicts the many cases that have disclaimed supervisory authority over the state courts. Because the Court is therefore “in a position where it must choose between two lines of authority,” overruling *Miranda* is as consistent with stare decisis as is maintaining it. *Id.* at 206 (internal quotation omitted).

¹⁰¹ Justice Scalia does not develop this point as clearly as he might have. His argument with respect to stare decisis seems to be essentially this: Because *Miranda* presented itself as engaging in constitutional interpretation, not as crafting a prophylactic

For these reasons, the majority's failure to address whether *Miranda* engaged in a legitimate exercise of judicial power in the first instance is profoundly frustrating. By ignoring Justice Scalia's arguments, the majority leaves open a series of questions that would seem to demand an answer: Was *Miranda* a prophylactic rule or not? If so, what makes it legitimate? If not, why is it not a prophylactic rule? That is, once we strip away the majority's hazy references to the "constitutional dimension" or "constitutional basis" for *Miranda*, what is the precise nature of the warnings requirement, and how does that differ from a prophylactic rule? Most importantly, what makes this type of rule legitimate if a pro-

rule, that critical "conceptual underpinning" has been removed by the many progeny that recharacterized *Miranda* in prophylactic as opposed to constitutional terms. Yet this is not wholly persuasive for at least two reasons. First, the claim that *Miranda* itself purported to derive its rule regarding warnings as an exercise of constitutional interpretation, as opposed to prophylactic rule-making (loosely understood), is highly contestable. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985) (contending that "[t]he *Miranda* Court itself recognized [the prophylactic character of its ruling] when it disclaimed any intent to create a 'constitutional straitjacket' and invited Congress and the States to suggest 'potential alternatives for protecting the privilege'" (quoting *Miranda*, 384 U.S. at 467)). Indeed, in a slight concession, even Justice Scalia describes that reading of *Miranda* as merely "the fairest reading," *Dickerson*, 530 U.S. at 447 (Scalia, J., dissenting), not the explicit or unambiguous one. Second, it is far from clear that Justice Scalia's vision of what constitutes a requisite "conceptual underpinning" in the relevant sense is the right one. That is, even were the majority to concede that *Miranda* is most fairly read as conceiving of itself as engaged in constitutional interpretation, it is not at all obvious why it should not frankly construe *Miranda* as announcing a prophylactic rule and then afford it stare decisis deference on *that* rationale. This question cannot be answered without elaborating the justifications for stare decisis in the first place.

Given these difficulties with what seems at first blush to be Justice Scalia's reason for not retaining *Miranda* as a matter of stare decisis, we might expect him to rely on additional arguments for overruling that case. Some predictable ones are that if *Miranda* is understood as announcing a prophylactic rule either it cannot warrant stare decisis deference at all because it is invalid as opposed to wrong, or that whatever stare decisis deference it can enjoy is overridden by the wrongness of that decision. In fact, arguments of this sort are suggested by Justice Scalia's conclusion:

In imposing its Court-made code upon the States, the original [*Miranda*] opinion at least *asserted* that it was demanded by the Constitution. Today's decision does not pretend that it is—and yet *still* asserts the right to impose it against the will of the people's representatives in Congress. Far from believing that *stare decisis* compels this result, I believe we cannot allow to remain on the books even a celebrated decision—*especially* a celebrated decision—that has come to stand for the proposition that the Supreme Court has power to impose extra-constitutional constraints upon Congress and the States.

Dickerson, 530 U.S. at 465 (Scalia, J., dissenting).

phylactic rule is not (or may not be)?¹⁰² If, as Strauss had argued, prophylactic rules are ubiquitous, the potential magnitude of these questions can hardly be overemphasized. Yet not only was there no response in the Court's opinion, not a single member of the seven-Justice majority wrote separately to rehabilitate prophylactic rules from Justice Scalia's attack—a striking silence given the much-noted penchant of modern Justices to pen separate concurrences.¹⁰³ Grano found his champion in Justice Scalia. Why did Strauss find none? Could all seven Justices have thought Justice Scalia's condemnation of prophylactic rules not important enough to warrant rebuttal? Or could they find nothing persuasive to say?¹⁰⁴

¹⁰² For a similar criticism leveled at the Court's treatment of *Miranda* a quarter century ago, see Stone, *supra* note 69, at 123 (noting that *Tucker* “deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be”).

¹⁰³ See, e.g., Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 147 (1990); Robert C. Power, Affirmative Action and Judicial Incoherence, 55 Ohio St. L.J. 79, 124 nn.153–54 (1994); Laura Krugman Ray, The Justices Write Separately: Uses of Concurrences by the Rehnquist Court, 23 U.C. Davis L. Rev. 777 (1990).

¹⁰⁴ Yale Kamisar suggests, without significant elaboration, that nobody wrote separately out of concern that doing so would have caused a chain reaction “and the 7-2 majority would have splintered badly.” Yale Kamisar, Foreword: From *Miranda* to § 3501 to *Dickerson* to . . . , 99 Mich. L. Rev. 879, 893 (2001). It is not at all apparent, however, why the existence of a separate concurrence that advanced a Straussian argument for the legitimacy of prophylactic rules would have undermined whatever reasons the other members of the majority must have had for joining Chief Justice Rehnquist's opinion, even if some of them then felt compelled to write a concurrence too. To be sure, the Chief Justice, along with Justices O'Connor and Kennedy, might have agreed in large measure with Justices Scalia and Thomas, and voted as they did for essentially pragmatic reasons. Justice Ginsburg's silence might be explained at least in part by a prejudice against concurrence-writing. See, e.g., Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1191 (1992) (criticizing “too frequent resort to separate opinions”). And Justice Stevens had previously denied that the Court had authority to announce prophylactic rules. See *supra* text accompanying note 68. The heart of the question thus becomes why neither Justice Souter nor Justice Breyer took Justice Scalia's bait. One possibility (suggested by Professor Kamisar in a personal communication) is that a concurrence defending prophylactic rules might have provoked others in the majority to have foregrounded what Rehnquist's opinion left in the background, namely that although § 3501 was invalid, Congress remained free to propose other alternatives to the specific warning requirement.

II. THE PROPHYLACTIC RULES DEBATE

To resolve questions regarding the prevalence and legitimacy of prophylactic rules we need, of course, a fair grasp on just what they are.¹⁰⁵ But our need to nail down the meaning of prophylactic rules might provoke concern, for commentators have proposed a wealth of sometimes widely divergent definitions.¹⁰⁶ In fact, though, the variety of extant definitions should not trouble us, for we are not looking for the best definition, or the modal definition; we only need to know what a prophylactic rule is in the minds of those—Justice Scalia and Professor Grano most vocally—who employ the term with a normative edge. What makes a judge-announced rule “prophylactic” in a sense that is supposed to render it illegitimate?

The core idea from Justice Scalia’s *Dickerson v. United States* dissent, as well as from progeny of *Miranda v. Arizona* that had preceded *Dickerson*,¹⁰⁷ seems to have two components, a genus and a differentia. First, a prophylactic rule is a judicial work product somehow distinguishable from judicial interpretation of the Constitution. As Justice Scalia emphasized, a prophylactic rule is something other than “an explication of what the Constitution requires.”¹⁰⁸ Second, it is that sort of extraconstitutional rule that overenforces what the Constitution, as judicially interpreted, would itself require; it “expand[s]”¹⁰⁹ or “sweeps more broadly than”¹¹⁰ the constitutional constraints that do or would emerge from straightforward judicial interpretation. Grano, the leading theorist among

¹⁰⁵ I am speaking here only of definitions of prophylactic rules as they function in constitutional adjudication. Many commentators recognize that the phrase or close synonyms are used in a wide variety of ways in other contexts.

¹⁰⁶ For one extraordinarily expansive definition of the term, see Michael Abramowicz, *Constitutional Circularity*, 49 *UCLA L. Rev.* 1, 43 (2001) (defining a prophylactic rule as “a rule of law beyond what the text of the Constitution explicitly requires”); see also *id.* at 8 (calling a rule prophylactic if it is “more expansive than what the Constitution would seem on an original reading to say”). On this view, every judge-announced constitutional rule that rests on interpretive modalities other than text—original meaning or intent, structure, precedent, etc.—is a prophylactic rule. Plainly, most scholars do not use the term so broadly. See *infra* note 115 (collecting more standard definitions). Still, this should convey a quick and dirty sense of the wide range of ways the phrase is understood.

¹⁰⁷ See, e.g., *supra* text accompanying notes 64–66.

¹⁰⁸ See *supra* text accompanying note 90.

¹⁰⁹ See *supra* text accompanying note 91.

¹¹⁰ See *supra* text accompanying note 66.

Miranda's critics,¹¹¹ conveys this same two-part idea when explaining that what "distinguishes a prophylactic rule from a true constitutional rule"¹¹² is that "[a] prophylactic rule . . . is a court-created rule that can be violated without violating the Constitution itself"¹¹³ and "that functions as a preventive safeguard to insure that constitutional violations will not occur."¹¹⁴

This definition, or something much like it, appears widely in the scholarly literature on prophylactic rules,¹¹⁵ and is probably clear

¹¹¹ Yale Kamisar, the preeminent academic defender of the Warren Court's criminal procedure revolution, has lauded Grano's work on *Miranda* as "brilliant," and conceded that Grano has made "a plausible doctrinal case against *Miranda* and a better case than anyone else had made up to that time. A better case than I thought anyone could make." Yale Kamisar, Joe Grano: The "Kid from South Philly" Who Educated Us All, 46 Wayne L. Rev. 1231, 1255 (2000). For confirmation of Grano's status among his fellow *Miranda* critics, see, for example, Paul G. Cassell, The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of *Miranda*, 85 Iowa L. Rev. 175, 175 (1999); Paul G. Cassell, A Tribute to Joe Grano: He Kept the Flame Alive, 46 Wayne L. Rev. 1219 (2000); Michael Edmond O'Neill, Undoing *Miranda*, 2000 BYU L. Rev. 185, 265 (2000).

¹¹² Grano, *supra* note 70, at 105 & n.23.

¹¹³ Grano, *Miranda's* Constitutional Difficulties, *supra* note 77, at 176–77.

¹¹⁴ Grano, *supra* note 70, at 105 & n.23.

¹¹⁵ See, e.g., 1 Wayne R. LaFave et al., Criminal Procedure § 2.9(e), at 673–74 (2d ed. 1999) [hereinafter LaFave et al., Criminal Procedure] (defining prophylactic rule as a rule that "does not announce a requirement mandated by the underlying constitutional provision, but a requirement adopted in the Court's exercise of its authority to draft remedies and procedures that facilitate its adjudicatory responsibility") (internal citation omitted); Evan H. Caminker, *Miranda* and Some Puzzles of "Prophylactic" Rules, 70 U. Cin. L. Rev. 1, 1 n.2 & 28 n.93 (2001) (defining the term—only to urge its retirement—"to refer to doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms"); Susan Klein, Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030, 1032 (2001) ("A 'constitutional prophylactic rule' is a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or 'true' federal constitutional rule is applicable."); Wayne R. LaFave, Constitutional Rules for Police: A Matter of Style, 41 Syracuse L. Rev. 849, 856 (1990) [hereinafter LaFave, Constitutional Rules] (describing prophylactic rules as "procedural safeguards to protect a certain constitutional interest, even though that interest is not inevitably compromised when the prescribed procedure is absent"); Brian K. Landsberg, Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules, 66 Tenn. L. Rev. 925, 926 (1999) (defining as prophylactic "risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules").

Despite variations in language, one constant among these definitions is plain: Prophylactic rules issue, in some sense, from an exercise of judicial creativity distinguish-

enough to most readers. Still, we will be enabled to more fully grasp the Straussian defense of prophylactic rules against the Scalian critique if we pause to situate this conception of prophylactic rules within more general explorations of the taxonomic or conceptual structure of constitutional doctrine.

A. Background: Two Models of Constitutional Adjudication

The “power of judicial review,” as Alexander Bickel described it, is the judicial “authority to determine the meaning and application of a written constitution.”¹¹⁶ From this conventional perspective,¹¹⁷ judicial review is essentially a two-step process: First, a court

able in character from the courts’ familiar power to interpret the Constitution. That is, the definitions recognize a distinction between “true constitutional rules” and “judicially-created doctrinal rules.” Beyond this core of agreement lie differences. The most conspicuous is that the LaFave et al., *Criminal Procedure*, supra, at 673–74, would apparently allow that a court-adopted rule could “facilitate its adjudicatory responsibility,” hence qualifying as prophylactic, even if the consequence is a slight *underenforcement* of the rule’s “underlying constitutional provision,” accord Strauss, supra note 38, at 207, whereas most other commentators believe that prophylactic rules can overenforce the Constitution but not underenforce it. See, e.g., Landsberg, supra, at 927 (specifying that “prophylactic rules build a fence around the Constitution”). A second variation is whether prophylactic rules can include deterrent remedies like the Fourth Amendment exclusionary rule. They can in Caminker’s definition, but not for Klein or Grano. In Klein’s vocabulary, the exclusionary rule is an example not of a prophylactic rule, but of “a ‘constitutional incidental right,’ a judicially-created procedure determined by the Court as the appropriate relief for the violation of an explicit or ‘true’ constitutional rule or a prophylactic rule.” Klein, supra, at 1033; cf. John Kaplan, *The Limits of the Exclusionary Rule*, 26 *Stan. L. Rev.* 1027 (1974) (describing the exclusionary rule as a contingent consequence of the Constitution); Lawrence Crocker, *Can the Exclusionary Rule be Saved?*, 84 *J. Crim. L. & Criminology* 310 (1993) (developing Kaplan’s argument into a theory of “contingent constitutional obligations”).

¹¹⁶ Alexander M. Bickel, *The Least Dangerous Branch* 1 (1962).

¹¹⁷ See, e.g., Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure* 89 (1998) (describing judicial review as the process through which courts “identify law, interpret it, apply it to facts presented in cases, and offer reasons for the result in a case”); Shelly L. Dowling & Mary C. Custy, *The Jurisprudence of United States Constitutional Interpretation: An Annotated Bibliography* 3 (1999) (labeling the process of American constitutionalism “the jurisprudence of constitutional interpretation”); Kermit L. Hall, *The Supreme Court and Judicial Review in American History* 1 (1985) (“Judicial review is the practice by which the Supreme Court scrutinizes state and federal legislation and the acts of state and federal executive officers and courts in order to determine whether they are in conflict with the Constitution.”); Laurence H. Tribe, *American Constitutional Law* 213 (3d ed. 2000) (defining judicial review as “the power of federal courts independently to interpret

interprets the Constitution; second, it applies that interpretation to the facts of the case to reach a constitutional holding.¹¹⁸ Thus, for example, the Supreme Court (1) interprets Article I, Section 8 to provide that Congress has constitutional authority to regulate intrastate activity if it would be rational to believe that the activity, in the aggregate, substantially affects interstate commerce, and then (2) applies that rule by determining whether Congress could rationally conclude that the farming of wheat for personal consumption has the requisite effect.¹¹⁹ Or, the Court (1) interprets the Equal Protection Clause to forbid departures from only a certain sort of formal equality, and then (2) applies that understanding to hold (a) that a Louisiana statute requiring railroad companies to

and apply the Constitution”). It is characteristic of the extent to which this image has seeped unexamined into our consciousness, I think, that a book subtitled *The Supreme Court and the Process of Adjudication* would be titled *Interpreting the Constitution* as though the Supreme Court’s role in the process of constitutional adjudication is just one of interpretation. Harry H. Wellington, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication* (1990).

¹¹⁸ This description of judicial review is agnostic with respect to a host of corollary matters (often intertwined) such as how much deference courts should give the interpretive judgments reached by the coordinate branches of the federal government or by the states, and whether constitutional judgments announced by the courts (deferential or not) should be understood to bind these other governmental actors. The literature on these issues—under headings like “extrajudicial constitutional interpretation” and “judicial supremacy”—is already vast and, in this year of *Marbury*’s bicentennial, seemingly growing by the day. For one recent contribution that usefully summarizes some of the debates, see Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. Rev. 773 (2002).

These are normative questions. In the past fifteen years, historians have made substantial progress on the related question of how our present understanding of judicial review compares to the conception of the power as announced in *Marbury*. Path-breaking works were Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review (1989) and Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (1990). As Michael Klarman helpfully summarizes:

[T]he judicial review power first exercised by the Supreme Court in *Marbury* was far more restricted in scope than is our modern understanding of the practice. Most people who contemplated judicial review in the early years of the republic understood it to be cabined by two important qualifications. Courts were empowered to strike down only “clearly unconstitutional” laws; if reasonable people could differ, courts had to sustain the statute. Moreover, courts could invalidate only those laws that fell within the special purview of the judiciary—for example, a law restricting access to jury trials—and not any old piece of legislation.

Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 Va. L. Rev. 1111, 1120–21 (2001) (internal citations omitted).

¹¹⁹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

provide “equal but separate accommodations for the white and colored races” affords such equal protection,¹²⁰ or (b) that Texas’s establishment of separate all-white and all-black law schools does not.¹²¹

Of course, the actual practice of constitutional adjudication is far more complicated than this austere view contemplates.¹²² For one thing, the proverbial Martian could not make full sense of our practice without some understanding of the relevant institutional and socio-legal context—matters like the organization of the federal judiciary and the special role of the Supreme Court, the politics of judicial nomination, and Congress’s influence, actual and latent, on federal jurisdiction. Furthermore, and of much greater relevance for the present study, courts employ a very large number of rules, principles, and customs when actually carrying out constitutional adjudication. Matters that function internal to the adjudicatory practice include the accepted methods of constitutional interpretation, the principle of *stare decisis*, the rules of justiciability and *certiorari*, canons of constitutional avoidance, customs to resolve decisional paradoxes that can arise on multimember bodies, a court’s authority to remedy what it determines to be constitutional violations, and surely much more besides. All this is meaningfully part of the “practice” or “institution” of judicial review.

This Article is not the place to attempt to catalogue all relevant features of the practice, let alone to model their workings.¹²³ Here I

¹²⁰ *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896).

¹²¹ *Sweatt v. Painter*, 339 U.S. 629 (1950).

¹²² Gadamerians might object that the actual structure is *less* complicated insofar as “[u]nderstanding . . . is always application.” Hans-Georg Gadamer, *Truth and Method* 275 (Garnett Barden & John Cumming eds., Sheed and Ward trans., The Seabury Press 1975) (1965). True, to understand what a provision means is to understand how it would apply to at least some hypothetical set of facts. It is not, however, to understand how it applies in the actual factual circumstances of the given case. See, e.g., Michael J. Perry, *We the People: the Fourteenth Amendment and the Supreme Court* 34–35 (1999). Interestingly, for jurists from Justice Holmes to Judge Posner who emphasize a judge’s tendency to intuit the “right” result before intuiting the legal rule under which that result falls, the converse might seem more nearly true: Application is always understanding.

¹²³ The literature on such matters as those mentioned in the previous paragraph are too large and diverse to justify citation to representative contributions. For one recent discussion that ambitiously canvasses a large number of the features relevant to the practice of judicial review, see, Aharon Barak, *The Supreme Court, 2001 Term—*

should like only to emphasize the single most conspicuous respect in which the actual practice of judicial review, or the actual structure of constitutional adjudication, has been claimed to be more complicated than the two-step model suggests. According to this view, the conventional picture ignores that the application of constitutional meaning to the facts of a given “case or controversy” is often mediated by judge-made tests of constitutional law that are not most fairly understood as themselves products of judicial constitutional interpretation. For many years, this claim was perhaps most widely associated with Monaghan’s distinction between “*Marbury*-shielded constitutional exegesis” and “constitutional common law.”¹²⁴ But it appears as well in Sager’s demonstration that, in lieu of applying what they take as the interpreted meaning of constitutional norms, courts often interpose judge-announced “institutional constructs” that do not fully enforce those presumed norms.¹²⁵ More recently, Fallon has developed a detailed critique of

Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 *Harv. L. Rev.* 16 (2002).

¹²⁴ See Monaghan, *supra* note 4, at 31.

¹²⁵ I think that the distinction between judge-created constitutional tests and judge-interpreted constitutional meaning may be more easily missed in Sager’s work than in Monaghan’s because of the many subtle distinctions that Sager introduces—distinctions between “constitutional norms” and “constitutional rules,” concepts and conceptions, “analytical constructs” and “institutional constructs.” His core insight, though, is that constitutional norms (concepts) get worked out during adjudication into court-announced constructs (rules or conceptions), which are of two different sorts: analytical (“based upon an understanding of the concept itself”) and institutional (“based upon questions of propriety or capacity”). Sager, *supra* note 5, at 1217–18. Although a cursory reading might suggest that these are simply alternative ways to implement the constitutional norm, it is more perspicuous, I believe, to view analytical constructs as always logically prior to institutional ones. That is, even if the judicially *announced* constitutional doctrine consists of an institutional construct, not an analytical one, that institutional construct is based on at least an implicit understanding of the analytical construct—what, in the court’s view, the constitutional norm means. Thus, when Sager refers to the underenforcement of constitutional norms, he does not mean to include those judge-announced analytical constructs that underenforce the “true” or ideally understood constitutional norms; he refers only to those judge-announced institutional constructs that underenforce the (perhaps implicit) *judicial view* of the constitutional norm, i.e., the (actual or hypothetical) judge-announced analytical construct. Were the case otherwise, the underenforcement thesis would be far less novel and important than it is, for it would amount, in large measure, to the prosaic argument that non-judicial actors should adhere to their own interpretation of the Constitution when they conclude that the courts’ interpretation is too generous to state power. See *infra* note 133.

the simple two-step model of constitutional adjudication in urging judges and commentators to think of judicial review in terms of constitutional “implementation” because “‘implementation’ is a more aptly encompassing term than ‘interpretation,’ capable of subsuming two conceptually distinctive functions: one of identifying constitutional norms and specifying their meaning and another of crafting doctrine or developing standards of review.”¹²⁶

It would be mistaken to suppose that Monaghan, Sager, and Fallon were endeavoring to communicate the very same vision, just with different words. Still, a detailed study of the similarities and differences among these three accounts of the constitutional adjudicatory practice ought not detain us. The essential point at present is that each would break down the broad and otherwise undifferentiated mass of judge-announced constitutional law into two conceptually distinct components—constitutional interpretation and constitutional common law, or analytical constructs and institutional constructs, or constitutional meaning and constitutional doctrine.

In an effort to keep attention fixed on the commonality uniting these accounts—that there exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of constitutional adjudication—and not on the singularity of any one,¹²⁷ let us not adopt whole hog the particular vocabulary advanced by any one these theorists. Instead, let us distinguish between “constitutional meanings” and “constitutional rules,” where meanings and rules are two different types of “constitutional doctrine.”¹²⁸ That is to say, judge-announced constitutional

¹²⁶ Fallon, *Implementing the Constitution*, supra note 10, at 38. Although, as here, Fallon usually defines constitutional doctrine in contradistinction to constitutional meaning, in places he seems to employ the phrase in the broader sense we have been using thus far, as signifying the universe of judicial outputs broad enough to include meaning. See *id.* at 41 (defining “constitutional doctrine . . . to embrace not only the holdings of cases, but also the analytical frameworks and tests that precedents establish”) (internal citation omitted).

¹²⁷ Not only might it hamper appreciation of the unifying thread to privilege language that readers are apt to strongly associate with just one or another of these visions, but there are independent reasons to be dissatisfied with the nomenclature just offered. I explore some of these considerations in the next footnote.

¹²⁸ Insofar as Sager would split the universe of constitutional doctrine into “norms” and “rules” of constitutional law, see Lawrence Gene Sager, *Symposium: The Emergence of State Constitutional Law*, Foreword: *State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 *Tex. L. Rev.* 959 (1985), and

Fallon distinguishes between “constitutional meaning” and “constitutional doctrine,” see Fallon, *Implementing the Constitution*, supra note 10, at 38, my proposed nomenclature is a compromise between the two. In my view, “constitutional meanings” is a more auspicious term than is “constitutional norms” for the *first* judicial output because the notion of “constitutional norms” might imply those norms of political morality that the Constitution endorses, and thus would be an ingredient of the constitutional meaning, not the judge-determined meaning itself. Take, for example, Article II’s dictate that no person is eligible to be President “who shall not have attained to the Age of thirty five Years.” U.S. Const. art. II, § 1, cl. 5. Were the Court to determine that a challenge to the election of a thirty-year-old was justiciable, and then to declare the candidate ineligible on the ground that she had not “attained to the Age of thirty five Years,” it would be applying straightforward constitutional “meaning.” Yet Sager’s norm/rule distinction might treat this as the application of a constitutional “rule” designed to effectuate an underlying “norm” that Presidents should have a requisite degree of maturity and life experience. Put another way, the norm/rule distinction might suggest that the relevant distinction to be drawn distinguishes between what is, and what is not, “law” in some meaningful sense: The judge-created constitutional “rule” fashions a constitutional “norm” of political morality into recognizable law. But this is not the distinction that I mean to capture.

I prefer “constitutional rule” to Fallon’s use of “constitutional doctrine” as a label for the *second* output because, as noted earlier, see supra note 3, the phrase “constitutional doctrine” is already in broad use to signify the entire range of judicial work products that operate in the practice of constitutional adjudication. In short, what Fallon calls “constitutional doctrine” to be distinguished from “constitutional meaning,” and to refer to a specific step in the conceptual logic of constitutional adjudication, is only one element of what most scholars think of as “constitutional doctrine.” Indeed, common parlance is plainly on the side of a broader usage. A reference, say, to “existing free exercise doctrine” is not, customarily, intended or taken as prejudging whether the rules of constitutional law that currently govern the Free Exercise Clause are better classified as “doctrine” as opposed to (mere) “constitutional meaning.” Although it is familiar enough to use the same term to refer both to a given genus and to one species within that genus (as just noted, rules are sometimes subdivided into rules and standards), taxonomic synecdoche of this sort predictably invites confusion and therefore should not be adopted complacently.

I have eschewed Monaghan’s vocabulary. “Constitutional common law” is, for one thing, cumbersome. More importantly, Monaghan treats it as “subject to amendment, modification, or even reversal by Congress” by definition. Monaghan, supra note 4, at 3; see also, e.g., id. at 31 (distinguishing between “*Marbury*-shielded constitutional exegesis and congressionally reversible constitutional law”). This vision of what is necessarily entailed by the “common law” appellation resonates broadly. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999) (Souter, J., dissenting) (arguing that the Eleventh Amendment codified a “common law” conception of state sovereign immunity and therefore is necessarily subject to congressional override). But, as a necessary characteristic of what I will call “constitutional rules,” that is something I very much wish to deny. See *infra* Section IV.A.2.c; see also, e.g., Sager, supra, at 966 n.19 (arguing that judicially recognized strategic rights are “products of a pervasive, legitimate aspect of federal constitutional decisionmaking,” which should not be wholly subordinated to the legislature). For similar reasons, I refrain from calling the outputs that I have labeled “meanings” and “rules,” respectively, “constitutional law” and extracon-

doctrine (what most lawyers have in mind when they speak of “constitutional law”) consists of judge-interpreted constitutional meanings supplemented or supplanted by judge-made constitutional rules. Conspicuous (and oft-commented upon) illustrations of the latter are likely to include the complex tiers of First Amendment and Equal Protection jurisprudence, the *Miranda* rule, and *Roe v. Wade*’s trimester framework. But, as many scholars have observed, constitutional rules in this sense are ubiquitous.¹²⁹ Of course, this is a positive claim that need not concede their legitimacy.

Merely recognizing the mediating function that constitutional rules play between the logically prior judicial announcement of constitutional meaning and the logically subsequent application of law to facts suggests the following schematic vision of the practice: A court interprets the Constitution to yield a (judicial) statement of constitutional meaning, on the back of which it may construct a constitutional rule, which rule it then applies to the facts to yield a constitutional holding, by which I mean, quintessentially, a declaration that challenged governmental conduct is, or is not, constitutionally permissible.¹³⁰ In this picture, two distinct judicial outputs function logically prior to the announcement of holdings: constitutional meanings and constitutional rules.¹³¹ This is contrasted with the simple model in which there exists only a single mediating output. (See Figure 1.)

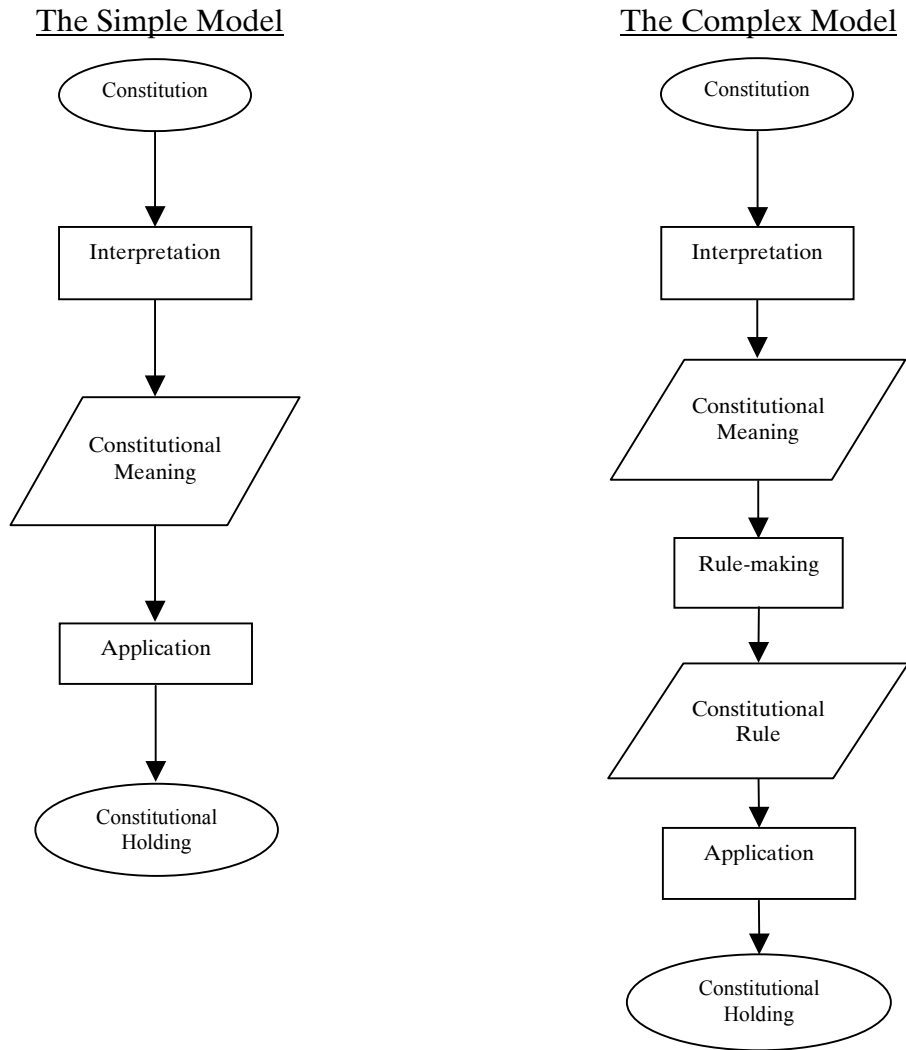
stitutional or subconstitutional law. Each of the latter terms might be read to connote (as Monaghan assumed) defeasibility by Congress. Additionally, they might be thought to imply eliminability whereas Fallon, at least, is keen to insist that the construction of what he calls “constitutional doctrine” is as essential a part of judicial review, as is the divination of “constitutional meaning.”

¹²⁹ In addition to the authorities discussed, see, for example, Fried, *supra* note 3.

¹³⁰ See also Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cin. L. Rev. 199, 199–200 (1971) (suggesting a similar image).

¹³¹ Following standard conventions, the ovals represent the starting and ending points, rectangles represent processes, and parallelograms represent the intermediate outputs.

The Logical Structure of Constitutional Adjudication: Two Models
(Figure 1)



B. Prophylactic Rules and Overprotection

Many questions and challenges can be raised against this more complex model, but as it is not my goal to defend it, we need not address them now. A rough picture is sufficient for our purpose.¹³² If this image is approximately correct, then “prophylactic rules” (as conceived of by most scholars) reside among what we have designated “constitutional rules.” This is what Grano means in claiming that they are “court-created,” not “true constitutional rules.”¹³³ “Prophylactic rules” and “constitutional rules” are not simply synonyms, however. If we can speak sensibly about the extensional relation that obtains between any given constitutional rule and its supporting or generating (court-interpreted) constitutional meaning,¹³⁴ three sorts of relationships can exist: (1) the constitutional rule can overenforce meaning; (2) it can underenforce meaning; and (3) it can overenforce in some parts while underenforcing in others.¹³⁵ (See Figure 2.)

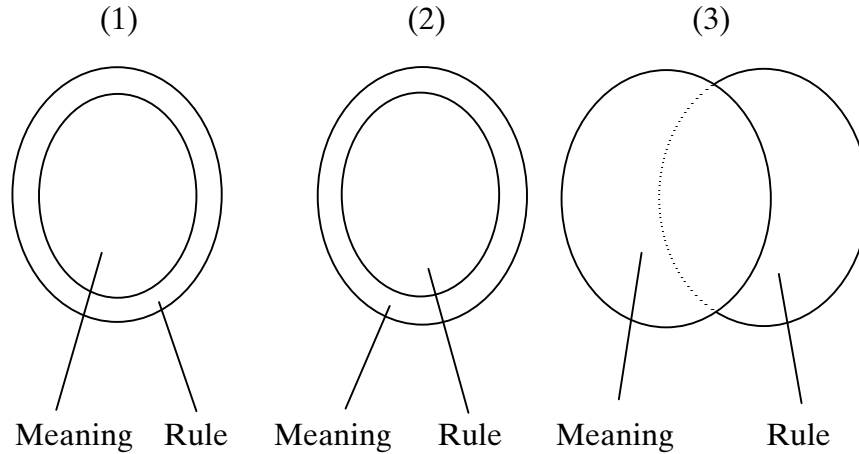
¹³² That purpose, to reiterate, is to appreciate as fully as possible the contending positions in the debate over the legitimacy of prophylactic rules. To preview what is to come, I will argue that our collective understanding of the nature and (il)legitimacy of prophylactic rules is infirm because neither the simple two-step model of judicial review nor the more complex three-step model—as currently conceived—faithfully captures the logic of constitutional adjudication.

¹³³ Surely Grano misspeaks when distinguishing violations of a prophylactic rule from violations of “the Constitution itself.” See *supra* text accompanying note 113. Any rule of constitutional law can be violated without violating the Constitution itself insofar as the rule can mistakenly interpret a constitutional restraint on state power more broadly than a “correct” (or better) interpretation would warrant. See, e.g., Grano, *Confessions*, *supra* note 77, at 184. By distinguishing “constitutional rules” from “the Constitution,” we see that Grano must mean that prophylactic rules can be violated without one’s having violated the Constitution *as judicially interpreted* (even if that interpretation is only implicit). Translated into our stipulated vocabulary, Grano and Justice Scalia are condemning, as “prophylactic,” those “constitutional rules” that overenforce judge-interpreted constitutional meanings.

¹³⁴ One of the insights gained from carving doctrine into operative propositions and decision rules is that this predicate (that it makes sense to think in terms of extensional relationships) is more vexed than the standard conceptualizations of constitutional doctrine would suggest. As a consequence, determining whether given doctrine overprotects what the Court takes the Constitution to mean is often more complicated than contributors to the prophylaxis literature have appreciated. See *infra* Section V.B.

¹³⁵ Actually, five relationships are theoretically possible. In the fourth, all that the rule prohibits the Constitution (as interpreted) allows, and all that the Constitution (as interpreted) prohibits, the rule allows. In the fifth, the constitutional rule and the

Extensional Relationships Between Constitutional Rule and
Constitutional Meaning
(Figure 2¹³⁶)



constitutional meaning are perfectly coextensive. Both of these possibilities, however, are of only theoretical interest. When a constitutional rule and its corresponding constitutional meaning share no content at all it is hard to see in what sense the governing rule could be classified as *constitutional* doctrine at all. When rule and meaning are extensionally identical, they qualify as different things only where their intensional meanings differ, which, in this context, is not likely to be a real prospect.

¹³⁶ Different but analogous representations appear in Klein, *supra* note 115, at 1079–80. Also, for roughly comparable arguments about the ways that remedies can over-enforce or underenforce a right, see Douglas Laycock, *Modern American Remedies* 279–89 (3d ed. 2002); David Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 *Minn. L. Rev.* 627 (1988).

It is definitional of prophylactic rules—at least for Grano and Justice Scalia—that they overenforce judge-determined constitutional meaning.¹³⁷ As far as the three images contained in Figure 2 are concerned, then, only image (1) represents a prophylactic rule.¹³⁸ (Let us say that image (2) depicts an “underenforcement rule”¹³⁹ and image (3) an “overlapping rule.”)

¹³⁷ See, e.g., Grano, *supra* note 70, at 104 (“While prophylactic rules also may be intended, at least in part, to prevent future constitutional violations, they result in suppression of evidence or appellate reversal even when the Constitution has not actually been violated. By contrast, deterrent remedies, such as the exclusionary rule, apply only after an actual constitutional violation has occurred.”) (internal citation omitted). As noted earlier, see *supra* note 115, Grano’s claim that it is definitional of prophylactic rules that they have this particular extensional relationship to what courts view as the true constitutional rule is not as widely accepted as is the proposition that prophylactic rules are something other than judge-interpreted constitutional meaning.

¹³⁸ Paul Cassell contends that “[r]ules required by the Constitution, and rules beyond those required by the Constitution together exhaust the universe of rules.” Paul G. Cassell, *The Paths Not Taken: The Supreme Court’s Failures in Dickerson*, 99 Mich. L. Rev. 898, 906 (2001). This proposition is correct, if “*beyond* those required by the Constitution” means merely “*other than* those required by the Constitution.” But an alternative reading would take “*beyond*” to refer to the rule’s extensional scope. Indeed, that is the reading Cassell seems to have in mind, as he distinguishes rules required by the Constitution from rules that afford “protection beyond what the Constitution requires.” *Id.* at 905. Rules required by the Constitution and rules that overprotect what is required by the Constitution do *not* exhaust the universe of rules. As Sager taught a quarter century ago, courts also create rules that *underprotect* what is required by the Constitution. Sager, *supra* note 5.

¹³⁹ Scholars have proposed varying language for this sort of constitutional doctrine. Stephen Schulhofer calls it a “reverse prophylactic rule[],” Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 449 (1987), a construction that has some undeniable merit but unfortunately privileges overprotection relative to underprotection, and also implies that constitutional rules are of only two sorts, not three. Susan Klein calls it a “safe harbor” rule. Klein, *supra* note 115. This terminology has value too. I think it is potentially misleading, though, insofar as it implies not only that there exists a particular extensional relationship between constitutional rule and constitutional meaning but also that that relationship was adopted for a particular purpose. It may connote, that is, that the doctrine was adopted for what I have termed “preventive” considerations. See *infra* Section IV.A.2.a. (Of course, calling the reverse of this sort of rule “prophylactic” instead of “overinclusive” or “overenforcement” might bear a similar connotation—in this case, that the rule was adopted for “deterrent” purposes. See *infra* Section IV.A.2.a. So even if “safe harbor rule” is less apt than “underenforcement rule,” it is arguably on closer par with “prophylactic rule.”) In any event, given the importance and widespread familiarity of Sager’s “underenforcement” vocabulary, “underenforcement rule” seems especially appropriate.

