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Characterizing Constitutional Inputs

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CHARACTERIZING CONSTITUTIONAL INPUTS

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ABSTRACT

Constitutional doctrine frequently employs tests that operate on abstract conceptual inputs rather than objectively identifiable facts. Consider some examples: substantive due process doctrine directs attention to whether a violated "right" qualifies as fundamental or nonfundamental; Commerce Clause doctrine directs attention to whether a regulated "activity" qualifies as economic or noneconomic; the strict scrutiny test directs attention to whether a relevant "government interest" qualifies as compelling or noncompelling; and so forth. These sorts of decision rules call for an evaluation of variables whose scope, content, and character are frequently up for debate, thereby requiring courts to characterize constitutional inputs as a precondition to reaching constitutional results. To determine whether the government has violated a "fundamental right," courts must first characterize the relevant right whose fundamentality is at issue. To determine whether a congressional enactment regulates an "economic activity," courts must first characterize the relevant activity whose economic nature must be scrutinized. To determine whether a challenged law pursues a "compelling government interest," courts must first characterize the relevant government interest whose importance is to be assessed. Tests of this sort thus implicate not just the familiar judicial challenge of evaluating a given variable by reference to an established doctrinal criterion, but also the less familiar (and often unnoticed) challenge of extracting from a fact pattern an operative characterization of the variable to be evaluated.

This Article examines these input-characterization problems as a general challenge of constitutional decisionmaking. The Article makes three contributions. First, the Article demonstrates the widespread presence of characterization problems within constitutional law,

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highlighting both the broad range of contexts in which these problems arise and the limited amount of attention they have thus far generated. Second, the Article explores the possibility of avoiding input-characterization problems through the reformulation of constitutional decision rules, considering in particular the tradeoffs implicated by the replacement of "characterization-dependent" decision rules with "characterization-resistant" alternatives. Finally, the Article works through the various methods by which courts might confront characterization problems on their own terms, asking whether there exist reliable and predictable means of selecting an authoritative input characterization from the many possibilities that the facts might afford. In sum, this analysis reveals that input-characterization problems are neither easily avoidable nor easily solvable, thus raising critical questions regarding the determinacy and coherence of the doctrine writ large.

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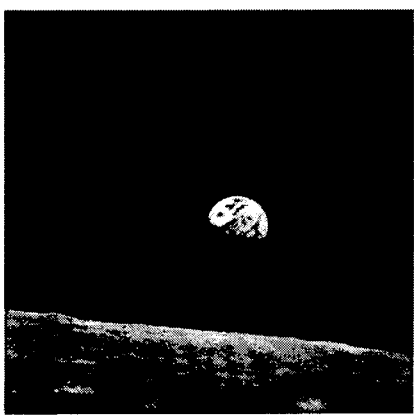
INTRODUCTION

Suppose that you have given me a collection of photographs and invited me to take from that collection any and all pictures of things that make me happy. I accept your invitation and start looking for photos to claim. Adhering strictly to your instructions, I ask with respect to each photo, "Does the subject of this picture make me happy?," and I select only those photos for which the answer to this question is "yes." Some photos are easy to deal with: I eagerly grab the photo of the dog, and I fervently reject the photo of smog. Others present a more complex calculus: I'm initially flummoxed by the photograph of a computer—sometimes computers make me happy, other times they do not—but I ultimately decide that my overall feelings toward computers are more positive than negative and thus add the photo to my pile. And I continue to make similar such judgments on a photo-by-photo basis, generally satisfied in my ability to distinguish between things that do and do not make me happy.

Suddenly, however, I hit a roadblock[1]:



My problem is this: I know that the earth makes me happy and I know that the moon does not, but I cannot figure out whether this is a picture of the earth or of the moon. Worse still, I worry that the picture might depict something other than "the earth" or "the moon": perhaps it depicts "outer space," "sunlight," "celestial orbs," "Earth as seen

1. As best I can gather, this photograph was taken by William Anders during the Apollo 8 mission, on December 24, 1968. *Earthrise* (photograph), NAT'L AERONAUTICS & SPACE ADMIN., https://www.nasa.gov/multimedia/imagegallery/image_feature_1249.html [https://perma.cc/BA9B-XX9A].

from the moon," "Earthrise over the moon," or even "what the Apollo 8 astronauts saw on December 24, 1968."

And then I start to wonder about other choices that I previously made. Was that photo of a dog really a photo of "a dog," or was it a photo of "a snarling guard dog"? Was that photo of smog really a photo of "smog," or was it a photo of "a somewhat obscured urban center"? Was that photo of a computer really a photo of "a computer," or was it a photo of "an Apple IIC computer," or was it a photo of "plastic"? I am identifying more and more potential subjects of each photograph, some more happy-seeming than others, but all of which strike me as equally valid *characterizations* of the images with which they are associated. And yet, I somehow must choose only one characterization out of each multitude in order to decide what to do with the picture it describes.

Suppose now that I am a judge tasked with deciding the following case.

> *Patient is suffering from a terminal illness and anticipates death within the year. Patient very much wishes to die on her own terms, rather than drag herself and her family through the painful ordeal of a slow medical decline. Patient asks Doctor to administer life-ending treatment, but Doctor refuses, citing to a state-law prohibition on "causing the death of a person." Patient claims that the law violates the substantive component of the Fourteenth Amendment's Due Process Clause.*[2]

Having recently studied up on substantive due process doctrine, I know that my disposition of this claim will depend on whether the "right" being asserted by the plaintiff qualifies as "fundamental" or "nonfundamental,"[3] and I know how I should go about assessing a right's fundamentality. Here too, however, I encounter a problem: I am not sure how to characterize the right whose fundamentality I should assess. Is Patient asserting a "right to commit suicide," a "right to demand physician-assisted suicide," a "right to die with dignity," a "right to refuse to continue living," a "right to spare one's family members of emotional pain," a "right to make decisions about one's

2. *Cf.* Washington v. Glucksberg, 521 U.S. 702 (1997) (presenting a similar fact pattern).

3. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 826 (5th ed. 2015) ("The Supreme Court has held that some liberties are so important that they are deemed to be 'fundamental rights' and that generally the government cannot infringe upon them unless strict scrutiny is met.").

own body," or some other "right" altogether?[4] Some of these rights seem more fundamental than others, but before I can even get to the question of fundamentality, I have to extract from the fact pattern a claim of right to be assessed. And this is no easy task. All of the rights I have considered strike me as descriptively accurate characterizations of the facts I am confronting, and yet I must select one and only one such characterization as the basis for my disposition of the substantive due process claim.

These two hypotheticals—the first, a figment of my imagination, the second, an adaptation of *Washington v. Glucksberg*[5]—highlight what I call the challenge of input characterization (or, the challenge of characterization, for short). This challenge arises whenever we must characterize factual information (for example, a photographic image or the fact pattern of a case) in terms of an abstract concept (the subject of the photograph or the right implicated by the case), which we then proceed to evaluate by reference to an operative criterion (is the subject of the photograph a "thing that makes me happy"?; is the right "fundamental" or "nonfundamental"?). The task is challenging because facts are often susceptible to large numbers of competing characterizations, and we have no obvious means of choosing a particular characterization to serve as the input for our evaluative inquiry. And the task is important because the characterization choices that we make will often influence, if not wholly dictate, the result of that inquiry itself.

These challenges are by no means unfamiliar to constitutional scholars, many of whom have commented on the importance and difficulty of defining the proper level of generality with which to frame the subject of a given doctrinal inquiry.[6] As I understand it, however,

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4. Many of these formulations were proposed and considered throughout the litigation of *Glucksberg* itself. *See, e.g.*, *Glucksberg*, 521 U.S. at 724 (referring to the "right to commit suicide with another's assistance"); *id.* at 722 (referring to the "right to choose a humane, dignified death"); *id.* at 755 (Souter, J., concurring) (referring to the "right to physician assistance").

5. Washington v. Glucksberg, 521 U.S. 702 (1997).

6. Most of the commentary concerns the particular problem of defining rights for purposes of substantive due process doctrine. *See, e.g.*, Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084 (1981) (noting that "[t]he levels-of-abstraction problem is pervasive, infecting theories of adjudication based on rights and consensus as well as tradition"); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065 (1990) ("Rightly or wrongly, the battle for constitutional meaning occurs primarily in the interpretation of prior cases. And competing characterizations of the level of generality at which to describe rights often constitute the principal weapons in that battle."); Anthony S. Winer, *Levels of Generality and the Protection of LGBT Rights Before the United Nations General Assembly*, 41

the challenge of characterization implicates more than just the well-known levels-of-generality problem. Characterization choices, in other words, implicate not just questions about generality, but also questions about what descriptive features of a fact pattern to include in—and exclude from—the doctrinal inputs that judges end up evaluating.[7] We might all agree, for instance, that I should characterize the NASA photograph at a low level of generality, but that fact alone does not tell us whether the characterization should be "the Earth on December 24, 1968," or "the Earth as seen by the crew of Apollo 8." Similarly, we might all agree that the right at issue in *Glucksberg* merited a high-generality characterization, but that fact alone does not tell us whether the characterization should have been a "right to die with dignity," a "right to die with a physician's assistance," or a "right to die at a time of one's own choosing."[8] I will elaborate on this point further in the

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WM. MITCHELL L. REV. 80, 91–100 (2015) (evaluating how levels of generality affect judicial decisions). *See generally* John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. FLA. J.L. & PUB. POL'Y 401 (2005) (analyzing how courts characterize fundamental rights). Some commentators, though, have noted the existence of similar problems within and across other domains as well. *See, e.g.*, Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 585 n.167 (1999) (noting that "levels of generality problems pervade qualified immunity, Teague, and [other habeas questions]," while analogizing to levels of generality problems that arise in the context of substantive due process doctrine); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 778–83 (1994) (discussing the importance of characterization choices in connection with inquiries that require a balancing of "liberty interests" against "government interests"); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1271 (2007) ("Although it is widely recognized that courts must determine the 'level of generality' at which constitutional rights should be defined . . . the Court has largely ignored parallel questions involving the generality with which government interests should be specified."); Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 275 (2014) (noting "the central place of state interest definition in constitutional adjudication," while noting the Court's "'astonishingly casual approach' to articulating or evaluating those sources of government concern that ambiguous interests comprise" (quoting Fallon, *supra*, at 1321)); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983) ("Frequently an analysis turns completely on the level of generality at which some feature of the issue under analysis is described.").

7. *See* Tribe & Dorf, *supra* note 6, at 1091 (highlighting this difficulty).

8. In this sense, the characterization of constitutional inputs bears some similarity to what Mark Kelman has described as the process of "interpretive construction" within U.S. criminal law. *See* Mark Kelman, *Interpretive Construction in Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–97 (1981). In deciding criminal cases, judges must often engage in processes whereby "concrete situations are reduced to substantive legal controversies." *Id.* at 592. Thus, for instance, in assessing the blameworthiness of a defendant's conduct, judges must first select a "relevant time frame," which may or may not include "some obviously voluntary act that contributes to the ultimate harm." *Id.* Similarly, judges often choose whether to represent a fact pattern in terms of a single "unified" incident or as a series of "disjoined" incidents, and that choice in turn can affect their assessment of the legal claims that the parties have raised. *See id.* at 616–20. Within criminal

discussion below,[9] but for now it suffices to say that the levels-of-generality problem represents only one aspect of the problem that I am considering here. With that broader understanding of the problem in place, we are more likely to notice its occurrence across many different areas of constitutional law.