C. Prophylactic Rules Defended (or Denied)

To this point we have expended some effort clarifying what, in the estimation of their critics, prophylactic rules *are*, without yet exploring what is supposed to make them *illegitimate*. Most generally, the question will be whether it is the fact of overprotection itself that is thought to render them illegitimate (in which case underenforcing constitutional rules would be legitimate and overlapping constitutional rules might be too) or, alternatively, whether their illegitimacy is just entailed by the supposed illegitimacy of all constitutional rules.¹⁴⁰ Let us bracket this question, though, and turn attention instead to the arguments of those who defend prophylactic rules, most notably David Strauss. If Strauss's view of prophylactic rules mirrored that of his opponents, the ubiquity thesis must be that constitutional doctrine consists in substantial part of constitutional rules that overenforce judge-interpreted constitutional meaning. In fact, though, that is *not* his claim. And to understand why it is not will be to see what is most centrally at issue in the dispute over prophylactic rules.

As the graphic representation of the complex model of constitutional adjudication in Figure 1 indicates, the difference between constitutional rules (of which prophylactic rules are one variety)

¹⁴⁰ It seems late in the day to contend that constitutional rules are categorically illegitimate, that constitutional adjudication must always apply constitutional meaning unmediated to the facts of the case to reach a holding. In any event, if Justice Scalia means to denounce constitutional rules full stop, we can fairly demand a more sustained and straightforward argument against it than is supplied merely by inferences from his rejection of *prophylactic* rules alone.

If Justice Scalia is not willing to declare illegitimate all judge-announced constitutional doctrine that is nonidentical to judicially interpreted constitutional meaning, perhaps his blanket denunciation of prophylactic rules is predicated on the view that doctrine must always underenforce meaning. As applied to doctrine implementing individual rights, this position systematically favors majoritarianism over individual liberty. It says, for example, that the Court may underenforce the rights of speech, or religious exercise or equal protection, but may not overenforce them—even though such underenforcement doctrines are at least as illiberal as prophylactic rules are antidemocratic. This is peculiar. Furthermore, the hypothetical proposition that underenforcement rules are permissible while prophylactic rules are not becomes even more puzzling when applied to paradigmatically structural provisions governing the allocation of powers between state governments and the federal government or between Congress and the President. What neutral, constitutionally mandated principle would produce the asymmetry that the federal judiciary may underenforce limits on Congress's enumerated powers, but not overenforce them?

and constitutional meanings rests upon differences in the modes of production. Judge-interpreted constitutional meaning is a product of “constitutional interpretation,” whereas constitutional rules are the product of “constitutional rule-making.” The labels, of course, are unimportant.¹⁴¹ What is important, at least in Strauss’s account, is that the existence of two conceptually distinct *outputs*—which, recall, is a logically necessary predicate for there being such things as “prophylactic rules” in the normatively loaded sense endorsed by Grano and Justice Scalia—depends upon there existing conceptually distinct *processes* of output-creation.¹⁴² That is, the processes

¹⁴¹ Indeed, what Figure 1 designates as constitutional interpretation may be even more faithfully understood as consisting of discrete subprocesses, a claim suggested, for example, by Keith Whittington’s recent contrast between “constitutional interpretation” and “constitutional construction.” See generally Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) [hereinafter Whittington, *Constitutional Construction*]; Keith Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999) [hereinafter Whittington, *Constitutional Interpretation*]; cf. Chester James Antieau, *Constitutional Construction* xxiii (1982) (defining “construction . . . to embrace both the task of ascertaining meaning of words employed by those responsible for the constitutions, and the far larger and more important duty of assigning the appropriate legal significances to clauses and words used in the basic laws”). As Whittington puts it:

Although the clauses and structures that make up the [constitutional] text cannot be simply empty of meaning, . . . the meaning that they do convey may be so broad and underdetermined as to be incapable of faithful reduction to legal rules. This is not so much a problem of a given clause possessing absolutely no judicially formalizable meaning as it is the inability of the judiciary to define exhaustively the meaning of the text. Regardless of the extent of judicial interpretation of certain aspects of the Constitution, there will remain an impenetrable sphere of meaning that cannot be simply discovered. The judiciary may be able to delimit textual meaning, hedging in the possibilities, but after all judgments have been rendered specifying discoverable meaning, major indeterminacies may remain. The specification of a single governing meaning from these possibilities requires an act of creativity beyond interpretation. . . . This additional step is the construction of meaning.

Whittington, *Constitutional Interpretation*, *supra*, at 7. For Whittington, then, construction is a second step in the identification of what I term “meaning”: Construction specifies a particular meaning from among the range of possibilities that other forms of interpretation have left available. For a broadly similar argument, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 *U. Chi. L. Rev.* 519 (2003) (discussing founding-era expectations that subsequent interpretations would “fix” the meaning of vague or ambiguous constitutional provisions).

¹⁴² But see Fallon, *Implementing the Constitution*, *supra* note 10, at 41 (contending that it is “misleading to suggest that the Court’s function consists exclusively in the search for constitutional ‘meaning,’” but observing as well that his “central claims . . .

that our diagram (arbitrarily) labels “interpretation” and “rule-making” must themselves be distinguishable. But, Strauss argues, this distinction is false: “[I]n deciding constitutional cases, the courts constantly consider institutional capacities and propensities. That is, to a large extent, what constitutional law consists of: courts create constitutional doctrine by taking into account *both* the principles and values reflected in the relevant constitutional provisions *and* institutional realities.”¹⁴³ If the processes of interpretation and its putative sibling are indistinguishable, the argument appears to run, it is meaningless to distinguish judge-interpreted constitutional meanings and judge-created constitutional rules because the very same sorts of pragmatic, institution-sensitive considerations are always potentially at work. In sum, Strauss rebuts the charge that prophylactic rules like the *Miranda* doctrine are illegitimate by denying the underlying premise that there exist two analytically discrete outputs. Prophylactic rules are ubiquitous, he says, *not* because court-announced doctrine consists of lots of outputs that overprotect court-interpreted constitutional meaning, but because there is only *one* sort of output—“constitutional doctrine”—much of which has the same “prophylactic” relationship to “the real, noumenal Constitution”¹⁴⁴ as does *Miranda*.¹⁴⁵ Viewed in this light,

could be accepted even by someone whose conception of ‘interpretation’ was broad enough to subsume the varied elements of what I call ‘implementation’”).

¹⁴³ Strauss, *supra* note 38, at 207.

¹⁴⁴ *Id.* at 207–08.

¹⁴⁵ Michael Dorf and Barry Friedman misunderstand Strauss’s analysis when they describe his position on prophylactic rules as an effort “to understand *Miranda* in . . . subconstitutional terms.” Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 *Sup. Ct. Rev.* 61, 64–65 (2001). Instead, they argue, “[T]he case can be explained equally effectively without raising the legitimacy concerns that prophylaxis and constitutional common law trigger: *Miranda* can be justified purely in terms of the Court’s incontestable power to interpret the Constitution.” *Id.* Perhaps so. But this is not an alternative to Strauss’s argument; it *is* Strauss’s argument. Or, to put the point another way, Dorf and Friedman err when criticizing Strauss on the grounds “that the analytic value of the concept of prophylaxis is limited because ultimately it asks the wrong question.” *Id.* at 75. The question the concept of prophylaxis asks, Dorf and Friedman think, is “how to justify judicial rulings that go beyond what the text and history of the Constitution strictly require.” *Id.* at 75–76. And that is mistaken, they maintain, because “[i]n a post-Realist world, there is no shortage of justifications for courts making law.” *Id.* at 76. Yet this, of course, was precisely Strauss’s point. Recall that Strauss did not originate prophylaxis talk; he responded to it. And his response, in essence, was that the vocabulary, along with the normative claims that

then, Strauss's contention is not so much that prophylactic rules (in Grano's sense) are ubiquitous, but that they are nonexistent.¹⁴⁶

Daryl Levinson pressed this Straussian argument with vigor in a highly regarded recent article, criticizing what, he dubbed "rights essentialism," and identified as the dominant vision of constitutional adjudication. "The rights-essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and

rode upon it, foundered on the mistaken assumption that there existed any meaningful category of *non*prophylactic constitutional interpretation.

Dorf and Friedman may have been misled by Strauss's 1996 article "Common Law Constitutional Interpretation," supra note 3, which is, in an important sense, a companion piece to "The Ubiquity of Prophylactic Rules," supra note 38. One might anticipate, given the similarity in titles, that Strauss would be arguing along the lines set out by Monaghan twenty years earlier in "Constitutional Common Law," supra note 4. If so, one would be mistaken. Strauss appropriated the phrase "constitutional common law" to signify, not a particular *output* in the logical structure of constitutional adjudication (as Monaghan had used the term), but rather a *method* of deriving those outputs. As he explains it, common law constitutional interpretation is the process of deriving constitutional meaning not "from some authoritative source," but "instead in understandings that evolve over time," especially in the steady accretion of judicial precedent. Strauss, supra note 3, at 879. Strauss very rarely uses the phrase "constitutional common law" to describe either his favored interpretive method or the body of law it produces, opting instead for such formulations as "common law constitutional interpretation," "the common law approach to constitutional interpretation," and "common law constitutionalism." See *id.*

¹⁴⁶ Revealingly, Justice Scalia's *Dickerson* dissent relies on just the distinction that Strauss denies when responding to examples marshaled in the government's brief offered to support the ubiquity thesis. Translated into our vocabulary, his argument, in effect, is that many of these purported prophylactic rules are really examples of judge-announced constitutional meanings that are prophylactic relative to their animating norms of political morality, not constitutional rules that are prophylactic relative to constitutional meanings. See, e.g., *Dickerson*, 530 U.S. at 439 (Scalia, J., dissenting) (agreeing that in various First Amendment contexts, "the Court has acknowledged that in order to guarantee that protected speech is not 'chilled' and thus forgone, it is in some instances necessary to incorporate in our substantive rules a 'measure of strategic protection,'" but explaining "that is because the Court has viewed the importation of 'chill' as *itself* a violation of the First Amendment—not because the Court thought it could go beyond what the First Amendment *demand*ed in order to provide some prophylaxis"); see also, e.g., Grano, *Miranda's* Constitutional Difficulties, supra note 77, at 189 (arguing "the first amendment may prohibit standardless licensing discretion not as an evil in itself but because of a concern that such discretion too easily will permit license denials for the 'wrong' reasons"). Perhaps because Strauss resists dividing constitutional doctrine into conceptually distinct sorts—what I have thus far called "constitutional meanings" and "constitutional rules"—he appears in a post-*Dickerson* article not fully to appreciate Justice Scalia's argument. See David A. Strauss, *Miranda, the Constitution, and Congress*, 99 Mich. L. Rev. 958, 965–66 (2001) [hereinafter Strauss, *Miranda, the Constitution, and Congress*].

only then pragmatically apply the right through the vehicles of implementation and remediation, bears little resemblance to the actual practice of rights-construction,” Levinson argued.¹⁴⁷ The attempt to carve constitutional doctrine into (what I have labeled) constitutional meanings and constitutional rules “assume[s] that constitutional rights have ‘true’ scopes which, while often lost in the undifferentiated judicial doctrine that courts produce in the course of deciding actual cases, comprise what the Constitution really means, as opposed to how it is used in constitutional adjudication.”¹⁴⁸ This, he contends, is just wrong. “Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”¹⁴⁹ The truth—“remedial equilibration”—is that “constitutional rights are inevitably shaped by, and incorporate, remedial concerns. Constitutional adjudication is functional not just at the level of remedies, but all the way up.”¹⁵⁰

Do not fixate on the right/remedy vocabulary. It takes no imagination to translate Levinson’s argument to the supposed distinction between constitutional meanings and constitutional rules,¹⁵¹ for rights in Levinson’s view just are those things that are supposed to reside in constitutional meaning, “while remedies are consigned to the banal sphere of policy, pragmatism, and politics”¹⁵²—the sphere of constitutional rule-making. In short, Levinson is advancing a two-part claim: first, that the distinction between judge-determined “constitutional meanings” and judge-made “constitutional rules” has become dominant in constitutional theory; and second, that the distinction is misguided because it assumes that pragmatic judgments about how meaning can be implemented most effectively in the real world are not inescapably part of constitutional interpretation, and thus can be relegated or reserved to a

¹⁴⁷ Levinson, *supra* note 27, at 873. But see *id.* at 861 n.9 (“The ‘essentialism’ in rights essentialism alludes to the qualitative distinction between rights and remedies, not to any claim that rights are objective, ahistorical Platonic Forms.”).

¹⁴⁸ *Id.* at 869–70.

¹⁴⁹ *Id.* at 858.

¹⁵⁰ *Id.* at 873.

¹⁵¹ See *id.* at 860 (identifying Monaghan’s theory of constitutional common law and Sager’s underenforcement analysis as leading examples of rights-essentialism); *id.* at 866–70 (discussing Monaghan and Sager in more detail).

¹⁵² *Id.* at 857.

conceptually distinct, logically subsequent, or less valued, dimension.

Strauss and Levinson are not, I want to make clear, isolated voices.¹⁵³ They represent a phalanx of scholars challenging the effort to subdivide “constitutional doctrine” along conceptual lines. Indeed, the challenge had been mounted even prior to “The Ubiquity of Prophylactic Rules,” in forceful works questioning the coherence of Monaghan’s distinction between constitutional exegesis and constitutional common law.¹⁵⁴ It also undergirds Evan Caminker’s recommendation “that we jettison the phrase ‘prophylactic rule’ from our vocabulary, because there really isn’t any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish and implement regarding every constitu-

¹⁵³ For further confirmation of the tight link between them, however, see *id.* at 904 (“Constitutional doctrine, in order to have any useful meaning in governing the primary behavior of government, must be more rule-like than any of the most abstract standards that might be put forward as the basic principle of any given constitutional right. Consequently, like all legal rules (as opposed to standards), constitutional law will be both overinclusive (i.e., prophylactic) and underinclusive relative to an ultimate purpose. The degree of over- and underinclusiveness of any given constitutional rule will depend on such factors as the administrability and expense of a more precise rule and the error costs of false negatives and false positives. Nothing in the Constitution’s text, structure, and history, and no amount of philosophizing about values or principles, will help courts to balance such remedial concerns. Yet every constitutional rule takes account of them.”).

¹⁵⁴ The leading examples, appearing a year apart, were by Martha Field and Thomas Merrill. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 *Harv. L. Rev.* 881, 890 (1986) (defining “federal common law” as “any rule of federal law created by a court (usually but not invariably a federal court) *when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional*”) (internal citation omitted); *id.* at 892, 895 (acknowledging that “[s]ome will believe that the proposed definition is so broad as to make meaningless the whole concept of federal common law; it includes too much that is clearly ‘just interpretation’”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 *U. Chi. L. Rev.* 1, 4–6 (1985) (cautioning against the “danger of assuming away important questions at the definitional stage,” while proposing to define “federal common law” to “mean[] any federal rule of decision that is not mandated on the face of some authoritative federal text” and acknowledging that, under this definition, “most modern constitutional law is indistinguishable from what courts call federal common law”).

The Field and Merrill lines of argument should not be confused with those critiques of Monaghan that accepted the conceptual distinction between constitutional interpretation and constitutional common law only to deny the latter’s legitimacy. See, e.g., Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 *Harv. L. Rev.* 1117 (1978).

tional norm.”¹⁵⁵ In language that could have been penned just as easily by Strauss or Levinson, Caminker argued:

The terminology misleadingly suggests that so-called prophylactic rules differ in kind from so-called “ordinary” doctrinal rules. But if the argument is that prophylactic rules are different because they rest on some institutional judgments concerning the capacity of courts to enforce constitutional norms, rather than merely on some “pure” interpretation of those norms, this is just wrong—such institutional judgments are precisely the stuff of which most constitutional law is made.¹⁵⁶

Rick Hills sought to capture this burgeoning attitude in a recent manifesto attacking what he calls “anti-Pragmatist” constitutional theory—“any constitutional theory that rests on a dichotomy between ‘principle’ and ‘policy,’ where the former category is the locus of abstract armchair reasoning about value and the latter is the site of messy, empirical analysis of causal relationships and instrumental rationality.”¹⁵⁷ Notwithstanding the prevalence of anti-Pragmatism, Hills argues, “the most promising legal scholarship since roughly the late 1980s has discredited” it.¹⁵⁸ That promising scholarship, as Hills describes it, starts with Strauss’s “Ubiquity of Prophylactic Rules,” and reaches its apogee in Levinson’s “Rights Essentialism.”¹⁵⁹ Surely the claimed distinction between judge-interpreted constitutional meaning and judge-made constitutional rules lies at the heart of anti-Pragmatist constitutional theory. If so, “[t]he most promising and important trend in constitutional theory over the last two decades,” writes Hills, has been to demonstrate that the distinction presents “a false and incoherent picture of constitutional law.”¹⁶⁰

¹⁵⁵ Evan H. Caminker, Lecture, *Miranda* and Some Puzzles of “Prophylactic” Rules, 70 U. Cin. L. Rev. 1, 25 (2001).

¹⁵⁶ *Id.*

¹⁵⁷ Roderick M. Hills, Jr., Exorcizing Anti-Pragmatism from Constitutional Theory 1 (Mar. 23, 2003) (unpublished manuscript, on file with the Virginia Law Review Association).

¹⁵⁸ *Id.* at 4.

¹⁵⁹ See *id.* at 4–5. Hills also identifies work by Fred Schauer, Daniel Halberstam, and John Garvey. *Id.* at 5.

¹⁶⁰ *Id.* at 1.

The point, in short, is that the debate over prophylactic rules is parasitic upon a more fundamental contest over the logical structure of constitutional adjudication. The terms of the debate are ever-shifting: from “constitutional common law” to “constitutional doctrine,” from norms and rules to rights and remedies. No matter what the terminology, though, the central question is whether it is meaningful to carve the universe of constitutional doctrine into conceptually distinct pieces. It is a debate that pits “Taxonomists” (like Monaghan, Sager, and Fallon) who advocate something like the “complex” model of constitutional adjudication against “Pragmatists”¹⁶¹ (like Strauss, Levinson, Caminker, and Hills) who insist that constitutional adjudication is instrumental “all the way up.”¹⁶²

III. A DIFFERENT WAY TO DIVIDE THE TERRAIN: CARVING DOCTRINE INTO OPERATIVE PROPOSITIONS AND DECISION RULES

The instant question (keeping, for the moment, the debate over “prophylactic” constitutional rules in the background) is whether we can have Taxonomy and Pragmatism too. Can we offer coherent dividing lines within the sprawling sphere of constitutional doctrine—a domain thought to encompass interpretations, reasons, mediating principles, and implementing frameworks¹⁶³—in a way that does not depend upon the anti-Pragmatist assumption that a meaningful sort of constitutional interpretation exists which does not involve “practical” or “instrumental” considerations? And, if so, is there a point to the enterprise? The central aim of the re-

¹⁶¹ The “Pragmatist” label is notoriously slippery and contested. I use the term here to signal a stance that rejects distinctions of the sort—for example, between principle and policy, values and facts—on which the taxonomic enterprise is thought by some to rely. This sense of the term is distinct from (though not incompatible with) the sense associated today with Judge Richard Posner, who defines “pragmatic adjudication” as “adjudication guided by a comparison of the consequences of alternative resolutions of the case rather than by an algorithm,” and as “a practical tool of social ordering” which prefers “the decision that has the better consequences for society.” Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* 186 (2001); see also, e.g., Richard A. Posner, *Overcoming Law* 4–15 (1995) (describing the pragmatic approach to law as, inter alia, instrumental, experimental, forward-looking, activist, antiessentialist, and antidogmatic).

¹⁶² See supra note 150 and accompanying text.

¹⁶³ See supra note 3 (quoting formulations by Amar, Fried, and Strauss).

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mainder of this Article is to demonstrate that the answer to each question is “yes.”

Relying on *Board of Trustees of the University of Alabama v. Garrett*,¹⁶⁴ a much commented-upon case decided the Term following *Dickerson v. United States*, this Part introduces a conceptual distinction between constitutional operative propositions (essentially, judge-interpreted constitutional meaning) and constitutional decision rules (rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with). It then elucidates the distinction by applying it to a variety of doctrines that range across constitutional law. Defense of the distinction’s utility is reserved for the next two Parts. Part IV offers exploratory arguments about the distinction’s likely value. Part V presents a concrete demonstration of the distinction’s coherence and utility by dividing one intensively scrutinized nugget of constitutional law—the *Miranda* doctrine—into its operative-proposition and decision-rule components, and by showing that the exercise advances debates about that decision’s legitimacy and proper scope.

A. Garrett and the Distinction Between Operative Propositions and Decision Rules

The facts of *Garrett* could not be much further afield from those of *Dickerson*. The case arose after Patricia Garrett, a registered nurse who was being treated for cancer, was removed from her position as Director of Nursing at the University of Alabama’s Birmingham Hospital because of her substantial leaves of absence for medical treatment.¹⁶⁵ Garrett sued the University of Alabama, alleging that her demotion violated the federal Americans with Disabilities Act (“ADA”), which requires that employers, including states, provide “reasonable accommodations” for their disabled employees.¹⁶⁶ Consistent with the ADA’s explicit

¹⁶⁴ 531 U.S. 356 (2001).

¹⁶⁵ *Id.* at 362.

¹⁶⁶ See 42 U.S.C. § 12112(b)(5)(A) (2000) (requiring specified categories of employers to “mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer’s] business”). This is Title I of

authorization,¹⁶⁷ she sought money damages. The University of Alabama moved to dismiss the suit, arguing that the Eleventh Amendment barred Congress from making states liable for money damages in suits alleging violations of the ADA.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”¹⁶⁸ Notwithstanding this plain language, however, the Supreme Court had held over a century ago that the Amendment confers state sovereign immunity even from federal question suits brought by its own citizens.¹⁶⁹ Alabama would therefore prevail against Garrett unless the Constitution authorized Congress to abrogate the states’ sovereign immunity from damages suits under the ADA. Analysis of this question, in turn, was shaped by the Court’s 1996 decision in *Seminole Tribe of Florida v. Florida*.¹⁷⁰

Seminole Tribe had held that Congress has no authority under Article I of the Constitution to subject states to suits for money damages.¹⁷¹ At the same time, though, the Court reaffirmed its earlier holding¹⁷² that Congress *could* abrogate a state’s immunity when validly exercising its enforcement power under Section 5 of the Fourteenth Amendment.¹⁷³ Because Congress had invoked Sec-

the Act. The Court reserved comment on whether Title II, which concerns the “services, programs, or activities of a public entity,” 42 U.S.C. § 12132 (2000), can also cover claims of employment discrimination. *Garrett*, 531 U.S. at 360 n.1.

¹⁶⁷ 42 U.S.C. § 12117(a) (2000) (allowing victims of employment discrimination under the ADA the same relief granted to victims of employment discrimination under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5); 42 U.S.C. § 12202 (2000) (abrogating state sovereign immunity).

¹⁶⁸ U.S. Const. amend. XI.

¹⁶⁹ *Hans v. Louisiana*, 134 U.S. 1 (1890).

¹⁷⁰ 517 U.S. 44 (1996).

¹⁷¹ *Id.*

¹⁷² *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

¹⁷³ *Seminole Tribe*, 517 U.S. at 59. Section 5 provides: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5. It is not entirely clear just why Congress has abrogation power under § 5 but not under Article I. Some possibilities are briefly canvassed in Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, State Accountability for Violations of Intellectual Property Rights: How To “Fix” *Florida Prepaid* (And How Not To), 79 Tex. L. Rev. 1037, 1049–50 (2001). Whether this distinction—or any other

tion 5 as one of its bases for enacting the ADA,¹⁷⁴ *Garrett* turned upon whether the ADA was valid Section 5 legislation.

Applying the test it had announced four years earlier in *City of Boerne v. Flores*,¹⁷⁵ a slim majority of the Supreme Court held that it was not. *Boerne* had emphasized that it was the responsibility of the Court, not Congress, to interpret the substantive reach of constitutional provisions.¹⁷⁶ Accordingly, the Court must be vigilant to ensure that Congress did not engage in substantive constitutional (re)interpretation under the guise of “enforcing” the Fourteenth Amendment’s guarantees. To this end, *Boerne* announced a two-part test governing legislation purporting to rest upon Section 5: First, the legislation must be designed to prevent or remedy actual constitutional violations; and second, it must exhibit “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”¹⁷⁷ The *Garrett* majority, in an opinion again written by the Chief Justice, concluded that, if designed to enforce the Fourteenth Amendment’s command that no State “deny to any person within its jurisdiction the equal protection of the laws,” the ADA failed the *Boerne* test.¹⁷⁸

The crux of the Court’s reasoning is straightforward. Because the Court had already determined that the disabled are not a sus-

aspect of present sovereign immunity jurisprudence—is sensible is irrelevant for present purposes.

¹⁷⁴ See 42 U.S.C. § 12101(b)(4) (2000).

¹⁷⁵ 521 U.S. 507 (1997).

¹⁷⁶ *Id.* at 519–24.

¹⁷⁷ *Id.* at 520. Neither *Boerne* itself nor the several cases that have applied its test have specified how, if at all, the “congruence” and “proportionality” requirements differ, nor have the decisions made clear just what function or functions the test is designed to perform. Does it serve, in an evidentiary manner, to flush out whether given legislation really was intended to “enforce” the Amendment’s substantive provisions, and not to reinterpret them, or does it give effect to the § 5 requirement that any legislation actually designed to enforce the substantive provisions adopt “appropriate” means? See Berman, Reese, & Young, *supra* note 173, at 1160 n.565. These questions have attracted significant scholarly comment. See, e.g., J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-Ends Relationships*, 36 *U.C. Davis L. Rev.* 407 (2003); Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 *Stan. L. Rev.* 1127 (2001); Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 *Ind. L.J.* 567 (2003). We need not resolve these questions to understand *Garrett* (though answers to them would help determine how the *Boerne* doctrine itself could best be redescribed in operative-proposition and decision-rule terms).

¹⁷⁸ *Garrett*, 531 U.S. at 374.

pect or quasi-suspect group,¹⁷⁹ any state classification that serves to disadvantage them “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”¹⁸⁰ Furthermore, the Court explained, in accord with well-settled precedent,¹⁸¹ “the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the classification.”¹⁸²

The ADA was constitutionally infirm, the Court concluded, because Congress failed to identify a pattern of employment discrimination against disabled persons by the states that violated this test. While acknowledging that Congress had identified “[s]everal . . . incidents [that] undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA,” the Court insisted that “these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”¹⁸³ Moreover, “even were it possible to squeeze out of [the legislative record] a pattern of unconstitutional discrimination by the States,” the ADA-imposed duty of reasonable accommodation too far exceeded what the Fourteenth Amendment would of its own force require of the states to satisfy *Boerne*’s requirements of congruence and proportionality.¹⁸⁴ For these reasons, the statute could not be predicated upon Section 5.

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. According to the dissent, the majority *understated* the extent of state employment practices disadvantaging the disabled that Congress could have found to violate the Equal Protection

¹⁷⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

¹⁸⁰ *Garrett*, 531 U.S. at 367 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

¹⁸¹ The precedent was well-settled by the time of *Garrett*, but long controversial. For a cogent summary of the history of the rational basis test, see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 651–63 (2d ed. 2002). For a more detailed analysis, if dated in some respects, see Robert W. Bennett, “Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 *Cal. L. Rev.* 1049 (1979).

¹⁸² *Garrett*, 531 U.S. at 367 (internal quotations and citations omitted).

¹⁸³ *Id.* at 370.

¹⁸⁴ *Id.* at 372.

Clause and, as a consequence, *overstated* the extent to which the prohibitions and duties of the ADA exceed what the Constitution independently requires of the states. The dissent's complex argument is not, in all respects, a model of clarity. From a metadoctrinal perspective, however, we need understand only the dissent's core reason for concluding that Congress could have concluded that far more state practices violate the Constitution than the majority was willing to credit.

The heart of Justice Breyer's argument is that the majority erred in "hold[ing] Congress to a strict, judicially created evidentiary standard."¹⁸⁵ At a minimum, he explained, the constitutional guarantee of equal protection forbids economic or social legislation that is in fact motivated by "negative attitudes, fear, or irrational prejudice."¹⁸⁶ But this is not the test that courts directly or straightforwardly *apply*. Instead, "'if any state of facts reasonably can be conceived that would sustain' challenged legislation, then 'there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing that the action is arbitrary.'"¹⁸⁷ That is to say, the party challenging a classification in court does not prevail by simply persuading the reviewing court that, more likely than not, the classification was in fact

¹⁸⁵ Id. at 382 (Breyer, J., dissenting); see also id. at 379–80 ("As the Court notes, those who presented instances of discrimination [to Congress] rarely provided additional, independent evidence sufficient to prove in court that, in each instance, the discrimination they suffered lacked justification from a judicial standpoint. . . . But a legislature is not a court of law.").

¹⁸⁶ Id. at 381 (internal quotations and citations omitted). This view of what the Equal Protection Clause commands seems to be shared by Justices Kennedy and O'Connor—in *Garrett* itself, see 531 U.S. at 374–75 (Kennedy, J., concurring) (observing that "[p]rejudice . . . may result . . . from insensitivity caused by simple want of careful, rational reflection" and that "persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will"); id. at 375–76 (seeming to acknowledge that "the States [would] transgress[] the Fourteenth Amendment by . . . lack of concern for those with impairments"); and elsewhere, see *Romer v. Evans*, 517 U.S. 620, 634 (1996) (asserting that treatment "born of animosity toward the class of persons affected" denies equal protection). The *Garrett* majority opinion—which, oddly, both Justice Kennedy and Justice O'Connor joined—apparently rejects this view. See *Garrett*, 531 U.S. at 367 (contending that classifications reflecting "negative attitudes" or "fear" do not violate the Equal Protection Clause so long as they are rationally related to furthering the purpose claimed by the state).

¹⁸⁷ *Garrett*, 531 U.S. at 382–83 (quoting *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935)) (quotation internal to *Pac. States Box* omitted).

adopted because of irrational prejudice; instead, she must demonstrate that no “conceivable state of facts . . . could provide a rational basis for the classification.”¹⁸⁸ The consequence, Justice Breyer explains, is to increase the possibility (which, concededly, cannot be avoided) that a given classification would, because motivated only by irrational prejudice or because failing to promote any legitimate state interest, actually violate the Equal Protection Clause, yet not be judicially invalidated.¹⁸⁹

If this looks much like the now-familiar claim that the Court’s equal protection doctrine underenforces the relevant constitutional norm,¹⁹⁰ that is no accident. Plainly, Justice Breyer throws his lot in

¹⁸⁸ *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

¹⁸⁹ *Garrett*, 531 U.S. at 377–89 (Breyer, J., dissenting).

¹⁹⁰ Indeed, Sager had specifically employed equal protection doctrine to illustrate his underenforcement thesis more than two decades earlier, see Sager, *supra* note 5, at 1215–17, and the argument had since been developed at length by Stephen Ross. Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 *Minn. L. Rev.* 311 (1987); see also, e.g., Strauss, *supra* note 38, at 204–07.

Several years prior to Sager’s influential work, Justice Brennan had provided this especially clear judicial articulation of the rational basis test in underenforcement terms:

As we have often indicated, questions of constitutional power frequently turn in the last analysis on questions of fact. This is particularly the case when an assertion of state power is challenged under the Equal Protection Clause of the Fourteenth Amendment. For although equal protection requires that all persons “under like circumstances and conditions” be treated alike, such a formulation merely raises, but does not answer the question whether a legislative classification has resulted in different treatment of persons who are in fact “under like circumstances and conditions.”

Legislatures, as well as courts, are bound by the provisions of the Fourteenth Amendment. When a state legislative classification is subjected to judicial challenge as violating the Equal Protection Clause, it comes before the courts cloaked by the presumption that the legislature has, as it should, acted within constitutional limitations. Accordingly, “[a] statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.”

But, as we have consistently held, this limitation on judicial review of state legislative classifications is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review. It is simply a “salutary principle of judicial decision,” one of the “self-imposed restraints intended to protect [the Court] and the state against irresponsible exercise of [the Court’s] unappealable power.” The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication. Courts, therefore, will overturn a legislative determination of a factual question only if the legislature’s finding is so clearly wrong that it may be characterized as “arbitrary,” “irra-

with the Taxonomists. He is not merely claiming, after all, that Congress should be free to decide for itself what equal protection means. He is saying that *the Court* has determined what the constitutional guarantee means and has determined what the in-court doctrine should be and that these are not, and need not be, the same thing.¹⁹¹ With the Taxonomists, then, Justice Breyer is arguing that court-announced constitutional doctrine can consist of two analytically distinct outputs. But the particular principle of division upon which he implicitly relies seems new. Justice Breyer's line is drawn between judicial determinations of the meaning of a constitutional provision and announcements of the rule courts should apply when called upon to decide whether the judicially interpreted meaning is complied with. For ease of exposition, let us coin some terms. Call the courts' determination of constitutional mean-

tional," or "unreasonable." Limitations stemming from the nature of the judicial process, however, have no application to Congress. Section 5 of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Should Congress, pursuant to that power, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination actually exists, it need not stop once it determines that some reasonable men could believe the factual basis exists. Section 5 empowers Congress to make its own determination on the matter. It should hardly be necessary to add that if the asserted factual basis necessary to support a given state discrimination does not exist, § 5 of the Fourteenth Amendment vests Congress with power to remove the discrimination by appropriate means.

Oregon v. Mitchell, 400 U.S. 112, 246–48 (1970) (Brennan, J., concurring in part and dissenting in part) (internal citations omitted).

¹⁹¹ This is my reading of Justice Breyer's *Garrett* dissent. Other critics of the decision, however, construe it as an argument that the Constitution lacks a univocal or invariant meaning, and therefore that Congress and the courts should share interpretive authority. See, e.g., *id.* at 18 n.83 (arguing that Justice Breyer's dissent "persuasively attacked" the majority's erroneous "assum[ption] that the Fourteenth Amendment has a singular and universal meaning"). See generally Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 *Ind. L.J.* 1 (2003) (examining the constitutional theory that underlies the Court's claim to exclusive interpretive authority). In contrast, to be clear, I read Justice Breyer's dissent to claim not that constitutional *meaning* differs depending upon the vantage point from which it is viewed (though this could be true) but that, even insofar as courts can stake a claim to being the privileged expositors of invariant constitutional meaning, the constitutional doctrine that they announce consists of devices additional to any such supposed interpreted meanings. Ultimately, of course, the taxonomic distinction between operative propositions and decision rules that this Article develops and defends does not stand or fall on one's preferred reading of the opinions in *Garrett*.

ing a “constitutional operative proposition,” and call the judicial direction regarding how courts are to decide whether an operative proposition has been complied with a “constitutional decision rule.”¹⁹²

¹⁹² A few words about this nomenclature. I am taking the term “constitutional operative proposition” to signify the same thing as “judge-interpreted constitutional meaning,” where “meaning” is agnostic regarding the means of deriving meaning, or the particular conception of meaning that the judge employs (original meaning, plain meaning, judicially constructed meaning, etc.). A constitutional decision rule is the judicially announced rule that directs courts how to “decide” whether the operative proposition is satisfied. Although this usage of the term “decision rule” should be clear enough to one who comes to the term fresh, federal courts scholars are apt to confuse “constitutional decision rules” with the “rules of decision” as that term is used in the Rules of Decision Act, which provided that “the laws of the several states . . . shall be regarded as rules of decision in trials at law in the courts of the United States in cases where they apply.” The Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. A “rule of decision” for purposes of that Act means nothing more than “the governing law.” It is *not* what I mean by “constitutional decision rule.” Instead of trying to figure out how “rules of decision” map onto my proposed distinction between operative propositions and decision rules, it would be best, I think, for readers to try to put that former phrase entirely out of mind. If you are unable to do so, feel free to substitute mentally the phrase “application rule” wherever you see “decision rule.”

Readers who are comfortable with my usage of the term “constitutional decision rule” might nonetheless wonder about pairing that phrase with the neologism “constitutional operative propositions” when the familiar distinction between decision rules and conduct rules, see, e.g., Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984), would seem so handy. For two reasons, however, an “operative proposition” is not more felicitously described as a “conduct rule” for our purposes.

Most importantly, it is generally thought that decision rules are addressed to judges while constitutional conduct rules are addressed to other governmental actors. See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?: Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466, 2469–70 (1996). It is true that, under my proposed taxonomic division, decision rules are addressed to judges alone, but some of what I am calling operative propositions are likewise addressed to them, not to any other governmental actor. (As we will see, the Fifth Amendment’s Self-Incrimination Clause is an example. The operative proposition is that judges must not admit into evidence statements that have been compelled from the defendant.) The fact that judge-interpreted constitutional meaning will on occasion apply directly to judges will be obscured if we divide doctrine into decision rules and conduct rules. The conduct rule/decision rule distinction is unpromising, additionally, insofar as it might be read to import Dan-Cohen’s acoustic separation gloss. I do not propose that judges, scholars, and lawyers classify doctrine as operative or decisional by trying to imagine where it would be classified in a hypothetical regime in which decision rules were kept invisible to non-judicial actors. Perfectly good decision rules can be predicated upon the assumption that non-judicial actors are aware of them and will alter their behavior in light of them. See *infra* Section IV.B.

The significance of this way of carving the doctrine lies in its implicit response to the Pragmatists. The reason the distinction is important, for Justice Breyer, is not because these two species of doctrine are supposed to rest on different sorts of *considerations*. The importance, rather, is that they serve different sorts of *functions*. Notice that Justice Breyer is happy to endorse the equal protection decision rule as a “paradigm of *judicial* restraint.”¹⁹³ But decision rules are designed to bind courts, not the political branches.¹⁹⁴ In *Garrett* itself, Justice Breyer deemed it important to separate the operative proposition from the decision rule not for the reason the Pragmatists charge and reject—namely, that the former necessarily reflects “pure principle”—but because proper application of *Boerne* requires courts to assess the fit between challenged legislation and the constitutional operative proposition, not between the statute and the decision rule. That is, Congress is not obligated to accord any deferential presumptions contained in the decision rule when ascertaining how often the states violate the Equal Protection Clause, and thus, how pressing the need for federal enforcement legislation. Consequently, when determining whether a stat-

Of course, the unsatisfactoriness of adopting the term “conduct rules” as a contrast to “decision rules” cannot itself make a case for the unlovely term “operative propositions.” I would be happy to consider other labels. To readers who might be disposed to come forward with friendly (or even not-so-friendly) amendments, however, let me add two final thoughts. First, the obvious alternative of “substantive rules” is undesirable because it risks implying a contrast with “procedural” and “remedial” rules. Viewed through the lens of this common trichotomy, many “operative propositions” would not be “substantive rules.” Second, I think it is somewhat more apt (if *even* less catchy) to describe judicial interpretations of constitutional meaning as operative *propositions* than as operative *rules* because such interpretations can assume very *unrule*-like shape; it might look more like a standard or perhaps even a principle. (I am indebted to Larry Sager for persuading me on this last point.)

¹⁹³ *Garrett*, 531 U.S. at 383 (Breyer, J., dissenting) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993)) (emphasis in *Garrett*).