Indeed, a central claim of this Article is that the challenge of input characterization presents a pervasive problem for judges tasked with deciding constitutional cases.[10] In case after constitutional case, involving clause after constitutional clause, courts must characterize complex bodies of factual details in terms of a single abstract concept that a decision rule demands. *Glucksberg* illustrates this point with respect to substantive due process doctrine: the case law distinguishes between claims involving fundamental and nonfundamental rights, and it thus requires courts to extract from each case's fact pattern a characterization of the relevant right whose fundamentality can then be gauged.[11] But characterization problems arise with equal frequency in many other domains. To determine whether a federal court plaintiff has Article III standing, one must first characterize the plaintiff's various burdens, grievances, indignities, and other harms in terms of a single "injury" whose concreteness, traceability, and redressability can then be evaluated.[12] To determine whether a law survives strict scrutiny, one must characterize the complex cluster of problems, policies, objectives, and effects of the law in terms of a "government interest" whose overall importance and closeness of fit can then be evaluated.[13] To determine whether a federal law preempts a state law, one must characterize various facts about each law as a description of each law's regulatory "field" before then proceeding to address whether those fields problematically overlap.[14] This list could go on, but the key point is simply that constitutional decision rules frequently operate on abstract characterizations of the facts rather than directly on the facts themselves. And where that is so, courts must characterize

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law, that is, "a legal-sounding argument can be made only after a situation is characterized nonrationally, so that the advocate seems able to deduce a single result on principle." *Id.* at 592. This Article attempts to show that a similar phenomenon is at work within various areas of constitutional doctrine as well.

9. For a criticism of different approaches to characterization problems that focus exclusively on calibrating generality levels, see *infra* Part IV.A.

10. *See infra* Part II.

11. *See infra* Part II.A.

12. *See infra* Part II.E.

13. *See infra* Part II.C.

14. *See infra* Part II.F.

constitutional inputs as a precondition to generating constitutional results.

This fact is not problematic in and of itself, but it becomes problematic when another fact comes to light. And that fact, which I will also endeavor to demonstrate in the pages below, is that the Supreme Court does not often pause to defend, let alone acknowledge, the characterization choices that it makes. All too often, contestable characterizations of the facts are simply adopted without explanation, buried within elaborate and involved discussions as to why one decision rule or another should be adopted or why a characterized input does or does not satisfy the terms of the decision rule being applied. The Court has told us much about how it evaluates the fundamentality of an unenumerated right, but it has told us relatively little about how it goes about characterizing the particular right that a given case implicates. Similarly, the Court has told us much about what distinguishes a mere "generalized grievance" from a cognizable injury-in-fact, but it has told us relatively little about how it goes about characterizing the particular injury that a plaintiff claims to have suffered. The Court has told us much about what sorts of government interests qualify as "compelling," but it has told us relatively little about how it goes about identifying the relevant interest that a given law pursues. To be sure, not all of the Court's characterization choices have been rendered so casually; some choices have been conducted out in the open, although even here the justifications for those choices have been largely unilluminating. But given the frequency with which the Court characterizes its constitutional inputs, it is both surprising and concerning that the Justices have had so little to say about how courts should go about performing this important task.

This Article aims to draw attention to a vital yet largely underappreciated facet of the Court's constitutional work. It begins in Part I by explaining in more detail how characterization choices fit into the constitutional decisionmaking process and why characterization choices are worth examining as a unitary and "trans-substantive" problem of constitutional law. With the brush thus cleared, Part II proceeds to advance the two major descriptive claims of the Article, demonstrating first, that many different decision rules of constitutional law operate on inputs that can only be identified via contestable characterizations of the facts, and second, that courts only rarely offer satisfactory justifications—or for that matter any justifications at all—for the characterization choices they have made. The challenge of characterization, in short, is as widespread as it is underexamined,

making it all the more important for us to analyze the structure of the problem it presents.

The remainder of this Article takes up that task. Part III looks at the challenge of characterization through the lens of decision rule design. This Part considers the possibility of crafting constitutional doctrine in such a way as to minimize the decisional influence of characterization choices—in effect, responding to the challenge of characterization by rendering difficult characterization choices irrelevant to the application of a given legal norm. This strategy might be pursued in one of three ways. First, the Court might prescribe decision rules that operate on specifically described and easily identifiable features of a fact pattern, calling for the assessment of targeted inputs drawn directly from the facts.[15] Second, and at the opposite extreme, the Court might prescribe decision rules that operate on the entirety of a given fact pattern, calling for a holistic and all-things-considered assessment of all aspects of a transaction giving rise to a case.[16] Finally, even where a decision rule operates on a characterized input, courts might attempt to neutralize the influence of the characterization choice by installing equilibrating or self-corrective mechanisms into the decision rule itself.[17] These three strategies, I argue, can and sometimes do succeed at producing various forms of characterization-resistant constitutional doctrine. But they will not always be available for courts to use. And when that is so, courts have no choice but to confront the challenge of characterization head on.

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15. Consider, for instance, rules that accord differing levels of First Amendment protection based on whether a defamation plaintiff qualifies as a public or nonpublic figure. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134 (1967); N.Y. Times v. Sullivan, 376 U.S. 254, 264 (1964); *see also* Stephen J. Mattingly, *Drawing a Dangerous Line: Why the Public-Concern Test in the Constitutional Law of Defamation Is Harmful to the First Amendment, and What Courts Should Do About It*, 47 U. LOUISVILLE L. REV. 739, 742 (2009) (noting that *New York Times* and *Butts* "established that the status of a defamation plaintiff determined the contours of the protection afforded to the speech in question").

16. Consider, for instance, the Court's suggestion that the "reasonableness" of a given search be assessed by reference to the "totality of circumstances" accompanying the search. *See, e.g.*, Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015) (per curiam) ("The reasonableness of a search depends on the totality of the circumstances . . . .").

17. Consider, for instance, the various forms of means/ends analysis, in which the breadth of a characterized government interest might simultaneously militate in favor of a finding that the interest qualifies as "compelling" and militate against a finding that the challenge law is "narrowly tailored" to serve that interest. *See* Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 447 (1998) (noting that "as [government] interests are defined more narrowly, they become less important," while also noting that "as interests are defined more generally, they become less related to the government policy at issue").

Part IV thus considers how courts should go about characterizing constitutional inputs. More specifically, it considers three different strategies for constraining characterization choices, asking how and according to what guideposts courts should select a particular characterization of the facts. The first strategy attempts to constrain characterization choices by prescribing the requisite *level of generality* with which a relevant input should be characterized. (If, for instance, I had been instructed to characterize the subject of each photograph at a "high" level of generality, I would have had some basis for concluding that a photo depicted a "dog" rather than a "snarling guard-dog.") But this strategy can only achieve so much, encountering limitations that result both from the difficulty of communicating and measuring desired generality levels and from the reality that multiple competing characterizations will often exist at the same overall level of abstraction. The second strategy employs what I call *results-based* characterization; utilizing this strategy, the Court would simply instruct its subordinates to characterize inputs in whatever manner is most likely to produce the correct-seeming outcome under the decision rule being applied. (As applied to the example of the photographs, this strategy would instruct me to ask first whether a picture makes me feel happy and then to characterize the photograph in terms of a "subject" that accords with this feeling.) In contrast to the generality-based strategy, this strategy is at least sometimes capable of generating determinate and predictable characterization choices, but it will also have the effect of rendering the operative decision rule largely irrelevant to the decision it purports to guide. Finally, the Court might call for *precedent-driven* characterization choices, instructing courts to characterize constitutional inputs in a manner that coheres with characterization choices made in previous, similar cases. (If, for instance, I had previously characterized a picture with a dog in it as a "picture of a dog," that strategy would instruct me to do the same thing in connection with similarly canine-focused pictures.) This strategy likewise carries only limited promise: among other things, the precedent-driven approach may impose undue cognitive burdens on the decisionmaker and may be impossible to pursue without once again converting the process into a doctrinally irrelevant sideshow.

The bad news, then, is that the analysis in Part IV fails to identify an approach to characterization choices that qualifies as both nonarbitrary and nonduplicative of the inquiry it purports to guide. All is not lost, however, as Part V attempts to sketch out a different understanding of the role that characterization choices might play in

the resolution of constitutional cases. The suggestion here is that characterization choices, along with the decision rules to which they attach, might make more sense when understood as an output-focused rather than input-focused phenomenon—concerned less with dictating results ex ante than they are with communicating a set of judgments that would otherwise resist easy description. That observation, in turn, might prompt a broader reexamination of the purposes and benefits of constitutional decision rules. In particular, the suggestion is that, to the extent that characterization-dependent decision rules afford benefits to the doctrine as a whole, those benefits may have more to do with the appearance of continuity across cases rather than with the actuality of the same. The suggestions here are largely tentative, but they do, I hope, at least demonstrate the importance of thinking carefully about the challenge of characterization and its relationship to the broader challenge of deciding constitutional cases over time.

I. THE CHARACTERIZATION PROCESS

A. *Basic Model of Constitutional Adjudication*

To understand the challenge of characterization, it may help to begin with an idealized account of how constitutional decisionmaking works. Constitutional litigation, like any other area of litigation, requires attention to both the law and the facts. To decide a constitutional case, a court must identify the applicable rule, identify the relevant facts, and then apply the rule to those facts.

With this picture in view, we can identify three tasks of importance to the enterprise. The first is that of *fact identification*—the development of a factual record against which to resolve the constitutional question before the court.[18] Fact identification can occur in a number of different ways, depending on the issues or procedural posture of a case: the parties might stipulate certain facts, some facts might be assumed, other facts might be found by a judge or jury, and so-called legislative facts might find their way into the case via amicus briefs or independent judicial research. These processes in turn generate different types of information: they might tell us, for instance,

18. For useful investigations into the various challenges to which this process gives rise, see DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS (2008); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255 (2012).

what was said during a traffic stop; they might tell us about the content of a television broadcast that triggered FCC penalties; or they might tell us about a state's history of enforcing a challenged law. The process can sometimes be arduous, and it can at other times proceed quickly. But however the fact-finding process takes place, its underlying purpose is the same: generating information about a legal dispute and the broader environment in which it operates.[19]

Second, courts must identify the applicable law. Call this the task of *rule identification*. In one sense, rule identification in constitutional cases is easy to do: if a litigant asserts a constitutional claim, the applicable rule is the Constitution itself. But rarely does the abstract language of the Constitution provide much in the way of concrete guidance. More frequently, that guidance comes from the various decision rules of Supreme Court doctrine that specify how to go about resolving a given constitutional claim. Equal protection doctrine, for instance, instructs courts to apply strict scrutiny when reviewing laws that employ race-based classifications;[20] Spending Clause doctrine calls for courts to apply a multifactor test when reviewing a conditional spending program;[21] procedural due process doctrine requires courts to apply the three-part balancing test from *Mathews v. Eldridge*[22] when evaluating the adequacy of procedural safeguards;[23] and so forth. For frequently litigated issues, one identifies the applicable rule simply by looking up the relevant judicial precedents and reciting the standards they set forth. Where the precedents are sparser, rule identification

19. I should note that—perhaps unconventionally—I will sometimes understand the relevant facts of a constitutional case to include materials of a formally legal character. For example, in a Commerce Clause challenge to a newly enacted piece of federal legislation, my conceptual framework would treat the legislation itself as a fact rather than as a rule that is of relevance to the constitutional decision. In such a case, after all, the challenged legislation would be operating as an object of, rather than source of, the legal analysis that the court conducts, becoming, in effect, one of several data points feeding into the question of whether a claimant's Commerce Clause argument should fail or succeed. This is not to say that the challenged legislation could not function as a rule in another case; we would understand it to be the governing rule, for instance, in a criminal prosecution presenting the question whether a defendant acted in violation of the legislation itself. But where the legislation is itself the object of a constitutional inquiry, it is more accurately characterized as a fact on which the relevant decision rule operates.

20. *See, e.g.*, Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) ("Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

21. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 207–08 (1987) (listing four factors for evaluating a conditional spending program).

22. Mathews v. Eldridge, 424 U.S. 319 (1976).

23. *Id.* at 335.

might involve the formulation of a new decision rule informed by judgments about text, history, structure, policy, and so forth.[24] Rule identification, in short, begins with the various sources of constitutional law and ends with some combination of tests, presumptions, formulations, exceptions, and other directives that courts have developed to facilitate the implementation of an abstract constitutional norm.

With the law and the facts on the table, a decisionmaker can then proceed to apply the former to the latter, thus carrying out the final, outcome-determinative task of *rule application*.[25] Is a particular government interest "compelling" enough to survive strict scrutiny? If so, is a particular race-based classification "narrowly tailored" to serve that interest? Is a particular conditional spending program unduly "coercive"? Does a given set of procedures satisfy the *Mathews v.*

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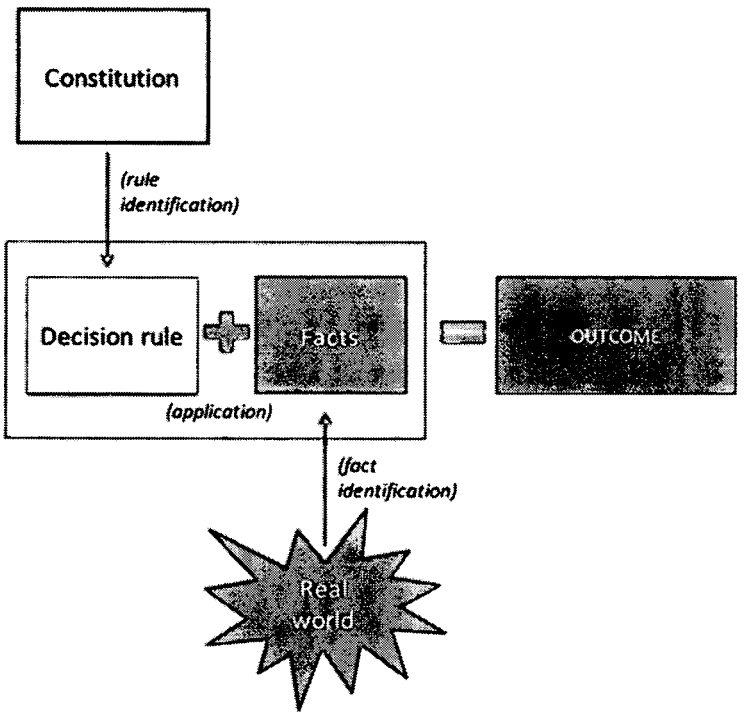
24. More specifically, I understand the rule identification enterprise to encompass two different sorts of determinations that courts routinely make. First, the rule identification process will sometimes involve the resolution of interpretive questions about the meaning of the constitutional text, with courts identifying an operative proposition of constitutional law by selecting one out of several plausible readings of a given textual provision. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2561–67 (2014) (reading the phrase "the recess" in the Recess Appointments Clause to refer both to intra-session and inter-session recesses of Congress). Second, the rule identification process will sometimes involve the creation of judge-made decision rules to facilitate the implementation of whatever the operative proposition is identified to be. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (setting forth a particularized warning requirement as a means of enforcing the Fifth Amendment's prohibition on compelled confessions); *see also* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (distinguishing 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)"); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (contending that the task of "[i]dentifying the 'meaning' of the Constitution is not the Court's only function" and that the Court must also "craft doctrine that is driven by the Constitution, but does not reflect the Constitution's meaning precisely"); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (distinguishing between "interpretation," which is "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text," and "construction," which is "the process that gives a text legal effect"); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 207 (1988) (noting that "courts create constitutional doctrine by taking into account both the principles and values reflected in the relevant constitutional provisions and institutional realities"). For ease of exposition, I will generally refer to the output of the rule identification process as a "decision rule" of constitutional doctrine; but I should emphasize that I do not intend to suggest that the process is wholly unrelated to the interpretive challenge of extracting meaning from the constitutional text.

25. *See, e.g.*, Berman, *supra* note 24, at 35–36 (noting 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"); *see also id.* at 58–59 (elaborating on this model).

Eldridge balancing test? To answer these questions, judges must assess a case's factual particularities in light of the various evaluative criteria that the applicable decision rule has set forth. And once these assessments have been made, a court can cite to the applicable decision rule as justifying the outcome it has reached: if the government interest is not compelling or the classification is insufficiently tailored, the law must be struck down. If the conditional spending program is impermissibly coercive, the spending program cannot stand. If the government interests outweigh the liberty interests, and if the risk of an erroneous deprivation is minimal, a court should uphold the procedural rules under review. Rule application marks the stage of the inquiry where law and fact come together—the identified decision rule takes the identified fact pattern as its input and yields a legal disposition as its output.

Figure 1: Basic Model of Constitutional Adjudication



All of this is diagrammed above. Every constitutional case starts with two fixed points: (1) the Constitution,[26] and (2) the world as we

26. Although my model characterizes the Constitution as the starting point of the rule

know it. The rule identification process takes us from the Constitution to an operative decision rule, whereas the fact identification process extracts from the world a fact pattern to be evaluated under the decision rule. The law application process then combines the decision rule with the fact pattern to produce the ultimate outcome of the case.

B. Adding Input Characterization Into the Mix

Thus far, our model has omitted reference to the characterization of constitutional inputs. We can now bring that process into the picture by noting that many decision rules require an assessment of something other than unvarnished facts about the real world. When, for instance, qualified immunity doctrine instructs the courts to evaluate whether a violated rule qualifies as "clearly established,"[27] the relevant facts will not yield a single agreed-upon description of what that relevant rule is. Similarly, when substantive due process doctrine instructs the courts to determine whether the plaintiff's liberty interest is fundamental, knowing what happened between the plaintiff and the government is not the same as knowing what particular liberty interest the plaintiff seeks to protect. The fact identification process gives us a detailed snapshot of a particular dispute, but the snapshot is not always the input that we need. This is where the challenge of characterization comes in—courts must organize a case's fact pattern into terms and concepts that the operative decision rule can understand.[28]

A further analogy may help to illustrate the idea. Suppose that a

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identification inquiry, nothing of much significance for our purposes turns on the question of whether the Constitution itself exhausts the content of U.S. constitutional law. *See, e.g.*, Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410 (2007) ("[T]he American 'constitution' consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments."). The central assumption of the model, rather, is that there exists some set of sources of constitutional law—including but not necessarily limited to the constitutional text—and that the rule identification process involves the translation of those the sources into rules of decision that courts can apply.

27. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

28. This understanding is reminiscent of Mark Kelman's suggestion that "legal argument has two phases," the first of which, "interpretive construction," involves "the way we construe a factual situation and . . . the way we frame the possible rules to handle the situation," and the second of which, "rational rhetoricism," involves "the process of presenting the legal conclusions that result when interpretive constructs are applied to the 'facts.'" Kelman, *supra* note 8, at 591–92. In a rough sense, the characterization of constitutional inputs may be seen as a form of what Kelman calls "interpretive construction," whereas the evaluation of those inputs in terms of a pre-established decision rule may be seen as a form of what Kelman calls "rational rhetoricism."

friend asks me whether the opening chord to "A Hard Day's Night" is major or minor in character. Suppose further that I have managed to identify all of the individual notes sounding from all of the individual instruments at the beginning of the song.[29] I have, in other words, identified an applicable rule (namely, evaluate whether the chord is major or minor) and I have gathered all the relevant facts (the notes being played at the beginning of the song). But I am not yet able to answer my friend's question, because the decision rule operates on the singular, abstract input of a "chord." Consequently, before I can discern the major or minor nature of the opening chord of "A Hard Day's Night," I first must restate that collection of notes in the conceptual language of a chord. Do the notes comprise a "G-seven chord with a suspended fourth"? A "D-minor-11 chord"? An "F-major-seven-add-9 chord"? Or some other chord altogether? As it turns out, these—and many other—labels all offer plausible harmonic descriptions of the collection of notes that I hear at the beginning of the song,[30] and no additional fact finding will shed light on the question of which particular description I should employ. I must therefore make a characterization choice, tagging one of these descriptions as the relevant "chord" to serve as the basis for the answer to my friend's question.

We can thus visualize the characterization process as a sometimes-necessary intermediate step between the fact identification and law application stages of the decisionmaking process.[31] In our example

29. As it happens, this information only recently became available. *See* Damian Fanelli, *Beatles Multitracks Reveal True "A Hard Day's Night" Opening Chord*, GUITAR WORLD (Nov. 6, 2015), http://www.guitarworld.com/beatles-multitracks-reveal-true-hard-days-night-chord-video [https://perma.cc/KD8K-SUEE].

30. *Compare, e.g.*, TONY BACON, FUZZ AND FEEDBACK: CLASSICAL GUITAR MUSIC OF THE 60'S, at 5 (2000) (characterizing the chord as a Dm7sus4), *with* DOMINIC PEDLER, THE SONGWRITING SECRETS OF THE BEATLES 478–79 (2003) (quoting George Harrison's characterization of the chord as an Fadd9). Whether Harrison's own characterization of the chord should carry special weight is an interesting question, but it is one, alas, that lies outside the scope of this Article.

31. I should note here that I understand the challenge of input characterization to be materially different from what David Faigman has elsewhere called problem of defining the "proper frame of reference for deciding constitutional cases." *See* FAIGMAN, *supra* note 18, at 78. *See generally* David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L.Q. 631 (2009) (exploring the relationship between liberty and government interests). Constitutional outcomes, as Faigman has demonstrated, often depend on what types of factual findings the Court should demand when deciding a given case, with the Court sometimes looking to findings that are true at the case-specific level and at other times looking to findings that are true in a more systemic sense. Faigman's "frame of reference" question, in other words, goes not

above, it was a process that took us from a collection of notes to a description of a chord. In law, it is the process that takes us from the text and legislative history of a congressional statute to a description of the "activity" that the statute regulates; from a transcript of statements made by a protester to a description of the "matter" that the protester discussed; from data about the history and effects of a regulation to a description of the liberty interests and/or government interests that it implicates. It takes as its input what we might call a raw fact pattern—a timeline of events, the text of a challenged law, the testimony of a government official—and it generates as its output a characterized factual input—a label, concept, or descriptive statement that can be plugged into the decision rule we are applying.