¹⁹⁴ For indirect confirmation that Justice Breyer was right, consider the Court’s own explanation in *Beach Communications* for crediting any post hoc rationale for a statutory classification: “[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” 508 U.S. at 315. This would be a non sequitur if the Court meant that, because *the judiciary* does not “require a legislature to articulate its reasons,” the true reasons for a legislature’s actions are irrelevant to whether it has in fact violated the Constitution. All the Court can sensibly mean is that a legislature’s actual reasons are, under deferential rational basis scrutiny, irrelevant for purposes of the constitutional decision rule.

ute designed to enforce the substantive guarantees of the Fourteenth Amendment is “appropriate legislation,” a court must focus on how well that legislation promotes the constitutional operative proposition—a rule, recall, that is itself a judicial product—not the decision rule adopted to facilitate judicial implementation of the constitutional operative proposition. Because they believed that Congress could reasonably have concluded, based on the record before it, that states engaged in substantial conduct that violated the operative proposition of equal protection doctrine (and not merely Congress’s own understanding of what equal protection means), the dissenters would have upheld the ADA as a valid exercise of Congress’s Section 5 enforcement power.

To be sure, merely to appreciate the distinction between operative propositions and decision rules is not necessarily to resolve the issue presented in *Garrett*. One could, after all, agree with the dissent that application of the *Boerne* “congruence and proportionality” test must measure challenged legislation against the constitutional operative proposition, yet nonetheless conclude, with the majority, that too much of what the ADA prohibits is constitutional under that rule to render the statute appropriate enforcement legislation. But the constitutionality of the ADA’s remedial provisions is not our concern. The lesson from Justice Breyer’s *Garrett* dissent is only that we can carve up constitutional doctrine into two sorts of rules—what we have termed, respectively, operative propositions and decision rules—even while conceding the legitimacy of each, and without staking ourselves to any claims about the sorts of considerations upon which courts might rely in the derivation and formulation of either.¹⁹⁵

¹⁹⁵ Unfortunately, this lesson seemed all but lost by last Term’s decision in *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), in which Chief Justice Rehnquist and Justice O’Connor joined the four *Garrett* dissenters to uphold, as a valid exercise of Congress’s § 5 power, application of the Family and Medical Leave Act (“FMLA”) against the states. In relevant part, the FMLA entitles eligible employees to take up to twelve weeks of annual unpaid leave to care for family members with serious health problems. This, the Court said in an opinion by the Chief Justice, was a congruent and proportional means to enforce the Equal Protection Clause. Distinguishing *Garrett*, among other cases, Rehnquist explained that in the FMLA,

Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. . . . Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than

B. The Ubiquity of Constitutional Decision Rules

Garrett highlights in especially stark fashion that constitutional doctrine can consist of “operative propositions” that constitute judicial determinations of constitutional meaning, as well as analytically distinct devices—“decision rules”—that establish the particular inquiry that courts should undertake when applying an operative proposition in the course of constitutional adjudication. But the “any conceivable purpose” gloss on equal protection doctrine is not exceptional. To the contrary, I will argue, constitutional decision rules are a ubiquitous component of constitutional doctrine. Of course, because this terminology is new and the underlying taxonomic distinction is at best inchoate, whether any given constitutional doctrine is better conceptualized as an operative proposition or a decision rule (or something else entirely) will often be contestable. What difficulties—or opportunities—this fact presents are explored in Part IV. This Section seeks only to solidify the basic distinction by offering a few additional illustrations of doctrine whose proper conceptualization in decision rule terms should appear particularly plausible (though not, it bears emphasis, incontrovertible).¹⁹⁶

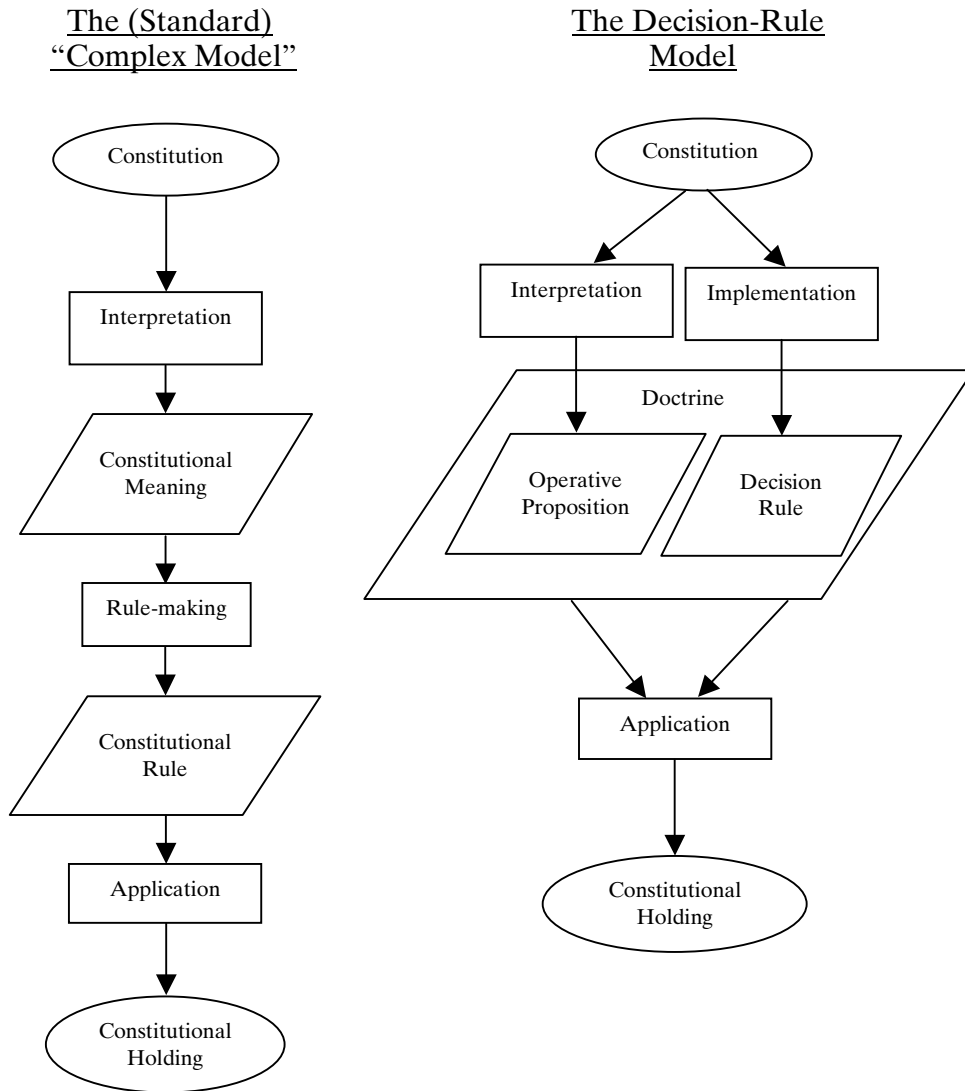
our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.

Id. at 1982 (internal citations omitted). This is not an understanding of the significance of the tiers of scrutiny in equal protection doctrine that should have been acceptable to the *Garrett* dissenters, three of whom nonetheless joined the majority opinion while signaling their disquiet on this score in a brief and somewhat cryptic concurrence. See *id.* at 1984 (Souter, J., concurring).

¹⁹⁶ Innumerable additional illustrations could be chosen. But whatever defects this Article may have, that it’s “not long enough” is probably not among them. For my own analysis of how the operative proposition/decision rule distinction can help make sense of the Court’s current struggles over Commerce Clause doctrine, see Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 *Iowa L. Rev.* (forthcoming 2004). For penetrating analyses of voting rights laws whose potential for profitable reinterpretation in decision rule terms will be evident, compare Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593 (2002) (advocating broader use of what the author calls “prophylactic rules” in election law jurisprudence), with Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 *Yale L.J.* 1603 (2000) (identifying *Shaw v. Reno*, 509 U.S. 630 (1993) as setting forth a *Miranda*-like “prophylactic rule” but criticizing the particular rule as not workable). Worthwhile examinations of criminal procedure doctrines that likewise map easily onto the operative proposition/decision rule distinction appear in Yale Kamisar, *Miranda Thirty-Five Years*

To start, though, it may be useful to have in mind a graphic image of this model of constitutional adjudication. Accordingly, Figure 3 offers one possible representation of the way that operative propositions and decision rules function in adjudication, contrasting this vision with the complex model that had been introduced in Figure 1. The critical lesson to take away from this rendering is that the operative proposition and the decision rule are *jointly necessary* for “constitutional doctrine” to be applied. As a consequence, the decision-rule model escapes the principal objection to other complex three-step models of constitutional adjudication—namely, that courts have no warrant to *replace* judge-interpreted “constitutional meaning” with something else when applying the Constitution.

The Logical Structure of Constitutional Adjudication Reprised
(Figure 3)



1. The Due Process “Some Evidence” Rule

An apt illustration of a constitutional decision rule—one closely resembling the rational basis “any conceivable purpose” decision rule—is the due process “some evidence” rule that the Court has applied in a range of administrative contexts for nearly ninety years.¹⁹⁷ As explained in one 1985 prison case:

[T]he requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. . . . Ascertaining whether this standard is satisfied does not require examination of the entire record. . . . Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.¹⁹⁸

This may or may not be sound constitutional doctrine. But surely, as Fallon has explained:

If viewed as a measure of the “meaning” of due process, the “some evidence” standard would make no sense. An official who maliciously deprived an inmate of liberty or property, knowing that this was a wrongful decision in light of all the properly presented evidence, would fail to provide “due process of law” in the most basic sense. . . . Rather than furnishing an interpretive judgment about the Constitution’s meaning, the “some evidence” test is a standard of review that largely trusts administrative officials to follow the Constitution and provides for judicial redress only in relatively egregious circumstances.¹⁹⁹

Put in our terms, insofar as a deprivation of a protected liberty or property interest will be presumed to provide constitutionally

¹⁹⁷ See generally Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 *San Diego L. Rev.* 631, 663–64 (1988) (arguing that the “some evidence” requirement is a standard of review, not a procedural requirement applicable to the original tribunal).

¹⁹⁸ *Superintendent v. Hill*, 472 U.S. 445, 455–56 (1985).

¹⁹⁹ Fallon, *Implementing the Constitution*, *supra* note 10, at 6; see also *id.* at 38 (arguing that “the ‘some evidence’ test is an unusually stark example of a standard of review that is distinct from the constitutional norms it is crafted to enforce”).

adequate process so long as “some” or “any” evidence in the record supports it,²⁰⁰ the doctrine is a constitutional decision rule.

2. *The Pearce Resentencing Rule*

Although he does not speak directly to the question, Fallon seems to view “standards of review,” like the “some evidence” rule, as representing a fairly narrow category of the constitutional doctrine that is something other than a judicial statement of constitutional meaning.²⁰¹ A key thrust of my argument, in contrast, will be that an ocean of constitutional doctrine is conceptually indistinguishable from what Fallon calls “standards of review.”

Consider, for example, *North Carolina v. Pearce*,²⁰² one of the cases most frequently appearing in academic and judicial discussions of “constitutional common law,” “prophylactic rules,” or “incidental powers.” *Pearce* raised a simple question: “When at the behest of the defendant a criminal conviction has been set aside and a new trial ordered, to what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?”²⁰³ The Court answered that imposition of a harsher sentence is not itself unconstitutional, but that imposing such a sentence for the “purpose of punishing the defendant for his having succeeded in getting his original conviction set aside” would be.²⁰⁴ The following statement, accordingly, was the Court’s interpretation of constitutional meaning: “Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.”²⁰⁵

²⁰⁰ In fact, though, this may no longer be an entirely accurate statement of existing doctrine. The Court recently explained that the some evidence rule applies only “when the basis for attacking the judgment is . . . insufficiency of the evidence,” *Edwards v. Balisok*, 520 U.S. 641, 648 (1997), indicating that where an inmate alleges that an adverse decision stemmed from bias, malice or vindictiveness, the mere presence of some evidence in the record to support that decision is not enough to defeat the constitutional claim.

²⁰¹ See generally Fallon, *Implementing the Constitution*, *supra* note 10, at 32–41.

²⁰² 395 U.S. 711 (1969).

²⁰³ *Id.* at 713.

²⁰⁴ *Id.* at 723–24.

²⁰⁵ *Id.* at 725. This is no more than the specific application of a more general principle that, I have argued elsewhere, applies to all constitutional rights. See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimen-*

The Court did not stop there, though. “In order to assure the absence of such a motivation,” the majority announced, “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear.”²⁰⁶ This, Justice Black complained in a lone dissent, was not constitutional interpretation.²⁰⁷ “This is pure legislation if there ever was legislation.”²⁰⁸ Whether or not the majority had engaged in “pure legislation,” however (a charge impossible to answer without more in the way of definition²⁰⁹), that the presumption it announced was not quite constitutional meaning seems all but indisputable. Surely the majority itself did not dispute it. *Pearce* announced a decision rule to adjudicate constitutional meaning. Of course, the Court’s choice was not between using this particular decision rule or doing without. A reviewing court would always need to know how to rule when faced with epistemic uncertainty regarding whether a sen-

sions, 90 Geo. L.J. 1, 32–36 (2001) [hereinafter Berman, Coercion Without Baselines]. As I have previously summarized the proposition:

Every constitutional right entails a claim-right that the state not *penalize* the exercise (or nonwaiver) of the constitutional right itself *in the sense of imposing (or allowing to obtain) consequences upon the right-holder that are adverse relative to the consequences that the state would impose (or allow to obtain) but for the state’s purpose in having the right-holder experience the consequences as disagreeable*. That is largely what it *means* to have a constitutional right.

Mitchell N. Berman, Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at “The Greater Includes the Lesser,” 55 Vand. L. Rev. 693, 732–33 (2002) [hereinafter Berman, Commercial Speech].

²⁰⁶ *Pearce*, 395 U.S. at 726. As announced by *Pearce*, the rule appears to be absolute. Put another way, it is a conclusive presumption: A sentencing order that imposes a more severe sentence than the defendant had previously received will be adjudged unconstitutional unless the reasons for the increase are stated in the order itself. The Court later converted this into a rebuttable presumption of vindictiveness that could be overcome by any objective information that might justify the increased sentence. *Texas v. McCullough*, 475 U.S. 134 (1986); *U.S. v. Goodwin*, 457 U.S. 368 (1982); see also, e.g., *Alabama v. Smith*, 490 U.S. 794 (1989) (holding that the *Pearce* presumption of vindictiveness does not apply to increased sentences imposed after trial when defendant was initially sentenced pursuant to a guilty plea).

²⁰⁷ *Pearce*, 395 U.S. at 741 (Black, J., concurring in part and dissenting in part) (agreeing that “courts must of course set aside the punishment if they find, by the normal judicial process of fact-finding, that such a [vindictive] motivation exists,” but objecting that “the courts are not vested with any general power to prescribe particular devices ‘[i]n order to assure the absence of such a motivation’”).

²⁰⁸ *Id.* (Black, J., concurring in part and dissenting in part).

²⁰⁹ Clearly it was “legislation” in that it involved “formulation of rules for the future.” Black’s Law Dictionary 899 (6th ed. 1990). But just as clearly that definition of legislation proves far too much.

tencing judge had in fact imposed a more severe sentence for vindictive reasons. Preponderance of the evidence, presumably, would supply the default. But this was not an ideal solution. Recognizing that “[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case,”²¹⁰ the majority evidently believed that requiring a statement of reasons to appear in the new sentencing order would make it easier for reviewing courts to identify such motivation when it did exist. Moreover, it is hard to read the majority opinion without getting the impression that the Justices thought the incidence of retaliatory motivation alarmingly high,²¹¹ and hoped that imposing a requirement of reason-giving would reduce it. For these reasons, the Court crafted a decision rule in the form of a conclusive presumption to administer the constitutional operative proposition it had announced.

3. Congress’s Tax Power and the Regulatory Effects Problem

The *Pearce* decision rule was a response to the twin facts that the operative proposition turned upon a governmental actor’s purposes and that the Court thought purposes hard to ascertain on a case-by-case basis. It would be surprising if the conjunction of these two facts was rare. Thus, *whenever* the Court has rejected an invitation to directly inquire into a governmental actor’s purposes or reasons for action, there is a chance that the resulting doctrine in fact reflects compound judgments: first, that the true constitutional meaning does turn upon the actor’s purposes, and second, that such meaning is best administered via a decision rule that conclusively presumes the absence (or presence) of such purposes under specified circumstances.²¹²

²¹⁰ *Pearce*, 395 U.S. at 725 n.20.

²¹¹ E.g., *id.*

²¹² The proper role of purpose scrutiny in constitutional analysis is controversial. For a recent introduction to the literature, see Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297 (1997). Critics of the practice have voiced many objections which this cannot be the place to rebut. I offer two points, though. First, claims that purposes are too hard to discover and that such scrutiny risks disrespecting other branches of government provide reasons (whether or not ultimately persuasive) not to incorporate purposes *into the decision rule*, but they do not address whether *the operative proposition* should turn upon purposes. Cf. Paul Brest, Reflections on Motive Review, 15 San Diego L. Rev. 1141, 1142 (1978) (“The principles underlying judicial review of unconstitutional motives are no less applicable to legisla-

Congress's Article I power "to lay and collect taxes"²¹³ is an illustration. Early on, the Supreme Court seemed to interpret this provision to confer upon Congress the power to impose taxes for the purpose of raising revenue, but not for the purpose of regulating conduct that it could not regulate under its other enumerated powers.²¹⁴ As a test of constitutional meaning, however, this interpretation is difficult to adjudicate because all taxes have regulatory effects. In not long, therefore, the Court announced that "the motives or purposes of Congress are [not] open to judicial inquiry in considering the power of that body to enact" laws that take the form of excise taxes.²¹⁵ The key language, of course, is "judicial inquiry," a characterization that can be read to signal the Court's determination to implement a constitutional operative proposition that does depend upon Congress's purposes (the tax must be adopted to raise revenue) via a decision rule that conclusively presumes the presence of constitutionally permissible purposes so long as the challenged measure actually raises revenue.²¹⁶

tive enactments than to other official decisions. If the motives underlying an administrative decision or a legislative enactment should be insulated from judicial review, it must be for institutional rather than jurisprudential reasons—courts cannot properly undertake the inquiry or act on its findings."). Second, the claim that the very notion of a purpose or motive is incoherent when applied to multi-member bodies would supply a reason not to interpret even the operative proposition to include a reference to "actual" or "subjective" purposes but provides no reason at all why the operative proposition could not constrain what are sometimes called "objective" purposes.

²¹³ U.S. Const. art. I, § 8, cl. 1.

²¹⁴ See, e.g., *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533, 541 (1869) ("There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power . . . if exercised for ends inconsistent with the limited grants of power in the Constitution."). Admittedly, this is an ambiguous passage. The thought could be either that certain purposes would render the exercise abusive albeit constitutional or that such purposes, because abusive, render the exercise unconstitutional.

²¹⁵ *McCray v. United States*, 195 U.S. 27, 53 (1904); see also, e.g., *United States v. Doremus*, 249 U.S. 86, 93 (1919) (observing that the claimed presence of certain motives "does not authorize the courts to inquire into that subject"); *United States v. Kahriger*, 345 U.S. 22, 28 (1953) (holding that if an excise tax produces revenue, its regulatory effects do not render it invalid), overruled in other part by *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

²¹⁶ Cf. Mark Tushnet, *Taking the Constitution Away from the Courts* 60 (1999) ("A key term [in constitutional doctrine] is *scrutiny*. When you see it, you should know that the courts are talking about themselves, and that it would be a mistake for legislators to think about the constitutional implications of what they were about to do in the same terms.").

Indeed, this way of breaking apart the doctrine helps make sense of the otherwise puzzling decision in *Bailey v. Drexel Furniture Co.*, in which a nearly unanimous Court struck down the Child Labor Tax Act (“CLTA”) precisely on the grounds “that the so-called tax” had a regulatory purpose.²¹⁷ Although the Court attempted to distinguish the precedents that proscribed judicial inquiry into Congress’s purposes for imposing a tax, the effort was more lame than game. A better account is that the *Bailey* Court understood that the doctrine which purported to make Congress’s purposes immaterial was only a decision rule. And in light of the extreme provocation—the CLTA was transparently adopted to circumvent the Court’s decision, in *Hammer v. Dagenhart*,²¹⁸ that Congress lacked power to regulate child labor—the Court thought application of a deferential decision rule inappropriate. Rather than simply ignoring the doctrine *tout court*, the *Bailey* Court just administered the operative proposition by the default preponderance-of-the-evidence decision rule.²¹⁹

4. Land Use Exactions

Takings doctrine provides another example of a decision rule designed to adjudicate a purpose-oriented operative proposition.²²⁰ The Nollans, owners of a California beachfront lot, wanted to replace their existing bungalow with a three-bedroom house. California law required, however, that they obtain a development permit from the state coastal planning commission before proceeding with construction. The Commission granted the permit but only on condition that the Nollans convey a public easement across a por-

²¹⁷ 259 U.S. 20, 37 (1922) (“[A] court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?”).

²¹⁸ 247 U.S. 251 (1918).

²¹⁹ For a more detailed discussion of *Bailey*, see Lynn A. Baker & Mitchell N. Berman, Getting Off the *Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So, 78 Ind. L.J. 459, 504–06 (2003).

²²⁰ The following discussion is borrowed from Berman, Commercial Speech, *supra* note 205, at 733–35. A lengthier analysis, with citations to relevant cases and commentaries on takings law, appears in Berman, Coercion Without Baselines, *supra* note 205, at 89–98.

tion of their private beach to allow beachgoers to travel between a public park a quarter mile to the north and a public beach to the south. The Nollans objected that the condition effected an unconstitutional taking. In *Nollan v. California Coastal Commission*, the Supreme Court agreed.²²¹

Writing for the five-Justice majority, Justice Scalia concluded that the condition could not stand because it was not germane to the legitimate purposes the Commission could have had for refusing the requested permit. Assuming that the Commission might have constitutionally denied the Nollans a permit in order to advance a legitimate state interest in, among other things, the public's *visual* access to the beach, Justice Scalia reasoned, the Commission could not threaten to withhold the permit in order to secure *lateral* access for the public to cross the beach.²²² When the "essential nexus" between the purpose of the condition and the purpose of the prohibition is eliminated, the Court explained:

[T]he situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. . . . Similarly here, the lack of nexus between the condition and the original purpose of the building restrictions converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.²²³

This is a dense and puzzling passage, for the alchemical notion at its heart that "the lack of nexus between the condition and the original purpose" of the development ban "converts" that original

²²¹ 483 U.S. 825 (1987).

²²² See *id.* at 836–42.

²²³ *Id.* at 837 (internal quotations and citation omitted).

purpose “to something other than what it was” is more than a little mysterious. One thing clear is that the Commission’s purposes matter. But how? Suppose that a municipality imposes a building restriction for the bona fide purpose of promoting the public’s access to light. Plainly the Constitution is not offended. Suppose further that a particular landowner subject to the restriction offers to transfer some valuable interest to the public in exchange for a variance. The state may or may not accept. But whether it accepts can have no bearing on “the original purpose of the building restriction,” which, by hypothesis, was to promote the public’s access to light. And this is true whether the landowner’s offer is to submit to a restriction that would increase public access to light elsewhere or to convey an easement that would reduce pedestrian congestion. It is part of the business of planning commissions to make tradeoffs among these sorts of (arguably) incommensurable public interests. All this being so, the original purpose *still* cannot be converted to something other than it was if, during the process of negotiations for a variance, it is a commission staff member rather than the landowner who first hits upon the potentially efficiency-maximizing idea that the commission grant the variance in exchange for the congestion-reducing easement. If, as we have supposed, the building restriction was originally devised to increase light, none of these ex post developments can render the original purpose something else.

Of course, I have asked you to assume the Commission’s original purpose was the legitimate one of promoting the public’s interest in light. Perhaps the Commission, believing that city light was fully adequate, imposed the height restrictions just so it could use the variance carrot as a tool with which to extract other sorts of property rights from landowners without having to pay compensation. Now, *that* would be a constitutionally illegitimate purpose. The operative proposition of takings doctrine, then, must be something like this: The state may neither take property without just compensation nor withhold a development right it would otherwise provide for the purpose of discouraging exercise of a landowner refusal to waive her right to just compensation.²²⁴

²²⁴ Indeed, this follows directly from my proposed concept of an unconstitutional penalty. See *supra* note 205.

How is a reviewing court to know whether the withholding of a development right was motivated by this unconstitutional purpose as opposed to any one of the almost limitless purposes that the Court has held constitutionally permissible?²²⁵ Case-by-case resolutions under the preponderance of the evidence standard would be likely to tell us more about the world view of the trial judge than about the historical facts. *Nollan*'s solution, in effect (though not in form), was to instruct courts to conclusively presume that withholding of an offered development right would be for the reason barred by the constitutional operative proposition "unless the permit condition serves the same governmental purpose as the development ban." Whether wise or foolish, the *Nollan* doctrine is a constitutional decision rule.

5. *The Enrolled Bill Doctrine*

Not all decision rules are responses to the problem of discerning constitutionally relevant motives or purposes.²²⁶ Indeed, one especially obvious (if little known) decision rule has nothing to do with the supposed difficulties of engaging in purpose scrutiny.²²⁷

Article I, Section 7 of the Constitution provides that a bill does not become a law of the United States unless it "shall have passed the House of Representatives and the Senate" and either have been signed by the President or, if vetoed, repassed by two-thirds majorities in each house.²²⁸ This is the *Schoolhouse Rock* version of legislation and accurate as far as it goes. One detail omitted concerns the "enrolled bill": the document that the Speaker of the House and the President of the Senate both sign, in attestation that the document has been approved by his respective house, and then forward to the President. It is this document that, if signed by the President, is forwarded to archives from which the *Statutes at Large*

²²⁵ See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (holding that a development permit may be denied if doing so would substantially advance any legitimate state interest); *Berman v. Parker*, 348 U.S. 26 (1954) (identifying broad range of legitimate state interests).

²²⁶ Following prevailing practice, see Berman, *Coercion Without Baselines*, supra note 205, at 23 n.87, I am here treating "motive" and "purpose" as synonyms.

²²⁷ The following discussion draws heavily from the clear and illuminating discussion in Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105, 1172-82 (2003).

²²⁸ U.S. Const. art. I, § 7, cl. 2.

are copied and the *United States Code* subsequently compiled. This is a generally adequate system, no doubt, but not a foolproof one. What if the enrolled bill was never actually passed by Congress? What if by honest error or chicanery the document that makes it into the law books is not the same document as that on which Congress acted?

The Court confronted precisely this question over a century ago in *Marshall Field & Co. v. Clark*.²²⁹ Marshall Field and other importers objected to tariffs levied by the President on the ground, among others, that the enrolled bill pursuant to which the President acted was not the bill actually passed by Congress, and thus not a valid law. The Court agreed that a bill:

[D]oes not become a law of the United States if it had not in fact been passed by Congress. . . . There is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the President to approve, nor in the Secretary of State to receive and cause to be published, as a legislative act, any bill not passed by Congress.²³⁰

But this, the Court said, was only half the question. “[I]t remain[ed] to inquire as to the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress.”²³¹

The importers hoped to make their case by relying on journals of the proceedings of each house. Yet this the Court would not allow. Such an inquiry, the Court concluded:

[I]s forbidden by the respect due to a coördinate branch of the government. The evils that may result from the recognition of the principle that an enrolled act, in the custody of the Secretary of state, attested by the signatures of the presiding officers of the two houses of Congress, and the approval of the President, is conclusive evidence that it was passed by Congress, according to the forms of the Constitution, would be far less than those that would certainly result from a rule making the validity of Con-

²²⁹ 143 U.S. 649 (1892).

²³⁰ *Id.* at 669.

²³¹ *Id.* at 670.

gressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them.²³²

This, then, is the operative proposition of Article I, Section 7, Clause 2: A bill, to become law, must be passed by both houses of Congress.²³³ The enrolled bill doctrine—directing that courts must conclusively presume that a bill signed by the Speaker of the House and the President of the Senate in attestation of its passage was in fact passed by both houses—is a decision rule.

6. *The Nondelegation Doctrine*

Although *Marshall Field* birthed the enrolled bill doctrine, it is more often cited in connection with a different matter. In addition to contending that the Tariff Act of October 1, 1890 was not the true law, the importers had argued that the Act was unconstitutional because, in delegating to the president authority to suspend tariffs under certain conditions, it contravened the constitutional directive that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”²³⁴ The Court agreed “[t]hat congress cannot delegate legislative power to the president,”²³⁵ but denied that any power delegated by the Tariff Act was legislative. Justice Harlan explained:

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.²³⁶

Though often quoted, the passage offers little guidance on the critical question—namely, what constitutes (permissible) execution. Thirty-six years later, the Court supplied an answer: “If Con-

²³² *Id.* at 673.

²³³ That there may be room for debate over just what “passage” entails, see Adler & Dorf, *supra* note 227, at 1173 (noting that passage presumably means approval by a majority of a quorum, but that this is perhaps arguable), shows only that the operative proposition could in theory require further elucidation.

²³⁴ U.S. Const. art. I, § 1.

²³⁵ *Marshall Field*, 143 U.S. at 692.

²³⁶ *Id.* at 693–94 (quoting *R.R. Co. v. Comm’rs*, 1 Ohio St. 88 (1852)).

gress shall lay down by legislative act an intelligible principle to which the person or body authorized to [make further rules] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”²³⁷ This is the nondelegation doctrine that governs to this day.²³⁸ What sense can be made of it?

Of course, the nondelegation doctrine could be simply an operative proposition: A decisionmaking or rule-making authority subject to an “intelligible principle” is not a “legislative power” within the meaning of Article I, Section 1, and therefore need not be vested in Congress. But this view confronts difficulties. Consider some of the specific enumerated powers contained in Article I. Congress is explicitly empowered, for instance, “[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”²³⁹ Surely this is an “intelligible principle.” Were this language to appear not as a constitutional grant of power from We the People to Congress but rather as a statutory grant of power from Congress to an administrative agency, there can be no doubt that the delegation would pass muster under the nondelegation doctrine. So if cabinining a decisionmaking power with an intelligible principle were sufficient to make such power not “legislative” within the meaning of Article I, Section 1, then it would seem to follow that legislation enacted pursuant to Section 8, Clause 8 is not the exercise of Congress’s legislative power. That would be a decidedly odd conclusion.

An alternative is to understand the nondelegation doctrine as consisting of an operative proposition to be administered by a non-standard decision rule. On this view, the decision rule directs that the operative proposition should be deemed satisfied so long as the delegation contains an “intelligible principle” that constrains the agency’s discretion. The task becomes to identify the precise operative proposition that (implicitly) is being administered via this

²³⁷ *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). In announcing this rule, the Court relied directly on *Marshall Field*, see *id.* at 410–11, a case with which the author of *J.W. Hampton*, Chief Justice Taft, had reason to be familiar. As Solicitor General, it was Taft who had defended the constitutionality of the 1890 Act against the importers’ challenge.

²³⁸ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001).

²³⁹ U.S. Const. art. I, § 8, cl. 8.

decision rule. There are several possibilities. One might think, for example, that the operative proposition is something like this: “Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing [the nation] are to be made by the Legislature.”²⁴⁰ Alternatively, the operative proposition could be more context-dependent and standard-like, providing that whether a delegation of legislative authority is constitutional depends upon such considerations as the scope of the discretion delegated, the social importance of the decision, the feasibility of leaving the decision to congressional resolution, etc.²⁴¹

I have no strong opinion regarding how best to conceive of the implicit operative proposition to which the intelligible-principle decision rule is directed. It does seem to me, though, that to recognize that the nondelegation doctrine makes little sense as an operative proposition presses one to think about what the operative proposition is. And one’s answer to that question provides in turn a better vantage point from which to assess the intelligibility of the intelligible-principle decision rule itself. Indeed, Justice Thomas’s skepticism about the nondelegation doctrine seems to follow just this path. Interpreting the Constitution to prohibit significant exercises of rule-making authority by any body other than Congress, he suggests that the intelligible-principle decision rule fits this operative proposition too poorly to make for sound constitutional doctrine.²⁴²

²⁴⁰ *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

²⁴¹ This seems to be something like Justice Stevens’s view. See, e.g., *Whitman*, 531 U.S. at 488–90 (Stevens, J., concurring) (intimating that Congress may delegate legislative powers so long as such delegations are “adequately limited by the terms of the authorizing statute,” and that courts should conclude that a delegation is adequately limited if it “provides a sufficiently intelligible principle”).

²⁴² See *id.* at 487 (Thomas, J., concurring) (“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great to be called anything other than ‘legislative.’”). Instead of just reading § 1 as providing that all basic decisions be made by Congress, Justice Thomas seems to reach that same conclusion via two discrete steps: first, § 1 provides that all “legislative” powers must be exercised by Congress; and second, a power is “legislative” if it involves a basic decision. This two-step process strikes me as just a way to give a textual fig-leaf to an interpretive judgment reached on structural grounds, but has no bearing on the basic point in text.

7. Standing and the “Imminent” Injury Requirement

Turn, finally, from Article I to Article III. Relying largely on textual and structural interpretive principles, the Court has interpreted Article III to impose a variety of limits on the scope of the federal courts’ constitutional authority. The Court has operationalized or channeled these limits by means of rules going under such diverse headings as “standing,” “ripeness,” “mootness,” and “advisory opinions.” It is unlikely, however, that these rules are in all respects consistent with what the Court understands to be the underlying constitutional meaning. Take, for example, the standing requirement. The Court has “derived directly from the Constitution” (by a process that appears to be run-of-the-mill constitutional interpretation) “[t]he requirement . . . [that a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”²⁴³ In addition, however, current standing doctrine requires—as part of what the Court asserts is the “irreducible constitutional minimum of standing,”²⁴⁴ rather than one of its “prudential” add-ons—that the injury complained of be “actual or imminent.”²⁴⁵

To be sure, a nonimminent complained-of injury is likely to be speculative and may, for that reason alone, fall outside of the federal courts’ constitutional authority. But it is surely possible that a complained-of injury is both likely and nonimminent.²⁴⁶ Accord-

²⁴³ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

²⁴⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

²⁴⁵ *Id.* (internal citations omitted).

²⁴⁶ This can be illustrated with a slight variation on the facts of *Lujan* itself. The Court agreed that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing,” *id.* at 562–63, but concluded that the evidence in the case did not “show[] how damage to the species will produce ‘imminent’ injury to [the plaintiffs]” because they had not alleged any specific present plans to visit the endangered animals’ habitats. *Id.* at 564. Imagine, though, that the plaintiffs lived near the animals and were challenging conduct that would almost certainly render the endangered animals incapable of reproducing. In this circumstance, it could be very probable—and surely not just “speculative”—that the challenged conduct would cause plaintiffs “injury in fact” by making it impossible for them to “use or observe” the animal species after it became extinct. But if the animals were themselves long-lived (like crocodiles or elephants), that particular injury, albeit nonspeculative, would not be “imminent.” The basic point that threatened harms could be nonspeculative—indeed, near-certain—even though not imminent has been recognized in other areas of law. For instance, the recognition that use of deadly force can on occasion be “necessary” to protect oneself from an injury

ingly, the imminence requirement seems most fairly understood not as a command of Article III itself (as judicially interpreted) but rather as a judicial invention added for an essentially evidentiary purpose: “to ensure that the alleged injury is not too speculative for Article III purposes.”²⁴⁷ The imminence requirement, therefore, is part of a decision rule.

IV. ELABORATING THE DISTINCTION: WHYS AND HOWS

Supposing that the nature of the proposed distinction between constitutional operative propositions and constitutional decision rules is reasonably apparent, we might nonetheless expect that classifying constitutional doctrine into its operative proposition and decision rule components will often be difficult and contestable, perhaps unresolvable. Indeed, not all readers will agree even with each of the examples presented in Part III. Take, for example, the taxing power. I have argued that present doctrine is best understood as an operative proposition that permits Congress to tax only for the purpose of raising revenue,²⁴⁸ implemented via a decision rule that directs courts to conclusively presume that a challenged provision does issue from such a purpose so long as some revenue is actually raised. But this characterization is not self-evidently correct. For example, one might prefer to view the doctrine as merely an operative proposition that Congress may use the taxing power to regulate behavior so long as the nominal tax raises some revenue, implemented by the ordinary preponderance-of-the-evidence decision rule. Furthermore, if examples that I selected, non ran-

that is not imminent provoked the drafters of the Model Penal Code to relax modestly the traditional imminence requirement in the law of self-defense. See Model Penal Code § 3.04(1) (1962) (justifying the use of force “when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion”). An argument for the wholesale elimination of an “imminence” or “immediacy” requirement for self-defense is pressed in Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. Rev. 371 (1993).

²⁴⁷ *Lujan*, 504 U.S. at 565 n.2.

²⁴⁸ This is an admittedly rough articulation of what I deem the better conceptualization of the operative proposition. The basic point is that presence of a (substantial) revenue-producing purpose is necessary for the tax to be constitutionally valid, not that the presence, in addition, of a regulatory purpose is necessarily fatal. So long as the operative proposition is administered via a nonstandard decision rule, it is very hard to formulate the operative proposition with great precision.

domly, because I thought their use of a nonstandard decision rule (i.e., a decision rule other than the simple preponderance-of-the-evidence rule) was relatively obvious are in fact controversial, the effort to reverse engineer many other doctrines might excite even more controversy. And the more difficult it is to reach agreement on the proper characterization of extant doctrines, the greater is the worry that the basic conceptual distinction between operative and decision rules would thereby be rendered, if not illusory,²⁴⁹ then of precious little value.

Worries of this sort naturally lead to two questions: (1) What sort of test or algorithm can we employ to properly classify aspects of doctrine as decision rule or operative proposition? and (2) What values are served by undertaking the task? These questions assume a special urgency when raised from a particular minimalist-inspired perspective.²⁵⁰ Constitutional adjudication is hard. It is hard for even a single judge to do well, but the dynamics of multi-member tribunals make the enterprise that much more difficult. Judicial minimalists might protest, then, that an effort to taxonomize constitutional doctrine (along these or perhaps other lines) threatens to frustrate rather than facilitate the project of constitutional adjudication. To require, or even just to encourage, courts to sort constitutional doctrine into operative propositions and decision rules (not to mention whatever additional taxonomic categories might be advanced over time) would, on this view, demand more than can reasonably be expected.

I will address the first question first, because the answer to this is easy. *There is no algorithm or litmus-paper test for correctly sorting existing doctrine into operative proposition and decision rule components.* A constitutional operative proposition is the judicial

²⁴⁹ The stronger claim that the distinction is illusory or vacuous depends upon the proposition that all doctrine could be plausibly classified either as “either operative proposition or decision rule” or as “both operative proposition and decision rule.” This would be a difficult claim credibly to maintain, for it requires the proponent to deny, for example, even that the “any conceivable purpose” aspect of equal protection doctrine is more appropriately described as a decision rule than as an operative proposition. I suspect that few if any theorists, even among the most committed “Pragmatists,” would be willing to bite that particular bullet.