C. Characterization Versus Evaluation

As the foregoing discussion suggests, what we call the application of law to fact often involves—or at least purports to involve—two distinct tasks: a characterization of facts into the language of the requisite doctrinal input, followed by an evaluation of that input by reference to criteria the test sets forth. For instance, when courts apply substantive due process doctrine, they must characterize the facts in terms of a "right" being asserted, and they must then evaluate the right by reference to its overall "fundamentality" or "nonfundamentality." When courts apply qualified immunity doctrine, they must characterize the facts in terms of a "violated rule," and they must then evaluate the rule by reference to its "clearly established" or not "clearly established" nature. When courts apply the Article III standing test, they must characterize the facts in terms of an asserted "injury" of the plaintiff, and then evaluate that injury in terms of its concreteness, traceability, and redressability. Questions of characterization in this sense precede questions of evaluation. To know whether some input satisfies the relevant doctrinal criteria, we must first identify, and hence characterize, the descriptive contours of the input itself.

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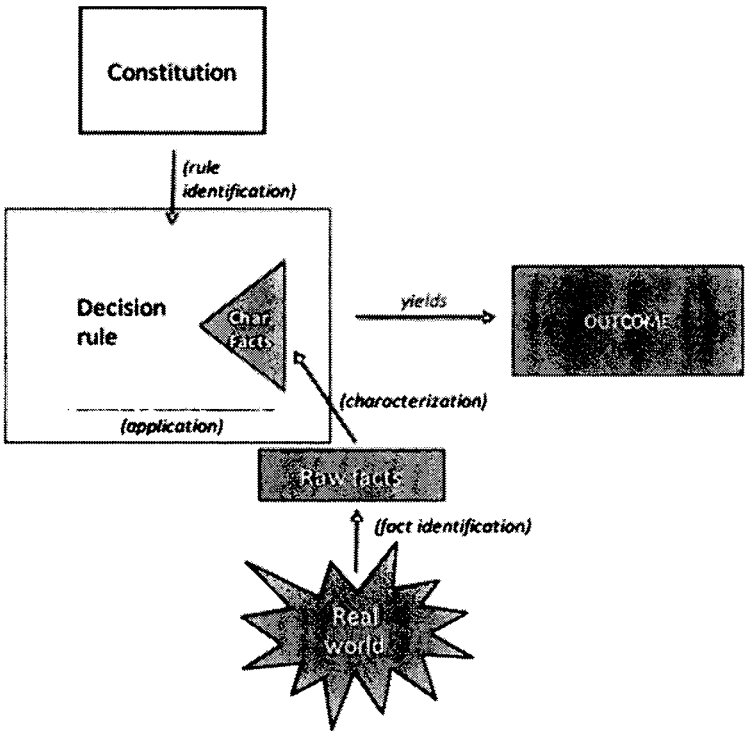
to the issue of how to characterize a factual input that the doctrine demands, but rather to the antecedent question of what sort of factual inputs the doctrine should demand in the first place. *See* FAIGMAN, *supra* note 18, at 66; *see also id.* at 195 n.236 (noting that "the concern over what frame of reference applies in particular constitutional contexts is fundamentally different from the debate sparked by Justice Scalia in *Michael H. v. Gerald D.*").

Figure 2: Updated Model of Constitutional Adjudication (with Characterization Included)



This posited distinction between characterization and evaluation should invite an important point of skepticism: perhaps our attempt to differentiate characterization-based questions from evaluation-based questions will tend to obscure more than it illuminates, for the simple reason that both types of questions ultimately implicate the same big-picture task of applying law to fact.[32] It may be formally correct to

32. A big-picture, methodological objection to this Article might as well be addressed here. Specifically, this objection attacks this Article's near-exclusive focus on *constitutional* law as arbitrary and unnecessary. Constitutional law, after all, is by no means the only area of law in which doctrinal rules require evaluations of abstract conceptual inputs, and there is nothing special about constitutional cases qua constitutional cases that would require us to think about their characterization problems any different from others. *Cf.* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 691 (2013) (questioning the utility of the constitutional/nonconstitutional distinction within a variety of doctrinal contexts). To this accusation, I plead guilty as charged. Although I do not squarely confront the issue in this Article, my inclination is to agree with the claim that characterization problems are by no means unique to the domain of constitutional law, *see, e.g.*, Tun-Jen Chiang, *The Levels of Abstraction Problem in Patent Law*, 105 NW. L. REV. 1097, 1118 (2011) (evaluating an analogous set of problems that arise from patent-law doctrines that require a characterization of the relevant "invention" that a given patent

describe the determination that "*X* is or is not *Y*" as involving both a characterization of the facts in terms of *X* followed by an evaluation of *X* in terms of *Y*. But if the first and second steps of the inquiry turn out to overlap with one another, then we might as well jettison the distinction as unhelpful to the goal of better understanding the challenge of constitutional decisionmaking. If, in other words, the various difficulties associated with questions of characterization end up mirroring the various difficulties associated with questions of evaluation, then we should examine those difficulties directly and on their own terms, without indulging any surface-level distinctions between the contexts in which they arise.

So, before proceeding further, I want to point out two important ways in which questions of characterization differ from questions of evaluation, and to suggest that these differences are significant enough to warrant the distinction I have drawn. First, unlike questions of evaluation, questions of characterization can be both posed and answered in purely descriptive terms: they are, on their face, value-neutral questions of "what," rather than value-laden questions of "whether." Characterizing the relevant government interest implicated by a law does not appear to involve an assessment of the strength of the government's justifications for that law, whereas evaluating the importance of that interest does. Characterizing the relevant injury suffered by a plaintiff does not require a court to express a judgment of the Article III bona fides of the plaintiff's complaint, whereas evaluating the injury's concreteness and redressability undoubtedly does. Obviously, and as we will explore in further detail, this feature of characterization questions does not shield them from normative influence,[33] but it does mean that such choices can mask or obscure value-based judgments in a way that their evaluation-based

protects), and I certainly do not intend for this Article's substantive domain to signify anything to the contrary. This Article's choice of focus derives instead from expositional considerations. A comprehensive treatment of characterization problems within all different areas of law strikes me as too big a task for a single law review article to take on, and I have thus decided to narrow the paper's focus to a body of cases with which I am already well familiar. Constitutional law, in other words, strikes me as as good an area as any other within which to explore the problem of characterization, and I do not think much is lost by limiting this Article's focus in this way. To the extent, moreover, that the insights I offer here turn out to be of interest and use to scholars within other disciplines, I would regard that outcome as all to the good.

33. *Cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935) (noting that "in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in 'legal problems' which can always be answered by manipulating legal concepts in certain approved ways").

counterparts cannot. In other words, even if questions of characterization turn out to be irreducibly normative, they still can be framed and disposed of in such a way as to make their motivating value judgments more difficult for the characterizing court to notice and for the observing reader to detect. With evaluation-based questions, by contrast, the value-based cards are more likely to be out on the table for everyone to see.

Second, questions of characterization—unlike questions of evaluation—accommodate a huge range of seemingly plausible answers. Evaluation-based questions are typically posed as binary "yes or no" questions: "Is the right fundamental?," "Is the government interest compelling?," "Is the injury concrete?," etc.[34] Characterization-based questions, by contrast, are typically posed as open-ended interpretive inquiries: "What right does this case implicate?," "What government interest does this law serve?," "What injury has plaintiff suffered?," and so forth. In answering an evaluative question, we at least have the luxury of knowing that the answer must come out one way or the other: either the characterized input will satisfy the relevant criterion or it will not, and there is no other option to choose. But to answer a characterization-based question, we must begin from the vast universe of descriptively accurate labels that we might affix onto a given body of facts. Worse yet, whereas the two possible answers to an evaluative question are mutually exclusive of one another—a right cannot be both fundamental and nonfundamental at the same time— the much higher number of possible answers to characterization questions are less obviously so. Descriptively speaking, for instance, a substantive due process case can simultaneously implicate a "right to same-sex marriage" and a "right to marriage," just as a qualified immunity case can simultaneously implicate the "prohibition on abridgments of free speech" and the "prohibition on abridgments of employee speech on matters of public concern." That is not to say that questions of evaluation are always easier to answer than their characterization-based counterparts. But it is to say that, all else equal, evaluation-based questions at least enjoy a clarity of framing that their characterization-based counterparts do not.

To be sure, distinguishing between characterization-based

34. *See, e.g.*, Frederick Schauer, *Analogy in the Supreme Court*: Lozman v. City of Riviera Beach, Florida, 2013 SUP. CT. REV. 405, 405 (noting that "legal decision making, in its archetypal mode, is bivalent").

questions and evaluation-based questions may not always prove to be a useful or easy exercise.[35] Even so, and as I hope the ensuing discussion will reveal, the distinction will often provide helpful means of thinking about a range of different problems in a range of different doctrinal contexts.

II. CHARACTERIZATION PROBLEMS IN CONSTITUTIONAL DOCTRINE

This Part offers a representative but by no means exhaustive catalogue of characterization choices implicated by constitutional decision rules. Specifically, it highlights decisions in which the Supreme Court has relied on a contestable characterization of the facts on the way to determining the outcome of a given doctrinal test. Some of the Court's characterization choices, as we will see, are easier to spot than others, but all of the examples below illustrate both the widespread existence of characterization-based questions in constitutional doctrine and the absence of a clear and systematic approach to resolving these questions.[36]

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35. In particular, it will sometimes be debatable whether a decision rule does in fact operate on characterized inputs. Consider, for example, the much-debated question of whether the so-called "individual mandate" of the Affordable Care Act regulated "inactivity" or "activity"—a question that five Justices ultimately found relevant to their disposition of the Commerce Clause claim presented in *NFIB v. Sebelius*, 567 U.S. 519, 522 (2013). Assuming for the moment the validity of a rule that withholds from Congress the power to regulate "inactivity" under the Commerce Clause, we might well disagree as to whether the application of that rule requires a characterization of the facts. As this Article argues below, one might answer this question in the affirmative, interpreting the rule the require the reviewing court to *characterize* out of the facts a particular "behavior" regulated by the law, and then to *evaluate* the active or inactive nature of the "behavior" so characterized. For a description of the question in these terms, see *infra* Part II.D. But one might alternatively understand the determination in characterization-free terms; perhaps, for instance, the operative decision rule simply instructs the court to ask whether a challenged statute is or is not behavior-forcing, in which case a characterization of the regulated behavior might not in fact be warranted. The ambiguity, in short, stems from the Court's failure to specify what exactly it understood the input of the operative decision rule to be: either the input is the statute itself, or the input is the behavior regulated by the statute (which does require a characterization choice). In this way can the seemingly straightforward distinction between decision rules that do and do not require characterization choices tend to break down at the margins.