²⁵⁰ See generally Sunstein, *Judicial Minimalism*, supra note 12 (describing judicial minimalism and suggesting that the practice leaves more issues open to democratic resolution, allowing for a more meaningful democratic debate).

statement or understanding of constitutional meaning; a constitutional decision rule states the test for deciding whether the terms of the operative proposition are satisfied. It follows, then, that whether a given piece of doctrine is an operative proposition depends on one's account of constitutional meaning, which in part depends upon one's theory of constitutional interpretation. Because there exist different plausible theories of proper constitutional interpretation, there exist different plausible conceptions of constitutional meaning. What one views as an operative proposition thus depends upon how one proposes to derive constitutional meaning, a matter that cannot be resolved (though it can be informed) by taxonomic explorations.²⁵¹

Again, an example will help. The Introduction showed how courts that interpreted the Equal Protection Clause to have a certain meaning could craft a decision rule that takes the form of conventional strict scrutiny.²⁵² But it did not claim that this particular path to strict scrutiny represented the only logically possible way to reach it. So the question remains whether the strict scrutiny component of existing equal protection doctrine is better understood as a judicial statement of constitutional meaning or, rather, as a judicial direction for how courts are to decide whether constitutional meaning, itself articulated in different form, is satisfied. Because the Court's own stated rationales for strict scrutiny can hardly be described as pellucid,²⁵³ this is a contestable matter of reverse-

²⁵¹ To speak even of the meanings of discrete constitutional provisions, as I often will, makes exposition easier, but at the risk of some misunderstanding I do not mean to convey that meaning must be linked to the Constitution in any narrowly clause-bound, or even textualist, way. It is precisely to avoid any such misconstrual that I do not speak of interpreting "the Constitutional text." Rather, by "the Constitution," I mean only what Richard Fallon usefully calls "the document denominated as 'the Constitution' in the National Archives." Fallon, *Implementing the Constitution*, supra note 10, at 112. This way of putting things is intended to maintain agnosticism with respect to the full range of interpretive modalities in potentially legitimate play in our legal culture.

²⁵² See supra text accompanying note 37.

²⁵³ Consider, for example, the Court's most recent defense of strict scrutiny:

[1] The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14, § 2. [2] Because the Fourteenth Amendment "protect[s] *persons*, not *groups*," all "governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right

to equal protection of the laws has not been infringed.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original; internal quotation marks and citation omitted). [3] We are a “free people whose institutions are founded upon the doctrine of equality.” *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (internal quotation marks and citation omitted). [4] It follows from that principle that “government may treat people differently because of their race only for the most compelling reasons.” *Adarand Constructors, Inc. v. Peña*, 515 U.S., at 227. [5] We have held that all racial classifications imposed by government “must be analyzed by a reviewing court under strict scrutiny.” *Ibid.* [6] This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. [7] “Absent searching judicial inquiry into the justification for such race-based measures,” we have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). [8] We apply strict scrutiny to all racial classifications to “smoke out” illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” *Ibid.*

Grutter v. Bollinger, 123 S. Ct. 2325, 2337–38 (2003) (bracketed sentence numbers added). Because the component ideas contained in this passage, along with the quotations from case law, are all so familiar to a constitutional lawyer, the reader is likely to gallop along contentedly without pausing to consider whether this is really a coherent justification for strict scrutiny. I daresay, however, that were this explanation itself subjected to rigorous scrutiny, it would fail.

Sentences [5] and [6] are true statements of existing doctrine, sentence [1] accurately quotes the constitutional text, sentence [3] is just atmospheric. If this passage is to explain or justify existing constitutional doctrine, the other four sentences must be doing the work. Sentences [7] and [8] throw a strong decision-rule cast on the doctrine: that a racial classification is not narrowly tailored to further a compelling governmental interest does not itself entail that the classification denies equal protection; rather, strict scrutiny serves to “smoke out” whether there is a violation. Government violates equal protection if it makes “illegitimate use” of race. What is an illegitimate use? Sentence [7] suggests that it is the use of race motivated by notions of racial inferiority or simple racial politics. Here, then, is the picture painted by the second paragraph: A person is unconstitutionally denied equal protection if she is disadvantaged relative to others because the government is motivated by notions of racial inferiority or racial politics. The implication is that a racial classification that is not so motivated and that bears a rational relationship (in the sense of ordinary degrees of over- and under-inclusiveness) to a legitimate (but not compelling) state interest does not actually violate the Constitution. The twin prongs of strict scrutiny are evidentiary devices designed to ensure that the judiciary does not accidentally permit to stand a classification that was in fact impermissibly motivated.

Yet the first paragraph, it seems to me, conveys a very different sense. Indeed, sentence [4] has the tone of an operative proposition: Government is constitutionally forbidden from classifying persons on the basis of race without compelling reason. If so, why? If this passage supplies an answer to that question it must appear in sentence [2]. However, it does not. That sentence contains two observations: (a) that the Equal Protection Clause protects persons not groups—i.e., is a “personal right”; and (b) that race is “in most circumstances irrelevant” to the pursuit of legitimate state interests.

engineering. Now, it is hard to imagine that the strict scrutiny test constitutes any part of the original meaning of the Equal Protection Clause. An originalist judge or theorist who accepts strict scrutiny doctrine is therefore extremely likely to view it as a decision rule. Likewise, say, for a textualist. But for those who advocate a common-law²⁵⁴ or historicist²⁵⁵ approach to constitutional interpretation, it is perfectly plausible to view constitutional meaning in nearly organic fashion, *just as* the accretion over time of interpretive judgments by relevant actors and communities (especially but not exclusively judges). For such persons, the rule that racial classifications are unconstitutional unless they are narrowly tailored to promote a compelling state interest can be part of what the Equal Protection Clause *means* at this particular historical moment. It does not follow that they must or should deny the operative proposition/decision rule distinction. The point is only that the mere fact that given doctrine is crafted in terms that depart from original understandings and text does not by itself entail that the doctrine is a decision rule.

You may think that this indeterminacy, my admitted inability to resolve all debates about how various doctrines are properly classified, is a defect of the operative proposition/decision rule distinction. It is not a defect. It is a virtue. I am proposing a (partial) conceptualization of the logical structure of constitutional adjudication.

But almost every trait is “in most circumstances” irrelevant to a stated end, a fact that does not provoke a demand for compelling justification, lest the personal right to equal protection be denied, on the occasions when the state claims that it *is* relevant.

So this is not an entirely satisfying account of strict scrutiny. On the fairest reading, though, strict scrutiny seems to rest on both evidentiary and justificatory rationales. Some demand for heightened justification is part of the operative proposition; narrow tailoring is supplied by the decision rule. Perhaps, then, the doctrine is best understood as follows. The operative proposition of equal protection prohibits states from treating people differently unless the public good pursued outweighs the harm to the disadvantaged persons. The decision rule directs that, because racial classifications generally produce substantial harm, and because fully ad hoc balancing is cumbersome and unpredictable, courts should presume that the good does not outweigh the harm unless the good is “compelling.” Furthermore, because our unfortunate history shows that states are especially likely to be pursuing illegitimate ends when employing racial classifications, the decision rule also directs courts to presume that the (putatively compelling) interest claimed by the state is not the real interest pursued unless the classification is narrowly tailored to advance that (putatively compelling) interest.

²⁵⁴ See, e.g., Strauss, *supra* note 3.

²⁵⁵ See, e.g., H. Jefferson Powell, *A Community Built on Words* (2002).

We should expect it to be valid over the range of plausible theories of constitutional interpretation.

However, to say that there is no algorithm for sorting doctrine into one taxon or the other is not to say that there are no ways of thinking about the problem intelligently, or that reasons cannot be given in favor of one proposed classification over another. Those reasons, however, will themselves be dependent upon the values that the distinction promotes. So the two questions I have imagined—what is the test?, and what are the values?—are really just one. To understand the values or functions that the distinction serves is to understand how to classify. Accordingly, Section IV.A sketches some anticipated values of attending to the operative proposition/decision rule distinction. The discussion is brief and suggestive because firm conclusions are impossible at the outset. Some benefits of treating the distinction seriously (as well, admittedly, as some costs) are likely to be hard to envision before a judicial and scholarly practice of doing so emerges. In any event, once armed with a fuller sense of the functions that the taxonomy could serve, we will be better positioned to think about how ambiguous doctrine could be most profitably classified. Section IV.B illustrates how awareness of the values of the distinction can help us apply it.

A. Some Values of the Distinction

At a high level of generality, we can identify at least two very broad sorts of reasons why the operative proposition/decision rule distinction can prove useful: because it can invigorate and enrich those aspects of American political culture that are deeply informed and shaped by constitutional understandings but which depend little or not at all on the prospect of adjudication; and because it can contribute to the development of more rational, efficacious, and legitimate constitutional doctrine, whether crafted by courts or legislatures. These points are abstract. Let me sketch what I have in mind.

*1. Extra-adjudicatory Constitutionalism*²⁵⁶*a. Constitutional Culture*

Why do we care what the Constitution means? On the Holmesian “bad man” picture of law,²⁵⁷ the answer is simple: Knowing our judicially enforceable rights, duties, powers, disabilities, and the like enables us to better plan our lives. That is a fine answer as far as it goes, but many people doubt that it’s a complete one. In particular, many people suppose that our Constitution plays a role in the construction of our political culture and even in the shaping of our identities as Americans that far transcends the Constitution’s operation in court.²⁵⁸ As Robert Post and Reva Siegel recently elaborated, “The Constitution . . . does not live in our society as

²⁵⁶ A more familiar term is “extrajudicial constitutionalism.” As will be made clear, by “extra-adjudicatory constitutionalism” I will mean constitutionalism not dependent upon adjudication. Rules of constitutional law that govern adjudication are, necessarily, *applied* by courts; but they could be *made* by other branches. So if courts chose to defer to congressional interpretations of the Constitution in the course of litigation, there is a plausible sense in which such a decision would reflect *extrajudicial* constitutionalism (constitutional meanings put forth by non-judicial actors) but would not be *extra-adjudicatory* constitutionalism.

²⁵⁷ See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”). I do not mean to claim here that the “bad man’s” reason for caring about constitutional meaning exhausts Holmes’s. For representative explorations of Holmes and his bad man, see Symposium: *The Path of the Law After One Hundred Years*, 110 Harv. L. Rev. 989–1054 (1997); Symposium: *The Path of the Law 100 Years Later: Holmes’s Influence on Modern Jurisprudence*, 63 Brook. L. Rev. 1–278 (1997); Symposium: *The Path of the Law Today*, 78 B.U. L. Rev. 691–960 (1998).

²⁵⁸ This is a recurrent theme in the work of James Boyd White. See, e.g., James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* 240–47 (1984); see also, e.g., Tushnet, *supra* note 216, at 12 (1999) (observing that the Constitution contributes to “the opportunity to construct an attractive narrative of American aspiration, and constructing such a narrative is an important constituent of the human good”); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 Sup. Ct. Rev. 127 (arguing that the founders who thought most seriously about the subject envisioned the federal courts as conducting “high political education” for the citizenry); Hans Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L.J. 227, 251–56 (1972) (drawing attention to the conceptual priority of constitutional norms to judicial review); Post & Siegel, *supra* note 191, at 17–30 (criticizing the Rehnquist Court’s § 5 jurisprudence for disregarding the social and political dimensions of American constitutionalism).

mere ukase. Disputes about the Constitution often raise deep questions of social meaning and collective identity [A]lthough constitutional law may be useful for settling disputes, the Constitution itself is not reducible to this function.²⁵⁹ If this is so, then all of us—citizens, legislators, and executive officials alike—might have reason to think about what our Constitution requires or permits even when we think that to run afoul of any such constitutional meaning will not provoke a judicial response.

For this reason among others, “[w]e need processes, formal and informal, by which our constitutional understandings and commitments can be challenged, reinterpreted, and renewed.”²⁶⁰ Explicit announcements by a federal court, and especially by the Supreme Court, of what it takes the Constitution to mean constitute an obvious—indeed, the single most obvious—locus for such processes to unfold.²⁶¹ Yet those who focus on what we might call the extra-judicatory functions of constitutional law—the Constitution’s role in structuring debates of political morality, in creating national identity, and the like—are frequently critical of the performance of the courts. Akhil Amar speaks for many in deriding the Supreme Court for producing “a mindnumbing array of formulas, tests, prongs, and tiers, often phrased in highly abstract legal jargon—‘overinclusiveness and underinclusiveness,’ ‘narrow tailoring,’ ‘intermediate scrutiny,’ and so on—that insulates and anesthetizes.”²⁶²

²⁵⁹ Post & Siegel, *supra* note 191, at 28.

²⁶⁰ Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *Harv. L. Rev.* 4, 15 (2001).

²⁶¹ This is a central theme of Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 4 (2003). See, e.g., *id.* at 8 (arguing “that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture”). It finds expression too, for example, in Barry S. Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577 (1993) (claiming that courts exercising judicial review are engaged in a “constitutional interpretive dialogue” with all segments of society); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *Harv. L. Rev.* 4 (1986) (arguing that judicial review can invigorate republican self-government by modeling for the citizenry the exercise of “practical reason”).

²⁶² Amar, *supra* note 3, at 46. An influential earlier critique of the modern Court’s enthusiasm for awkward, cumbersome formulas was Robert F. Nagel, *The Formulaic Constitution*, 84 *Mich. L. Rev.* 165 (1985); see also, e.g., Joseph Goldstein, *The Intelligible Constitution: The Supreme Court’s Obligation to Maintain the Constitution as*

It might seem to follow (though Amar does not himself draw this lesson) that we should strive harder to create constitutional meanings not dependent on the courts' handiwork. Perhaps we should, in Mark Tushnet's evocative phrase, take the Constitution away from the courts.²⁶³

This, however, is an extravagant proposal. At the least, as Tushnet himself acknowledges, even constitutional populists might accord judicial interpretations "added weight because they come from experts who have thought seriously about the interpretive questions over a long period."²⁶⁴ If we can benefit from the courts' expert judgments on constitutional meaning, but if institutional and pragmatic concerns are likely to continue to produce constitutional doctrine that is abstruse and legalistic, a partial solution is to separate that doctrine into its taxonomic components.²⁶⁵ In particular, to distinguish operative propositions from decision rules will better enable the Justices to live up to their "professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest,"²⁶⁶ which will in turn enrich the Constitution's political, cultural, and extra-judiciary value.²⁶⁷ Revealingly, even while deriding the taxo-

Something We the People Can Understand (1992) (maintaining that the Court is obligated to comprehensibly explain the Constitution to those governed by it).

²⁶³ Tushnet, *supra* note 216. Among contemporary scholars, perhaps the most steadfast and influential voice for a position of this sort has belonged to my colleague Sandy Levinson. See, e.g., Sanford Levinson, *Constitutional Faith* (1988). See generally Legal Scholarship Symposium: The Scholarship of Sanford Levinson, 38 *Tulsa L. Rev.* 553-794 (2003). For another contribution to populist constitutionalism, see Richard Parker, *Here, the People Rule: A Constitutional Populist Manifesto* (1994).

²⁶⁴ Tushnet, *supra* note 216, at x.

²⁶⁵ For brief remarks in a similar spirit, see Klein, *supra* note 115, at 1070.

²⁶⁶ Goldstein, *supra* note 262, at 19.

²⁶⁷ Even if it is valuable for the Court to say "the Constitution commands *X*" while acknowledging at the same time that institutional considerations convince it to apply a different decision rule in the course of adjudication, one might doubt, with Hans Kelsen, whether the operative proposition in such circumstances truly is "law." See Hans Kelsen, *General Theory of Law and State* (1945). I am not sure what would turn on the answer. In any event, if as H.L.A. Hart claimed, law has, or aspires to, an internal normativity, see H.L.A. Hart, *The Concept of Law* (2d ed. 1994), then it would seem entirely appropriate to conceive of constitutional operative propositions as part of "constitutional law" no matter what form their corresponding decision rules might take. Cf. Tushnet, *supra* note 216, at x-xi (suggesting that it is appropriate to call "constitutional decisions made away from the courts" *law* "because it is not in the first instance either the expression of pure preferences by officials and voters or the ex-

conomic distinctions pressed by Sager and Monaghan, Daryl Levinson recognized “that constitutional rights that are announced but that carry no sanction when violated might influence behavior by educating the public or shaping social norms.”²⁶⁸

b. Conscientious State Actors

These comments have related and obvious implications for constitutionally proper behavior by state agents. A central theme from Sager’s “Fair Measure” was that governmental actors should feel themselves bound by the true constitutional norm even when the constitutional rule that judges will apply in adjudication effectively underenforces that norm.²⁶⁹ But the language of norm and rule, or concept and construct, threatens to obscure a key point. As the operative proposition/decision rule distinction makes clear, the question is not just whether a legislator should follow her own interpretation of the constitutional norm in lieu of the courts’ when she believes that the latter does not fully realize the former. There is a middle ground between independence and slavishness, between what Sandy Levinson dubbed the Protestant and Catholic orientations toward constitutional law.²⁷⁰ Constitutional operative propositions and decision rules are both judicial products. Thus, a “conscientious legislator”²⁷¹ who is not confident of her abilities as independent interpreter of the Constitution may choose to follow the judge-announced constitutional operative proposition even if

pression of unfiltered moral judgments [and because, [i]n short, it is not ‘mere’ politics, nor is it ‘simply’ philosophy]”).

²⁶⁸ Levinson, *supra* note 27, at 887 n.123; see also *id.* at 906 (“To the extent that declaring rights shapes understandings and preferences . . . there may be good reason for talking about right and remedy as if they were two entirely separate issues.”). One might suppose that this concession is in more tension with Levinson’s attack on the right/remedy distinction (and its cousins) than he acknowledges. It is true, as Fred Schauer emphasizes, “that ordinary people simply do not read judicial opinions.” Frederick Schauer, *Opinions as Rules*, 62 *U. Chi. L. Rev.* 1455, 1463 (1995). But I do not think that this observation undermines the instant point. Judicial statements of constitutional meaning are just the sort of thing—unlike decision rules—that should be able to seep easily into public discourse even absent widespread lay readership of the opinions themselves.

²⁶⁹ Sager, *supra* note 5, at 1227.

²⁷⁰ Levinson, *supra* note 263, at 27–30.

²⁷¹ See Brest, *supra* note 212.

she believes that the full doctrine would, because of an underenforcing decision rule, allow her greater latitude.

The same principle applies, *mutatis mutandis*, with respect to decision rules that overenforce operative propositions. Even if government officials should or do feel themselves obligated to obey judicial interpretations of the Constitution at all (as opposed to being obligated to obey their own good faith understandings of the Constitution), that obligation extends only to judge-determined constitutional meaning, i.e., constitutional operative propositions, and not to those aspects of constitutional doctrine that are properly understood as decision rules. Thus a governmental agent who *complies* with an operative proposition—but under circumstances in which she knows that her conduct would be *adjudged to violate* that operative proposition by virtue of an overenforcing decision rule—may be taking a risk, but violates no duty of constitutional obedience. That is, where a decision rule effectively overenforces the judicial view of constitutional meaning, legislators who do not anticipate litigation *may*, wholly honorably, choose to legislate to the full limits of the constitutional operative proposition.²⁷²

2. *The Making of Constitutional Doctrine*

Think now about adjudicatory constitutionalism—how constitutional law works in the courts. To distinguish operative propositions from decision rules can serve many values here, too. For example, it can help structure potentially productive debates about the legitimate judicial moves in constitutional implementation, it can facilitate sounder judicial refinement of constitutional doctrine, and it can assist us to better understand Congress's appropriate role in the shared enterprise of American constitutionalism.

a. *Legitimacy*

When introducing the concept of “constitutional common law” nearly thirty years ago, Monaghan was keenly aware that its legiti-

²⁷² I emphasize “may” because the fact that some action is constitutionally permissible does not, of course, entail that its commission would be honorable or even permissible *all things considered*. I am thinking, in particular, of cases in which a constitutional operative proposition underenforces our best understanding of political morality.

macy could not be taken for granted. “Most writers,” he claimed, “view the Court’s authority to fashion remedial rules admittedly not required by the Constitution as virtually self-evident.”²⁷³ But this complacency, he said, was mistaken. As he fully acknowledged, the crafting of rules binding on other departments of the federal government and upon the states “that are admittedly *not* integral parts of the Constitution and that go beyond its minimum requirements”²⁷⁴ threatens values of separation of powers and of federalism.²⁷⁵

Despite the challenge, Monaghan ultimately concluded that the federal courts do indeed possess legitimate authority to craft constitutional common law.²⁷⁶ In reaching this conclusion, he was persuaded, in part, by analogies to the federal courts’ common law powers with respect to such areas as admiralty and foreign affairs law.²⁷⁷ But even in the arena of individual liberties, Monaghan deemed “the affirmative case for recognizing a constitutional common law . . . a strong one.”²⁷⁸ First, he explained, “[t]he Court’s history and its institutional role in our scheme of government, in which it defines the constitutionally compelled limits of governmental power, make it a singularly appropriate institution to fashion many of the details as well as the framework of the constitutional guarantees.” Moreover, in light of the importance of uniformity in this area, “the desirability of some such undertaking seems clear.” Finally, “recognition of that power is the most satisfactory way to rationalize a large and steadily growing body of Court decisions.”²⁷⁹

Monaghan’s thesis provoked substantial commentary. The most sustained and influential critique appeared three years later in an article, also in the *Harvard Law Review*, by two political scientists, Thomas Schrock and Robert Welsh.²⁸⁰ Despite having recognized the separation of powers and federalism based objections to consti-

²⁷³ Monaghan, *supra* note 4, at 9.

²⁷⁴ *Id.* at 22–23.

²⁷⁵ *Id.* at 34–38.

²⁷⁶ *Id.* at 38.

²⁷⁷ *Id.* at 10–14.

²⁷⁸ *Id.* at 19.

²⁷⁹ *Id.*

²⁸⁰ Schrock & Welsh, *supra* note 154. There is some irony in the fact that this article appeared in the very same issue as Sager’s “Fair Measure,” *supra* note 5.

tutional common law's legitimacy, they argued, Monaghan seemed to suppose that the desirability of constitutional common law provides an adequate basis for its legitimacy.²⁸¹ "[W]hat he is recommending," Schrock and Welsh concluded, "is neither constitutional nor common law but pragmatism without either precedent or principle—judicial realism radicalized and rampant."²⁸² But because "mere utility" is *not* a ground of constitutional authority, the constitutional principles of separation of powers and federalism demand rejection of "the idea that the Supreme Court should assume and exercise the power to impose on coordinate departments, and especially on the states, rules developed at a subconstitutional level."²⁸³

Notice that Monaghan staked himself to a fairly categorical claim, and that Schrock and Welsh responded in kind. Reflecting a similarly categorical view of the problem, many contemporary metadoctrinalists—proponents and critics alike—seem essentially to take for granted the Court's power to create doctrine that departs from interpreted meaning.²⁸⁴ Perhaps, however, the legitimacy of constitutional doctrine (conceived as something other than judge-announced constitutional meaning) is not all or nothing. It

²⁸¹ Schrock & Welsh, *supra* note 154, at 1126–31.

²⁸² *Id.* at 1124.

²⁸³ *Id.* at 1171.

²⁸⁴ So, for example, although the recent Forewords by Amar and Sunstein reflect significant hostility to constitutional doctrine, see *supra* text accompanying notes 13 and 16, neither even hints that the creation of doctrine is illegitimate. See, e.g., Amar, *supra* note 3, at 80 ("A documentarian judge does not begin and end with the document. Rather, she begins with the document and then ponders how best to translate its wisdom into workable in-court rules, as contemplated by Article III."). Similarly, in an article dedicated to defending Supreme Court constitutional decisions from criticisms that the Court has come to rely excessively on complex multipart tests, Fred Schauer never once addressed the possibility that such doctrine-making exceeds the proper scope of judicial power. See Schauer, *supra* note 268. Indeed, many commentators claim that doctrine-making is inescapable. See, e.g., Fallon, *Implementing the Constitution*, *supra* note 10, at 26 ("The Court must craft doctrine as well as specify constitutional meaning through interpretation."); *id.* at 42 (contending that many constitutional norms "are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts"); Whittington, *Constitutional Interpretation*, *supra* note 141, at 6 ("In order for the [constitutional] text to serve as law, it must be rulelike. . . . For the Constitution to serve this purpose, it must be elaborated as a series of doctrines, formulas, or tests. Thus, constitutional interpretation necessarily is the unfolding of constitutional law. Debates over constitutional meaning become debates over the proper formulation of relatively narrow rules.").

could be, as commentators to the literature on supervisory and inherent powers²⁸⁵ seem to agree, that the legitimacy of the power's exercise depends upon the gravity of the need that calls it forth.²⁸⁶

²⁸⁵ Valuable studies on “inherent” and/or “supervisory” powers include Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 *Colum. L. Rev.* 1433 (1984); Evan Caminker, *Federal Courts: Allocating the Judicial Power in a “Unified Judiciary,”* 78 *Tex. L. Rev.* 1513, 1526–30 (2000); Linda S. Mullenix, *Federal Judicial Independence Symposium: Judicial Power and the Rules Enabling Act*, 46 *Mercer L. Rev.* 733, 754 (1984); James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 *Tex. L. Rev.* 1433, 1442–59 (2000); James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 *Colum. L. Rev.* 1515 (2001); Robert J. Pushaw, *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 *Iowa L. Rev.* 735 (2001); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits of Judicial Decisions*, 77 *B.U. L. Rev.* 761 (1997); William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 *Law & Contemp. Probs.* 102, 128 (1976); Office of Legal Pol’y, U.S. Dep’t of Justice, “Truth in Criminal Justice” Series: *The Judiciary’s Use of Supervisory Power to Control Federal Law Enforcement Activity*, reprinted in 22 *U. Mich. J.L. Reform* 773 (1989).

Although the distinctions between inherent and supervisory powers, and between those powers and “constitutional common law,” are vague, a few general observations can be made. While Monaghan suggested that constitutional common law was one of the federal courts’ integral powers, see Monaghan, *supra* note 4, at 10–26, courts generally use the term “inherent” powers with reference to those powers that are either necessary or at least beneficial to the exercise of integral powers. See Pushaw, *supra*, at 742–43. Inherent powers include the power to control litigation, via such means as evidentiary and procedural rulings, as well as the power to impose sanctions on parties and witnesses. Most commentators agree that the courts’ inherent powers include the power not only to make discrete rulings but also to establish rules for lower federal courts, even in the absence of specific congressional authorization. But see Office of Legal Pol’y, U.S. Dep’t of Justice report, *supra*, at 811 n.156 (“The proposition that courts have inherent rulemaking power is dubious at best.”). The federal courts’ so-called “supervisory” power, exercised expressly by the Supreme Court since *McNabb v. United States*, 318 U.S. 332 (1943), is the authority to supervise the administration of criminal justice in lower federal courts, an authority that includes “the duty of establishing and maintaining civilized standards of procedure and evidence.” *Id.* at 340. Most commentators and courts classify the supervisory power as a species of inherent power. See, e.g., Beale, *supra*, at 1464; Pushaw, *supra*, at 779–83. Unlike the federal courts’ constitutional common law making power described by Monaghan, the federal courts’ exercise of supervisory and other inherent rulemaking powers bind only the federal courts, not their state counterparts.

²⁸⁶ While nearly all commentators acknowledge that the federal courts have an inherent or implied rulemaking power (perhaps deriving from the Vesting Clause of Article III), they disagree regarding its scope; in particular, they disagree as to how “necessary” a claimed inherent power must be. Compare, e.g., Van Alstyne, *supra* note 285, at 128 (arguing that “[o]nly when the particular assertion of privilege can

Yet there are other possibilities. To divide doctrine into interpreted meaning (“operative propositions”) and decision rules suggests that the legitimacy of the latter might depend, at least in part, on the reasons that underlie its creation. This is, of course, precisely the assumption that has shaped the long-standing debate over constitutional interpretation. Just as only some sorts of moves are supposed permissible when traveling from the Constitution to constitutional meaning, then, maybe only some moves (albeit different ones) can fairly be relied on to support a given constitutional decision rule.

Metadoctrinalists tend to speak loosely, however, about the sorts of considerations that courts do, or should, rely upon when creating doctrine.²⁸⁷ But if the legitimacy of decision rules may depend upon their reasons, some greater precision will prove useful.²⁸⁸ As a

fairly be said to be the least adequate power [a federal court] clearly must have to perform express duties enumerated in the Constitution” can the courts assume such authority), and Pushaw, *supra* note 285, at 847–50 (arguing that federal courts may exercise “implied indispensable” powers without congressional authorization, but only Congress can exercise merely “beneficial” powers—those that are helpful or useful in implementing Article III), with Beale, *supra* note 285, at 1468–77 (arguing that the Supreme Court (but not the lower federal courts) may without congressional authorization, exercise those powers that are “reasonably appropriate and relevant” to the exercise of its Article III powers).

²⁸⁷ See, e.g., Amar, *supra* note 3, at 79–80 (explaining that the concretizing of open-ended constitutional standards “call[s] for strategic, pragmatic, empiric, institutional, and second-best judgments as to which the document gives rather little specific guidance. Judicial doctrines, working alongside rules laid down and practices built up by other branches, properly fill in the document’s outline, making broad principles workably specific in a court and in the world”); Strauss, *supra* note 38, at 193 (observing that “[o]ne customary way” to describe judicial constitutional doctrine-making “is that the court will attempt to minimize the sum of error costs and administrative costs,” and noting that “[t]his is misleading to the extent it suggests that all of these interests can be reduced to a single currency, or that distributional concerns are irrelevant,” but concluding that nonetheless “it is a useful shorthand”).

²⁸⁸ This suggestion resembles Fallon’s observation that “when we recognize that the Court may sometimes under- as well as overenforce constitutional norms, we can appreciate the urgency of assessing the grounds on which the Court determines whether to do so.” Fallon, *Implementing the Constitution*, *supra* note 10, at 7. But Fallon does not pursue such an assessment very far. Although he does offer “[a] nonexhaustive list” of the sorts of “value arguments” that courts do in fact employ when constructing constitutional doctrine, *id.* at 47–52, he does not explore the possibility that these features of contemporary practices are not all (equally) legitimate. Instead, his argument on this particular score seems largely to reduce to claiming that “[t]he measure of the soundness of constitutional doctrine—including ‘prophylactic’ rules as well as three- and four-part tests—is whether it implements the Constitution effectively.” *Id.* at 42.

first pass, then, we might identify six analytically distinct factors or families of factors that might appeal to a judge considering whether, and how, to form a constitutional decision rule—considerations I label *adjudicatory*, *deterrent*, *protective*, *fiscal*, *institutional*, and *substantive*. No doubt some of these considerations could be usefully subdivided and others could be added.²⁸⁹ But for present purposes a start is good enough.

A decision rule of some sort is unavoidable because application of the operative propositions confronts epistemic uncertainty. The most obvious factor that a decision-rule-maker should consider, then, is how best to minimize adjudicatory errors—i.e., the sum of false positives and false negatives. Call this an *adjudicatory* consideration. It comes in two variants: A court could think that a particular decision rule is likely to minimize either the sum total of adjudicatory errors, or the sum total of weighted errors, taking account of a difference in perceived social disutility between false negatives and false positives.²⁹⁰ Either way, it is not inevitable that the more-likely-than-not burden of proof will best serve this goal.²⁹¹ Most of the decision rules identified in Part III are likely to rest, at least in part, on adjudicatory considerations.

By minimizing adjudicatory errors, a decision rule is likely at the same time to optimize compliance with the operative proposition. If addressees of the operative proposition perceive or anticipate that adjudication of that rule yields many false negatives, they may become less disposed to comply with the judge-announced constitutional meaning. Just as a court may craft constitutional doctrine to reduce the adjudicatory errors, then, it may also be motivated to secure greater compliance. Call an interest in reducing violations of constitutional meaning a *deterrent* consideration. The Fourth

Unfortunately, it's not entirely clear what "soundness" means in this context. Is this a synonym for legitimacy? If it is not, then Fallon has not responded to the legitimacy worry. If it is, then Fallon has responded, but not wholly satisfactorily because he does not provide—let alone defend—any metric by which effectiveness is to be measured. (One might suspect, though, that he has in mind the untheorized, common-sensical notion of effectiveness and success characteristic of Posnerian pragmatism.) See *supra* note 161.

²⁸⁹ Cf. Sunstein, *Judicial Minimalism*, *supra* note 12, at 46–50 (partially unpacking the judicial interest in minimizing the sum of decision costs and error costs).

²⁹⁰ Errors could come from good faith epistemic mistakes or from the danger that judges will intentionally manipulate loose standards.

²⁹¹ See *infra* text accompanying notes 404–07.

Amendment exclusionary rule is surely the most salient example.²⁹² But the *North Carolina v. Pearce* decision rule that presumes vindictiveness from the absence of stated reasons for a longer sentence²⁹³ might similarly be explained on grounds of deterrence.

Of course, errors in adjudicating claims of unconstitutionality can cut two ways. Just as an excess of false negatives can water down the incentives for other governmental actors to comply with the constitutional operative proposition, an excess of false positives may produce overdeterrence or chilling effects. A *protective* consideration, then, is the obverse of a *deterrent* consideration. It reflects a possible judicial concern to ensure that the adjudicatory process not render other actors unduly timid. *Protective* and *deterrent* considerations are the two species of a broader genus of considerations we might call guidance-promoting.²⁹⁴

In a broad sense, a decision rule is always designed to reduce “costs.”²⁹⁵ A protective consideration, for example, is the interest in reducing excessive timidity because such timidity is deemed socially costly. Among the costs that a legal system might be concerned to minimize, however, are some that involve direct mone-

²⁹² See, e.g., *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998) (noting that the exclusionary rule “is prudential rather than constitutionally mandated”); *United States v. Leon*, 468 U.S. 897, 915–22 (1984) (explaining that the deterrent function of the exclusionary rule does not justify its application when police officers conduct a search in objectively reasonable reliance of a warrant later determined to be invalid); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (describing the exclusionary rule as a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved”). If the exclusionary rule is not a constitutional operative proposition then it represents a third category of constitutional doctrine, what could be termed, straightforwardly, a remedial rule. As I have emphasized, the operative proposition/decision rule distinction is only an introduction to the project of doctrinal taxonomy.

²⁹³ See *supra* Section III.B.2.

²⁹⁴ Compare Hart and Sacks’s discussion of what they term a “self-applying regulation”—an official directive “which is susceptible of correct and dispositive application by a person to whom it is initially addressed.” Henry Hart & Albert Sacks, *The Legal Process* 120–22 (William Eskridge & Philip Frickey eds., 1994). Monaghan described *Miranda* and the lineup cases as exercises of the “traditional judicial function” of “providing guidance to primary actors (law enforcement personnel in these cases) in terms sufficiently specific to allow ‘self-applying regulation.’” Monaghan, *supra* note 4, at 20–21.

²⁹⁵ For recognition, and caution, of this broad use of “costs” language in this context, see, e.g., Sunstein, *Judicial Minimalism*, *supra* note 12, at 46–47.

tary outlays—the monies that parties and the judicial system itself expend to litigate disputes, as well as private expenditures to avoid litigation. A *fiscal* consideration drives a court to craft doctrine in such a way as to reduce these private and governmental litigation-related expenditures.²⁹⁶

A fifth possible decision-rule-making consideration is famous from the justiciability literature. Alexander Bickel justified the passive virtues in large part as a way to conserve the court's "moral authority" and to reduce interbranch friction.²⁹⁷ The very same considerations—what we might call *institutional*—could influence a court's decision of whether, and if so how, to create a constitutional decision rule. Indeed, several of the decision rules already canvassed, including the "any conceivable purpose" decision rule from equal protection doctrine, and the enrolled bill doctrine, seem patently motivated by institutional considerations.

Suppose finally that none of the foregoing considerations singly or in combination militate against the customary more-likely-than-not decision rule. Nonetheless, judges could conclude, based on their own substantive value or policy judgments, that a particular constitutional provision, properly interpreted, carries its underlying norm or principle too far or not far enough. And they might, as a consequence, create a decision rule designed simply to better effectuate that norm. Call an interest in better operationalizing constitutional norms or policies in this way a *substantive* consideration.²⁹⁸ As an illustration, recall the nondelegation doctrine discussed earlier,²⁹⁹ and assume that a majority of the Court believed both that

²⁹⁶ This includes many of the costs that courts and commentators often have in mind when defending a particular course as a means to reduce "unpredictability."

²⁹⁷ See Bickel, *supra* note 116; see also Bobbitt, *Constitutional Fate*, *supra* note 33, at ch. 5 (discussing the "prudential" modality of constitutional interpretation). For a scathing criticism of the Bickelian approach, see Gerald Gunther, *The Subtle Vices of the Passive Virtues: A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1 (1964); Herbert Wechsler, *Book Review*, 75 *Yale L.J.* 672 (1966).

²⁹⁸ Cf. Field, *supra* note 154, at 893 (positing that "constitutional common law" arises when "the judiciary chooses the 'best rule' based upon its own notions of policy and upon whatever policies it finds implicit in the constitutional . . . provisions it does have an obligation to follow"); Schrock & Welsh, *supra* note 154, at 1126–27 ("[T]he constitutional common law claims for the Court . . . power . . . to overturn acts of the political branches when, though admittedly not unconstitutional, these acts violate some subconstitutional judgment of utility or desirability."); *id.* at 1153–58.

²⁹⁹ See *supra* Section III.B.6.

Article I, Section 1, properly interpreted, means that Congress may not delegate the authority to make “important” decisions and that to permit such delegations would be wiser social policy. Adoption of the “intelligible principle” decision rule might then have been adopted as a way to effectively expand Congress’s power to delegate beyond what the Constitution allows. Were this an accurate account of the intelligible-principle decision rule, it would rest on a substantive consideration.³⁰⁰

This (nonexhaustive) catalogue of decision-rule considerations might seem useless to someone who believes either that federal courts lack authority to create any constitutional decision rules or that courts enjoy *carte blanche* to craft decision rules for any reason at all. But neither of these positions is plausible.

To deny federal courts power to create decision rules is not, it must be remembered, to maintain that constitutional adjudication should proceed without the benefit of decision rules at all. It is to claim, instead, that all facts made relevant by constitutional operative propositions (which is to say, by judicial determinations of constitutional meaning) must be assessed on a case-by-case basis, without benefit of presumptions or other adjudicatory devices, under the preponderance-of-the-evidence standard of proof. However, it is late in the day to take seriously the claim that the judicial creation of constitutional decision rules is categorically illegitimate. This is *not* (contrary to the view of many contemporary theorists³⁰¹) because constitutional doctrine that departs from judicial interpretations of constitutional meaning is inevitable or ineliminable, but only because it has staked a position that will be extremely costly to dislodge and because the most plausible test of legitimacy is not

³⁰⁰ If it is not clear what about this example is fanciful, see *infra* text accompanying notes 304–05.

³⁰¹ See *supra* note 284. That courts find it useful to concretize often vague constitutional standards into doctrine cannot be doubted. That such doctrine is essential to “enabl[e] the document to work as in-court law,” Amar, *supra* note 3, at 79, is something else entirely. Courts could, after all, apply what they take to be constitutional meaning directly to the facts of every case without the benefit of “implementing frameworks,” *id.*, so long as they are prepared to rely very heavily on analogical reasoning. Indeed, this is much how constitutional law operated for the better part of two centuries. See, e.g., Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 *Harv. L. Rev.* 13, 74 (1995) (“In many ways, the Warren Court created modern constitutional law through its plethora of doctrines, rights, tendencies, and expectations.”).

purely foundational but is, instead, at least partly a function of existing practices.³⁰² Moreover, common law practice at the time of the framing authorized courts to create and adapt standard adjudicatory devices like rebuttable and conclusive presumptions and burden-shifting mechanisms when administering statutes.³⁰³

At the other extreme, it is hard to credit that courts should enjoy effectively unconstrained authority to craft constitutional decision rules. As even David Strauss has observed, constitutional doctrine that rests on “a judgment by the Court that the world would be a better place” with it “does indeed have a legitimacy problem” for “[j]udges do not have a general authority to implement their visions of the best world.”³⁰⁴ True, the bite of this concession depends on the amount of doctrine that rests on substantive considerations, and that there exists much of it might be doubted.³⁰⁵ Perhaps this is

³⁰² In this respect, an argument against the power to create decision rules runs into one of the problems that confronts a stringent commitment to originalism—namely, that it “entails a massive repudiation of the present constitutional order.” Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 *Colum. L. Rev.* 723, 727 (1988).

³⁰³ See, e.g., 9 W.S. Holdsworth, *A History of English Law* 142 (3d ed. 1932); James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 315–16 (1898). Not surprisingly, federal courts today routinely “allocate burdens and levels of persuasion consistent with perceived demands of policy if a federal statute does not control.” Ronald J. Allen, *Presumptions, Inferences and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 *Nw. U. L. Rev.* 892, 900 (1982).

³⁰⁴ Strauss, *supra* note 38, at 194.

³⁰⁵ To see why this might be, it helps to have in mind examples of decision rules that might be claimed to rest on substantive considerations. So return to our brief ruminations about the nondelegation doctrine. See *supra* Section III.B.6. Suppose that the Court concluded that the Constitution, as properly interpreted, actually—but unwisely—forbids Congress from delegating the power to make any “important” policy choices. Suppose, too, that the Court then adopted a decision rule directing that courts must find that a delegation did not implicate the power to make important choices if it contained an “intelligible principle” as a sneaky way to effectively allow broader delegations than it believed that the Constitution permits. But if this example suggests the illegitimacy of making decision rules for substantive reasons, it also suggests how unlikely is such a practice.

It seems in this hypothetical that the Court chooses to realize its vision about the proper scope of legislative delegations by resorting to a substantive decision rule only as a result of its logically prior conclusion that the true constitutional operative proposition imposes severe constraints. But what reason is there to believe that Justices who believe that broad delegations of law-making power are sensible would in fact interpret the Constitution to provide otherwise? The fact is that what is and is not a valid method of constitutional interpretation is not God-given, but chosen by the in-

partly due to the widespread, if tacit, recognition, even on the part of the most “Pragmatic” judges and scholars, that resort to substantive considerations in the shaping of constitutional doctrine is improper.

If neither polar position in the debate over the legitimacy of constitutional decision rules appears promising, then it should become obvious why it is helpful to think clearly about the discrete considerations that might present themselves in the process of constitutional doctrine-making. Very simply, most participants to the legitimacy debate are likely to believe that the federal courts have constitutional power to rely upon some sorts of instrumental considerations in the creation of decision rules, but not others. The consideration that would seem to enjoy the strongest claim to legitimacy is an interest in reducing adjudicatory error. The practice of judicial review requires that courts have ways to reach constitutional holdings even though they do not know, say, what constitutionally relevant conduct was engaged in, what the constitutionally relevant purposes were, or what the constitutionally relevant effects will be.³⁰⁶ Yet we should expect courts to try to resolve these constitutionally relevant questions as accurately as (reasonably) possible. Since it is more than doubtful that the preponderance standard always best promotes adjudicatory accuracy,³⁰⁷ it is hard to imagine a convincing argument that would allow courts sometimes to create constitutional decision rules, but not for the purpose of

dividual judge. Of course, such choices are constrained by professional practices. But this constraint is not very constraining for purposes of the nondelegation example because a conclusion that constitutional limits on the delegation of law-making powers are flexible and context-dependent can be easily reached via familiar (albeit contested) moves in constitutional interpretation. The more general lesson, I think, is that a judge who would employ substantive considerations in the construction of constitutional decision rules is apt, in good faith, to interpret the constitutional operative proposition in a way that makes resort to such substantive considerations unnecessary. But cf. Monaghan, *supra* note 4, at 44–45 (designating, as “the most troublesome feature of constitutional common law,” “its potential as a vehicle for reading into our law at a subconstitutional level values that judicial activists have ‘discovered’ in the general substantive guarantees of due process and equal protection”); Schrock & Welsh, *supra* note 154, at 1125 (objecting that constitutional common law makes it “possible for a Court, animated by realism, to be constitutionally cautious but subconstitutionally activist, even adventurist”).

³⁰⁶ I have argued elsewhere that these are the three relevant dimensions of constitutional violation. See Berman, *Coercion Without Baselines*, *supra* note 205, at 19–29.

³⁰⁷ See *infra* text accompanying notes 404–07.

minimizing adjudicatory error. From this premise, reasonable people might argue that courts have legitimate authority to create decision rules for the purpose of minimizing adjudicatory error but for no other purposes. Or, somewhat more liberally, that legitimate decision rules may be designed to minimize adjudicatory error and to promote guidance to the addressees of the operative proposition, but not, say, to reduce the incidence and aggregate expense of constitutional litigation. Other possibilities could be identified and argued about at great length.³⁰⁸

But not here. The critical point is that a willingness to think about constitutional doctrine in terms that divide it into (among other categories) operative propositions and decision rules does not preempt normative debates about the legitimate judicial moves in constitutional implementation. Rather, it helps structure the sorts of debates that taxonomic explorations cannot themselves dispose of. Although I have some views about the propriety of conceivable moves in the construction of decision rules, I am inclined to believe that the consistency of one's answers to questions of this sort is much more important than is their content. A judge or theorist who would permit courts to rely on some considerations but would rule others out of bounds must assume the burden of distinguishing the forbidden considerations from the permissible. As Herbert Wechsler famously argued, "[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting *with respect to every step* that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."³⁰⁹ Judges who take this admonition seriously can ensure that they live up to it only if they make clear, at least to themselves, just what the steps in their constitutional analyses are.

³⁰⁸ Insofar as courts craft decision rules to serve ends other than minimization of adjudicatory error, it may be appropriate for them to recast their holdings to convey when a given judgment of constitutionality *vel non* may not reflect a court's best judgment on the matter. In particular, when application of an underenforcing decision rule yields the conclusion that a challenged action is not unconstitutional, that should be the announced judgment—"not unconstitutional"—*not* that the action is "constitutional." The obvious analogue, of course, appears in criminal cases. When a factfinder is unable to conclude that the defendant is guilty beyond a reasonable doubt, the verdict is "not guilty"—standing for "not found to be guilty"—as opposed to "innocent." This way of proceeding would better serve interests in what I have called extra-adjudicatory constitutionalism.

³⁰⁹ Wechsler, *supra* note 50, at 15 (emphasis added).

This requires that they separate constitutional operative propositions from constitutional decision rules and think hard about what might justify construction of the latter.

b. Doctrinal Refinement

In addition to helping to structure discussions about what sort of doctrine is permissible, distinguishing decision rules from operative propositions can profitably aid judges in seeing what doctrines are most sensible. Constitutional doctrine is both fertile and mutable. Presumably, courts should be sensitive, when elaborating, modifying, or fine-tuning doctrine, to the particular considerations that underlay it in the first place. To take a simple example, when a court comes to decide whether a given doctrine should be applied retroactively (a question that might arise subsequent to the case that had announced the doctrine), the right answer might vary depending on whether that doctrine reflected interests in minimizing adjudicatory error as opposed, say, to providing better guidance for non-judicial actors.³¹⁰ Classifying doctrine as either an operative proposition or a decision rule is likely to aid courts in isolating precisely which sorts of practical and institutional considerations generated the doctrine whose contours are being manipulated.

To take another example, it is at least plausible—though not necessary—that stare decisis should apply with different force to operative propositions and decision rules.³¹¹ Courts might feel

³¹⁰ In mentioning this, I do not mean to suggest that the proper solution to the problem of retroactive application of judicial decisions will ever be reducible to a simple algorithm. However, the present jurisprudence of retroactivity is widely thought to be unnecessarily confused and confusing. See, e.g., Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 *Harv. L. Rev.* 1055 (1997); Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 *Conn. L. Rev.* 1075 (1999).

³¹¹ For example, the “traditionalism” that constitutes, for Strauss, one of the two basic normative foundations for common law constitutionalism (the other being “conventionalism”) is based on a humility toward judicial innovation and a concomitant preference for incrementalism. It is plausible to think that a court disposed to abandon precedent in an Amar-inspired manner might do less violence to the “traditionalist” interest in incrementalism by affording greater stare decisis weight to operative propositions than to decision rules, even if each has been a product of common law constitutionalism.

themselves freer to be more avowedly experimentalist³¹² when announcing doctrine candidly described as decision rules. These comments are admittedly exploratory but, I hope, suggestive. We will see additional ways that the concept of decision rules can promote the more intelligent raising of doctrinal progeny in the next Part.³¹³

c. The Congressional Role

The proper role of non-judicial actors, especially Congress, in the making of constitutional law is one of the hot topics in contemporary constitutional scholarship.³¹⁴ The issue is often posed in terms of how much deference courts should give interpretive judgments reached by the other branches. This is an appropriate question. Framing the discussion in terms of relative “interpretive” competence and authority, however, risks setting too narrow a focus. The more general subject, as Fallon has emphasized, is one of constitutional implementation.³¹⁵ And the distinction between constitutional operative propositions and decision rules makes clear that courts could afford Congress a more substantial role in that enterprise even if they choose not to defer to congressional inter-

³¹² See generally Dorf, *supra* note 14 (arguing for a less “Socratic” approach to jurisprudence, one focused on finding “provisional, workable solutions”).

³¹³ See *infra* Section V.D.

³¹⁴ See, e.g., Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. Rev. 123, 156 (1999) (describing the scope of judicial deference to constitutional interpretation by Congress and the President as “perhaps *the* central question” of constitutional adjudication). Some of the more notable recent commentaries on the subject include Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 Cornell L. Rev. 1529 (2000); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 Va. L. Rev. 83 (1998); Kumar Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335 (2001); Frank I. Michelman, *Living With Judicial Supremacy*, 38 Wake Forest L. Rev. 579 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943 (2003); Robert A. Schapiro, *Judicial Deference and Interpretive Coordination in State and Federal Constitutional Law*, 85 Cornell L. Rev. 656 (2000); Whittington, *supra* note 118.

³¹⁵ See *supra* text accompanying notes 10–11.

pretations of constitutional meaning. Let me identify two distinct ways that could occur.³¹⁶

Debates over judicial supremacy always return to James Bradley Thayer and his famous proposed “rule of administration” that courts should not declare an Act of Congress void “unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”³¹⁷ It is often thought to follow—certainly Thayer himself thought so—that courts should defer to any reasonable interpretation of the Constitution advanced by Congress.³¹⁸ But neither Thayer nor most scholars who write in this tradition explicitly recognize that the process of determining whether a legislative act is permitted by the Constitution consists, at a minimum, of two discrete steps: (1) determining what the Constitution means, that is, what it permits, commands, or forbids, and (2) determining whether the legislation is consistent with that meaning. These are the stages, respectively, of interpretation and application. To be sure, judicial deference to a congressional judgment *could* operate at both stages. But it need not. A court could defer at the interpretation stage but not the application stage, or vice versa. Put another way, Thayer’s proposed rule of administration could be operationalized in two distinct ways: (1) when setting forth their understanding of what the Constitution means, the courts should respect all reasonable doubts in favor of an interpretation hospitable to national power, or (2) when determining whether challenged national

³¹⁶ This is in addition to a point we have already seen. As the *Board of Trustees of the University of Alabama v. Garrett* dissenters persuasively argued, when determining whether a congressional regulation of the states is congruent and proportional to the constitutional harm Congress claims to have sought to redress or prevent, hence authorized by § 5 of the Fourteenth Amendment, the scope of that harm should be measured by reference to the constitutional operative proposition alone, not to the operative proposition glossed by any accompanying decision rule. See 531 U.S. 356, 381–83 (2001) (Breyer, J., dissenting); supra text accompanying notes 185–92.

³¹⁷ James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 140 (1893) (quoting *Commonwealth v. Smith*, 4 Binn. 117 (Pa. 1811)). For a sampling of commentaries on Thayer’s essay on the centennial of its publication, see *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 Nw. U. L. Rev. 1–468 (1993). On its ninetieth anniversary, Henry Monaghan described it as “the most influential essay ever written on American constitutional law.” Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 7 (1983).

³¹⁸ E.g., Thayer, supra note 317, at 136 (contending that Congress, not the Courts, has “primary authority to interpret” the Constitution).

action runs afoul of the courts' interpretation of constitutional meaning, courts should entertain all doubts in favor of the action. This second possibility speaks to what the constitutional decision rule should be.³¹⁹

In fact, there is reason to think that Thayer's goal is more likely to be realized (if only partially) by deferential decision rules than by judicial deference to congressional judgments regarding the constitutional operative propositions. Thayer himself imagined that critics might object to his proposal on the ground that "the ultimate question here is one of the construction of a writing . . . and that it cannot well be admitted that there should be two legal constructions of the same instrument."³²⁰ This, he said, "begs the question" because "the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not."³²¹ In other words, he resisted the effort to tease the stages of interpretation and application apart, seeming to suggest instead that courts could and should just announce whether challenged legislation could stand without specifying what they took to be the constitutional premise supporting such a conclusion.

Perhaps this strategy could work if the federal courts sat in judgment only of other national actors. But, of course, federal courts review the actions of states too, and interpretive deference to state courts, legislatures, and executives seems far less defensible. Indeed, Thayer himself made clear that his rule of reasonable doubt should govern coordinate branches only, not state legislators.³²² This limitation is a larger problem for Thayer's proposal than he recognized, because constitutional challenges to state con-

³¹⁹ According to Keith Whittington, "the most important implications of the debate over judicial supremacy may relate to the proper degree of deference the branches should show to one another's constitutional judgments." Whittington, *supra* note 118, at 778. That is, he says, "the debate over judicial supremacy focuses more squarely on the institutional problem of who should make the final decision concerning contested interpretations." *Id.* My point is that Whittington's first observation is not entirely captured by his second. The courts could afford at least partial deference to another branch's "constitutional judgments" not by deferring to that branch's judgments about what the Constitution is most properly interpreted to mean but by deferring only to potentially contrary judgments about whether the constitutional meanings, as judicially determined, are satisfied.

³²⁰ Thayer, *supra* note 317, at 150.

³²¹ *Id.*

³²² *Id.* at 154–55.

duct are likely to produce two important consequences: First, the federal courts will, not infrequently, adjudge the state action unconstitutional; second, and as a consequence, they will (rightly) feel compelled to provide more detailed explanations for such judgments than just that “the legislation is not sustainable.” Constitutional litigation involving state actors, in short, will force the federal courts to announce their views about constitutional meaning—announcements that Thayer had hoped would not be necessary in litigation challenging federal legislation. Once such judgments are announced, however, it will become more difficult for courts to defer to contrary interpretations put forth by Congress because so doing would produce what Thayer seems to acknowledge would be an embarrassment of “two legal constructions of the same instrument.”³²³ If this is so, then deference to Congress, if it is to exist, will find a more hospitable home at the level of applying constitutional meaning, not deriving it. Thayerians may therefore do well to shift their focus from arguing for judicial deference to Congress’s constitutional interpretations—i.e., to Congress’s judgments about the constitutional operative propositions—to arguing for more deferential decision rules.

I have just explained why the usual arguments for judicial deference to the interpretive judgments of Congress may find greater success if translated into arguments that courts should give greater deference to Congress’s judgments about whether given policies conform to judge-interpreted constitutional meanings. The argument becomes that courts should, on their own initiative, adopt more deferential decision rules. There is an even more profound way in which full appreciation of constitutional decision rules could pave the way for a more robust congressional role in the enterprise of constitutional implementation: The Court could permit Congress to substitute its judgment for the Court’s on just what the applicable decision rule should be.

Recall our provisional catalogue of the considerations upon which courts are likely to rely when creating decision rules: minimizing adjudicatory error, promoting greater compliance with the constitutional operative proposition, reducing the extent to which an operative proposition chills socially valuable conduct, reducing

³²³ *Id.* at 150.

constitutional litigation and its associated costs, etc. We noted that reasonable people might disagree about which of these considerations courts should be permitted to rely upon at all. Insofar as judges do believe themselves authorized to take considerations like these into account in the shaping of constitutional decision rules, it remains a wholly separate question whether the resulting judge-made decision rules should stand in the face of contrary factual or evaluative judgments made by Congress. Suppose, for instance, that a particular underenforcing decision rule rests on the Court's conclusion that adjudication of the operative proposition in question by the usual preponderance-of-the-evidence decision rule is likely to chill a large amount of socially valuable behavior. Congress might disagree with either or both of these judgments. It could think that the overdeterred behavior is not especially valuable (hence its chill not especially costly) or that little of it would be chilled by a decision rule that does not underenforce the operative proposition. In either case, Congress might be moved to legislate that courts should apply a different decision rule. The question for the courts would then become whether to allow the judge-made decision rule to be replaced by the Congress-made one.³²⁴ An appropriate analysis would no doubt be complex, depending on, among other things, a relative institutional-competencies analysis more sophisticated than legal process armchair meditations.³²⁵

³²⁴ *Miranda* had stated explicitly that custodial statements could be admitted without warnings if Congress or the states created alternative methods to effectively protect the privilege against self-incrimination. See 384 U.S. at 467. The point here is that neither Congress nor the Court should stand on ceremony. Even without an explicit invitation, Congress has authority—which the Court should recognize in an appropriate case—to revise or supplant judge-made decision rules.

³²⁵ For views that are readily assimilable to this argument, see, for example, Robert A. Burt, *Miranda* and Title II: A Morgantic Marriage, 1969 Sup. Ct. Rev. 81; Ross, supra note 190; Strauss, *Miranda*, the Constitution, and Congress, supra note 146. Note, however, this difference between Strauss's view and mine. Referring to Monaghan's distinction between *Marbury*-shielded constitutional interpretation and congressionally reversible constitutional common law, Strauss argues in favor of a third category: congressionally reversible constitutional interpretation. Strauss, supra note 146, at 960 & n.11. Instead of viewing this possibility as a middle ground between two poles, however, we could view it as the third box in a two-by-two matrix. If so, a fourth possibility plainly emerges: doctrine that neither qualifies as constitutional interpretation nor is congressionally reversible. Some decision rules—perhaps a great many—will fall in this box.

3. Summary

Here, to summarize, are some of the reasons why we should train ourselves to view judicial constitutional doctrine not as an undifferentiated mass but, rather, in terms of such conceptually distinct components as operative propositions and decision rules. *First*, because our debates about political morality are so thoroughly couched in constitutional terms, being able to more clearly identify what the Supreme Court thinks the Constitution *means* will provide us richer argumentative and educative resources than is supplied by a mere understanding of what the constitutional doctrine is. *Second* and relatedly, isolating judge-interpreted constitutional meaning from within judge-announced constitutional doctrine better informs governmental agents of their true (judicially determined) constitutional responsibilities, and thus better enables us to evaluate their performance. We might find that conduct that would, if adjudicated, be held constitutional nonetheless warrants criticism, or that conduct that would, if adjudicated, be held unconstitutional does not.

Third, to focus on the process of decision-rule making as a conceptually distinct step in the logic of constitutional adjudication can enable clearer and more reasoned analysis and debate about the legitimate moves in the making of constitutional doctrine. It is not uncommon for theorists or judges who espouse a strict variety of textualism or originalism to (claim to) reject *tout court* judicial reliance on what we might loosely term pragmatic or institutional considerations in the exercise of judicial review. However, to recognize the inevitability that constitutional decision rules of some sort will exist and to acknowledge (as almost inescapable) that federal courts should have the authority to construct constitutional decision rules for the purpose of minimizing adjudicatory error in the aggregate makes it impossible to maintain such a categorical stance. Once we grant as legitimate some recourse to pragmatism in the formation of constitutional doctrine, those hostile to a more thoroughgoing judicial pragmatism are compelled to adopt more realistic and nuanced positions.³²⁶

³²⁶ Some readers may notice that the argument here assumes the same shape as does Matt Adler and Michael Dorf's recent analysis of what they term constitutional existence conditions and constitutional application conditions. Adler & Dorf, *supra* note

Fourth, by more clearly identifying the logic that undergirds particular doctrines, the distinction will make courts better able to develop and refine those doctrines in more coherent and sensible fashion. *Fifth*, distinguishing decision rules from operative propositions creates more varied opportunities for courts to accommodate other branches' "constitutional judgments" (broadly construed) than does the debate over whether courts should defer to other branches' interpretations of constitutional meaning, and thus facilitates development of more democratically legitimate constitutional law.

At bottom the point is this. The operative proposition/decision rule distinction may appear at first blush to divide the terrain of constitutional doctrine only slightly differently than had previous accounts. But this tweaking has the great virtue of being less susceptible *both* to Straussian doubts that the classificatory enterprise inevitably rests upon a false assumption that constitutional meaning can be derived through a process divorced from practical and empirical considerations,³²⁷ and to objections (perhaps coming from a Scalian direction) that all doctrinal outputs other than judicial statements of constitutional meaning are illegitimate. And if the distinction between decision rules and operative propositions better tracks our experience of constitutional adjudication and better resists some forceful critiques, then we should expect that adopting it will not just mirror our reality more faithfully but will have consequences. That is how conceptual frameworks work.

227. In reply to absolutists who would urge wholesale abolition of judicial review, Adler and Dorf contend that judicial review of what they term constitutional existence conditions is ineliminable, thus forcing judicial review skeptics to draw and defend finer lines than they might otherwise.

³²⁷ I have emphasized that this proposed start to a doctrinal taxonomy does not commit one to anti-Pragmatism. Even one who believes that we cannot isolate two distinct sorts of judicial processes (called, perhaps, "constitutional interpretation" and "constitutional doctrine-making") based on the sorts of considerations that judges employ, can still endorse a distinction between operative propositions and decision rules in the belief that such a distinction usefully serves some of the functions just discussed (and/or others). That is, the distinction is consistent with the view that the formation of constitutional doctrine "is functional . . . all the way up." See *supra* text accompanying note 150 (quoting Levinson, *supra* note 27, at 873). Consistent with, but not dependent upon. Indeed, this way of carving the domain of constitutional doctrine has the great virtue that it can be employed as well by self-described textualists or originalists as by the Pragmatists.

B. An Illustration

This Part began by acknowledging that trying to classify ambiguous constitutional doctrine as either operative proposition or decision rule could be either futile or pointless. The previous Section does not demonstrate otherwise. Nothing in this Article should be understood to advance the strong claim that how constitutional doctrine is best classified can always (or even usually) be successfully divined from judicial opinions, or that it would always be worthwhile even to try. Nor, looking forward, do I argue that, when announcing doctrine, a court should always make clear which aspects of that doctrine are operative propositions and which, if any, are decision rules. I do contend, though, that courts, scholars, and litigators ought to reflect on the possible values of doctrinal taxonomy, and should think and speak in terms of operative propositions and decision rules when doing so would be productive. *Atwater v. City of Lago Vista*,³²⁸ a case decided the same Term as *Board of Trustees of the Univeristy of Alabama v. Garrett*, provides a recent and illuminating example of how appreciation of the values that the decision rule concept serves can help courts and commentators make reasoned judgments about whether, and how, to try to classify ambiguous doctrine.

The case arose after Gail Atwater, a mother driving with her two young children in the small city of Lago Vista, Texas, was pulled over by Officer Bart Turek and cited for the misdemeanor of driving without her seatbelt, or those of her children, fastened. Although Turek could have simply issued Atwater a citation, he arrested and handcuffed her and transported her to the police station. Arguing that the arrest was an unreasonable seizure within the meaning of the Fourth Amendment, Atwater sued Turek, the chief of the police, and the city.

Four Justices would have upheld Atwater's claim, reasoning straightforwardly that a custodial arrest is a seizure, that the Fourth Amendment proscribes "unreasonable seizures," that whether a given seizure is reasonable depends entirely upon the particulars of the situation,³²⁹ and that this particular seizure was patently unrea-

³²⁸ 532 U.S. 318 (2001).

³²⁹ "It is beyond cavil that the touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular govern-

sonable because legitimate state interests could have been served just as well by the simple issuance of a citation.³³⁰ A five-member majority disagreed, holding in an opinion by Justice Souter that the arrest did not violate Atwater's Fourth Amendment rights.

To paraphrase Justice Scalia's *Dickerson v. United States* dissent, the *Atwater* majority (which he joined) does not say that Officer Turek had engaged in a "reasonable seizure." That would have been "preposterous."³³¹ Indeed, Justice Souter could hardly have made plainer that Officer Turek had acted *unreasonably*. "If we were to derive a rule exclusively to address the uncontested facts of this case," the majority conceded, "Atwater might well prevail Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case."³³² But this was not the sort of inquiry the majority wanted adjudications of Fourth Amendment cases to turn on, for

a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.³³³

In short, the majority wanted a rule not a standard. And, dissatisfied with the rule Atwater proposed,³³⁴ the majority announced its

mental invasion of a citizen's personal security." *Id.* at 360 (O'Connor, J., dissenting) (internal quotations and citations omitted).

³³⁰ *Id.* at 369–71.

³³¹ *Dickerson*, 530 U.S. at 448.

³³² *Atwater*, 532 U.S. at 346–47.

³³³ *Id.* at 347 (internal citation omitted).

³³⁴ Atwater proposed that the Court declare it constitutionally unreasonable for police officers to make warrantless misdemeanor arrests except in cases of "breach[es] of the peace," a category of nonfelony offenses "involving or tending toward vio-

own: “If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”³³⁵

This is the *Atwater* doctrine. But is it an operative proposition or a decision rule? On its face, it looks like the former. That is, it purports to be a statement of just what the Fourth Amendment demands. On this view, it is *per se* reasonable within the meaning of the Fourth Amendment for a police officer to arrest anyone who commits any criminal offense under any circumstances, so long as the offense occurs in the officer’s presence. Yet there is reason for doubt. Simply put, *per se* analysis seems inconsistent with the very concept of reasonableness.³³⁶ And in fact the Court had previously suggested that Fourth Amendment reasonableness calls for the all-things-considered exercises of judgment.³³⁷ For these reasons, the *Atwater* doctrine might be better conceived as a decision rule that courts should conclusively presume a full custodial arrest to be reasonable if they conclude (by a preponderance of the evidence) that the officer had probable cause to suppose that the arrestee had committed any offense in his presence. This characterization of the doctrine can explain how *Atwater* lost, even though not a single member of the Court seemed to doubt that *she* had been subjected to an unreasonable seizure.

lence.” *Id.* at 327. The majority rejected this suggestion largely on the grounds that it was inconsistent with historical practice. *Id.* at 326–45.

³³⁵ *Id.* at 354.

³³⁶ See Sager, *supra* note 5, at 1244 n.104 (illustrating his observation that some “constitutional provision[s] . . . simply do[] not lend [themselves] to under-enforcement analysis,” with “the search and seizure clause of the fourth amendment, which explicitly calls for case-by-case balancing of state and private interests”); cf. Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239 (2002) (presenting a blistering attack on the *Atwater* majority’s characterization of relevant historical practice).

³³⁷ See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990) (“[I]n order to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable. . . . Whether the basis for [arrest] authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.”).

Even to ask the classificatory question might strike some readers as overly academic. What matters, the Pragmatist might insist, is to appreciate the sorts of considerations that the Court relied upon. *Atwater* is just further confirmation that, as Strauss had argued, “courts create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities.”³³⁸ In particular, the Court worried that, absent mediation by rule-like doctrine, judicial implementation of the Fourth Amendment would risk social harm by encouraging police officers to become unduly timid³³⁹ and would also generate excessive litigation.³⁴⁰ If it is proper for courts to advert to such considerations in the crafting of doctrine, *Atwater* was legitimate; if not, then it wasn’t.³⁴¹ Surely we need not classify the doctrine as an operative proposition or a decision rule to see *that*.

Surely. But the question is not whether we *need* the distinction; it is whether access to these concepts could prove useful. One way into the problem is to ask whether, had the distinction between

³³⁸ Strauss, *supra* note 38, at 207 (emphasis omitted). For a discussion of Strauss’s argument, see text accompanying notes 71–75.

³³⁹ See *Atwater*, 532 U.S. at 351 (“An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect’s risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial. Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked.”). Notice that the majority offers no hint that the *Atwater* doctrine (whether operative proposition or decision rule) rests on estimates about how best to minimize adjudicatory errors. The Court expresses no concern that courts do a bad job of separating the reasonable from the unreasonable on a case-by-case basis. The problem, rather, is that *police* might do a bad job of assessing reasonableness “on the spur (and in the heat) of the moment.” *Id.* at 347. And if they are unsure whether an arrest is unreasonable, they are likely to err on the side of caution. This is an instance of what I have called a “protective” doctrine-making consideration.

³⁴⁰ *Id.* at 350 (observing that the dissent’s approach “would guarantee increased litigation over many of the arrests that would occur”). This is a “fiscal” consideration.

³⁴¹ For a debate long preceding *Atwater* regarding the propriety of bright-line judge-made rules to administer the Fourth Amendment, compare Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith,”* 43 U. Pitt. L. Rev. 307 (1982), and Wayne LaFare, “Case-by-Case Adjudication” Versus “Standardized Procedures”: The *Robinson* Dilemma, 1974 Sup. Ct. Rev. 127 (defending many of the same protective considerations endorsed in *Atwater*), with Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227 (1984). For a recent and nuanced endorsement of LaFare’s position, see Dripps, *supra* note 94, at 1.

constitutional operative propositions and constitutional decision rules been part of Justice Souter's conceptual toolbox, he might have perceived reasons to think one or the other characterization of the doctrine preferable.

Consider these three reasons to favor the decision-rule characterization of the *Atwater* doctrine over the operative-rule alternative. First, it is to be preferred on the dimension of social meaning. The *Atwater* decision was roundly denounced.³⁴² A recurrent theme in the criticism was that the Court had condoned Turek's behavior, a view of the case picked up even in reports neutral as to the outcome.³⁴³ Certainly the majority did not want to convey the impression that this sort of behavior was in fact "reasonable." It is plausible to suspect that the Court would have been able to more effectively communicate that message had it explicitly described its doctrine as a decision rule adopted only to help ensure that *well-intentioned officers in the future* not be rendered unduly timid by fear of being adjudged, after the fact, to have acted unreasonably.

Second, the decision-rule characterization is likely to open up more space for (appropriate) congressional involvement in the shaping of constitutional doctrine. Suppose that Congress disagreed with the Court's predictive judgment about how much well-intentioned police behavior the ad hoc, totality of the circumstances approach to Fourth Amendment reasonableness would chill, or with the Court's evaluative judgment about how much litigation on the matter was excessive. Which branch's judgments on

³⁴² See, e.g., Richard S. Frase, What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. City of Lago Vista*, 71 Fordham L. Rev. 329, 331 n.4 (citing criticisms of the decision from the media).

³⁴³ See, e.g., Akhil Reed Amar, An Unreasonable View of the 4th Amendment, L.A. Times, Apr. 29, 2001, at M1 (questioning the Court's analysis of what constitutes "unreasonable" conduct under the Fourth Amendment); Sandy Banks, Why A Mom's Fate Should Worry Us All, L.A. Times, Apr. 27, 2001, at 1E (stating that "the U.S. Supreme Court sided with the cop, [agreeing] that even the most minor criminal offense can justify a trip to jail"); Mark Cloud, Extreme Searches, Chi. Trib., May 4, 2001, at 25N (jesting that the Court "didn't let the 4th Amendment interfere with [the officer's] good work"); A Decision Lacking Reason, Investor's Bus. Daily, Apr. 26, 2001, at 22 (observing that the Court "ruled the officer's action is allowed by the Constitution"); Municipal Court Practice Committee Report, New Jersey Lawyer, Feb. 25, 2002, at 365 n.3 ("In *Atwater*, a divided U.S. Supreme Court ruled that a police officer in Texas acted properly in arresting a woman for the minor offense of failing to wear a seatbelt.").

these particular questions should prevail in determining what shape constitutional doctrine should take? One might reasonably conclude that Congress's judgments on this question should trump those of the Court. Again, it is plausible to suppose that announcing the *Atwater* doctrine as a decision rule employing a conclusive presumption would be a particularly effective (though not essential) way to signal where and how Congress could intervene if it so chose.

Third and relatedly, characterizing the doctrine as a decision rule might make it easier for the Court to itself revisit the doctrine if appropriate. When balancing the costs of overdetering police from engaging in reasonable arrests against those of under-detering them from engaging in unreasonable ones, the Court expressly observed "a dearth of horribles demanding redress."³⁴⁴ But what if the Court substantially underestimated the incidence of unreasonable warrantless misdemeanor arrests? Or what if the Court was right at the time of its opinion, but facts changed? No doubt the Court could revise the doctrine in light of experience regardless of how the doctrine was classified. But it is plausible to suppose that the competing demands of stability and flexibility might find more effective reconciliation in the development of stare decisis practices that allow decision rules to be modified or abandoned somewhat more readily than operative propositions.

The claim, to reiterate, is not that these interests could not be advanced if we lacked the operative proposition/decision rule distinction entirely, or if, possessed of the distinction, we classified the *Atwater* doctrine as an operative proposition. It is to suggest, though, that these interests could probably not be served *as well*. That you find these particular arguments in favor of the decision-rule reading of *Atwater* convincing is not critical. Additional arguments could lie in its favor; strong arguments may militate for the operative-proposition reading. The essential points are two: First, it is possible to give *reasons* for preferring one characterization of the doctrine over another even when the doctrine could be characterized either way; second, those reasons do not depend upon implausible assumptions about the nature of constitutional adjudication.

³⁴⁴ *Atwater*, 532 U.S. at 353.

V. *DICKERSON* REVISITED: *MIRANDA* AS A DECISION RULE

We are finally positioned to respond to Justice Scalia's *Dickerson* dissent. The response, in short, will be that the *Miranda* doctrine consists of a constitutional operative proposition directing courts not to admit into evidence statements that had been compelled by the state, administered by a constitutional decision rule directing that a court must conclusively presume a statement to have been compelled if it concludes (by a preponderance of the evidence) that the statement was elicited during custodial interrogation not preceded by the requisite warnings or in which the suspect's invocation of a right to silence or to counsel was not respected. The Court chose this decision rule, furthermore, as a means to reduce adjudicatory error because it believed that compulsion was common yet very hard to discover. On this account, the *Miranda* doctrine is a legitimate exercise of judicial power on the modest (though not incontestable) assumption that courts are empowered to create error-minimizing constitutional decision rules.

Although the labels "operative proposition" and "decision rule" are unconventional, the foregoing interpretation of *Miranda* is, in broad strokes, familiar.³⁴⁵ But it has not been universally accepted. Regrettably, a lengthy analysis is necessary to elaborate and defend the claim, and to demonstrate some of what follows.

Section V.A presents the basic claim. In order to make vivid, or even plausible, why the Court held as it did, and why the decision-rule interpretation is sensible, we need a reasonably firm grasp on the operative proposition that the decision rule is intended to adjudicate. Accordingly, Section V.A explains more clearly and fully than have most other accounts just what the operative proposition is and how the decision rule is designed to administer it. Section V.B shows that, if the account of Section V.A is correct, then the charge that *Miranda* announced a prophylactic rule (in the sense intended by *Miranda*'s critics) fails. A decision rule designed to

³⁴⁵ See, e.g., 2 Wayne R. LaFare et al., *Criminal Procedure* § 6.2(d) (2d ed. 1999); Cox, *supra* note 130, at 250–51 (concluding that "the thrust of the argument [in *Miranda*] seems to be that unless prophylactic measures are employed there will be inadequate assurance that any confession obtained in secret is not procured by compulsion violating the privilege against self-incrimination"); Huitema, *supra* note 76, at 263.

minimize adjudicatory errors is not meaningfully characterized as “overprotecting” the constitutional operative proposition, or as “sweeping more broadly” than the judge-interpreted constitutional meaning. Perhaps, however, the account of Section V.A is not correct. And perhaps the reason it is not correct has something to do with the fact that the putative *Miranda* decision rule employs a conclusive presumption. Section V.C confronts and rebuts the argument, voiced often by Joseph Grano, that use of a conclusive presumption in a decision rule cannot be designed to minimize adjudicatory error. In short, if the *Miranda* doctrine is properly classified in decision-rule terms, and if the decision rule rests on adjudicatory considerations, the doctrine is not rendered illegitimate by being operationalized in the form of a conclusive presumption. Together, then, Sections V.B and V.C identify and defeat challenges to the defense of *Miranda* put forth in Section V.A.

Section V.D turns from *Miranda* itself to its progeny, exploring how sensitive attention to the operative proposition/decision rule classification and to the actual considerations that could support the *Miranda* decision rule, bear upon how the *Miranda* doctrine ought to be more fully fleshed out, with regards, for example, to the propriety of an emergency “public safety” exception and the admissibility of fruits of an un-Mirandized statement. These inquiries are of more than academic interest as the Supreme Court will address the scope of the fruits doctrine this very Term,³⁴⁶ while some lower courts have questioned whether the public safety exception to *Miranda* survives *Dickerson*.³⁴⁷ Moreover, this discussion constitutes, in effect, another test of the utility—and therefore the truth—of the conceptualization this Article advances. I will hope to

³⁴⁶ See *Missouri v. Seibert*, 123 S. Ct. 2091 (2003) (granting certiorari to determine whether the *Oregon v. Elstad* rule that a statement elicited during a warned custodial interrogation is admissible despite the fact that the suspect had made an inculpatory statement in a prior unwarned custodial interrogation applies even when the police officer’s failure to issue warnings in the first interrogation was intentional); *United States v. Patane*, 123 S. Ct. 1788 (2003) (granting certiorari to determine whether *Dickerson* overturns the *Elstad-Tucker* doctrine on fruits of un-Mirandized interrogations).

³⁴⁷ See, e.g., *Dyson v. United States*, 815 A.2d 363, 370 n.2 (D.C. 2003) (noting that “at a minimum” *Dickerson* suggests that the *New York v. Quarles* exception be “narrowly construed and strictly applied”); *Allen v. Roe*, 305 F.3d 1046, 1050 n.4 (9th Cir. 2002) (“The rationale supporting *Quarles*’ public safety exception has been, to some degree, called into question by *Dickerson*.”).

show that this particular way of dividing the conceptual terrain offers a more satisfactory defense of *Miranda*'s legitimacy—while more clearly isolating its assumptions and its vulnerabilities—than do other accounts.

A. *The Miranda Doctrine Taxonomized*

As Stephen Schulhofer observed fifteen years ago, criticism of the *Miranda* rule “usually obscures the fact that *Miranda* contains not one holding but a complex series of holdings [that] . . . can be subdivided in various ways.”³⁴⁸ Even today, much confusion remains concerning precisely what *Miranda* held. This Section explicates “the *Miranda* doctrine” by distinguishing two outputs from that case: a constitutional operative proposition containing two discrete elements, and a constitutional decision rule.

1. *The Operative Proposition*

The Fifth Amendment commands that “[n]o person . . . be compelled in any criminal case to be a witness against himself.”³⁴⁹ Everyone agrees that this means, at a minimum, that courts not “compel” defendants upon pain of conviction or contempt sanctions to testify at their trials.³⁵⁰ In contrast, say, to the Fourth Amendment's ban on unreasonable searches and seizures, this is a constitutional

³⁴⁸ Schulhofer, *supra* note 139, at 436. Schulhofer himself carved up the decision as containing “three conceptually distinct steps” or “holdings”: (1) “that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute ‘compulsion’ within the meaning of the fifth amendment”; (2) “that this element of informal compulsion is present in *any* questioning of a suspect in custody”; and (3) “that precisely specified warnings are required to dispel the compelling pressure of custodial interrogation.” *Id.* This analysis has proven influential, see, e.g., Kamisar, *supra* note 58, at 942; George C. Thomas III, Separated at Birth But Siblings Nonetheless: *Miranda* and the Due Process Notice Cases, 99 Mich. L. Rev. 1081, 1083 (2001), and surely has much to recommend it. Its greatest defect, in my opinion, lies in the opacity of the second step. What does it mean for an “element of . . . compulsion” to be “present”? Plainly it does *not* mean that every unwarned custodial interrogation constitutes compulsion “within the meaning of the fifth amendment.” But if the presence of an “element” of compulsion, or (what might be the same thing) the existence of *some* “compelling pressure,” does not itself amount to compulsion in the constitutionally relevant sense, then the justification for step (3) remains unclear.