36. This Part will also reveal that the Court itself often blends together its characterization-based findings with its evaluation-based determinations. For example, rather than characterize the relevant right whose fundamentality must be evaluated and then explain why that right does or does not qualify as fundamental, the Court will sometimes simply catalogue reasons as to why a case does or does not implicate a fundamental right without ever specifying *what* exactly it understood that fundamental right to be. In other words, courts will often determine and justify the outcome of a decision rule while failing to identify the precise contours of the particular input

A. Characterizing Rights

Characterization problems frequently arise when litigants allege infringements of unenumerated rights under the Fourteenth Amendment's Due Process Clause. The Clause has long been understood to contain a substantive component,[37] according to which courts must apply heightened scrutiny to government action that deprives individuals of a fundamental right. The fundamentality or nonfundamentality of the right asserted thus carries major implications for the success or failure of a substantive due process claim, and courts must, and often do, devote substantial analysis to the question of whether the asserted right does or does not qualify as fundamental. But a Court cannot render this assessment until it has rendered a characterization of the relevant "right" to be assessed. Substantive due process analysis therefore must begin, as the Court itself has acknowledged, with a "'careful description' of the asserted fundamental liberty interest."[38]

This is no easy task. A well-known illustration of its difficulties comes from *Michael H. v. Gerald D.*[39] Michael H. believed, on the basis of strong DNA evidence, that he was the father of a child born to a woman married to another man.[40] A California court had denied his request for visitation rights, citing to a state evidentiary presumption

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they have evaluated.

To the extent this is so, it might provide reason to question the descriptive validity of an adjudicatory model that conceptualizes "characterization" and "evaluation" as independent, sequential steps. Certainly, it is important not to take the model as an airtight description of how courts actually apply law to fact. Even so, the model still accords with descriptive reality insofar as it describes what the operative decision rules themselves purport to require. When we are told to evaluate the *Y*-ness of *X*, we cannot perform that task without first determining *what X is*, and that fact is in and of itself descriptively significant. There can be a difference, in other words, between what a decision rule instructs courts to do and what courts say they are doing when applying that rule, but misalignments between these two things do not in any way falsify our claims we might make about the rules themselves. To be sure, those misalignments may themselves be significant. They might suggest, for instance, that courts are making the required characterization choices internally, implicitly, or altogether subconsciously. They might also suggest that a nominally operative decision rule is in fact inoperative, failing to guide or constrain judicial decisionmaking as it purports to do. But those conclusions cast no doubt on the more basic descriptive suggestion that I wish to offer here—namely, that many existing rules of constitutional doctrine on their own terms require courts to engage in the difficult business of characterizing inputs out of the facts.

37. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

38. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

39. Michael H. v. Gerald D., 491 U.S. 110 (1989).

40. *Id.* at 113–14 (plurality opinion).

that "the issue of a wife cohabitating with her husband . . . is conclusively presumed to be a child of the marriage."[41] In response, Michael H. sought judicial invalidation of the presumption on substantive due process grounds, claiming an unjustified government infringement of a fundamental right.[42] A fractured Court denied his claim, with the Justices disagreeing about, among other things, how to characterize the liberty interest Michael H. sought to vindicate.[43] According to Justice Scalia's plurality opinion, Michael H. had invoked an interest in "assert[ing] parental rights over a child born into a woman's existing marriage with another man"[44]—an interest that was not "so deeply embedded within our traditions as to be a fundamental right."[45] Justice Brennan and the other dissenters disagreed, arguing that Michael H. was seeking recognition of the "parent-child relationship"—an interest that "was among the first that this Court acknowledged in its cases defining the 'liberty' protected by the Constitution."[46] One group of Justices, in other words, saw the case as concerning the rights of "adulterous natural father[s],"[47] whereas another group of Justices saw the case as concerning the right of "parenthood," full stop.[48] With these differing characterizations adopted, the Justices reached differing conclusions as to whether Michael H. should win.

Characterization choices also played a significant role in shaping the Court's evaluation of state antisodomy laws under the Fourteenth Amendment. The Court originally upheld one such law, reasoning in *Bowers v. Hardwick*[49] that the "right to engage in homosexual sodomy" did not qualify as sufficiently fundamental to implicate heightened due process protections.[50] But some twenty years later, the Court reversed

41. *Id.* at 115 (citing CAL. EVID. CODE § 621(a) (West 1989)).

42. *Id.* at 116.

43. *Id.* at 121–31 (plurality opinion); *see id.* at 132 (O'Connor, J., concurring in part); *id.* at 133 (Stevens, J., concurring in the judgment); *id.* at 142 (Brennan, J., dissenting).

44. *Id.* at 125 (plurality opinion).

45. *Id.*

46. *Id.* at 142 (Brennan, J., dissenting); *see also id.* at 157 (White, J., dissenting) ("Prior cases here have recognized the liberty interest of a father in his relationship with his child.").

47. *Id.* at 127 n.6 (plurality opinion).

48. *Id.* at 139 (Brennan, J., dissenting).

49. Bowers v. Hardwick, 478 U.S. 186 (1986).

50. *Id.* at 191; *see id.* at 196 (Burger, J., concurring) ("I write separately to underscore my view that in constitutional terms there is no such thing as a fundamental right to commit homosexual sodomy."). *But see id.* at 204 (Blackmun, J., dissenting) ("The case before us implicates both the decisional and the spatial aspects of the right to privacy.").

course in *Lawrence v. Texas*,[51] finding in *Bowers* a "failure to appreciate the extent of the liberty at stake."[52] Rather than implicate the "right to engage in consensual sodomy," the Court instead characterized the right as involving "the most private human conduct, sexual behavior, and in the most private of places, the home."[53] Put differently, the plaintiffs in *Lawrence* sought not just to engage in a particular form of sexual activity, but rather to develop a "personal bond that is more enduring."[54] The Court in *Lawrence* concluded that its earlier decision in *Bowers* had thus "misapprehended the claim of liberty there presented to it."[55]

Consider also the Court's decision in *Washington v. Glucksberg*—described in this Article's Introduction. A group of doctors and patients sought facial invalidation of a Washington law prohibiting physician-assisted suicide of terminally ill patients.[56] Among the first issues the Court confronted was the nature of the liberty interest at stake: was it a "right to die,"[57] a "liberty to choose how to die,"[58] a right to "control of one's final days,"[59] a "right to choose a humane, dignified death,"[60] or something else entirely? Confronting this question, and emphasizing the Court's "tradition of carefully formulating the interest at stake in substantive due-process cases,"[61] the Court ultimately settled upon a formulation based on the "right to commit suicide which itself includes a right to assistance in doing so."[62] Having framed the right in these terms, the Court then proceeded to note that "[t]he

51. Lawrence v. Texas, 539 U.S 558 (2003).

52. *Id.* at 567. To be sure, the Court in *Lawrence* was not altogether clear as to whether the (recharacterized) "liberty interest" did in fact qualify as fundamental. *See id.* at 586 (Scalia, J., dissenting) (noting the absence of an explicit declaration as to the asserted right's fundamentality). But even though the Court never expressly declared that the plaintiff's liberty interests were fundamental, it left strong signals that suggested as much. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1935 (2004) ("The Court left no doubt about its understanding of the fundamental claim to 'liberty' being advanced in Lawrence . . . .").

53. *Lawrence*, 539 U.S. at 567.

54. *Id.*

55. *Id.*

56. Washington v. Glucksberg, 521 U.S. 702, 707–08 (1997).

57. *Id.* at 709 (quoting Compassion in Dying v. Washington, 79 F.3d 790, 816 (9th Cir. 1996) (en banc)).

58. *Id.* at 722 (quoting Brief for Respondents at 7, *Washington*, 521 U.S. 702 (No. 96-110)).

59. *Id.* (quoting Brief for Respondents at 7, *Washington*, 521 U.S. 702 (No. 96-110)).

60. *Id.* (quoting Brief for Respondents at 15, *Washington*, 521 U.S. 702 (No. 96-110)).

61. *Id.*

62. *Id.* at 723.

history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[63] And that fact in turn led to the conclusion "that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."[64]

Contested characterizations of rights recently took center stage in litigation concerning the constitutionality of same-sex marriage bans.[65] Faced with the question whether the Due Process Clause prohibited states from denying marriage licenses to same-sex couples, lower court judges had reached different results predicated on differing characterizations of the right that same-sex marriage bans abridged. Some judges in particular had characterized the relevant right as a "right to same-sex marriage," and they had further concluded that this was not a right whose "fundamentality" could be demonstrated.[66] Other judges, by contrast, characterized the right as a "right to marry,"[67] whose fundamentality was made manifest by prior Supreme Court decisions such as *Loving v. Virginia*,[68] *Turner v. Safley*,[69] and *Zablocki v. Redhail*.[70] When the issue reached the Supreme Court, a majority of the Justices opted for the broader of the two characterizations, explaining the choice as follows:

> [The respondents] assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to

63. *Id.* at 728.

64. *Id.*

65. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (discussing competing characterizations of the right to same-sex marriage).

66. *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 411 (6th Cir. 2014) ("*Loving* addressed, and rightly corrected, an unconstitutional eligibility requirement for marriage; it did not create a new definition of marriage.").

67. *See, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 376 (4th Cir. 2014) ("Because we conclude that the fundamental right to marry encompasses the right to same-sex marriage, *Glucksberg*'s analysis is inapplicable here.").

68. Loving v. Virginia, 388 U.S. 1 (1967).

69. Turner v. Safley, 482 U.S. 78 (1987).

70. Zablocki v. Redhail, 434 U.S. 374 (1978).

> interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.
>
> That principle applies here.[71]

The *Obergefell* dissenters, by contrast, saw things differently. In their view, the "'right to marry' cases stand for the important but limited proposition that particular restrictions on access to marriage *as traditionally defined* violate due process."[72] The relevant case law, in other words, "sa[id] nothing at all about a right to make a State change its definition of marriage, which is the right that petitioners actually seek here."[73] That being so, the right the plaintiffs sought—namely, a right "to make a State change its definition of marriage"—could not be shown to be fundamental within the meaning of the Due Process Clause.[74]

In one sense, this dispute went to the import of prior precedents: the Justices in the *Obergefell* majority saw the Court's past "right to marriage" cases as enshrining a broader set of constitutional protections than did their colleagues in dissent. In another important sense, however, the Justices' dispute stemmed from differing characterizations of the facts before them in terms of the right the plaintiffs had invoked. Both camps in *Obergefell* could agree, and in fact did agree, that *Loving*, *Turner*, and *Zablocki* established a fundamental right to marry, but they could not agree on whether *that was the right* at issue in *Obergefell* itself. Each side, looking at the same set of facts, characterized out of those facts substantially different descriptions of the liberty interest being asserted. And with these divergent characterizations of the liberty interest on the table, divergent conclusions as to its fundamentality naturally followed suit.

B. Characterizing Rules

Characterization problems can also arise within the law of qualified immunity, which generally shields public officials from

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71. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) (first citing *Glucksberg*, 521 U.S. 702, 752–73 (1997) (Souter, J., concurring in judgment); then citing *Glucksberg*, 521 U.S. at 789–92 (Breyer, J., concurring in the judgment)).

72. *Id.* at 2619 (Roberts, J., dissenting).

73. *Id.*

74. *Id.*

liability for actions that, though unlawful, did not at the time of their occurrence violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[75] The standard exists to measure the "objective legal reasonableness" of official conduct, which is to be "assessed in light of the legal rules that were clearly established at the time it was taken."[76] This rule's applicability, as the Court has noted, "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified."[77] The broader the characterization of the violated rule, the easier it is to demonstrate a violation of clearly established law; the narrower the characterization, the more difficult it becomes to do the same.[78] Consequently, characterization choices regarding the identity of the rule that an official is alleged to have violated can play a major role in shaping courts' dispositions of qualified immunity cases.

Consider *Mullenix v. Luna*.[79] During the course of a car chase, a Texas state trooper fatally shot the driver of a car.[80] The district court denied summary judgment to the trooper, and the Fifth Circuit affirmed, with both courts finding that material issues of fact existed as to the question whether the officer's actions violated clearly established Fourth Amendment law.[81] Operative Fourth Amendment doctrine, the Fifth Circuit explained, held in no uncertain terms that "the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment."[82] The plaintiffs had adduced facts suggesting that the victim's conduct had not given rise to a "substantial and immediate" threat, the court reasoned,

75. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It bears noting that the qualified immunity rule is not a "constitutional" rule, as it does not derive directly from the Constitution itself. *See* Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) (describing qualified immunity as a "creature of the common law"). But because the rule remains relevant to a wide variety of different constitutional cases, I have chosen to include it within the scope of my analysis here.

76. Pearson v. Callahan, 555 U.S. 223, 244 (2009) (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)).

77. Anderson v. Creighton, 483 U.S. 635, 639 (1987).

78. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 IND. L. REV. 187, 200 (1993) ("In most cases, the answer to the question of whether the right was clearly established will be a function of how narrowly the 'contours' of the particular right are drawn when framing the inquiry.").

79. Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam).

80. *Id.* at 306–07.

81. *See id.* at 307 ("[T]here are genuine issues of fact as to whether Trooper Mullenix acted recklessly, or acted as a reasonable, trained peace officer would have acted in the same or similar circumstances." (quoting Luna v. Mullenix, 773 F.3d 712, 725 (5th Cir. 2014))).

82. *Luna*, 773 F.3d at 725.

meaning that the officer violated the clearly established Fourth Amendment rule that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm."[83]

The Supreme Court reversed. It did not necessarily disagree with the Fifth Circuit's conclusion that the Fourth Amendment clearly prohibited the use of deadly force in the absence of a "substantial and immediate threat," nor did it necessarily disagree with the Fifth Circuit's conclusion that the officer had in fact exercised deadly force in the absence of a substantial threat.[84] But it did disagree with the lower courts' conclusion that the relevant rule implicated by the facts was a general Fourth Amendment prohibition on the use of deadly force in nonthreatening situations.[85] Instead, the Court held that the relevant rule should have been characterized with greater particularity, incorporating into its content the specific circumstances faced by the defendant when choosing to fire his weapon.[86] With the rule so characterized, its clearly established nature could hardly be shown, given that past case law had "not clearly established that deadly force is inappropriate in response to conduct like [the victim's]."[87] In other words, it may have been true that Fourth Amendment doctrine plainly prohibited the exercise of deadly force in the absence of a substantial threat, but Fourth Amendment doctrine did not plainly prohibit the exercise of deadly force under the circumstances the defendant faced. Thus, the differing conclusions of the Fifth Circuit and the Supreme Court in *Mullenix* derived largely from differing characterizations of the relevant rule whose clearly established nature was at issue in the case.[88]

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83. *Id.* (quoting Lytle v. Bexar Cty., 560 F.3d 404, 417 (5th Cir. 2009)).

84. *Mullenix*, 136 S. Ct. at 308.

85. *Id.*

86. *Id.* at 309 ("The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances 'beyond debate.' The general principle that deadly force requires a sufficient threat hardly settles this matter." (citation omitted) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011))).

87. *Id.* at 311.

88. Disputes over the proper characterization of federal rules are not unique to qualified immunity determinations. Similar issues have arisen in the context of federal collateral review, where various procedural and remedial standards require federal courts to investigate the clarity of the rule underlying a petitioner's claim for postconviction relief. In *Sawyer v. Smith*, 497 U.S. 227 (1990), for instance, the Court confronted a retroactivity question stemming from a habeas petitioner's Eighth Amendment challenge to a capital sentence. *Id.* at 232. During sentencing proceedings, the prosecutor had told the jury that its sentencing determination would represent only an "initial step" in the sentencing process and that a juror voting for death should not "feel

C. Characterizing Government Interests

Equal protection doctrine, substantive due process doctrine, free speech doctrine, and various other areas of law often call upon courts to employ some form of means/ends analysis in assessing the validity of challenged government action.[89] The requisite doctrinal standards vary—the strict scrutiny test requires that the government interest be "compelling" and that the challenged action be "narrowly tailored" to that interest; the intermediate scrutiny test requires that the interest be "important" and that the challenged action be "substantially tailored" to that interest; the rational basis test requires that the interest be merely "legitimate" and that the challenged action be "rationally related" to that interest—but the overarching structure of the inquiry is largely the same. In particular, all forms of means/ends analysis require at their outset a characterization of the relevant government interest whose importance and relatedness to the challenged law may

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like you are the one . . . pulling the switch." *Id.* at 231. The jury imposed the death sentence, and the sentence was upheld on direct appeal. *Id.* at 232.

The retroactivity issue in *Sawyer* centered on a case called *Caldwell v. Mississippi*, 472 U.S. 320 (1985), decided approximately one year after Sawyer's conviction had become final. *Caldwell*, according to the Court in *Sawyer*, had held that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere," *Sawyer*, 497 U.S. at 233 (citing *Caldwell*, 472 U.S. at 328–29); *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring in part and concurring in the judgment), and its holding therefore cast doubt on the validity of Sawyer's capital sentence. *Sawyer*, 497 U.S. at 233–34. But because *Caldwell* postdated Sawyer's conviction, Sawyer could not receive the benefit of *Caldwell* itself; rather, he needed to show that *Caldwell*'s holding (and thus the unconstitutionality of his sentence) had been "dictated by" prior precedents in existence at the time of his conviction. *Id.* at 234 (quoting Teague v. Lane, 498 U.S. 288, 301 (1989) (O'Connor, J., concurring)). Whether that was so, however, depended largely on how one chose to characterize the relevant rule that the prosecutor allegedly violated in Sawyer's case. Sawyer (and, ultimately, the dissenting Justices) sought to characterize the prosecutor's conduct as subverting the "principle of reliability in capital sentencing," a principle that long predated the decision in *Caldwell* itself. *Id.* at 247 (Marshall, J., dissenting). But a majority of Justices rejected that characterization, believing it to be cast at too high a "level of generality." *Id.* at 236 (majority opinion). To these Justices, the relevant rule that the prosecutor had violated was the holding of *Caldwell* itself—a prohibition on forms of "prosecutorial comment" that diminished the jury's sense of responsibility for imposing a sentence of death. *Id.* And with the relevant characterization thus adopted, the majority could easily conclude that Sawyer's claim for relief was *Teague*-barred. Cases prior to *Caldwell* may have emphasized the importance of reliability in capital sentencing, but "no case prior to *Caldwell* invalidated a *prosecutorial argument* as impermissible under the Eighth Amendment." *Id.* (emphasis added). Thus, Sawyer's claim for relief depended squarely on *Caldwell* and not its predecessor cases, which in turn meant that Sawyer's habeas petition relied on a rule that was "new."

89. For a general overview of the various contexts in which this test arises, see Michael Coenen, *More Restrictive Alternatives*, 96 N.C. L. REV. 1, 19–41.

then be assessed.[90] In other words, to know whether a law is sufficiently related to the achievement of a sufficiently important government interest, courts first must characterize out of the facts the particular government interest to be evaluated.

Despite the frequency with which the Court engages in means/ends inquiries of this sort, it seldom explains the characterization choices it makes regarding the relevant government interest at stake. Much more often, the Court simply states without explanation the interest that it understands a law to serve, and then investigates with far more thoroughness the question of how that government interest fares under the requisite means/ends criteria.[91] This is a problem, because, as various commentators have suggested, many government actions lend themselves to a host of different interest-based characterizations, and these different characterizations may carry different implications for the overall outcome of the means/ends test.[92] In other words, means/ends analysis may be sensitive to threshold characterization choices that the Court seldom if ever explains.

Richard Fallon has persuasively demonstrated this point by reference to the question whether public universities violate the Equal Protection Clause by considering race as a factor in student admissions.[93] Operative Supreme Court doctrine provides that such programs should pass muster only if narrowly tailored to serve a compelling government interest. To apply that test, we must know something about what sorts of interest do and do not qualify as compelling and we must have some general sense of how close the means/ends fit must be to satisfy the narrow-tailoring requirement as

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90. *See* Fox, *supra* note 6, at 274 ("The Constitution imparts no inventory of . . . interests that the state may or must pursue, and a particular such interest can be described in any number of ways. Courts therefore face a choice about how to characterize the interest(s) that a contested state action advances.").

91. *See, e.g.* Fallon, *supra* note 6, at 1321 (noting the Court's "astonishingly casual" approach to the question).

92. *See, e.g., id.*; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-23, at 983 (2d ed. 1988) (suggesting that the Court in *United States v. O'Brien*, 391 U.S. 367 (1968), adopted a "generous definition of a governmental purpose," which "guaranteed that the law under review would indeed be the 'least restrictive means' to the end being pursued"); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 40–41 (1994) (noting that "[m]any social goals appear 'compelling' when they are inflated to the highest level of generality" and that "too many free exercise decisions have blindly accepted the government's characterization of its interest at the highest level of generality").

93. Fallon, *supra* note 6, at 1323–24.

well. But before even getting to these questions, we must settle on a characterization of the relevant government interest underlying the program under review. And this characterization choice is by no means an easy one to make. As Fallon suggests, even once we have narrowed our focus to matters of educational diversity, the range of plausible characterization choices remains quite wide:

> Is [the relevant interest] an interest in racial diversity or, instead, an interest in diversity of perspectives for which racial background may function as evidence, but evidence of only limited weight? A further complication arises if it would be possible for a university to achieve diversity without affirmative action if, for example, it reduced its reliance on grades and test scores as admissions criteria. Is the government's compelling interest one that embraces both retaining high academic distinction and achieving diversity? Finally, because diversity is inherently a matter of degree, the question emerges whether the government's interest should be defined as one in achieving diversity per se, or whether, instead, it should be regarded as one in attaining particular levels or increments of diversity? In other words, is there a compelling interest in moving from one level of diversity (that is more than zero) to another, higher level?[94]

Our choice among these varying characterizations of the relevant government interest may in turn affect our conclusions about its overall weightiness and closeness of fit to whatever set of admissions criteria the challenged program employs. In this way, Fallon argues, "it will frequently be crucial how the government's interest is defined."[95]

To take another example, consider the Supreme Court's recent opinion in *Holder v. Humanitarian Law Project*.[96] There, the Court rejected a First Amendment challenge to the federal "material support" statute, considering in particular the statute's application to aid organizations seeking to "facilitate only the lawful, nonviolent purposes" of various foreign groups the State Department had designated as terrorist organizations.[97] The challengers successfully persuaded the Court to apply a heightened form of means/ends analysis in evaluating the law's application to them. But the Court ultimately found the ban to be justified in light of a governmental "objective of the highest order"—namely, "the Government's interest

94. *Id.* at 1324 (footnotes omitted) (citing Grutter v. Bollinger, 539 U.S. 306 (2003)).

95. *Id.* at 1323.

96. Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

97. *Id.* at 8–9.

in combatting terrorism."[98] And while the Court devoted a significant amount of attention to the question of why the law proved necessary to the achievement of this interest,[99] it devoted no attention whatsoever to the question of why the interest should have been characterized in this way. The relevant interest, after all, might alternatively have been characterized as that of "undermining the operations of foreign organizations designated as terrorist groups," "prohibiting outside assistance to such organizations," "cutting off support for the lawful, nonviolent activities of such organizations," or "cutting off the plaintiffs' support for the lawful nonviolent activities of such organizations," and these alternative interests might not have qualified as weighty enough to justify the infringement of speech that the plaintiffs endured. And yet, the Court offered no explanation as to why its preferred characterization of the government interest was in fact the most appropriate.