³⁴⁹ U.S. Const. amend. V.

³⁵⁰ The Court had earlier described the right to remain silent in an official inquiry as necessary to avoid “the cruel trilemma of self-accusation, perjury or contempt.” *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964).

rule directed in the first instance to trial courts, not to the police. The question logically prior to the *Miranda* Court's exploration of the need for specific warnings, accordingly, was whether anything that happens outside of trial could implicate the Self-Incrimination Clause at all. Posing the question as "whether the privilege is fully applicable during a period of custodial interrogation,"³⁵¹ the Court answered in the affirmative. Its first holding, consequently, was "that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning."³⁵²

Unfortunately, this statement is ambiguous. It could mean either (a) that any action by government agents—including police—that compels someone to incriminate herself violates the Self-Incrimination Clause, or (b) that introduction within a criminal case of a defendant's compelled statement violates that Clause even if the statement was compelled outside the formal criminal proceedings.³⁵³ Surely the latter is the better reading. Legal historians have found much to debate about the origins and scope of the privilege against self-incrimination.³⁵⁴ One point on which they agree, however, is that the privilege against self-incrimination was an *evidentiary* privilege.³⁵⁵ The Court's first step, then, was to announce constitutional meaning. The constitutional operative

³⁵¹ *Miranda*, 384 U.S. at 460–61.

³⁵² *Id.* at 461.

³⁵³ The ambiguity has been retained in subsequent characterizations. See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 352 (1985) (Brennan, J., dissenting) (noting that "by the time we decided *Miranda*, it was settled that the privilege against self-incrimination applies with full force outside the chambers of 'formal' proceedings"); Kamisar, *supra* note 58, at 917 ("The *Miranda* Court held that the privilege against self-incrimination applies not only to the proceedings in a courtroom or before a legislative committee, but to the 'informal compulsion exerted by law-enforcement officers during in-custody questioning.'") (quoting *Miranda*, 384 U.S. at 461).

³⁵⁴ Valuable recent contributions include Katharine B. Hazlett, *The Nineteenth Century Origins of the Fifth Amendment Privilege Against Self-Incrimination*, 42 *Am. J. Legal Hist.* 235 (1998); R.H. Helmholz et al., *The Privilege Against Self-Incrimination: Its Origins and Development* (1997); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 *Mich. L. Rev.* 1047 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 *Mich. L. Rev.* 1086 (1994).

³⁵⁵ This was clearly the Court's view when, seventy years before *Miranda*, it first held that the Self-Incrimination Clause barred admission in federal court of extra-judicially compelled confessions. See *Bram v. United States*, 168 U.S. 532, 541–58 (1897).

proposition, that is to say, is a command to trial courts: “Do not admit evidence about statements made by criminal defendants that were in fact compelled by the police.”³⁵⁶

For this statement to be useful, of course, we need some idea of what compulsion means in this context. We need, that is, further elaboration of the operative proposition. Criminal procedure scholars have debated for decades what compulsion does mean, or should mean, or did mean for the *Miranda* Court, and this cannot be the place for a full rehearsal.³⁵⁷ Let us start instead with the Court’s own language. Recognizing that in the three actual cases before it, the Court “might not find the defendants’ statements to have been involuntary in traditional terms,” Chief Justice Warren insisted that

concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate

³⁵⁶ See, e.g., Akhil Reed Amar & Renee B. Lettow, Reply—Self-Incrimination and the Constitution: A Brief Rejoinder to Professor Kamisar, 93 Mich. L. Rev. 1011, 1012 (1995) (“Rogue police can be cruel, barbarous, and uncivilized. Abusive actions in police stations, squad cars, and crime scenes are *themselves* unconstitutional—they are paradigmatic unreasonable searches and seizures under the *Fourth* Amendment. But, if a defendant’s coerced ‘confession’ . . . is never introduced in a criminal case, the *Fifth* Amendment, on our reading, is not violated.”); Strauss, *Miranda*, the Constitution, and Congress, *supra* note 146, at 958 n.8 (“The Fifth Amendment is violated when compelled statements are admitted into evidence against the speaker in a criminal prosecution.”). In a speech delivered after *Dickerson*, Justice Stevens intimated a contrary position. See John Paul Stevens, How a Mundane Assignment Affected My Re-Examination of *Miranda*, 14 Oct. Chi. Bar Ass’n, Rec. 34, 36–37 (2000) (contending that the Fifth Amendment Self-Incrimination Clause “is implicated the moment that custodial interrogation commences” even if the suspect does not say a word). “Implicated” is a sufficiently imprecise word that we cannot be certain just what Justice Stevens means. But if he means that interrogation itself can violate the Clause, I think this is mistaken. The mistake rests, I think, on Justice Stevens’s failure to distinguish due process from self-incrimination constraints on police behavior.

³⁵⁷ A useful overview, including citations to a handful of authorities, appears in 2 Wayne R. LaFare et al., *Criminal Procedure* § 6.2 (2d ed. 1999).

safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.³⁵⁸

This passage is maddeningly enigmatic. Does the Court mean to announce that compulsion for purposes of the Self-Incrimination Clause is not limited to the “traditional” understanding of “involuntariness,” familiar from the Court’s due process jurisprudence? Or is the point that even though the test of compulsion under the Self-Incrimination Clause is the same as the traditional due process test of involuntariness, and even though the Court might not find the statements at issue in the instant cases involuntary, hence compelled, “safeguards” were necessary to protect against involuntary/compelled statements in the future?³⁵⁹ Again, although the question cannot be conclusively resolved, there are good reasons to favor the former reading—including that such a position was urged by petitioners at oral argument.³⁶⁰ Criminal procedure scholars, in any event, have reached a fairly wide consensus. As Schulhofer put it: “[C]ompulsion for self-incrimination purposes and involuntariness for due process purposes cannot mean the same thing.”³⁶¹

³⁵⁸ *Miranda*, 384 U.S. at 457.

³⁵⁹ See, e.g., Welsh S. White, *Miranda’s Waning Protections: Police Interrogation Practices After Dickerson* 56 (2001) (noting this ambiguity).

³⁶⁰ Victor Earle, counsel in one of the *Miranda* companion cases, readily conceded at oral argument that there was “no sense” in which his client’s confession was coerced. Instead, he urged attention to “a substantial difference between” Fifth Amendment compulsion and “coercing a confession,” which latter concern he attributed “to the generality of the totality of the circumstances under the due process clause.” “It is true,” he continued, “that the word ‘compel’ is used in the Fifth Amendment with respect to the privilege, but it is quite different to say that the privilege is cut down and impaired by detention and to say a man’s will has been so overborne a confession is forced from him.” Yale Kamisar et al., *Modern Criminal Procedure: Cases-Comments-Questions* 461 (10th ed. 2002) (quoting from unofficial transcripts of oral argument).

³⁶¹ Schulhofer, *supra* note 139, at 443. For an extended recent argument, see Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 Mich. L. Rev. 941, 943–51 (2001) [hereinafter Schulhofer, *Puzzling Persistence*]; see also, e.g., Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 Mich. L. Rev. 59, 65–82 (1966); LaFare, *Constitutional Rules*, *supra* note 115, at 858 (“[W]hat the Constitution protects against is not merely the more gross technique of police interrogation commonly the focus of attention under the old due process ‘voluntariness’ test . . . but also other circumstances which produce ‘compulsion’ in the fifth amendment sense.”); Ritchie, *supra* note 69; Stone, *supra* note 69, at 118 (con-

Assuming this is so, we need to know what the difference is. The Court's due process cases were themselves far from pellucid, resorting as they did to such empty metaphors as the famous "overborne will."³⁶² Still, the root idea was adequately discernible. Most historians agree that the common law ban on "involuntary" confessions was principally driven by a concern to exclude confessions thought likely to be unreliable. However, the Supreme Court refused to fix the privilege on such a narrow base, candidly explaining six years before *Miranda* that "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary."³⁶³ And, according to Joseph Grano, "most commentators" have concluded that this complex of values fundamentally reduces to two: "(1) a desire, surviving from the common-law approach, to eliminate untrustworthy confessions and (2) a desire to control offensive police practices."³⁶⁴ On the assumption that self-incrimination compulsion is more expansive than due process voluntariness, it follows that a statement may not reflect a "truly . . . free choice," hence is "compelled," even if the magnitude of pressure exerted by the police

tending that the *Tucker* Court's "conclusion that there is a violation of the Self-Incrimination Clause only if a confession is involuntary under traditional standards is an outright rejection of the core premises of *Miranda*"; Thomas, *supra* note 348, at 1086–87 (arguing that the "due process protection . . . the *Miranda* Court thought it was creating . . . substitut[ed] . . . Fifth Amendment 'compulsion' for due process 'coercion' as the relevant inquiry"). Strauss may be mistaken, therefore, in assuming that, to make adequate sense of *Miranda*, the notions of due process voluntariness and self-incrimination compulsion "can be equated." Strauss, *Miranda*, the Constitution, and Congress, *supra* note 146, at 962; see also Susan R. Klein, Essay, No Time for Silence, 81 *Tex. L. Rev.* 1337, 1344 (2003) ("Regardless of whether the Court frames the issue as one of due process or privilege, the voluntariness test and the condemnation of coercive police practices should be identical.").

³⁶² This formulation was introduced in *Chambers v. Florida*, 309 U.S. 227, 239–40 (1940). The classic criticism is Yale Kamisar, What is an "Involuntary" Confession? Some Comments on Inbau and Reid's *Criminal Interrogation and Confessions*, 17 *Rutgers L. Rev.* 728, 755–59 (1963); see also, e.g., Grano, Confessions, *supra* note 77.

³⁶³ *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

³⁶⁴ Grano, Confessions, *supra* note 77, at 65; see also, e.g., White, *supra* note 359, at 39–48; Kamisar, *supra* note 362. One treatise identifies a third value of protecting the dignity of criminal defendants by excluding statements secured under circumstances, even if not involving inherently obnoxious police practices, that significantly constrained the individual's freedom of choice. 2 LaFare et al., *supra* note 357, at 446. As will be seen, I suggest that *Miranda* makes most sense as treating the two concerns identified by Grano to undergird the due process "involuntariness" test, while locating something like this third concern only in the Self-Incrimination Clause.

was not so great as either to provoke worries that a resulting confession would be unreliable or to constitute a morally offensive police practice.³⁶⁵ Regardless of whether this would present an attractive or persuasive vision of what represents (in an inescapably evaluative assessment) adequate freedom, it is a perfectly coherent position to maintain.³⁶⁶

³⁶⁵ In speaking of degrees of pressure, I am ignoring other circumstances, most notably (but perhaps not exclusively) deception on the part of the police, that might be thought to render subsequent admission of a resulting statement unconstitutional on either due process or self-incrimination grounds. For a characteristically careful examination of this problem, see George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 Wash. U. L.Q. 275. My sense, which I will not defend, is that deception can make out a due process violation but should not constitute compulsion for self-incrimination purposes. See, e.g., *State v. Patton*, 826 A.2d 783 (N.J. Super. Ct. 2003).

³⁶⁶ For just one illustration of how this could be, consider Harry Frankfurt's well-known theory of freedom grounded in the distinction between first- and second-order desires. Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in *The Importance of What We Care About* 11–25 (1988). Very roughly, Frankfurt argues that a person's choice is free when it issues from a first-order desire that is itself consistent with a second-order desire. If I eat a second piece of cheesecake without anyone having pressured me to do so, that is a free choice in one sense: it is consistent with my first-order desires. But I may not really want to have that second piece. Indeed, even as I reach for it, I may know that I do not "really" want it. I may, in Frankfurt's terms, have a second-order desire that I not have the first-order desire on which I act. When my action is consistent with a first-order desire that is itself not consistent with my second-order desires, that action may plausibly be said not to be "truly free" or to lack "free will." See, e.g., *id.* at 18 (contending that a drug addict who takes a drug in conformity to a first-order desire under circumstances in which his second-order desire is that he not act on that first-order desire "may meaningfully make the analytically puzzling statements that the force moving him to take the drug is a force other than his own, and that it is not of his own free will but rather against his will that this force moves him to take it"). It is not important for present purposes whether an account of free will along these lines can provide a successful response to the threat of determinism, as Frankfurt claimed for it. For doubts, see, for instance, Gary Watson, *Free Agency*, 72 J. Phil. 205 (1975). The point is only that it provides an account of free choice by which a choice can be unfree even if the phenomenology of the experience is such that the agent would not conclude that she "had no choice" or that her will was "overborne." In short, it illustrates how a statement can be not "truly the product of free choice" without being "involuntary." And it does so by conceptualizing human choice and action in a way that gives some content or substance to the Court's evident (if largely unarticulated) intuition that differences in the magnitude of pressure a person experiences translate into a more nuanced range of normatively meaningful distinctions than is implied by recourse to a simple pair of opposites such as "free" and "unfree," or "voluntary" and "involuntary," and that does not depend upon attributions of wrongful conduct by others. It is therefore a plausible candidate for the account of freedom at work in *Miranda*. Indeed, I think it plausible (though

This is not to say that every incriminating statement that is not “truly free” is compelled within the meaning of the Self-

not at all essential) that the *Miranda* Court did in fact have an image of true freedom something like this inchoately in mind. See, e.g., *Miranda*, 384 U.S. at 458 (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”); *id.* at 467 (“[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”).

Grano thinks such an account untenable. In his view, it is impossible to avoid

[t]he unremarkable conclusion that the Fifth Amendment, if properly applied to police interrogation at all, prohibits coerced or involuntary confessions. That is, in the context of police interrogation, to “compel” a suspect to become a witness against himself can only mean to “coerce” a suspect to become a witness against himself.

Grano, *Confessions*, *supra* note 77, at 135; see also Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 *Mich. L. Rev.* 662, 684 (1986) (arguing that due process “voluntariness” and self-incrimination “compulsion” can each “be understood only as a synonym for coercion”). Furthermore, Grano argues that the concept of “coercion” necessarily entails “a claim that the alleged coercer engaged in wrongful conduct.” Grano, *Confessions*, *supra* note 77, at 99. Grano grounds this latter assertion on an important analysis of coercion by the philosopher Alan Wertheimer. See generally *id.* at 64–69; Alan Wertheimer, *Coercion* (1987). Wertheimer’s insightful and illuminating analysis has influenced my own views on coercion. See Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *Legal Theory* 45 (2002). Nonetheless, that analysis does not support Grano’s attempt to equate compulsion and coercion. As the Frankfurt example illustrates, there is no reason why a view of what constitutes the normatively adequate freedom of party *A* must be cashed out by reference at all to the wrongful character of the behavior engaged in by some other party, *B*. That is, we could conclude that *A*’s conduct was “compelled” by *B*’s conduct because (1) *B*’s conduct had some specified sort of causal relationship to *A*’s conduct, and (2) *A*’s conduct was not sufficiently free in the sense of not cohering adequately with *A*’s higher-order wants, or not being adequately integrated with more stable characteristics of her personality, without believing that such a conclusion entails that *B*’s conduct warrants criticism.

Still, we need not press this objection to Grano too strenuously. For even while arguing that the two clauses *should* be interpreted to prohibit the very same police pressures, Grano, *Confessions*, *supra* note 77, at 131–41, Grano agrees that the *Miranda* Court took the view “that *coercion* for Fifth Amendment purposes should be a less demanding concept than *coercion* for due process purposes and that, accordingly, *involuntariness* should have different meanings under the two amendments.” *Id.* at 135. Put another way, he does not deny that we could—and that the Court did—“regard police practices as wrongful under the Fifth Amendment [Self-Incrimination Clause] that would be insufficiently wrongful to make out a due process claim of involuntariness.” *Id.* at 138.

Incrimination Clause.³⁶⁷ If I walk into the local police precinct determined to confess to a particular crime, my decision to do so could be not “truly free” in the Court’s normatively freighted sense because, say, I’m in the grip of an uncharacteristically melancholic or self-hating mood or because I’m responding to pressures exerted by private third parties. Yet it seems extraordinary to conclude that that fact alone would make my statement compelled for constitutional purposes.³⁶⁸ A second condition, then, must be that the state has somehow brought pressure to bear for the purpose of eliciting a statement. If this is right, then an out-of-court statement is compelled for Self-Incrimination Clause purposes (according to the *Miranda* Court) if two conditions are satisfied: The statement must be not “truly free” in the sense that it issues from psychological pressures incompatible with the Court’s vision of appropriate freedom or dignity, and it must have been elicited by police pressure exerted for the specific purpose of overcoming the suspect’s unwillingness to talk.³⁶⁹

³⁶⁷ However, it does entail that *refusals* to confess (just like confessions themselves) can be “not truly free,” for a first-order desire not to confess might be inconsistent with a second-order desire that one be the sort of person who accepts responsibility. This observation (for which I am grateful to Larry Alexander) does not undermine my effort to supply a possible conceptual grounding for the *Miranda* Court’s apparent view that Fifth Amendment compulsion need not collapse into due process involuntariness, see *supra* note 366, but it might draw even further into question the soundness of the Court’s impulse to interpret compulsion in terms of something as broad as “true freedom.” Very possibly too much of noncoerced human conduct is not “truly free” to make that latter concept a plausible constitutional touchstone.

³⁶⁸ Cf. *Colorado v. Connelly*, 479 U.S. 157 (1986) (holding that a statement is “involuntary” for due process purposes only when the product of coercive police activity); *Miranda*, 384 U.S. at 535 (White, J., dissenting) (arguing that there is “no rational foundation” to conclude that “accused persons [are] so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will”).

³⁶⁹ See, e.g., *id.* at 457 (explaining that the “interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity”). I am therefore agreeing with Schulhofer that “[t]he policy served by the [Self-Incrimination Clause] is not limited to preventing inhuman degradation or breaking the will, but extends to all governmental efforts intended to pressure an unwilling individual to assist as a witness in his own prosecution,” Schulhofer, *supra* note 139, at 445, yet claiming that he overlooks this critical first condition when contending that “pressure imposed for the *purpose* of discouraging the silence of a criminal suspect constitutes prohibited compulsion whether or not it ‘breaks the will.’” *Id.* Such a statement is compelled only when the

2. *The Decision Rule*

Once this first holding of *Miranda* is properly understood we are better positioned to appreciate its second holding—the holding that, I will claim, announced a constitutional decision rule.

a. *The Rule Itself and a Common Misconception*

Casual references to the *Miranda* decision, by courts and academics alike, frequently characterize it as requiring police to issue the warnings. Kenneth Starr, for example, explained in a recent book that *Miranda* announced “the new rule . . . that police must give a person in custody certain warnings about his or her rights.”³⁷⁰ Certainly snippets from the majority opinion can be read to support this view. For example, the Court’s declaration that, “[i]n order to combat these [inherently compelling] pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored,”³⁷¹ appears to order police officers to issue the specified warnings prior to interrogating a suspect. This reading gains additional support from Justice Clark’s separate opinion where he describes the Court as “fashion[ing] a constitutional rule that the police may engage in no custodial interrogation without . . . advising

state imposes pressure for the forbidden purpose *and* when the statement is not, in fact, “truly free.”

³⁷⁰ Kenneth W. Starr, *First Among Equals: The Supreme Court in American Life* 193 (2002). Judge Friendly’s influential critique of *Miranda* likewise characterizes the decision as “forbid[ding] the police” from questioning suspects “without first endeavoring to make it likely that they will not be answered.” Friendly, *supra* note 52, at 277. For a large number of similar examples, see Steven D. Clymer, *Are Police Free to Disregard Miranda*, 112 *Yale L.J.* 447, 449 n.4 (2002); see also, e.g., *Withrow v. Williams*, 507 U.S. 680, 706 (1993) (“*Miranda*’s innovation was its introduction of the warning requirement: It commanded the police to issue warnings (or establish other procedural safeguards) before obtaining a statement through custodial interrogation.”); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (“*Miranda*, of course, required police interrogators to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments and set forth a now-familiar set of suggested instructions for that purpose.”); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (“*Miranda*’s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation.”).

³⁷¹ *Miranda*, 384 U.S. at 467; see also *id.* at 471 (stating that the warnings are “an absolute prerequisite to interrogation”).

the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him.”³⁷²

Were this requirement part of the *Miranda* doctrine, it would not be a decision rule. Perhaps it would be an operative proposition—though one of dubious legitimacy. Or perhaps recognition of doctrinal rules of this sort would provoke further taxonomic line-drawing. But it is unnecessary to speculate because reliance on these stray passages is misplaced. Any apparent commands to the police are much better construed to offer only *conditional* guidance: Give these warnings, the Court’s opinion advises, *if you want subsequent statements to be admissible*.

To begin, “[t]he constitutional issue” that called for decision concerned precisely “the admissibility of statements,” and not the propriety of their extraction.³⁷³ Yet more important is the language Chief Justice Warren uses whenever the lengthy majority opinion pauses to offer what looks like more formal statements of its holding. In the opinion’s introduction, for example, the Court encapsulates the holding thusly: “[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”³⁷⁴ This rule from *Miranda*, accordingly, would be addressed to the trial courts, not

³⁷² Id. at 500 (Clark, J., dissenting in part, and concurring in part).

³⁷³ Id. at 445.

³⁷⁴ Id. at 444 (emphasis added). And after spelling out the required warnings in detail, the Court summarizes the holding in even plainer terms: “[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant].” Id. at 479. To be sure, this articulation of the holding differs from the one quoted in text in one significant respect: Whereas the latter makes only the unwarned statement itself inadmissible, this seems to require suppression of the unwarned statement as well as any fruits thereof. For present purposes, though, the important point is only that these two formal pronouncements similarly resolve the ambiguity of whether the *Miranda* doctrine constrains courts or police; how best to resolve the *new* ambiguity that they combine to create is reserved for later. See *infra* Section V.D.3. As far as interpreting *Miranda* itself, though, I agree with Judge Friendly that this passage “can be better read as referring only to the statements themselves, which are repeatedly mentioned in the opinion, rather than as disposing of so large an issue in so casual a fashion.” Friendly, *supra* note 52, at 279.

the police—just like the operative proposition itself.³⁷⁵ It is a direction that they must not admit any statements given during custodial interrogation unless the statements were preceded by the specified warnings and their protections waived.³⁷⁶ Appropriately, then, *Dickerson* itself begins: “In *Miranda* . . . we held that certain warnings must be given before a suspect’s statement made during custodial interrogation could be admitted in evidence.”³⁷⁷

³⁷⁵ This is the core thesis of Clymer, *supra* note 370, and a point that several earlier commentaries had also taken pains to make clear. See, e.g., *infra* note 377; Susan R. Klein, *Miranda* Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide, 143 U. Pa. L. Rev. 417 (1994). Understanding that the doctrine that *Miranda* created as a means of implementing its interpreted meaning of the Self-Incrimination Clause is not an order to the police to give the specified warnings prior to subjecting any suspect to custodial interrogation, but rather, an instruction to the trial courts not to admit certain custodial statements into evidence, has practical consequences. It is precisely this distinction between *Miranda* as a rule governing the admission of evidence and as a rule commanding behavior by police that led the Court to hold just last term that the mere fact of an un-Mirandized interrogation gives suspects no legal claim against the police interrogators. *Chavez v. Martinez*, 123 S. Ct. 1994, 2003–04 (2003). For a thorough discussion of the pre-*Chavez* case law, see Clymer, *supra* note 370, at 486–93.

³⁷⁶ According to Schulhofer, “the heart of *Miranda* . . . lies not so much in the famous warnings as in the cut-off rule—that if at any time the suspect indicates a desire to remain silent, all questioning must cease.” Schulhofer, *Puzzling Persistence*, *supra* note 361, at 954.

³⁷⁷ *Dickerson*, 530 U.S. at 431–32. In his dissent, though, Justice Scalia vacillated between these two readings of *Miranda*, compare, e.g., *id.* at 446 (criticizing the majority for not straightforwardly announcing “that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States”), with *id.* at 447 (describing, as “the fairest reading of the *Miranda* case itself,” “the proposition that . . . the admission at trial of un-Mirandized confessions . . . violates the Constitution”), thus provoking some commentators to chide him for ignoring the difference. “[E]ven under *Miranda*,” Strauss explained, “what the Constitution (arguably) prohibits is the admission into evidence obtained by custodial interrogation without warnings. It seems doubtful that questioning a suspect in custody without warnings would violate the Constitution if the statements were never used as evidence, unless the interrogation were in some other way abusive.” Strauss, *Miranda*, the Constitution, and Congress, *supra* note 146, at 958–59 n.8; see also, e.g., Craig M. Bradley, Supreme Court Review behind the *Dickerson* Decision, 36 JTLA 80, 81 (Oct. 2000) (characterizing the *Miranda* right as a trial right, not a right during interrogation). As already indicated, Strauss’s point that *Miranda* is addressed to courts, not cops, is right and important. The references, though, to “what the Constitution . . . prohibits” and what “would violate the Constitution” are inconsistent with my thesis that the *Miranda* warnings are part of the constitutional decision rule, not part of the operative proposition. They are entirely consistent, however, with the anti-taxonomic thrust of “The Ubiquity of Prophylactic Rules.”

b. The Rationale

But why? On this score the Court is reasonably clear. At the very beginning of its analysis the Court cautions that “[a]n understanding of the nature and setting of . . . in-custody interrogation is essential to our decisions today.”³⁷⁸ The critical feature, of course, is that “[i]nterrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”³⁷⁹ And because courts cannot know what has occurred in the interrogation, they cannot know whether the resulting statement was compelled. This would be true no matter how compulsion were defined. But the Court’s expansive construal of what compulsion means exacerbated the difficulty in determining, on a case-by-case basis, whether any given statement had in fact been compelled. Some statements would be truly free, some would not be, and a trial court’s answer would be little better than a guess.³⁸⁰

Under circumstances like these, how can a tolerable degree of adjudicatory accuracy be achieved? One obvious answer would be to presume all custodial statements to be compelled. If interrogation exerts the sort of pressures *likely* to elicit incriminating statements that are not “truly free,” and if the accuracy of case-by-case inquiries is close to random, then courts might maximize right answers simply by presuming all such statements to have been compelled hence inadmissible. Sure, such a decision rule would yield many false positives, but conceivably fewer than the sum of false positives and false negatives generated by a simple preponderance decision rule. The Court did not adopt this solution, and sought instead to reduce the “inherently compelling”³⁸¹ character of the interrogation. That is precisely what the warnings are supposed to do by making suspects aware that they may remain silent or ask for an attorney, and that the police know it.³⁸² The hope was that issuance of the warnings would reduce the proportion of custodial state-

³⁷⁸ *Miranda*, 384 U.S. at 445.

³⁷⁹ *Id.* at 448.

³⁸⁰ This was a common criticism of pre-*Miranda* efforts to determine whether an out-of-court confession was “involuntary” for due process purposes. See, e.g., *Developments in the Law—Confessions*, 79 *Harv. L. Rev.* 935, 954–84 (1966).

³⁸¹ *Miranda*, 384 U.S. at 467.

³⁸² See *id.* at 467–79.

ments that were compelled (in what the Court took to be the constitutionally relevant sense), *thereby making it plausible to suppose that a trial court could achieve greater adjudicatory accuracy by investigating compulsion case by case than by globally presuming it.*³⁸³ In other words, the Court had concluded that trial courts would minimize errors in the adjudication of the constitutional operative proposition by (a) conclusively presuming that a given out-of-court statement was compelled if it was given in a custodial setting without the benefit of warnings, and (b) assessing case-by-case via a preponderance standard whether other out-of-court statements (non-custodial or custodial-but-warned) were compelled.³⁸⁴ This is a complex rule instructing courts how to proceed so as to minimize adjudicatory error. Notwithstanding its unusual form, conceptually speaking it is a quintessential decision rule.

Critics, and even some supporters, often describe the genesis of the *Miranda* doctrine in alternative, or additional, terms as “de-

³⁸³ A very first cut at formalizing these assumptions would go something like this. Let S_i be the set of (possibly inculpatory) custodial statements in a pre-*Miranda* world; C_i is the set of such statements that were compelled (in the constitutionally relevant sense); and F_i is the set of such statements that were not compelled (in the constitutionally relevant sense), hence (in the constitutionally relevant sense) free. $S_i = C_i + F_i$.

Let the courts' accuracy rate in determining (by application of the more-likely-than-not decision rule) whether any given statement was compelled or free be $.x$ ($.x > .5$). Let $C_i/S_i = .y$. If $.y > .x$, then adjudicatory accuracy would be higher if courts conclusively presume any given statement to have been compelled than if courts try to ascertain whether the statement is compelled or free on a case-by-case basis.

If police issue warnings, then we may suppose that possibly inculpatory custodial statements decrease, and, furthermore, that both sorts of statements decrease—compelled and free. Thus: $S_1 > S_2$; $C_1 > C_2$; $F_1 > F_2$. Very possibly, though, the issuance of warnings results in a proportionally larger reduction of compelled statements than of free statements. If so, $C_2/S_2 = .z$, where $.y > .z$. If $.x > .z$, then the *Miranda* decision rule reduces adjudicatory accuracy relative both to case-by-case adjudications under the more-likely-than-not decision rule and to a decision rule that conclusively presumes all custodial statements to have been compelled.

This is, to be sure, a simplified and imprecise model. To note just one source of simplification, it does not incorporate errors in adjudicating whether the *Miranda* strictures were complied with. However, greater formalization would not, at this point, be worth the candle. I aim only to explicate a little more clearly the basic assumptions that support reading the *Miranda* decision rule as designed to minimize adjudicatory error.

³⁸⁴ As several scholars have observed, this second part of the rule has been ignored in practice. See, e.g., Klein, *supra* note 115, at 1070 & n.184 (citing other commentators).

signed to deter potential police overreaching.”³⁸⁵ Because a decision rule’s legitimacy is likely to be most secure insofar as it is designed to reduce adjudicatory error, and because *Miranda*’s correct doctrinal consequences (i.e., the proper outcomes in its progeny) should depend upon the reasons that undergird it, some thoughts on this claim are warranted.³⁸⁶

Even assuming, as I argue and as the Court’s recent decision in *Chavez v. Martinez*³⁸⁷ supports, that the decision rule is addressed to courts and not to cops, there is no reasonable doubt that it is intended to affect police behavior. The *Miranda* majority expected and hoped that police officers wanted inculpatory statements to be admitted and would, therefore, issue the warnings (and respect their invocation by suspects). So it would be foolish to assert that the *Miranda* Court was indifferent as to whether cops issued the warnings. Naturally, the Court wanted the cops to issue them. The *Miranda* doctrine is, as Grano says, “forward-looking.”³⁸⁸

³⁸⁵ Monaghan, *supra* note 4, at 20 n.105; see also, e.g., Paul G. Cassell, The Costs of the *Miranda* Mandate: A Lesson in the Dangers of Inflexible “Prophylactic” Supreme Court Inventions, 28 Ariz. St. L.J. 299, 300 (1996) (“[T]he *Miranda* mandate is not a constitutional requirement. Rather, the Court has held specifically that *Miranda* rules are only ‘safeguards’ whose purpose is to reduce the risk that the police will violate the Constitution during custodial questioning.”). Supreme Court Justices have often described *Miranda* in these terms. Strauss, *Miranda*, the Constitution, and Congress, *supra* note 146, at 968 (explaining “another of the problems *Miranda* sought to avoid” was creating incentives for the police “to try to coerce incriminating statements by subtle, undetectable means”); Strauss, *supra* note 38, at 200 (describing “the *Miranda* rules [as a] relatively rigid doctrine[] designed to reduce the likelihood that . . . the police . . . will violate the law, and designed to improve a reviewing court’s chances of identifying violations when they occur”). See, e.g., *infra* note 452 (discussing *Elstad* and *Tucker*).

³⁸⁶ I am grateful to Yale Kamisar and Susan Klein for pressing me on this point.

³⁸⁷ 123 S. Ct. 1994, 2003–04 (2003); see *supra* note 375.

³⁸⁸ According to Grano, “[w]hether or not a rule is prophylactic depends entirely on how the Court describes the rule and its underlying rationale.” See Grano, *supra* note 70, at 111. In particular, a rule is prophylactic if it is designed either “to establish understandable per se rules for [governmental agents] to follow” or to overcome “the difficulty of detecting constitutional violations on a case-by-case basis.” *Id.* at 105. Put another way, “A prophylactic rule may be intended to insure either that constitutional violations will not occur in the future or that a constitutional violation did not occur in the case before the court.” *Id.* at 105 n.22. Although Grano treats both of these interests as amounting to prophylactic rules, it is telling that he distinguishes between the two for purposes of legitimacy, noting, in particular, that “[f]orward-looking prophylactic rules raise the most difficult legitimacy questions.” *Id.*

Whether this means that the decision rule was designed “to reduce police overreaching,” however, necessarily depends on what police overreaching is taken to mean. If it refers to police behavior that violates the Constitution, then *Miranda* is not designed to reduce police overreaching. *Miranda* is presented entirely as a decision giving effect to the Self-Incrimination Clause, not the Due Process Clause. And the police just cannot violate the Self-Incrimination Clause, no matter how hard they try. If, on the other hand, “police overreaching” is shorthand for “police behavior that compels suspects to confess,” then *Miranda* was designed to reduce police overreaching. As I have conceived and defended it, the *Miranda* decision rule could plausibly minimize adjudicatory error (relative to doctrines that would administer the Court’s announced operative proposition either by means of a simple more-likely-than-not decision rule or by means of a conclusive presumption that all custodial statements were compelled) only on the assumption that it would result in fewer statements having been compelled.

It seems, then, that I am endorsing the view that the decision rule was designed for two purposes: to minimize adjudicatory error and to reduce “police overreaching” (in this narrow stipulated sense). In fact, however, I believe that is a very misleading description. It is misleading because it implies the wrong sort of relationship between these two purposes.

At bottom, the question is whether these purposes are independent or causally linked. Consider the institution of criminal punishment. Some people (call them “mixed theorists”) believe that it can be explained or justified as serving two purposes: to make criminals suffer and to deter the commission of crimes. Others will dispute this. No, they may say, punishment is justified only for the purpose of deterring crime.³⁸⁹ Now, one could say that these two camps do not disagree: Surely the deterrence theorists recognize that general deterrence would be served only if persons considering crime believe that punishment inflicts suffering and, moreover, that specific deterrence requires that those who are pun-

³⁸⁹ Obviously, this is a brutally oversimplified characterization of debates over the justificatory theories of punishment. The caricature is nonetheless adequate to illustrate the instant point.

ished do in fact experience the punishment as a form of suffering. Therefore, despite their protests to the contrary, the deterrence theorists, like the mixed theorists, endorse, as a purpose of punishment, that criminals be made to suffer.

One *could* say this. But it would miss the critical point of distinction, which is that the mixed theorists believe that punishment serves two independent purposes—the infliction of deserved suffering and the deterrence of crime—whereas our deterrence theorists believe that the infliction of suffering is only a mediate purpose in service of the more ultimate purpose of deterring crime. Moreover, it is comfortable and familiar to capture this distinction just as our deterrence theorist has—namely, that she, unlike her opponents, does not describe or justify punishment as serving the purpose of inflicting suffering.

With this contrast in mind, we should want to know whether the *Miranda* decision rule is designed to encourage police not to compel statements only as a means to achieve the end of increasing adjudicatory accuracy or, instead, as an end in itself (by which we are likely to mean, rather, that it is a means in a distinct causal chain).

There are powerful reasons, I think, to believe that the former characterization is more apt. To appreciate the first reason, suppose that, even pre-*Miranda*, courts were very good at identifying which custodial statements were compelled and which were not. If so, then as far as adjudicatory accuracy were concerned, there would be no reason to require warnings as a precondition for admissibility. In contrast, there *would* remain a reason to require the warnings if deterring cops from securing compelled statements was an independent goal. Put another way, if deterring police overreaching were an independent goal then there would have been no reason for the *Miranda* Court to observe that trial courts were not good at sorting the compelled from the not compelled because the doctrine that the Court ultimately announced would be justified even were the case otherwise. Therefore, the heavy emphasis that the Court placed on trial courts' inability to determine station-house compulsion on a case-by-case basis is itself evidence that deterring police overreaching was *not* an independent purpose for the warnings rule but only a *means* to ensure greater adjudicatory accuracy. More fundamentally, it is hard to see what warrant the Court would have to seek to reduce compulsion by the police if

such behavior (contrasted, it must be recalled, with coercion by the police, which *is* a violation under the Due Process Clause) does not violate the Constitution, and if courts can do a constitutionally adequate job of determining, after the elicitation of a given statement, but before its admission, that the statement was compelled.

For these two reasons, I conclude that “detering police overreaching” is best understood only as a mediate purpose in service of the more ultimate purpose of increasing adjudicatory accuracy. It is the latter objective that determines the doctrine’s legitimacy, and contribution to that latter objective is the touchstone by which *Miranda*’s progeny should be measured. In short, then, it will be most perspicuous to continue to maintain that the *Miranda* decision rule is designed to reduce adjudicatory error—i.e., to improve the accuracy of judicial determinations of facts made relevant by constitutional meaning—even while understanding that it does so by the particular means of reducing the occasions on which prosecutors seek to introduce against a defendant statements that had been compelled by the police, by the means of reducing the incidence of police-compelled statements, by the means of inducing police to warn suspects of their rights.³⁹⁰ To characterize the *Miranda* doctrine as resting on deterrent considerations as opposed to, or more than, adjudicatory ones likely reflects the misapprehension that some aspect of the *Miranda* doctrine (either operative proposition or decision rule) is directed to the police.³⁹¹

³⁹⁰ Compare this explanation for the *Miranda* warnings from a unanimous Burger Court:

The purposes of the safeguards prescribed by *Miranda* are [1] to *ensure* that the police do not coerce or trick captive suspects into confessing, [2] to relieve the “inherently compelling pressures” generated by the custodial setting itself, “which work to undermine the individual’s will to resist,” and [3] as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary.

Berkemer v. McCarty, 468 U.S. 420, 433 (1984) (brackets added) (internal citations omitted). This looks like at first blush like three independent rationales. But that is quite misleading. Rather, by reducing the “inherently compelling pressures” of custodial interrogations, the warnings make it less likely that a custodial statement will have been the product of coercion, thereby making judicial determinations of whether particular confessions were voluntary more likely to be correct than they otherwise would be.

³⁹¹ That is so if the “deterrent considerations” that the speaker has in mind are akin to an interest in discouraging police overreaching. But we can introduce yet a further complication: Although the doctrine is not most usefully understood as designed to

B. Prophylactic Decision Rules? Understanding Overprotection

Supposing the argument of Section V.A is correct, does *Miranda* announce a “prophylactic rule?” To reiterate a point made earlier,³⁹² although the answer depends on precisely which of the many possible definitions of “prophylactic rule” we choose, for present purposes the choice is made for us. Justice Scalia, following Grano, argued in *Dickerson* as follows: (1) *Miranda* employed a prophylactic rule; (2) prophylactic rules are illegitimate; (3) therefore, *Miranda* employed an illegitimate rule. The present question, then, is whether the *Miranda* decision rule is a “prophylactic rule” *in any sense of that term that would make the argument sound*.

As already described, the proponents of this syllogism define a prophylactic rule as a judge-made rule that “overenforces” or “overprotects” judge-interpreted constitutional meaning. Thus a

deter undesirable police behavior, it necessarily *is* intended to deter constitutional violations. Many constitutional commands apply to non-judicial actors (legislators and executive agents) and the judiciary sits in judgment. As Hans Linde observed, “the Constitution is addressed to government, and concerns judges only as a consequence.” Linde, *supra* note 258, at 255. But the Self-Incrimination Clause, like much in the Fifth through Eighth Amendments, governs the conduct of courts in the first instance. It is a conditional directive to trial courts that takes (roughly) the following form: “if a criminal defendant’s extra-judicial statement was compelled, then do not admit it into evidence against him.” If, as I have just argued, the *Miranda* decision rule is designed to reduce adjudicatory errors, the reduction of adjudicatory errors is itself designed, in this context, to reduce constitutional violations. Furthermore, the very same reasoning that leads me to conclude that we should view the *Miranda* decision rule as designed to serve the (relatively ultimate) purpose of minimizing adjudicatory error rather than the (more mediate) purpose of deterring police overreaching should entail that we do even better by viewing the rule as designed to serve the (yet more ultimate) purpose of preventing constitutional violations.

I am going to resist this logic. *Every* doctrine designed to reduce errors in the adjudication of constitutionally relevant facts is also designed to reduce constitutional violations whenever the erroneous judicial findings sought to be reduced constitute predicates for some sort of constitutional violation—i.e., with respect to all constitutional provisions that govern the conduct of courts in the first instance. In a case of that sort the causal relationship between “reducing adjudicatory error” and “reducing constitutional violations” is necessary, not contingent. More particularly, then, any device designed to reduce a trial court’s erroneous determinations that a particular statement was not compelled is designed, ipso facto, to reduce the incidence of unconstitutional admissions of compelled statements. So to say that the *Miranda* decision rule is designed to reduce the introduction, in violation of the Self-Incrimination Clause, of “compelled” statements is *less* revealing than characterizing it as serving purposes that I have labeled adjudicatory.

³⁹² See introduction to Part II, *supra*.

decision rule is a prophylactic rule if it overenforces or overprotects its corresponding operative proposition. What I'd like to point out here is that, if constitutional doctrine is divided into operative propositions and decision rules, the notion of overprotection is surprisingly complex. What can it mean for a decision rule to overenforce or overprotect an operative proposition?

One possible understanding of "overenforce" is to enforce "too much." On this view, a decision rule overenforces its operative proposition if its application yields "too many" erroneous legal judgments that the operative proposition has been violated. But "too many" by what standard or by whose lights? Obviously, the content of "too many" cannot be merely "more than would be legitimate," for we would then need to know the standard of legitimacy. Premise (2) above is just tautological if "prophylactic rule" is defined as a rule that results in more false positives in the adjudication of operative propositions than would be legitimate. Put another way, if judgments of appropriateness or legitimacy are incorporated *by definition* into the concept of "prophylactic rule," then Justice Scalia's argument that the *Miranda* doctrine is illegitimate *because* it is a prophylactic rule becomes vacuous.

So here is a second candidate for the baseline against which claims of "overenforcement" are to be measured: A decision rule overenforces its operative proposition (hence is a prophylactic rule) if application of the decision rule yields more false positives in adjudication than would adjudication of the operative proposition by the "preponderance of the evidence" decision rule. We could define prophylactic rules in this way. But then we would need an argument to establish that overenforcement as measured against this baseline is illegitimate. Two sorts of claims seem most likely. The first is that it is illegitimate for the courts to adopt any decision rule for a specific context that is likely to yield more false positives *or* more false negatives in judicial administration of the corresponding operative proposition than would the preponderance decision rule but must, instead, rely on a globally applicable preponderance decision rule. But this claim is virtually equivalent to (and more straightforwardly expressed as) the claim that courts lack legitimate power to create decision rules. Although such a

claim is not demonstrably false, it seems exceedingly implausible.³⁹³ The second claim is the slightly narrower one that it is illegitimate for courts to adopt any decision rule that is likely to yield more false positives in judicial administration of the corresponding operative proposition than would the preponderance standard even though courts may adopt a decision rule likely to yield more false negatives than the preponderance standard. In other words, a decision rule can legitimately underenforce relative to the preponderance decision rule but not overenforce relative to the preponderance decision rule. This position is a logically coherent position, but the path toward a successful defense of such an asymmetry will be far from smooth.³⁹⁴

Consider a third possibility: A decision rule is a prophylactic rule if it results in more total adjudicatory errors than would the preponderance standard. To say that this is what a prophylactic rule means (or, more precisely, what a prophylactic decision rule means) in the context of a broader argument that such rules are illegitimate, is just to maintain that courts may not create decision rules for reasons other than minimizing adjudicatory error. This strikes me as just the sort of proposition about which reasonable people could disagree, and just the sort of disagreement for which the operative proposition/decision rule distinction is intended to clear space.³⁹⁵

Unfortunately for *Miranda's* critics,³⁹⁶ this particular fleshing out of what it means for a rule to overenforce or overprotect constitu-

³⁹³ See supra Section IV.A.2.a.

³⁹⁴ Very briefly: The most plausible justifications for judicial review must depend to some extent on the claim that courts are better positioned than are the more democratically accountable branches to protect certain valuable interests against infringement by temporal majorities. So to adopt a metarule governing its practice that would systematically privilege our polity's majoritarian commitments over our liberal ones by permitting the underenforcement of rights but not their overenforcement borders on self-contradiction. For a similar (if arguably understated) observation, see Strauss, supra note 38, at 207.

³⁹⁵ See supra text accompanying note 326.

³⁹⁶ I am speaking here of those critics who deny *Miranda's* legitimacy, not those who charge, for example, that *Miranda* announced an erroneous operative proposition (because it should have concluded that the Fifth Amendment does not bar introduction of statements compelled outside of court by the police, or because it adopted an overly expansive understanding of "compulsion"), or that the Court's choice of decision rule was unwise. This Article takes no position on the soundness of these or other such criticisms.

tional meaning does not imperil *Miranda*. A decision rule designed to minimize adjudicatory error is not, according to this elucidation of the Scalia-Grano account, a prophylactic rule. And, as shown in the previous Section, the *Miranda* decision rule is most plausibly understood as having been intended to minimize total errors in the adjudication of the Fifth Amendment operative proposition.³⁹⁷ Therefore, *Miranda* is not a prophylactic rule in the sense that Justice Scalia's argument appears to require.³⁹⁸

C. The Conclusive Presumption Red Herring

Section V.A argued that the Fifth Amendment doctrine announced in *Miranda* can be usefully and fairly broken into an operative proposition directed to judges (do not admit a statement against a criminal defendant that has been compelled) and a deci-

³⁹⁷ No doubt Justice Scalia would deny this. In his *Dickerson* dissent, for example, Justice Scalia pronounces that “what is most remarkable about the *Miranda* decision—and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition—is its palpable hostility toward the act of confession per se, rather than toward what the Constitution abhors, *compelled* confession.” *Dickerson*, 530 U.S. at 449–50 (Scalia, J., dissenting). The suggestion, perhaps, is that although the Justices in the *Miranda* majority recognized that the Constitution prohibits only some subset of confessions—“compelled” ones—they crafted doctrine to effectuate a disapproval of all confessions even though they knew that such a disapproval rested on their own very different judgments of political morality. Put in terms introduced earlier, see supra Section IV.A.2.a, Justice Scalia might be claiming that the *Miranda* decision rule was based on substantive considerations. Cf. Strauss, supra note 38, at 194 (speculating that Grano's true objection to *Miranda* stems from his suspicion “that *Miranda* reflects not a genuine effort to minimize the sum of administrative costs and error costs but only a judgment by the Court that the world would be a better place if law enforcement officers were required to comply with *Miranda*”). Justice Scalia could be correct. But the fairer reading of *Miranda* is that the majority Justices' hostility to confession (grounded in solicitude for the dignity of criminal defendants) undergirded the Court's expansive interpretation of what constitutes compulsion. And no matter how open to criticism that construal was (and, I repeat, I am not defending it), it is a statement of constitutional meaning, not a constitutional decision rule. Once the Court chose to interpret the Self-Incrimination Clause as broadly as it did, then, there seems to be slight basis to deny that it turned to adjudicatory considerations at the stage of decision rulemaking. Surely the *Dickerson* majority could reasonably have concluded that the *Miranda* doctrine rested on that Court's estimation of how best to minimize adjudicatory errors. But see infra Section V.D (acknowledging that this interpretation is in tension with at least some of *Miranda*'s progeny, notably *Harris* and *Quarles*).

³⁹⁸ The *Nollan* doctrine, however, might be. It depends on just what considerations support the nexus decision rule. See supra Section III.B.4.

sion rule designed to minimize errors in adjudicating the operative proposition (conclusively presume that a statement has been compelled if given during custodial interrogation without specified warnings or if given after warnings that had not been waived). Section V.B showed that, if this is right, the *Miranda* doctrine is not vulnerable to attack on grounds of its being a prophylactic rule. This Section addresses a direct challenge to the description of *Miranda* that Section V.A offered. According to that challenge, use of a conclusive presumption by the putative *Miranda* decision rule demonstrates that the decision rule is not designed to minimize adjudicatory error because conclusive presumptions cannot serve to minimize error in the adjudication of an operative proposition.³⁹⁹

This Section responds to that charge in three steps. First (and wholly unoriginally), it briefly considers and (provisionally) rejects the straightforward assertion that a conclusive presumption cannot minimize adjudicatory errors relative to feasible alternatives. Second, it addresses and rebuts the arguments that Grano marshaled from evidence scholarship to support this superficially implausible

³⁹⁹ Even if true, this argument would not get its proponents very far unless married to the additional premise that, as a matter of constitutional legitimacy, courts have power to create decision rules to minimize adjudicatory error, but for no (or significantly limited) other purposes. As I have emphasized several times now, the taxonomic enterprise cannot resolve that question. Accordingly, this Section proceeds on the assumption that that additional premise could be true.

The conclusive-presumption objection could alternatively be broken down this way: (1) As a matter of constitutional taxonomy, we should reserve the “decision rule” label for only those doctrinal rules designed to minimize adjudicatory error; (2) courts have legitimate authority only to announce constitutional meanings and to craft constitutional decision rules, but not to make other sorts of constitutional doctrine; (3) a conclusive presumption cannot be designed to minimize adjudicatory error; therefore, (4) purported decision rules that employ a conclusive presumption are illegitimate. I disfavor this way of proceeding because it can work, if at all, only for people who accept premise (2). Scholars or judges who believe that courts may have legitimate authority to craft doctrinal devices (beyond operative propositions) to serve interests other than adjudicatory-error minimization could accept premise (1) only if they are then prepared to develop a much richer doctrinal taxonomy in which each type of rule is defined in terms of the consideration that supports it. But if multiple considerations are legitimate, then it will become an inordinate challenge to articulate the principles needed to classify individual rules that are supported by more than one such consideration. We can avoid this challenge by allowing decision rules to rest, as a conceptual matter, on varied judicial considerations, and then leaving for separate normative argument which of the conceptually possible considerations are permissible. Simply put, clear thinking is aided by describing the concepts in ways that are not hostage to resolution of the normative issues in dispute.

assertion. This subsection is long and can be skimmed or skipped by readers who are already persuaded after the first step that a decision rule that employs a conclusive presumption can serve the goal of error minimization. Turning last from the general claims of evidence scholarship to the more narrowly focused worries of constitutional law, I entertain the argument that regardless of whether federal courts generally have constitutional power to craft decision rules to serve adjudicatory aims, and even if a conclusive presumption can be designed to realize such goals, the courts' legitimate authority does not extend to the making of decision rules that employ conclusive presumptions. This argument, too, I conclude, is not persuasive.

1. The Argument Straight-Up

The gist of the critics' argument is that conclusive presumptions "cannot be defended" on the theory that "they assist federal reviewing courts in accurately resolving" contested factual disputes because they guarantee adjudicatory errors.⁴⁰⁰ As Schulhofer conceded, "one can imagine a case in which a law professor-suspect knows his rights and is not in fear of abuses, in which he tells all in response to the first question, not because of any sense of pressure but simply because he wants the truth to come out."⁴⁰¹ In such a case, directing lower courts to conclusively presume compulsion from the absence of warnings produces false positives that would be avoided were the court allowed to treat the presumption as rebuttable. The conclusive presumption is thus supposed not to be adopted for the purpose of error minimization.

If this is all there is to the argument, it is fallacious. To see why, it would be helpful to pin down precisely what sort of rebuttable presumption Grano thinks would necessarily yield fewer adjudicatory errors than the conclusive presumption at issue. If the imagined alternative to the use of a conclusive presumption is a presumption that merely shifts upon the party against whom the

⁴⁰⁰ Grano, *supra* note 70, at 145; see also *id.* at 141 n.271 & 144–45 (arguing that if the *Pearce* rule is irrebuttable, then "[e]xcept in a pickwickian sense, [it] cannot be viewed as a procedural rule [a rule that 'helps the reviewing court to determine correctly the constitutional issue before it'] designed to assist the reviewing court in accurately resolving the vindictiveness issue").

⁴⁰¹ Schulhofer, *supra* note 139, at 448.

presumption lies the burden to deny the presumed fact by a preponderance of the evidence,⁴⁰² then it should be obvious that conclusive presumptions do not necessarily produce more adjudicatory errors.⁴⁰³

It is common to suppose that a preponderance standard yields roughly equal numbers of false negatives and false positives and that any upward departure from the standard increases false negatives *more* than it decreases false positives.⁴⁰⁴ But this claim crucially depends upon the assumption that the factfinder's degree of subjective confidence regarding a given factual proposition, given certain evidence, accurately corresponds to the statistical probability that that proposition is true. Put more precisely, it depends upon the assumption that factfinders accurately assess the probative value of different types of evidence. And this is simply untrue. Take one common example. Study after study confirms that factfinders substantially overvalue eyewitness testimony.⁴⁰⁵ Therefore,

⁴⁰² This was Morgan's theory of how rebuttable presumptions should work. See, e.g., Edmund M. Morgan, *Some Problems of Proof under the Anglo-American System of Litigation* 74–81 (1956). However the dominant view, sometimes called the “bursting bubble” theory, holds that a rebuttable presumption shifts only the burden of producing evidence with respect to the presumed fact; if and when that burden is satisfied, the presumption disappears. For a compact summary of the debate see, for instance, McCormick on Evidence § 344 (Edward W. Cleary ed., 3d ed. 1984) [hereinafter Cleary, McCormick on Evidence]. The argument in text is that a conclusive presumption does not necessarily produce more adjudicatory errors than do rebuttable presumptions even as Morgan conceived of them. A fortiori the same is true with respect to rebuttable presumptions that shift only the burden of production.

⁴⁰³ For solid presentations of this argument, see, for instance, Schulhofer, *supra* note 139, at 450–51; Strauss, *supra* note 38, at 193.

⁴⁰⁴ Indeed, that is why the beyond-a-reasonable-doubt standard in criminal law is justified with the adage that it is worse to convict one innocent person than to allow ten guilty persons to go free. This adage implicitly acknowledges that departures from the preponderance standard increase total adjudicatory errors. Having just introduced the beyond-a-reasonable-doubt standard, it is worth mentioning that this is part of the due process operative proposition; it is not a constitutional decision rule. That is, the court has interpreted the Due Process Clause as requiring that a criminal defendant not be deprived of life, liberty, or property unless the prosecution proves all elements of the offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

⁴⁰⁵ See, e.g., Brian L. Cutler & Steven D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* 181–96 (1995); Elizabeth D. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* 1–8 (3d ed. 1997); John C. Brigham and Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 *Law & Hum. Behav.* 19, 19–30 (1983); Brian L. Cutler et al., *Juror Decision Making in Identification Cases*, 12 *Law & Hum. Behav.* 41, 41–

if factfinders could effectively be instructed to credit eyewitness testimony only when convinced of its accuracy to some heightened standard of certainty (say, sixty-five percent), such an instruction could actually reduce total false positives as much as it increases false negatives, or more, thereby reducing total adjudicatory errors.

All that this shows, of course, is that increasing the quantum of proof can, perhaps counterintuitively, reduce total adjudicatory errors. It can do so whenever factfinders systematically overestimate or underestimate the probative value of a particular type of evidence, or are otherwise systematically biased for or against a particular class of litigant. Therefore a conclusive presumption can minimize adjudicatory errors relative to a presumption that is rebuttable by disproof of the presumed fact by a preponderance of the evidence. This does not by itself demonstrate, however, that a conclusive presumption can minimize total adjudicatory errors relative to an alternative presumption that can be overcome only by disproof of the presumed fact to some very high standard of confidence. Take the example of the law professor-suspect. We would have to assume an implausible degree of systematic epistemic bias to believe that the conclusive presumption that a nonwarned confession was compelled would reduce total adjudicatory errors relative to a presumption that could be rebutted, for example, "only by evidence 'so strong as effectively to eliminate all doubt whatever that the statement was voluntary.'"⁴⁰⁶ Therefore, the charge would go, a conclusive presumption cannot serve to minimize adjudicatory error relative to all conceivable alternatives.⁴⁰⁷

55 (1988); R.C.L. Lindsay et al., *Mock-Juror Belief of Accurate and Inaccurate Eyewitnesses: A Replication and Extension*, 13 *Law & Hum. Behav.* 333, 333-39 (1989).

⁴⁰⁶ Strauss, *supra* note 38, at 192. Compare the notion of "presumptive formalism" floated in Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509, 544-48 (1988).

⁴⁰⁷ A distinct but related objection is that, even assuming *arguendo* that conclusive presumptions can possibly minimize total adjudicatory errors, the conclusive presumption adopted in *Miranda* cannot be said to do so, or is otherwise somehow illegitimate, because the Court never "even considered, let alone tested," a rebuttable presumption before taking "the more drastic step" of making the presumption conclusive. Grano, *supra* note 70, at 154. It is not clear just what to make of this observation. My best guess is that it is an evidentiary claim: The fact that the Court did not test fashioning the warnings requirement into some form of rebuttable presumption demonstrates that it was not really motivated by adjudicatory considerations. But even insofar as we should care about the explanatory reasons for the Court's action as

This argument founders on an unrealistic assumption about human rationality and cognitive processes. Human beings are not calculating devices that can follow directions of this sort very well.⁴⁰⁸ That is why the common law recognized only two quantum of evidence standards: the beyond-a-reasonable-doubt standard for criminal offenses and the preponderance standard for everything else. Even the now-familiar “clear and convincing evidence” standard was unknown at common law.⁴⁰⁹ Factfinders who are instructed on an “effectively no doubt” standard predictably will apply standards of rather greater leniency. So the fact, if true, that a very high standard of proof for rebutting a presumption would, *if strictly followed*, produce fewer adjudicatory errors than would a conclusive presumption, does not prove that a rebuttable presumption of near-conclusiveness would, *in actual practice*, yield fewer adjudicatory errors than a fully conclusive presumption.⁴¹⁰

opposed to the guiding or justificatory ones, the Court’s failure to explicitly consider use of a rebuttable presumption in lieu of the conclusive one it did adopt is only one piece of evidence, and not, to my mind, a particularly powerful piece.

⁴⁰⁸ Consider Bentham’s proposal that witnesses be encouraged to describe their subjective confidence levels in mathematical degrees instead of in terms of ordinary language. See 1 Jeremy Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice* 73–80 (John Stuart Mill ed. 1827). To this, Bentham’s contemporary, the Swiss legal scholar Etienne Dumont, responded: “I cannot deny that, where different witnesses have different degrees of belief, it would be extremely desirable to obtain a precise knowledge of these degrees, and to make it the basis of the judicial decision; but I cannot believe that this sort of perfection is attainable in practice. I even think, that it belongs only to intelligences superior to ourselves, or at least to the great mass of mankind.” *Id.* at 106.

⁴⁰⁹ See, e.g., Zelman Cowen & P.B. Carter, *Essays on the Law of Evidence* 244 (1956). Even today, it is not entirely clear whether English law recognizes intermediate standards. See Adrian Keane, *The Modern Law of Evidence* 83 (4th ed. 1996) (“The notion of a third and intermediate standard of proof lying between the standards required in criminal and civil cases has not found favour in the courts.”).

⁴¹⁰ It is therefore not surprising to find that Grano has wavered on the significance of the distinction between rebuttable and irrebuttable presumptions. In a 1985 article he seemed to concede, albeit grudgingly, that the federal courts do have power to create constitutional doctrine in the form of rebuttable presumptions. See Grano, *supra* note 70, at 148 (concluding that “[t]he federal courts arguably have implied authority to promulgate rebuttable presumptions and rules allocating the burden of proof concerning constitutional questions”). By 1993, however, he deemed it “far from obvious that the Supreme Court through the vehicle of appellate reversal should be able to force state courts to employ a rebuttable presumption they prefer not to employ,” and admitted to a new belief that his 1985 views “ceded too much constitutional ground.” Grano, *Confessions*, *supra* note 77, at 196 & 294 n.176. Still, even in 1993 Grano took pains to insist that there did exist a critical difference between rebuttable and irrebut-

2. *The Argument from Authority*

Instead of directly engaging the intuitively sensible contention that conclusive presumptions can reduce adjudicatory errors (weighted or unweighted) relative to any plausible adjudicatory alternative, Grano effectively shifts the ground of argument by invoking authority. “Conclusive presumptions differ in kind, not simply degree, from rebuttable presumptions. Indeed, conclusive presumptions are not evidentiary or adjudicatory devices at all, but rather substantive rules of law”⁴¹¹ This important conclusion rests upon the following passage, which Grano quotes from *McCormick on Evidence*:

In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all. For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that he could not have committed a felony. In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony.⁴¹²

Although this passage has a certain, if hard to articulate, intuitive force, it does not, on its face, support Grano’s assertion. For two reasons, it does not obviously establish that a “conclusive presumption” cannot be adopted for what I have called adjudicatory considerations—namely, error minimization. First, even assuming that this passage provides a good example of a “conclusive presumption,” that it is not a “presumption” properly so-called (as McCormick claims) does not establish (as Grano claims) that it is not an “evidentiary or adjudicatory device” because “presumptions” are either a subset of “evidentiary or adjudicatory devices” or a cross-cutting category. Evidentiary or adjudicatory devices are

table presumptions. See *id.* at 294 n.181 (“The examples in the text make inexplicable Professor David Strauss’s assertion that the alleged difference in kind rather than degree between rebuttable and conclusive presumptions ‘rings false’ and ‘proves false.’”) (quoting Strauss, *supra* note 38, at 192).

⁴¹¹ Grano, *Miranda’s Constitutional Difficulties*, *supra* note 77, at 179.

⁴¹² *Id.* (quoting Cleary, *McCormick on Evidence*, *supra* note 402, § 342, at 966) (Grano’s emphasis removed).

not plausibly a subset of “presumptions.” Furthermore, if the (negative) claim that a conclusive presumption is not a presumption cannot establish that it is not an adjudicatory error-minimizing device, nor can the (affirmative) claim that a conclusive presumption is, instead, a “rule of law.” After all, a constitutional decision rule supported by adjudicatory considerations likewise is a rule of law. Such a doctrine is a legal rule (not, say, a hortatory norm or a rule of etiquette) that tells judges how to reach conclusions on disputed matters.

So we have reason at the outset to be suspicious of Grano’s argument. But not *too* suspicious, for it turns out that Grano’s conclusion does in fact reflect the orthodoxy of evidence scholarship. As one student hornbook puts it: “‘Conclusive presumptions’ are not evidentiary devices. They are not evidence rules at all. They are new rules of substantive law.”⁴¹³ On its face, this is a more helpful statement for Grano than is the one from McCormick. So Grano is right to think his pivotal claim—that conclusive presumptions are not adjudicatory devices—is supported by evidence scholars. The question to address, then, is whether the evidence scholars are right.

Strictly read, the passage from McCormick does not support the proposition that conclusive presumptions are not evidentiary devices in the sense (the only sense that presently matters) of being designed to reduce adjudicatory error. Although it is orthodoxy in evidence scholarship that conclusive presumptions are not “true”

⁴¹³ Roger C. Park et al., *Evidence Law* § 4.08, at 106 (1998); see also, e.g., Richard O. Lempert et al., *A Modern Approach to Evidence* 1299 (3d ed. 2000) (“Most authorities now recognize that so-called conclusive presumptions are not evidentiary presumptions at all, but rather substantive laws making X, irrespective of Y, decisive of the parties’ rights and duties through the *irrebutable* fiction that X’s existence always establishes Y.”). This passage says much less than might first appear. The latter part of the sentence is undeniable, but also undenied. That conclusive presumptions make the basic fact decisive (for purposes of litigation) of the parties’ rights and duties through an irrebutable fiction that the basic fact always establishes the presumed fact is not, I think, a proposition that authorities could even debate. It is simply a definition of conclusive presumptions. The claim that conclusive presumptions are not evidentiary presumptions at all might look like a debatable claim, but this too the authors resolve by definitional fiat. See *id.* at 1297 (defining “true presumptions” as devices that “give the basic fact an influence beyond its normal probative value *without having conclusive effect*”) (emphasis added).

presumptions,⁴¹⁴ McCormick happens to choose a particularly inapt example to demonstrate it. McCormick defines presumption as “a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts.”⁴¹⁵ By this standard definition, a conclusive presumption differs from a rebuttable presumption only in that the latter allows the party against whom the presumption lies to rebut the particular facts that are presumed, whereas the former does not. The issue then becomes whether this difference warrants withholding the “presumption” label from its conclusive variant. An affirmative answer is equivalent to the claim that the necessary conditions for something being properly labeled a presumption are, in the first place, that it has the conditional form of “if [basic fact] then [presumed fact]”; and, secondarily, that the linkage is rebuttable, not conclusive.

But by that definition, the passage from McCormick upon which Grano stakes his claim still cannot be relied upon to demonstrate that a conclusive form of a presumption is not a true presumption because McCormick’s example does not contain a presumption that meets the *first* requirement of presumptions. Here is one common example of a presumption cited by McCormick: Proof that a person has disappeared from home and whose whereabouts have been unknown for a specified period of time (often seven years) raises a presumption under certain circumstances that she is dead.⁴¹⁶ The foundational fact (“fact B” in McCormick’s terms) concerns the person’s absence; the presumed fact (“fact A”) is that she is dead. This presumed fact is legally material for a variety of

⁴¹⁴ See, e.g., Park et al., *supra* note 413, § 4.08, at 105; 9 John H. Wigmore, *Evidence in Trials at Common Law* § 2492, at 307 (James H. Chadbourne ed., rev. ed. 1981) (“In strictness there cannot be such a thing as a ‘conclusive presumption.’”).

⁴¹⁵ 2 McCormick on Evidence § 342, at 433 (John W. Strong ed., 5th ed. 1999) [hereinafter, Strong, McCormick on Evidence]; see also, e.g., Park et al., *supra* note 413, § 4.08, at 102 (“A presumption is a rule providing that proof of a designated fact has a predetermined effect in establishing the existence of another fact. It thus expresses a legal relationship between certain facts (what we will call the ‘foundational’ or ‘basic’ facts) proved by a party and certain other facts (what we will call the ‘presumed facts’).”).

⁴¹⁶ Strong, McCormick on Evidence, *supra* note 415, § 343 at 441. For another example, see *id.* § 344, at 444 (stating that if “plaintiff proves that a letter was mailed, that it was properly addressed, and that it was never returned,” then “[s]uch evidence is generally held to raise a presumption that the addressee received the letter”).

purposes, such as administering the person's estate or determining the eligibility of the person's spouse to remarry. If the *Miranda* decision rule is construed as an adjudicatory device (by which I will mean constitutional doctrine justified as a means to reduce adjudicatory errors), the foundational facts are that the statement sought to be admitted was made during custodial interrogation not preceded by warnings; the presumed fact is that the statement was compelled. This presumed fact is legally material because the *Miranda* operative proposition takes the Fifth Amendment to bar admission of compelled statements.

In McCormick's example, the foundational facts are that a given child "is under seven years of age"; the presumed fact would be that she "could not have committed a felony."⁴¹⁷ But here's the rub: This "presumed fact" does not mean that the child did not commit the acts in the world of which she stands accused—such as stealing the candy bar or pulling the trigger. It means, instead, that she "did not have criminal intent," by which McCormick really means, I think, that she is not legally competent to have committed a felony.⁴¹⁸ In contrast to the above examples, then, this is not a fact that is made legally relevant by other legal rules; it is just itself a statement of a legal rule: Children under seven cannot be convicted of felonies. To see this more clearly, imagine that we were to remove the presumptions in all three cases. In the first two examples, the presumed facts—that an absent person is dead, or that a given statement was compelled—would nonetheless remain facts that must be proven for certain legal consequences to obtain. But were the presumption removed from McCormick's example, there would remain no (formerly presumed) fact left to prove. Absent McCormick's presumption, that is, it is not the case that the child's attorney would have to resort to *other means* to prove that the child "could not have committed the felony." In short, "fact A" in McCormick's example is not a "fact" in the relevant sense, but only a statement of the legal consequence of "fact B."⁴¹⁹

The illustration, therefore, does not demonstrate that a conclusive (or irrebuttable) form of what McCormick calls a presumption

⁴¹⁷ Cleary, McCormick on Evidence, *supra* note 402, at 966.

⁴¹⁸ But see *infra* note 422.

⁴¹⁹ See 1 John H. Wigmore, Evidence in Trials at Common Law § 1, at 4 (Peter Tillers ed., rev. ed. 1983).

is not “really” a presumption by virtue of its conclusiveness; it shows only that some things that people—including judges—*call* a conclusive presumption do not have even the minimum required attributes of what is properly called a presumption, conclusive or otherwise.⁴²⁰ All this is true, but it has no bearing on the debate over *Miranda*. Whatever else might be said of conceptualizing *Miranda* to set forth a conclusive presumption as a form of decision rule, there is no question that it satisfies the fundamental requirement for presumptions, properly so-called: It provides that “certain facts [(custodial interrogation without warnings)] are held to call for uniform treatment with respect to their effect as proof of other facts [(compulsion)].”⁴²¹

This all might seem something of a quibble because McCormick’s example could be reformulated so as to satisfy the initial condition of presumptions. This is done in the margin.⁴²² But this fact does not moot my objection. It illustrates that when we confront examples employed to pump our intuitions that a given “presumption” is not really an adjudicatory device or is otherwise somehow illegitimate, we must guard against the fallacy of equivocation: The “presumption” that is thereby condemned might be a very different sort of thing than the “presumption” that is at issue in the debate over “conclusive presumptions.”

This warning is important to keep in mind because, as it happens, every single example that Grano advances in support of his contention that conclusive presumptions are not adjudicatory de-

⁴²⁰ Indeed, hornbooks and treatises on evidence routinely criticize courts for referring to burdens of proof and permissive inferences as “presumptions.” See, e.g., 2 Strong, McCormick on Evidence, *supra* note 415, § 342, at 433–37.

⁴²¹ *Id.* at 433.

⁴²² Suppose the law were that a person cannot be convicted of a felony if he is unaware of the moral character of his actions (which may be a principle undergirding the criminal law but is not itself a rule of positive law), and suppose further that a child under seven were conclusively presumed not to be aware of the moral character of his actions. This legal rule would satisfy the threshold requirement for presumptions because it would now mediate (as it did not in the initial example) between basic facts (that the child is under age seven) and the legally material facts that are to be presumed (that the agent is unaware of the moral character of his acts). Therefore, if this presumption were, by virtue of its conclusiveness, not an adjudicatory device, but rather a substantive rule, perhaps Grano’s condemnation of *Miranda* would stand. But the entire thrust of this Section is to demonstrate that the precedent is false: A presumption of this sort *could* serve to minimize adjudicatory error.

vices suffers from just this defect. Responding to Strauss's charge that the distinction between rebuttable and conclusive presumptions "proves false" because there is no practical difference between a barely rebuttable presumption and a conclusive one,⁴²³ Grano turned to *Faretta v. California*⁴²⁴ to illustrate the difference. "In *Faretta*," Grano explained,

the Supreme Court held that the sixth amendment confers both the right to have the assistance of counsel and the opposite right to proceed pro se. Nevertheless, in effect creating a rebuttable presumption against waiver of counsel, the Court emphasized that demanding waiver criteria must be satisfied before the right of self-representation is triggered. Had the *Faretta* Court gone further, however, and adopted a conclusive presumption that an unrepresented defendant has not made a valid waiver, its presumption would have been the equivalent of a rule of law that waiver of counsel, and thus self-representation, is neither protected constitutionally nor permitted. Unlike a rebuttable presumption against waiver, a conclusive presumption against waiver could not have coexisted with a right of self-representation. Conclusive presumptions are substantive rules of law, not adjudicatory devices.⁴²⁵

Grano is right that "a conclusive presumption that an unrepresented defendant has not made a valid waiver . . . would have been the equivalent of a rule of law that . . . self-representation, is neither protected constitutionally nor permitted."⁴²⁶ But this cannot support the conclusion that the conclusive presumption *at issue in Miranda* is a substantive rule of law, not an adjudicatory device, because the presumptions involved are entirely different. Recall the definition of presumption quoted above: "A presumption is a rule providing that proof of a designated fact has a predetermined effect in establishing the existence of another fact." Neither the actual *Faretta* decision nor Grano's hypothetical variant, however, involves a presumption in this sense; there is no foundational fact, and no presumed fact. What Grano terms *Faretta's* "rebuttable

⁴²³ Strauss, *supra* note 38, at 192.

⁴²⁴ 422 U.S. 806 (1975).

⁴²⁵ Grano, *Miranda's* Constitutional Difficulties, *supra* note 77, at 187.

⁴²⁶ *Id.*

presumption against waiver of counsel” is more properly understood as a rule establishing *a heavy burden of proof* on the defendant who seeks to represent himself to establish that he knows the consequences of his waiver and acts (in some normatively loaded sense) “voluntarily.” A heavy burden of proof is not the same as a rebuttable presumption. Just as hornbook law advises that conclusive presumptions are not true presumptions, so too does it insist that neither are “[a]ssignments of the burdens of proof prior to trial.”⁴²⁷ Consequently, the *Faretta* example simply does not speak to the question *Miranda* raises—namely, whether a rule providing that proof of a designated fact has a conclusive effect in establishing the existence of another fact is (whether called “presumption” or not) an adjudicatory device in the sense that, if sensibly chosen, it serves to minimize error in the adjudication of the presumed fact.

Perhaps having an inkling that his other examples did not work, Grano has offered, as a “final example” of the supposedly critical difference between rebuttable and conclusive presumptions,

a statute that adopts negligence rather than strict liability as the tort standard for a particular activity. Perhaps because of a belief that accidents do not normally occur unless the operator of the activity is negligent, a court might adopt a (rebuttable) presumption of negligence triggered by the mere occurrence of an accident. (If *X*, an accident, occurs, *Y*, the operator’s negligence, will be presumed barring proof to the contrary.) While such a presumption might be unwise and empirically unsound, and while it would impose on the operator the burden of disproving negligence, it would remain consistent, in letter if not in spirit, with the statutory standard of negligence. The same could not be said about a conclusive presumption of negligence triggered by the mere occurrence of an accident. Under such a rule, liability would exist regardless of what the operator could prove, were such proof permitted, about lack of negligence. That is, *Y*, the operator’s negligence, would now be legally immaterial. Such a “presumption” would really constitute a substantive rule of strict

⁴²⁷ 2 Strong, McCormick on Evidence, *supra* note 415, § 342, at 436.

liability and, as such, it would represent a rejection of the statutory standard.⁴²⁸

At first glance, this example appears to rectify the error of the *Faretta* example, for the putative presumption now explicitly mediates between a foundational fact (the accident) and the presumed fact (the operator's negligence). On second glance, however, the seeming difference evaporates. Because the foundational fact is necessarily present in every case in which the presumed fact is at issue—adjudication of negligence presupposes an accident—the rebuttable presumption predicated on proof of the foundational fact is, again, not a presumption at all (in the evidence scholars' stipulative sense). Rather, it is merely a somewhat convoluted way to (as Grano rightly put it) “impose on the operator the burden of disproving negligence.” This is therefore merely the *Faretta* example in different clothing. So while the example might justify the conclusion that a rule requiring courts to find a statement given during custodial interrogation compelled *if the defendant is a human being* “would really constitute a substantive rule” that courts must find *all* statements given during custodial interrogation compelled, it does not speak to the actual presumption at work in *Miranda*.⁴²⁹

⁴²⁸ Grano, Confessions, *supra* note 77, at 197.

⁴²⁹ The negligence example would have a true rebuttable presumption were the rule, say, that negligence is presumed if the operator was using a cell phone at the time of the accident. Parity with *Miranda* would then be achieved by asking whether making this rebuttable presumption conclusive would be inconsistent with its being an adjudicatory rule. Notice how this differs from Grano's original hypothetical. As we have seen, that hypo does not implicate a true presumption because it does not mediate between a contingent basic fact and the presumed fact. However, there is another reason it is so effective at pumping an intuition that the conclusive presumption is inappropriate. Not only is the putative judicially created adjudicatory device functionally equivalent to a substantive rule of law different from the one the legislature enacted, but that functionally equivalent rule is one that we may assume the legislature considered and specifically rejected. Perhaps something still could be said in the court's defense: Maybe the legislature had what proved to be a naive faith in the ease with which *ex post* judgments of negligence could be made. But this is a weak argument. Presumably legislators were aware that negligence assessments *might* prove to be harder than they assumed. The fact that they nonetheless adopted a rule instead of leaving it for judicial law-making in a common law style suggests that they were willing to take that risk. Besides, the wisdom of one rule versus the other depends not only upon the relative frequency of Type I and Type II errors but also upon an evaluation of their relative social costs. It is the combination of these circumstances

My purpose in all this is not to reprove Professor Grano. After all, “[t]he word ‘presumption’ has perhaps suffered from more misuse and inconsistent use than any other evidentiary term.”⁴³⁰ The point, rather, is that the conclusive presumption at work in *Miranda* has a precise structure not shared by many of the other imaginable evidentiary devices that tend—much too loosely—*also* to be called conclusive presumptions. Without much more argument than Grano supplies, the fact (if true) that they are not truly adjudicatory devices cannot be relied upon to demonstrate that the *Miranda* doctrine is not either.

So let us turn away from intuition-pumping examples and toward arguments. What reasons can be given for the proposition that a conclusive presumption is not an adjudicatory device? Put another way, what could the evidence scholars say in response to the tentative conclusion reached in the previous subsection? Unfortunately, the evidence scholarship insisting that this is true is notably reticent in explaining the assertion.

The obvious reason is that administering any given rule by means of a conclusive presumption is identical in effect to amending the rule itself and administering it without a presumption at all. Take a “substantive rule of law” (*R*) of the form “if *y* then *z*” served by a conclusive presumption (*CP*) of the form “if *x* then conclude *y*.” The presumption could always be mooted by recasting the legal rule to turn on fact *x* instead of, or in addition to, fact *y*. That is, *R* could become *R*₁: “If *x* or *y*, then *z*.” This is plainly true. But so what? Why should this truth convert what we originally wrote as an adjudicatory device—“determine that the defendant does not know the moral character of her actions if she was under seven”—into a substantive rule? This is not so obvious. Af-

that renders the hypothesized judge-made conclusive presumption such chutzpah. The propriety of a judge-made rule that negligence shall be conclusively presumed from cell phone usage at the time of the accident might well turn upon whether the legislature considered making cell phone usage negligence per se and judgments about the ease with which the legislature could do so if it wanted. Obviously, considerations like this tend to make the case for the *Miranda* Court’s resort to a conclusive presumption look stronger.