D. Characterizing Activities

Characterization problems have also emerged in cases concerning Congress's power to regulate interstate commerce. According to the Court's holdings in *United States v. Lopez*[100] and *United States v. Morrison*,[101] Congress may regulate "economic" activities, which, when taken in the aggregate, have a "substantial effect[]" on interstate commerce.[102] Whether a congressional enactment is consistent with the Commerce Clause will thus depend, at least in part, on "whether an intrastate activity is commercial or noncommercial" in nature.[103] This question is difficult enough to answer on its own terms, but it becomes even more vexing when one realizes that it will not always be clear how to characterize the activity whose economic or noneconomic nature must be determined.[104]

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98. *Id.* at 28–29.

99. *Id.* at 27–40.

100. United States v. Lopez, 514 U.S. 549 (1995).

101. United States v. Morrison, 529 U.S. 598 (2000).

102. *See id.* at 611 ("[I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."); *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

103. *Lopez*, 514 U.S. at 566.

104. *See* Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. REV. 879, 904 (2005) (noting that "the 'substantial effects' test depends on two utterly subjective judgments," one of which "concerns the level of generality at

Consider the facts of *Lopez* itself. The Gun Free School Zones Act criminalized the possession of firearms in a school zone. In the view of the *Lopez* majority, the regulated activity was obviously noncommercial, for the simple reason that "[t]he possession of a gun in a local school zone is in no sense an economic activity."[105] But to the dissenters, that conclusion was not so straightforward. The majority, according to the dissent, "clearly cannot intend . . . to focus narrowly on an act of gun possession standing by itself," because the Court had in prior cases allowed Congress to regulate "specific transaction[s]" that were not in and of themselves commercial.[106] At the same time, "if the majority instead mean[t] to distinguish generally among broad categories of activities," its conclusions regarding the noncommercial nature of the regulated activity would have become much harder to defend.[107] The relevant activity, after all, could alternatively have been characterized as the "endangerment of school safety," "the disruption of educational services," or perhaps even the "interference of operations at a job-training facility," and with the regulated activity more broadly characterized, application of the commercial/noncommercial distinction might have come out the other way.[108] Gun possession might not bear an important relationship to labor productivity, but education certainly does. And if the law had been characterized as an education-focused measure, rather than gun-related measure, then a different conclusion should have followed, given that Congress "could rationally conclude that schools fall on the commercial side of the line."[109]

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which the regulated activity is characterized"); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1252 (2003) ("The Supreme Court exercises a . . . political and judgment-laden power when it selects a single, constitutionally relevant 'activity' for purposes of its Commerce Clause analysis.").

105. *Lopez*, 514 U.S. at 567.

106. *Id.* at 628 (Breyer, J., dissenting); *see also* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 204 ("[I]f one defines the activity that narrowly, then it is unclear how, for example, the Civil Rights Act of 1964 gets upheld. For there, one could have defined the activity as 'discriminating' and then asked whether discriminating is 'commercial or not.'").

107. *Lopez*, 514 U.S. at 628–29 (Breyer, J., dissenting) ("[I]f the majority instead means to distinguish generally among broad categories of activities . . . then, as a practical matter, the line becomes almost impossible to draw.").

108. *See* Schapiro & Buzbee, *supra* note 104, at 1259 (noting that "[i]n *Lopez*, the Court could have focused on the business aspects of education, the business of guns or even illegal guns, defendant Lopez's plan to sell a gun in the school, or the many ripple effects of school quality and safety on economic vitality" (footnote omitted)).

109. *Lopez*, 514 U.S. at 629 (Breyer, J., dissenting). To this point, the majority responded that

Characterization-related disputes also arose in *Gonzales v. Raich*.[110] There the Court rejected a Commerce Clause challenge to the federal Controlled Substances Act (CSA), brought by individuals involved in the personal cultivation of medicinal marijuana.[111] Distinguishing the case from *Lopez* and *Morrison*, Justice Stevens had no trouble identifying a regulated activity that was economic in nature.[112] As he explained, "[t]he CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."[113] But to Justice O'Connor in dissent, the majority had mischaracterized the activity implicated by the case, suggesting instead that the inquiry should have focused on "[t]he homegrown cultivation and personal possession and use of marijuana for medicinal purposes."[114] Thus did the Justices' disagreement in *Raich* as to the economic or noneconomic nature of the activity in question depend upon understandings of what that activity was. The majority characterized the relevant activity as the entire class of behavior covered by the CSA (the "production, distribution, and consumption of commodities"),[115] whereas the dissenters saw it as the narrower behavior in which the plaintiffs themselves had engaged (*i.e.*, "[t]he

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"depending on the level of generality, any activity can be looked upon as commercial." *Id.* at 565 (majority opinion). And Justice Breyer's rationale therefore "lack[ed] any real limits," because similarly general characterizations could always be used to sustain any enactment along similar lines. *Id.*

110. Gonzales v. Raich, 545 U.S. 1 (2005).

111. *Id.* at 6, 9.

112. *Id.* at 25 ("Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic.").

113. *Id.* at 26; *see also* Michael C. Dorf, *Commerce, Death Panels, and Broccoli: Or Why the Activity/Inactivity Distinction in the Health Care Case Was Really About the Right to Bodily Integrity*, 29 GA. ST. U. L. REV. 897, 907 (2013) ("[B]y defining the relevant activity in *Raich* as the consumption of marijuana, the Court was able to analogize the case closely to [*Wickard v. Filburn*], where the law aimed to limit the consumption of home-grown wheat by people like Filburn.").

114. *Raich*, 545 U.S. at 50 (O'Connor, J., dissenting); *see also* Pushaw, *supra* note 104, at 904 (noting that "Justice O'Connor characterized the relevant activity narrowly" whereas Justice Stevens "described the CSA broadly as governing the production, possession, and use of drugs"); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After* Gonzales v. Raich, 2005 SUP. CT. REV. 1, 23 ("The characterization problem in *Raich* was reminiscent of the classic 'level of generality' problem arising in the definition of fundamental rights under the Due Process Clause.").

115. *Raich*, 545 U.S. at 18, 26.

homegrown cultivation and personal possession and use of marijuana for medicinal purposes").[116] And these different characterizations of the relevant activity each supported their own respective conclusions as to its economic or noneconomic nature.

Activity-based characterization choices have also accompanied applications of the federalism canon of statutory construction, which instructs courts to disfavor readings of congressional statutes that would authorize action at "the outer limits of Congress' power."[117] In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*,[118] the Corps claimed regulatory authority over a landfill project that threatened the habitats of several species of migratory birds, citing to Section 404 of the federal Clean Water Act. In the course of rejecting the Corps' claim of statutory authority, the Court pointed to the "serious constitutional problems" that might result from construing the statute in the Corps' favor.[119] These problems would arise, the Court explained, because "[p]ermitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use."[120] That argument, however, rested on a contestable characterization of the activity that the Corps sought to regulate. If one characterized the relevant activity as "land and water use," then one could make a case that the Corps was attempting to transgress a subject of traditional state regulation. But why not alternatively characterize the relevant activity as, say, the "endangerment of migratory birds," the "destruction of [an] aquatic migratory bird habitat,"[121] the "discharge of fill material into water," or some other form of

116. *Id.* at 50 (O'Connor, J., dissenting); *see also id.* at 68 (Thomas, J., dissenting) ("By defining the class [of activities] at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market.").

117. *See* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172, 174 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

118. Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

119. *Id.* at 173.

120. *Id.* at 174.

121. *Id.* at 195 (Stevens, J., dissenting) ("The destruction of [an] aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (*e.g.*, a new landfill) are disproportionately local, while many of the costs (*e.g.*, fewer migratory birds) are widely dispersed and often borne by citizens living in other States.").

interference with traditionally federal regulatory interests? Whether one saw a federalism problem in *Solid Waste*, in other words, depended on how one chose to characterize the activity being regulated.[122]

Consider finally the five-Justice determination in *NFIB v. Sebelius*[123] that the Commerce Clause did not authorize enactment of the Affordable Care Act's "individual mandate."[124] In contrast to *Lopez*, which turned on the noneconomic nature of the activity under regulation, the commerce-power issue in *NFIB* turned on the question of whether the individual mandate regulated "activity" as opposed to "inactivity."[125] *NFIB* thus posed an interesting variation on the characterization choice that the Court had earlier confronted: rather than identify an activity whose economic or noneconomic nature would then be decided, the Justices had to identify a relevant form of behavior governed by the law, and then decide whether that behavior qualified as any sort of activity at all. Five Justices opted for the "inactivity" conclusion, with Chief Justice Roberts reasoning that the mandate simply "compels individuals to *become* active in commerce by purchasing a product,"[126] and Justices Scalia, Kennedy, Thomas, and Alito reasoning that the mandate "impressed into service third parties."[127] But to the remaining Justices, it was hardly self-evident that the relevant behavior should be characterized as the inactive nonpurchase of health insurance. After all, they pointed out, "it is possible to restate most actions as corresponding inactions with the same effect,"[128] and the nonpurchase of health could therefore easily

122. *See* Schapiro & Buzbee, *supra* note 104, at 1260 (calling *Solid Waste* "troubling because of the Court's insistence on interpreting the case and the Clean Water Act as involving land use regulation, a function it characterized as 'traditionally performed by local governments,' rather than as an example of federal environmental leadership in pollution control, protection of biodiversity, or wildlife regulation." (footnote omitted)).

123. NFIB v. Sebelius, 567 U.S. 519 (2012).

124. *See id.* at 547–58 (opinion of Roberts, C.J.) ("The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to 'regulate Commerce.'"); *id.* at 649–60 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("If this provision 'regulates' anything, it is the *failure* to maintain minimum essential coverage . . . . [T]hat failure . . . is not 'Commerce.'").

125. *See, e.g.*, David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1, 19 ("A central theme of the majority's opinions in *NFIB* was that the mandate was unconstitutional because it regulated inactivity, rather than activity.").

126. *NFIB*, 567 U.S. at 552 (opinion of Roberts, C.J.).

127. *Id.* at 652 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

128. *Id.* at 612 (Ginsburg, J., concurring in part, concurring in the judgment in part and dissenting in part) (quoting Archie v. City of Racine, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc)).

be recharacterized as an active "decision to self-insure."[129] To be sure, the question of how to characterize the regulated behavior represented only one of many points of disagreement among the Justices in *NFIB*. But with respect to the particular issue of whether the mandate regulated activity or inactivity, the Justices' disagreement stemmed largely from competing characterizations of the behavior that the mandate targeted.