⁴³⁰ Park et al., *supra* note 413, § 4.07, at 102; see also, e.g., 2 Strong, McCormick on Evidence, *supra* note 415, § 342, at 433 (describing presumption as “the slipperiest member of the family of legal terms”); Charles V. Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195, 196–207 (1953).

ter all, if $(R + CP)$ is functionally equivalent to R_1 , the equivalence necessarily works in both directions. Why could we not, with equal logic, conclude that every substantive rule of law is “really” a different substantive rule administered via a conclusive presumption? More precisely, why must the transformation *always* work in the former direction, never the latter? Why is it not enough to observe that $(R + CP)$ and R_1 are identical, without asserting too that the latter is more real than the former?⁴³¹

Wigmore provides an answer. After distinguishing between two types of adjudicatory devices based on the purposes they are designed to serve—rules of auxiliary probative policy and rules of extrinsic policy—Wigmore explained that conclusive presumptions always fell in the latter category. Conclusive presumptions serve to exclude evidence of certain kinds of facts “because its admission would injure some other cause more than it would help the cause of truth and because the avoidance of that injury is considered of more consequence than the possible harm to the cause of truth.”⁴³² And the Supreme Court deemed this view “obviously correct” seventy years ago.⁴³³

It is *not* obviously correct. Notice how Roger Park explains his assertion that conclusive presumptions are rules of substantive law: “In virtually every case, they exist because of a policy-based determination that the existence of certain facts should establish a factual issue and that society would not be served by permitting contrary evidence.”⁴³⁴ That this is true in some cases can hardly be doubted. Take, following Park, the rule that “the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”⁴³⁵ Very likely,

⁴³¹ For a more fully developed argument along similar lines, see John M. Phillips, Note, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975).

⁴³² 1 Wigmore, *supra* note 419, § 11, at 689.

⁴³³ *United States v. Provident Trust Co.*, 291 U.S. 272, 285 (1934). Interestingly, the Court had previously explained that “all presumptions as to matters of *fact*, *capable of ocular or tangible proof*, such as the execution of a deed, are in their nature disputable. No conclusive character attaches to them. They may always be rebutted and overthrown.” *Lincoln v. French*, 105 U.S. 614, 617 (1881) (emphasis added). The negative implication seems to be that presumptions as to matters of fact that are not capable of such proof—matters that are not of *brute* fact—might support a conclusive presumption.

⁴³⁴ Park et al., *supra* note 413, § 4.08, at 106.

⁴³⁵ *Id.* at 105 (internal quotation and citation omitted).

such a presumption is adopted for policy reasons, particularly that disputes over paternity would be harmful to the child. And yet, by observing, with greater care than did either Wigmore or the Court, that this is true in “virtually every case,” Park has given the game away. Whether “virtually every case” is accurate or an overstatement is beside the point. The point, rather, is that, by negative implication Park concedes that it is not true in every case. So the question becomes why a conclusive presumption is not an evidentiary device in those *other* cases. Moreover, absolutely no reason has been given why it is not an adjudicatory rule when it exists—as arguably it does in *Miranda*—for the primary purpose of minimizing total adjudicatory errors.

In sum, there appears no remotely persuasive argument to support Park’s implicit assertion that even the exceptional conclusive presumption adopted for the purpose merely of accommodating epistemic doubt, and not to achieve other policy goals, is not an evidentiary device but rather a rule of substantive law. It turns out, ironically, that the standard assertion that a conclusive presumption is not a true evidentiary device is itself just a conclusive presumption—namely, that all conclusive presumptions should be conclusively presumed to be adopted for policy reasons, hence to be substantive rules of law. There may be good policy reasons to adopt this presumption, but as statement of existential fact it is false. Put simply: *Rules that take the form of a conclusive presumption can rest on the “adjudicatory” or “evidentiary” consideration of reducing adjudicatory errors.* Wigmore’s assertion to the contrary is wrong.

3. The Argument from Constitutional Legitimacy

Although Grano relies on evidence scholarship for what appears to be a conceptual claim—that conclusive presumptions just cannot serve to minimize adjudicatory error—it is possible that his intended point is more provincial—namely that, even if a given conclusive presumption can actually minimize adjudicatory error relative to any plausible alternative, a decision rule that employs a conclusive presumption is nonetheless an illegitimate exercise of federal judicial power. In other words, constitutional decision rules that contain conclusive presumptions are illegitimate because, “[r]egardless of how they are explained, conclusive presumptions

pertaining to constitutional violations have the effect of amending the Constitution, a task not assigned to the judiciary.”⁴³⁶

The language of “effects” is important. Compare this possible objection to Congress’s power to enforce the substantive provisions of the Fourteenth Amendment: Federal legislation predicated on Section 5 of the Fourteenth Amendment that prohibits more conduct than do the Amendment’s substantive provisions is illegitimate because, “regardless of how they are explained, prophylactic rules have the effect of interpreting the Constitution, a task not assigned to Congress.” Yet as a long line of Supreme Court decisions culminating in *City of Boerne v. Flores*⁴³⁷ makes clear, this claim would be false. Because bona fide *prophylactic* legislation is perfectly valid despite having the same effect as invalid *substantive* legislation, the critical task is to distinguish the legislation on grounds *other than effect*. So too for conclusive presumptions crafted by the federal judiciary as constitutional decision rules: *pace* Grano, “how they are [correctly] explained” is *precisely* what determines whether they are legitimate.

Admittedly, we cannot always be certain how a given doctrine is correctly explained. A court might invoke adjudicatory considerations in defense of a given decision rule that takes the form of a conclusive presumption when it was actually influenced by doctrine-making considerations whose legitimacy is less secure, including substantive ones. That is, conclusive presumptions are dangerous because they may enable courts to engage in illegitimate forms of doctrine-making under the guise of pursuing adjudicatory ends.⁴³⁸ What follows? Should constitutional scholars seek to promulgate a norm that would forbid the judiciary from realizing adjudicatory considerations in the form of a conclusive presumption? Should the judiciary itself adopt such a “prophylactic rule”? If so, on what authority? May the Court conclusively presume that any doctrine which employs a conclusive presumption is not designed to minimize adjudicatory error? Would application of such a con-

⁴³⁶ Grano, *supra* note 70, at 154; see also Grano, *Confessions*, *supra* note 77, at 198 (“To explain, applaud, or defend *Miranda* in terms of a conclusive presumption rationale . . . is to assert for the Supreme Court the power of constitutional amendment. There is no other way to describe it.”).

⁴³⁷ 521 U.S. 507 (1997).

⁴³⁸ See Grano, *Confessions*, *supra* note 77, at 188, 194.

clusive presumption minimize adjudicatory error? This line of attack seems too rife with paradox to provide a promising route for *Miranda*'s detractors.

D. *Miranda*'s Progeny

The distinction between judge-interpreted constitutional meaning and constitutional decision rules has shown some of its worth by contributing new insights and arguments to long-standing debates over *Miranda*'s legitimacy. The *Dickerson* majority (or some members thereof) could have replied to Justice Scalia's dissent as follows: (1) the *Miranda* warnings requirement was part of a constitutional decision rule designed to minimize errors in adjudicating whether out-of-court statements had been compelled within the meaning of the Self-Incrimination Clause (as *Miranda* interpreted that particular constitutional provision); (2) constitutional decision rules are ineliminable, hence cannot be categorically illegitimate; (3) while the extent of the Court's constitutional authority to craft decision rules may be reasonably debated, the creation of decision rules to minimize adjudicatory error has the strongest claim to legitimacy; (4) such a device is not a "prophylactic" rule in the Grano-Scalia sense because it does not *overenforce* constitutional meaning as measured against the appropriate baseline; rather, it was adopted to *optimally* enforce constitutional meaning; (5) use of a conclusive presumption is common to constitutional decision rules (including the decision rule adopted by Justice Scalia himself in *Nollan v. California Coastal Commission*), and is not incompatible with an interest in reducing adjudicatory error. None of this, it should hardly bear mentioning, is to extol *Miranda*. Like any other judicial product, it might have been wise or foolish. But, on the reading thus far developed, it is not susceptible to the charge of judicial usurpation.⁴³⁹

⁴³⁹ This is a response to the familiar contention (of which Justice Scalia's *Dickerson* dissent is just one example) that *Miranda* was an illegitimate exercise of judicial power. However, this response does not fully resolve the issue presented in *Dickerson* because, even granting *Miranda*'s legitimacy, it remained to determine whether 18 U.S.C. § 3501 constituted a permissible exercise of Congress's authority to displace a judge-crafted decision rule. Of course, that question cannot be fully answered without articulating and defending a theory of the circumstances in which the judiciary should

There is more. I hypothesized earlier that attention to the distinction between judge-interpreted constitutional meaning and constitutional decision rules might also assist the project of doctrinal development. This Section pursues that idea by briefly examining what rooting the *Miranda* doctrine's legitimacy in adjudicatory considerations implies for some of *Miranda*'s progeny.⁴⁴⁰

1. Retroactivity

Early questions concerned *Miranda*'s retroactive application. In *Johnson v. New Jersey*, the Court held that *Miranda* governed the admissibility of statements obtained prior to its announcement, but not if the trial had already commenced.⁴⁴¹ Yale Kamisar, among the most stalwart of *Miranda*'s defenders, has concluded that "[t]he Court probably should have held that *Miranda* affected only those confessions obtained after the date of the decision."⁴⁴² This would be right if the purpose of the *Miranda* doctrine were to deter "police overreaching." But if *Miranda* is best explained as a decision rule resting on adjudicatory considerations—and surely if such a description is deemed necessary to its legitimacy—then unwarned custodial statements should be presumed compelled no matter when the custodial interrogation occurred. Indeed, because the pivotal event for *Miranda*'s purposes is the *admission* of statements into evidence at trial and not their *elicitation* prior to trial, to apply *Miranda* to a trial that commenced after it is not, properly under-

defer to decision rules put forth by Congress, tasks that this Article does not even attempt. See *supra* Section IV.A.2.c.

With that caveat, I admit to skepticism that Congress is better positioned than is the Supreme Court to determine what decision rule would minimize adjudicatory errors. Largely for this reason, I am strongly disposed to believe that had the *Dickerson* majority defended *Miranda*'s legitimacy in the way I have described, refusal to give effect to § 3501 would have been proper. I am under no illusion, however, that these brief remarks are adequate to resolve the question. Furthermore, even assuming that the Court was correct to refuse to give effect to § 3501, that does not mean that Congress could not try again to craft an alternative decision rule to replace the one announced in *Miranda*, or that—depending upon the particular rule proposed—the Court ought not acquiesce.

⁴⁴⁰ For an extensive discussion of the qualifications and exceptions to *Miranda*, see Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 *St. Thomas L. Rev.* 461 (1998). This Section discusses only a few.

⁴⁴¹ 384 U.S. 719, 721 (1966).

⁴⁴² Kamisar, *supra* note 58, at 937 n.278.

stood, a “retroactive” application even if the custodial interrogation had preceded *Miranda*.

2. Impeachment

Whether unwarned statements may be admitted against a criminal defendant for impeachment purposes should depend, in the first instance, upon the scope not of the decision rule, but of the operative proposition. The straightforward question is whether introduction of a compelled statement for impeachment purposes violates the constitutional guarantee that no person be compelled “to incriminate himself.” The correct answer is not self-evident. But some language in *Miranda* suggested that the answer was yes.⁴⁴³ In any event, thirteen years after *Miranda* the Court made this answer explicit.⁴⁴⁴ If courts minimize adjudicatory errors by presuming unwarned statements to have been compelled within the meaning of the operative proposition of Fifth Amendment doctrine, the error-reduction justifications for the *Miranda* decision rule would seem to apply in the impeachment context too. *Harris v. New York*,⁴⁴⁵ which held that unwarned statements could be admitted for impeachment, seems wrong.⁴⁴⁶

3. Fruits

Are the evidentiary fruits of an un-Mirandized custodial interrogation admissible? The Court has strongly indicated that they are. In *Michigan v. Tucker*, the Court held admissible statements by a

⁴⁴³ *Miranda*, 384 U.S. at 477 (“[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.”).

⁴⁴⁴ *New Jersey v. Portash*, 440 U.S. 450, 459–60 (1979) (prohibiting impeachment by immunized grand jury testimony). The Court had held the previous year that a suspect’s statements made involuntarily for due process purposes were not admissible for impeachment. *Mincey v. Arizona*, 437 U.S. 385, 398–402 (1978). As I have emphasized, those are distinct inquiries.

⁴⁴⁵ 401 U.S. 222, 225–26 (1971).

⁴⁴⁶ For similar criticism, see Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198 (1971).

witness discovered as a result of an interrogation during which police had failed to advise the suspect of his right to free counsel.⁴⁴⁷ In *Oregon v. Elstad* the Court held that evidence of a suspect's voluntary statement made after complete issuance of the *Miranda* warnings was not rendered inadmissible just because the suspect had made an initial inculpatory custodial statement that had not been preceded by the warnings.⁴⁴⁸ The full significance of these decisions was doubtful: *Tucker* had engaged in a totality-of-the-circumstances analysis that emphasized, among other things, that the custodial interrogation preceded the *Miranda* decision,⁴⁴⁹ and *Elstad* had questioned whether the second statement was in fact a consequential "fruit" of the first failure to issue warnings.⁴⁵⁰ But lower federal courts have routinely read these decisions as standing for the general proposition that fruits of a custodial statement not preceded by *Miranda* warnings were admissible even though the statement itself would not be.⁴⁵¹

The Court's analyses in these cases are far from satisfactory.⁴⁵² Yet insofar as the *Miranda* decision rule rests on adjudicatory con-

⁴⁴⁷ 417 U.S. 433, 452 (1974).

⁴⁴⁸ 470 U.S. 298, 318 (1985).

⁴⁴⁹ See *Tucker*, 417 U.S. at 447 ("We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground.") (citation omitted).

⁴⁵⁰ See, e.g., *Elstad*, 470 U.S. at 310–14 (rejecting argument that "the psychological impact" of having made an initial inculpatory statement compromises the voluntariness of a subsequent inculpatory statement on a "cat-out-of-the-bag" theory); *id.* at 347 n.29 (Brennan, J., dissenting) ("Notwithstanding the sweep of the Court's language, today's opinion surely ought not be read as also foreclosing application of the traditional derivative-evidence presumption to physical evidence obtained as a proximate result of a *Miranda* violation.").

⁴⁵¹ See 3 LaFave et al., *supra* note 115, § 9.5(b), at 388 & n.37.

⁴⁵² This is largely due, I think, to the Court's failure adequately to distinguish the Fourth Amendment exclusionary rule from the *Miranda* doctrine. Writing for the Court in *Tucker*, then-Justice Rehnquist emphasized that the exclusionary rule serves a deterrent purpose: "to compel respect for the [Fourth Amendment] guaranty in the only effectively available way—by removing the incentive to disregard it." 417 U.S. at 446 (internal quotations omitted). Observing that "[i]n a proper case this rationale would seem applicable to the Fifth Amendment context as well," he explained that "[b]y refusing to admit evidence gained as a result of [willful or negligent] conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Id.* at 447.

siderations, the general proposition for which *Tucker* and *Elstad* now stand—namely, that *Miranda* does not itself bar admission of the fruits of an un-Mirandized confession—is probably correct, and certainly defensible. The core premise, of course, is that the police violate no aspect of constitutional doctrine by failing to issue the *Miranda* warnings. This is true whether the failure be inadvertent or willful. The cost is that any statement elicited will be inadmissible in the state's case-in-chief in a subsequent criminal trial of the suspect being interrogated. But the Self-Incrimination Clause has been construed not to protect a criminal defendant from being compelled to surrender nontestimonial evidence against himself,⁴⁵³ much less does it protect the accused from the testimonial evidence of others. In short, then, admission into evidence of anything other than the defendant's own statements does not violate the Self-Incrimination Clause, nothing in *Miranda* being to the contrary. And the mere fact that a custodial interrogation proceeded without

This deterrent purpose would not be well-served, though, by excluding statements obtained prior to the *Miranda* decision. Furthermore, then-Justice Rehnquist continued: "When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule has been asserted: protection of the courts from reliance on untrustworthy evidence." *Id.* at 448. But the Court found that this consideration did not justify suppressing the statements at issue either.

Writing for the *Elstad* Court eleven years later, Justice O'Connor announced (claiming to rely on *Tucker*, among other cases) that "a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the 'fruits' doctrine." 470 U.S. at 306. And yet she proceeded to agree with *Tucker* "that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression" of the putative fruits before it. *Id.* at 308. However, a true appreciation of the differences between the judge-made *Miranda* prophylactic doctrine and the judge-made Fourth Amendment exclusionary doctrine should have driven the Court to recognize that the *Tucker* analysis was both mistaken and incomplete. It was mistaken because the former is simply not designed, as is the latter, to deter bad conduct by the police. It was incomplete because the Court assumed that the only other reason for the Fifth Amendment exclusion of "compelled" testimony was to guard against untrustworthy evidence. Although historians debate whether this was the sole or predominant original rationale for the Self-Incrimination Clause, *Miranda* had described the "one overriding thought" underlying the Clause as "the respect a government—state or federal—must accord to the dignity and integrity of its citizens." 384 U.S. at 460. Analysis of the admissibility of evidence derived from an unwarned custodial statement could not be adequate without considering how the *Miranda* doctrine was designed to serve *that* value.

⁴⁵³ See *Fisher v. United States*, 425 U.S. 391, 408 (1976).

warnings violates no other rule from *Miranda*, so there is no poisonous tree, hence no poisonous fruit.⁴⁵⁴

I anticipate at least two objections. First, allowing the admission of fruits reduces police officers' incentives to issue the *Miranda* warnings.⁴⁵⁵ That may be true. The short response, though, is that the *Miranda* decision rule is best conceived as an effort to minimize adjudicatory error in the determination of whether an out-of-court statement by the accused was compelled. So long as this objective is met, how police officers treat suspects is a matter of indifference to Self-Incrimination Clause doctrine—even post-*Miranda*. This is not to say, of course, that how police officers treat suspects is a matter of indifference to constitutional doctrine as a whole. The Due Process Clauses, for instance, have been interpreted to prohibit the police from engaging in certain egregious interrogation practices. But whether police conduct has violated due process is a question separate from whether they have issued the *Miranda* warnings.

The second argument against the admissibility of fruits of unwarned custodial interrogations, accordingly, challenges that this

⁴⁵⁴ Justice O'Connor cogently advanced this basic argument in her separate opinion in *New York v. Quarles*. See 467 U.S. 649, 665–72 (1984) (O'Connor, J., concurring in part and dissenting in part). It is developed at length in Akhil Reed Amar & Renee B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 Mich. L. Rev. 857 (1995). In reply, Yale Kamisar has argued that this position is inconsistent with settled case law which holds that the Self-Incrimination Clause requires that witnesses compelled to testify in noncriminal proceedings on pain of contempt be granted not just use immunity but derivative use immunity as well. See Yale Kamisar, Response: On the "Fruits" of *Miranda* Violations, Coerced Confessions, and Compelled Testimony, 93 Mich. L. Rev. 929 (1995). I think Professor Kamisar is right, which compels me to conclude that the Self-Incrimination Clause does not demand the derivative-use rule. At the same time, I think it plausible that the derivative-use rule could be derived from the Due Process Clause, and that such a conclusion need not entail that the Due Process Clause requires suppression of the fruits of a custodial statement that is "compelled" (within the meaning of the Self-Incrimination Clause) but not "involuntary" or "coerced" (within the meaning of the Due Process Clause itself). However this is a digression not worth pursuing here.

⁴⁵⁵ For this argument, see especially Charles D. Weisselberg, Saving *Miranda*, 84 Cornell L. Rev. 109 (1998) (documenting widespread police practices of questioning "outside *Miranda*" and arguing that the practice is antithetical to the language and purposes of *Miranda*); David Wollin, Policing the Police: Should *Miranda* Violations Bear Fruit?, 53 Ohio St. L.J. 805 (1992); Dorf & Friedman, supra note 145, at 71 n.29 (asserting that "[t]here is simply no way to interpret *Miranda* as a decision permitting such questioning").

should be so. Interrogation practices that “overbear” a suspect’s will so as to elicit “involuntary” statements violate substantive due process. The in-court admission of such statements against the accused violates procedural due process. Admission of the fruits of such an interrogation should therefore likewise be unconstitutional—on the theory either that procedural due process itself proscribes the admission of fruits obtained in certain ways, or that exclusion of such fruits by means of a constitutional remedial rule is proper to deter substantive due process violations by the police. However, the argument continues, it is hard to determine on a case-by-case basis whether any unwarned statement which has borne fruit was actually “involuntary.” Therefore the very same reasoning that alone could justify recourse to a conclusive presumption in *Miranda* justifies recourse to the identical decision rule for purposes of vindicating a suspect’s due process rights: Courts should conclusively presume that an unwarned custodial statement was involuntary for due process purposes, rendering any fruits of such a statement consequently inadmissible.

The defect in this argument is simply that, as we have seen, due process “involuntariness” is a different, and less capacious, concept than self-incrimination “compulsion.”⁴⁵⁶ So even assuming arguing that the *Miranda* decision rule (conclusively presume that an unwarned custodial statement was compelled) can serve to minimize adjudicatory errors when administering the operative proposition of Self-Incrimination Clause doctrine, it need not follow that the same decision rule, *mutatis mutandis* (conclusively presume that an unwarned custodial statement was involuntary), would minimize adjudicatory errors for purposes of administering the Due Process Clause. In sum, we can agree that fruits of a custodial due process violation should be excluded without concluding that the case-by-case approach to adjudicating claimed violations of due process fails to minimize the adjudicatory error rate. Of course, if the Court fails to recognize the difference between “compulsion” for purposes of the Self-Incrimination Clause and due process “voluntariness,”⁴⁵⁷ then the proposition that fruits of

⁴⁵⁶ See supra Section V.A.1.

⁴⁵⁷ It is therefore not surprising that the conflation of compulsion and involuntariness in *Tucker* and *Elsad* was specifically objected to by astute contemporary critics. See, e.g., Kamisar, supra note 69, at 153; Ritchie, supra note 69, at 430–31.

unwarned custodial statements may be admissible becomes much harder to reconcile with *Miranda*.

Notice that I have just defended what I have called the “general proposition” for which *Tucker* and *Elstad* are thought to stand—that *Miranda* does not bar the admission of the fruits of a statement that the *Miranda* conclusive presumption renders inadmissible. That defense is enough to justify the narrow holding of *Tucker*.⁴⁵⁸ It is not enough, however, to justify the result in *Elstad*. For even assuming that the *Elstad* Court was correct not to exclude a subsequent confession on the theory that it is the fruit of an unwarned, hence inadmissible, prior confession, a separate question is whether the subsequent confession should be barred on the ground that it was *itself* “compelled” within the meaning of the Self-Incrimination Clause.⁴⁵⁹ Instead of answering that the initial failure to issue warnings necessarily rendered the subsequent statement inadmissible (or, for that matter, that the belated issuance of warnings necessarily rendered the subsequent statement admissible), the Court held that the trial court must engage in an all-things-considered assessment of whether the subsequent statement was voluntary.

To reiterate a theme I have been hammering at, this last point was either wrong or, at best, imprecise, insofar as it conflates Fifth Amendment compulsion with due process involuntariness. The Court should have said that the existence of a prior unwarned statement (i.e., a statement that is conclusively presumed to have been compelled) does not justify a conclusive presumption that the subsequent, warned, statement was also compelled but, rather, that whether the second statement was compelled, hence inadmissible, should be assessed by the default more-likely-than-not decision rule.

⁴⁵⁸ To put the point in terms raised by a case that the Supreme Court is likely to decide by the time this Article leaves the printer, *United States v. Patane*, cert. granted, 123 S. Ct. 1788 (2003) (mem.) (No. 02-1183), there is no good reason to believe that *Dickerson* undermines *Tucker*.

⁴⁵⁹ As the Court aptly noted, this question implicates a different metaphor: not whether a subsequent statement is a “tainted fruit of a poisonous tree” but whether it can be deemed sufficiently free once the “cat is out of the bag.” *Elstad*, 470 U.S. at 303–04.

If modified in this way, the *Elstad* holding seems consistent, if barely, with the reading of *Miranda* I have put forth.⁴⁶⁰ If *Miranda* is justified as a way to minimize adjudicatory error, the critical question must be whether, when trying to determine whether a warned statement made subsequent to an unwarned one is compelled, presuming compulsion in such cases will enable courts to minimize adjudicatory errors in the aggregate. This is an empirical question, one that *Miranda* itself simply cannot answer.

Justice O'Connor, writing for the *Elstad* majority, thought not, seeming to repose faith in trial courts' abilities to assess the "psychological impact" of the earlier statement case by case.⁴⁶¹ Justice Brennan, in dissent, derided the majority's "marble-palace psychoanalysis"⁴⁶² and purported to rely more heavily on "the realities of police interrogation and the everyday experience of lower courts."⁴⁶³ Quoting heavily from standard interrogation manuals, Justice Brennan (joined by Justice Marshall) observed that "interrogators describe the point of the first admission as the 'break-through' and the 'beachhead' which once obtained will give them enormous 'tactical advantages.'"⁴⁶⁴ This being so, Justice Brennan

⁴⁶⁰ The holding would be consistent. Not consistent is Justice O'Connor's repeated references to statements made during custodial interrogations that, albeit unwarned, were voluntary. See, e.g., *id.* at 303 (observing that "the police had obtained an earlier voluntary but unwarned admission from the defendant"); *id.* at 307 ("Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*."); *id.* at 318 (concluding that "there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary"). If, as Justice O'Connor suggests, *compulsion*, *coercion*, and *involuntariness* are all synonyms, then to believe that courts can identify with acceptable accuracy those unwarned statements that *are* voluntary flies in the face of the theory that both explains, and can justify, the *Miranda* decision rule. Justice O'Connor rightly observes that "[w]hen police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled." *Id.* at 317; see also *id.* at 307 n.1 ("A *Miranda* violation does not constitute coercion but rather affords a bright-line legal presumption of coercion . . ."). But for her to then cavalierly describe statements as, albeit unwarned, neither compelled nor coerced, marks a signal failure to appreciate *why* *Miranda* created the presumption it did.

⁴⁶¹ *Id.* at 311–14.

⁴⁶² *Id.* at 324 (Brennan, J., dissenting).

⁴⁶³ *Id.* at 328 (Brennan, J., dissenting).

⁴⁶⁴ *Id.* (Brennan, J., dissenting) (internal citations omitted).

thought that courts would more accurately assess whether a given custodial statement was compelled by presuming that it was if it followed a custodial admission not preceded by warnings. In Justice Brennan's eyes, however, this presumption, unlike the one announced in *Miranda*, should not be conclusive. "The correct approach," he concluded, "is to presume that an admission or confession obtained in violation of *Miranda* taints a subsequent confession unless the prosecution can show that the taint is so attenuated as to justify admission of the subsequent confession."⁴⁶⁵ As an a priori matter, all of these decision rules—the majority's endorsement of an all-things-considered, more-likely-than-not rule, the dissent's preference for a weighty but rebuttable presumption,⁴⁶⁶ and even a *Miranda*-inspired conclusive presumption—strike me as potentially defensible.

Perhaps significantly, though, even the *Elstad* majority assumed that the cops' initial failure to read the suspect his *Miranda* warnings was an "oversight."⁴⁶⁷ A case presently before the Court, *Missouri v. Seibert*,⁴⁶⁸ raises the question whether *Elstad* applies even

⁴⁶⁵ Id. at 335 (Brennan, J., dissenting).

⁴⁶⁶ In Justice Brennan's view, the fact of an initial, unwarned, custodial confession should not merely shift the burden onto the prosecution to establish by a more-likely-than-not standard that a subsequent, warned, custodial confession was not compelled. Rather, the prosecution should be required to "convincingly rebut[] the presumption." Id. at 331 (Brennan, J., dissenting).

⁴⁶⁷ Id. at 316.

⁴⁶⁸ 93 S.W.3d 700 (Mo. 2002) (en banc), cert. granted, 123 S. Ct. 2091 (2003) (No. 02-1371). Another case, *United States v. Fellers*, 285 F.3d 721 (8th Cir. 2002), cert. granted, 123 S. Ct. 1480 (2003) (No. 02-6320), also raises the question of how an initial unwarned statement affects the admissibility of a subsequent warned statement. There is no indication that the cops' initial failure to issue warnings was deliberate. That initial questioning did, however, occur after Fellers had been indicted, thus implicating his Sixth Amendment right to counsel. See *Patterson v. Illinois*, 487 U.S. 285 (1988) (requiring knowing and intelligent waiver of right to counsel for post-indictment questioning); *Massiah v. United States*, 377 U.S. 201 (1964) (suppressing post-indictment statements that had been deliberately elicited). Indeed, just as this Article was going to press, the Court decided *Fellers*, holding unanimously that the lower courts erred in applying *Elstad* by rote to hold Feller's second statements admissible. *Fellers v. United States*, 72 U.S.L.W. 4150 (2004). Explaining that it had not previously "had occasion to decide whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of Sixth Amendment standards," the Court remanded to the Eighth Circuit "to address this issue in the first instance." Id. at *12 (slip op. 6).

when the initial failure was intentional.⁴⁶⁹ The short answer to that question, I think, is no. Simply put, it is hard to see how whether the *police officer* acts intentionally or merely negligently when failing to issue warnings affects whether the *suspect* subsequently confesses freely in accordance with *Miranda's* understanding of the operative meaning of the Self-Incrimination Clause.⁴⁷⁰

But perhaps that is the wrong question. At the least, it is not the only question that the facts of *Seibert* raise. The officer in that case did not only deliberately refrain from issuing the *Miranda* warnings in the first place. Additionally, after eliciting a confession from *Seibert* and only then providing the warnings, the officer referred back to the earlier interview several times.⁴⁷¹ In this respect, too, *Seibert* is distinguishable from *Elstad*, for the *Elstad* majority had specifically noted that the officers did not “exploit the unwarned admission to pressure respondent into waiving his right to remain silent.”⁴⁷² This is a distinction with a difference. I have claimed (admittedly, without elaboration) that an officer’s reasons for failing to give warnings the first time have little bearing on whether a statement given during a second interview was compelled in what the *Miranda* Court intimated was the constitutionally relevant sense. The officer’s behavior *during* that subsequent interview, in contrast, bears mightily on whether any statements thus elicited were “truly free” in the thick sense that *Miranda* endorses. The Court might well conclude, accordingly, that trial courts must presume—conclusively or, at a minimum, rebuttably—that a suspect’s statement was compelled, hence inadmissible against him, if it was elicited during a custodial interrogation in which police officers had exploited any statements that the suspect had given during a previous custodial interrogation not preceded by the *Miranda* warnings. Such a decision rule would very possibly minimize adjudicatory er-

⁴⁶⁹ See Petition for Writ of Certiorari, 2003 WL 21840372 (No. 02-1371) (“Is the rule ‘that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings’ abrogated when the initial decision to withhold the *Miranda* warnings was intentional?” (quoting *Elstad*, 470 U.S. at 318)).

⁴⁷⁰ See *supra* Section V.A.1.

⁴⁷¹ See *Seibert*, 93 S.W.3d at 702.

⁴⁷² *Elstad*, 470 U.S. at 316. It is not distinguishable, though, from the *Elstad*-era practice. See *id.* at 329–32 (Brennan, J., dissenting).

rors in the aggregate and would therefore be wholly consistent with both *Elstad* and *Miranda*.

4. Emergency Exception

In *New York v. Quarles*,⁴⁷³ the Court announced “a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence.”⁴⁷⁴ In that case, a police officer arrested a rape suspect in a supermarket and, after handcuffing him and finding an empty shoulder holster, asked where the gun was. The suspect nodded in a particular direction and responded, “the gun is over there.”⁴⁷⁵ The trial court subsequently suppressed the gun and the statement, however, because the officer had not issued the *Miranda* warnings.⁴⁷⁶ The Supreme Court held the gun and the statement admissible, reasoning that failure to issue warnings was justified by the compelling public need “that further danger to the public did not result from the concealment of the gun in a public area.”⁴⁷⁷

A public safety exception that makes a custodial statement itself admissible though unwarned would be defensible were the *Miranda* doctrine conceived of, and justified as, a remedial rule designed to deter “police overreaching.” In that event, the Court must be interested in how the social costs of the conduct it wishes to deter balance against the social costs of foregoing beneficial conduct that its doctrine might chill. It is perfectly sensible, then, to carve out an exception to the general rule for a subset of cases in which the costs of that rule are likely to be especially high. And perhaps the *Quarles* modification of the *Miranda* doctrine would

⁴⁷³ 467 U.S. 649 (1984).

⁴⁷⁴ *Id.* at 655.

⁴⁷⁵ *Id.* at 652.

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 657. Justice O’Connor rejected the majority’s newly hatched “public safety” exception, and therefore would have held the suspect’s statements inadmissible. *Id.* at 660 (O’Connor, J., concurring in part and dissenting in part). But she agreed that the gun was admissible because, as mentioned above, she reasoned that the police officer had done nothing wrong to warrant “poisonous fruit” analysis. It is perhaps revealing on the latter point that Justice Marshall’s dissent challenged only the majority’s proposed exception, refraining from debating Justice O’Connor’s analysis of the fruits question on the ground that the state had not raised it below. *Id.* at 688 n.11 (Marshall, J., dissenting).

do just that. But insofar as the *Miranda* doctrine is a decision rule justified on the strength of adjudicatory considerations, this reasoning seems inapposite. If *Miranda* can only be defended as a means to minimize total adjudicatory errors, then crafting a public safety exception was an error.⁴⁷⁸

CONCLUSION

Over the past dozen or so years, constitutional scholars have turned with marked energy and enthusiasm to problematics of “constitutional doctrine”—a collection of judicial work product more comprehensive than what an earlier generation would have termed “constitutional meaning.” Central questions have concerned how doctrine relates to meaning, and what implications might follow for debates over the legitimate methods of constitutional interpretation. The Court has itself begun to struggle with these questions in such important and disparate decisions as *Dickerson*, *Garrett*, and *Atwater*.

Notwithstanding this notable metadoctrinal turn, the domain described by the phrase “constitutional doctrine” remains, for the most part, a conceptually undifferentiated mass of “interpretations, reasons, principles, and frameworks.”⁴⁷⁹ This is unfortunate. For, as Peter Birks has taught, the law’s long-term coherence and effectiveness depend, in significant measure, on taxonomic understanding. Law that does “not properly understand itself” will “be erratic

⁴⁷⁸ Again I am disagreeing with Dorf and Friedman, who argue that *Quarles* was rightly decided. See Dorf & Friedman, *supra* note 145, at 79 n.77 (“Few rights are absolute, and all *Quarles* does is to acknowledge that some balancing is appropriate.”). To my mind, they have *Quarles* and *Tucker* backwards. See *id.* at 80 & n.78 (deeming *Tucker* “dubious”). We come to opposite conclusions because, failing to distinguish the *Miranda* operative proposition from the *Miranda* decision rule, Dorf and Friedman read the decision as imposing a command upon the police as a matter of constitutional interpretation. See *id.* at 78 (contending that, according to “*Miranda*’s core holding, . . . what the Fifth Amendment requires is . . . that an accused learn of the right not to speak with the police, and that the interrogation take place in a manner that permits the suspect to exercise that right at any time”); *id.* at 106 (“*Miranda* establishes a constitutional right to procedures that are adequate to inform a suspect of his right to remain silent in the face of custodial interrogation . . .”). In contrast, my view, to repeat, is that the warnings aspect of *Miranda* is neither judicial interpretation of constitutional meaning, nor a command to the police.

⁴⁷⁹ Amar, *supra* note 3, at 79.

and doomed to ridicule.”⁴⁸⁰ It is time, accordingly, to work toward a taxonomy of constitutional doctrine.

Reasons for the relative poverty of our present taxonomic understanding of constitutional doctrine are no doubt multiple and complex. A major part of the causal story, though, is that early classificatory efforts, especially Henry Monaghan’s “Constitutional Common Law,” purported to divide constitutional doctrine into domains of true constitutional rules and of subconstitutional rules, where the former were understood as the product of abstract, principled reasoning while the latter relied upon messy inquiries into likely consequences and institutional realities. But this, many scholars argued, presented a false image of constitutional adjudication, which was reputed to be instrumental “all the way up.” This hostility to taxonomic projects that depended—or were perceived to depend—upon the assumption that some constitutional doctrine emerged through a process uncontaminated by “policy, pragmatism, and politics”⁴⁸¹ easily carried over into a hostility toward the taxonomic project itself.

In light of this background what we need is a taxonomy consistent with Pragmatism. That is, we need a classificatory scheme that neither depends upon, nor rules out, the anti-Pragmatist assumption that there exists a meaningful sort of constitutional interpretation not involving practical, instrumental, interest-balancing considerations—or at least not involving such considerations in quite the same way as do other sorts of constitutional interpretation.

A first step toward such a taxonomy—and only a first step—is to distinguish statements of judge-interpreted constitutional meaning from rules directing how courts should adjudicate claimed violations of such meaning. I have called these constituents of constitutional doctrine “constitutional operative propositions” and “constitutional decision rules,” respectively. Attention to these two conceptually distinct species of constitutional doctrine can, I have maintained, pay a wide range of dividends. For example, it could help courts craft better doctrine, it could promote a richer and more meaningful popular constitutional culture, and it could generate a more fully developed sense of Congress’s proper role in the

⁴⁸⁰ Birks, *supra* note 1, at 3.

⁴⁸¹ Levinson, *supra* note 27, at 857.

project of constitutional adjudication. That these hopes are not just idle fancy is borne out by close examinations of the Court's recent decision in *Dickerson* and, through *Dickerson*, *Miranda*. Among other things, the operative proposition/decision rule distinction has helped make clear how the *Dickerson* majority could have better replied to Justice Scalia's overblown attack on *Miranda*'s legitimacy, and how *Miranda*'s progeny should be reshaped in light of *Miranda*'s reaffirmance.

Of course, even within the parameters that this Article defines for itself, there is much it leaves undone. It does not prove that courts enjoy legitimate authority to create decision rules. It does not resolve which considerations in the making of decision rules are legitimate and which are not. It does not provide an algorithm for sorting operative propositions from decision rules. It does not conclusively establish that the most controversial aspect of the *Miranda* doctrine is in fact a decision rule, let alone a decision rule that is explicable or justifiable as a means to minimize adjudicatory error. And this is just a partial list.

All this is true. But, I daresay, to have hoped for much more would reflect inappropriate expectations for what constitutional theorizing of a conceptual or analytical bent can accomplish. Rarely can it compel assent to contested propositions. A conceptualization is a tool. Its truth lies in its utility—its power to reveal possibilities and relationships that had lain fully or partly obscured, to focus argument by identifying more sharply the nature and extent of what lies in dispute, and to point us in the direction of more promising lines of inquiry.

This Article has endeavored to make clearer a conceptualization of the practice of constitutional adjudication that, I believe, undergirds much of contemporary constitutional theorizing and underlies many of the most difficult cases that reach the Supreme Court, but which had desperately wanted for a more complete and precise fleshing out. No doubt a very long way toward completion and precision remains. Still, even incremental improvements in detailing the conceptual map of the practice of constitutional adjudication can purchase large improvements in our ability to negotiate the terrain.