E. Characterizing Injuries

Modern Article III standing doctrine requires a would-be plaintiff to demonstrate the existence of an injury-in-fact that is both fairly traceable to a defendant's allegedly unlawful conduct and redressable by the courts.[130] All three components of the test have generated uncertainty: courts frequently disagree as to whether a claimed injury is sufficiently concrete, whether the causal link between the injury and the claimed unlawful conduct is sufficiently direct, and whether a favorable judgment would be sufficiently ameliorative of the injury in question. These disagreements stem in part from competing conceptions of each component's underlying requirements: How actual, particularized, and imminent must a claimed injury be to satisfy the injury-in-fact requirement? How does one measure the causal link between the injury and the challenged activity for purposes of the fairly-traceable requirement? How substantially must judicial relief alleviate the injury for purposes of the redressability requirement? But lurking beneath these disputes are important questions of characterization as well. Simply put, whether or not a claimed injury meets the Article III standard will sometimes depend on what that injury is understood to be.[131]

Consider, for instance, Professor Gene Nichol's discussion of the standing determinations in *Linda R.S. v. Richard D.*,[132] *Warth v. Seldin*,[133] and *Simon v. Eastern Kentucky Welfare Rights*

129. *Id.* at 615; *see also id.* at 612 ("An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance.").

130. *E.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (setting out the elements of standing).

131. *See, e.g.*, Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464 (1988) (noting that the "central problem" in many standing "cases is not whether there is a causal nexus among injury, remedy, and illegality; it is how to characterize the relevant injury").

132. Linda R.S. v. Richard D., 410 U.S. 614 (1973).

133. Warth v. Seldin, 422 U.S. 490 (1975).

Organization[134]—three cases in which the plaintiffs alleged an injury based on their difficulties in obtaining access to a service or good.[135] In *Linda R.S.*, the plaintiffs challenged the discriminatory enforcement of a state child support law, citing to the reduced availability of child support assistance as their alleged injury-in-fact.[136] In *Warth*, the plaintiffs challenged a local government's exclusionary zoning policy, citing to the reduced availability of housing as their injury-in-fact.[137] And in *Simon*, the plaintiffs challenged the provision of favorable tax treatment to hospitals, citing to the reduced availability of medical services as their alleged injury-in-fact.[138] All three cases, in short, involved plaintiffs seeking access to something and claiming that unlawful government activity frustrated their ability to obtain it. And all three cases foundered on causation/redressability grounds, with the Court concluding that the relief being sought—even if issued—would not do enough to alleviate the injuries in question.[139]

In one sense, these cases turned on the plaintiffs' failure to demonstrate that ceasing the allegedly unlawful behavior would guarantee them access to the goods and services they sought: even with the requested injunctions in place, the *Linda R.S.* plaintiffs might still fail to obtain child support, the *Warth* plaintiffs might still fail to obtain housing, and the *Simon* plaintiffs might still lack access to medical services. But in another sense, their outcomes rested on contestable characterizations of the injuries that prompted these plaintiffs to bring suit. Nichol explains:

> In *Linda R.S.*, the Court refused jurisdiction because even a decree requiring nondiscriminatory enforcement would not ensure support. But why was obtaining the payment of child support considered the relevant injury? The mother in *Linda R.S.* sought to be treated on an equal basis with married mothers. Her injury—denial of equal treatment—would undoubtedly have been redressed by an affirmative decree requiring enforcement of child support obligations

134. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26 (1976).

135. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 79–82 (1984).

136. *Linda R.S.*, 410 U.S. at 615–16.

137. *Warth*, 422 U.S. at 495–96.

138. *Simon*, 426 U.S. at 45.

139. *See id.* ("Speculative inferences are necessary to connect [the respondents'] injury to the challenged actions of petitioners."); *Warth*, 422 U.S. at 506 ("[T]he record is devoid of any indication . . . that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners."); *Linda R.S.*, 410 U.S. at 618 ("The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.").

> against unmarried fathers. Similarly, the *Warth* plaintiffs sought not only to obtain housing in Penfield. They also asserted their interest in equal participation in a housing market not distorted by unconstitutional zoning practices. The denial of a meaningful opportunity to persuade others to construct low cost housing in Penfield, for example, would have been redressed by a determination that the ordinance was unconstitutional. The indigents in *Simon* had no objection to receiving hospital access, but the interest they asserted would more appropriately be described as having hospital decisions concerning the services offered to indigents accurately reflect an earlier incentive structure implicitly approved by the Congress. Again, that injury would have been redressed by the claim presented.[140]

And the puzzle becomes more puzzling when still other cases enter the mix. In *Regents of the University of California v. Bakke*,[141] the Court found no causation or redressability-based bar to an applicant's challenge to a medical school's affirmative action program.[142] As in *Linda R.S.*, *Warth*, and *Simon*, the plaintiff in *Bakke* could not definitively show that a favorable decision from a court would have resulted in his obtaining the service that he sought—namely, an education from the UC Davis Medical School. But that fact did not matter, the Court held, because the relevant injury suffered by Alan Bakke was simply his inability "to compete for all 100 places in the class."[143] And that injury, by definition, could obviously be redressed by a judicial order requiring that the school allow Bakke to compete for all 100 places in the entering class. Bakke might not ultimately gain admission to the program, but his injury had been characterized in a way that rendered that fact irrelevant. Bakke's "opportunity-based" injury—namely, his inability to compete for class seats on a level playing field with others—could thus be certainly remedied, whereas the previous plaintiffs' actuality-based injuries could not.[144] The

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140. Nichol, *supra* note 135, at 80 (footnote omitted); *see also* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1356 (2000) (noting that "to know whether the redressability requirements are met, it is necessary to know how to characterize the relevant injury").

141. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

142. *Id.* at 280–81 n.14.

143. *Id.*; *see* Nichol, *supra* note 135, at 81 ("If . . . the *Warth* plaintiffs could redress their injuries only by showing that they would actually obtain housing, and if the mother in *Linda R.S.* was required to show that she would actually receive support payments, *Bakke* should have been made to prove that he would have gotten into medical school.").

144. *See* Texas v. Lesage, 528 U.S. 18, 21 (1999) (per curiam) ("Of course, a plaintiff who

differences in outcomes therefore stemmed from antecedent differences in characterization.

F. Characterizing Fields

Characterization problems also attend federal-law preemption cases, especially those predicated on theories of implied rather than express preemption. A common means of determining whether a federal law impliedly preempts a state law is to ask whether the federal law "occupies the field" in which the state law regulates.[145] Field preemption analysis requires courts to identify the regulatory field of the allegedly preempted state law and to ask whether that same field has already been occupied by the allegedly preemptive federal law. Framed in this way, field preemption analysis often turns on *how* the regulatory fields have been characterized. And this is a problem, because "[i]n most cases, the relevant 'field' can be characterized in multiple ways."[146]

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[147] utility companies challenged a California moratorium on the construction of nuclear power plants, claiming that the law was preempted by the federal Atomic Energy Act of 1954 (AEA).[148] In the challengers' view, the case was straightforward: the AEA occupied the field of nuclear power regulation, and the California moratorium—by restricting the construction of nuclear power plants—had impermissibly encroached upon that field.[149] But the Court saw things differently. In its eyes, the

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challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is 'the inability to compete on an equal footing.'" (quoting Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)); *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am.*, 508 U.S. at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

145. *See* Arizona v. United States, 567 U.S. 387, 401 (2012) ("Where Congress occupies an entire field . . . even complementary state regulation is impermissible.").

146. Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 336; *see also* Eang L. Ngov, *Under Containment: Preempting State Ebola Quarantine Regulations*, 88 TEMP. L. REV. 1, 34 (2015) ("[W]hether the federal government successfully exerts field preemption depends on how narrowly or broadly the field is defined.").

147. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983).

148. *Id.* at 194–95.

149. *Id.* at 204.

AEA reflected Congress's desire that "the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant,"[150] whereas the California moratorium reflected an attempt to deal with "economic problems, not radiation hazards"[151] associated with nuclear power. Thus, by defining the respective fields of each law narrowly, the Court was able to reach the conclusion that the fields did not in fact overlap.

Related problems emerge from the rule mandating a presumption against implied preemption in cases involving "fields of traditional state regulation."[152] Here, too, the characterizations of the relevant field can matter a great deal, with some characterizations more conducive than others to a finding that a federal law touches on a traditional regulatory province of the state. Consider, for instance, the Second Circuit's recent decision in *Liberty Mutual Insurance v. Donegan*,[153] which presented the question whether the federal ERISA statute preempted a Vermont law requiring health insurance companies to submit to the state claims data "and other information relating to health care."[154] Two judges on the panel found the presumption inapplicable and the Vermont law not preempted, reasoning that "state health data collection laws do not regulate the safe and effective provision of health care services, which is among the states' historic police powers."[155] To the dissenting judge, however, the picture looked quite different: The "stated purpose" of the Vermont statute was to "help improve health care quality," and the law certainly "'operate[d] in [the] field' of health and safety."[156] Health care information services may not have qualified as a traditional field of state regulation, but "general health care regulation" clearly did so qualify.[157] And, thus, having characterized the relevant field in such divergent fashions, the two sides of *Donegan* reached different conclusions regarding the overall applicability of the presumption

150. *Id.* at 205.

151. *Id.* at 213.

152. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, 655 (1995).

153. Liberty Mut. Ins. v. Donegan, 746 F.3d 497 (2d Cir. 2014), *aff'd sub nom.*, Gobeille v. Liberty Mut. Ins., 136 S. Ct. 936 (2016).

154. *Id.* at 501.

155. *Id.* at 506 n.8; *see also id.* (noting that "collecting data can hardly be deemed 'historic'—most such laws were enacted only within the last ten years").

156. *Id.* at 513 (Straub, J., dissenting) (second alteration in original) (quoting De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997)).

157. *Id.* at 512.

itself.

These and other preemption cases lend support to one commentator's recent observation that "[t]he doctrine of field preemption gives the courts power to affect the federal-state balance by choosing the level of generality at which to define the relevant field."[158] When it comes to field preemption analysis, in other words, characterizing the relevant field "becomes the entire game."[159]

G. And on and on . . .

Further examples are not difficult to come by. In the First Amendment context, for instance, various rules of free speech doctrine direct attention to the question of whether a speaker's message involves a "matter of public concern"[160]—a test that requires judges to characterize the matter about which a speaker spoke.[161] In a variety of doctrinal contexts, courts must ask whether multiple regulatory

158. Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056, 1067 (2013) [hereinafter *Preemption*].

159. *Id.*

160. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (requiring a showing of actual malice to recover presumed or punitive damages against a private figure plaintiff in a defamation action involving a matter of public concern); *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985) (confirming that the *Gertz* framework applies only to expression on a "matter of . . . public concern"); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (setting forth limited free-speech protections for public employees who have spoken on "matters of public concern").

161. In *Snyder v. Phelps*, 562 U.S. 443 (2011), for instance, the Court had to determine whether a protest outside a military funeral dealt with a matter of "public concern." The Justices' disagreement on this question turned largely on differing characterizations of the "matter" that the protesters addressed. *Compare, e.g., id.* at 454 (contending that the protesters, who charged that a deceased soldier's death represented divine retribution for various sins committed by the U.S. government and the public at large, were speaking on "issues" such as "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy," all of which qualified as "matters of public import"), *with id.* at 470 (Alito, J., dissenting) (contending that the protesters were "specifically attack[ing] Matthew Snyder because (1) he was a Catholic and (2) he was a member of the United States military," and contending that "[w]hile commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not"). *See also* Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 173 (2011) ("Justice Alito also interpreted all of the signs, despite their seeming reference to larger political issues, to be personal in reference and personal affronts to Matthew Snyder."). Everyone could agree, in other words, that "the political and moral conduct of the United States" constituted a matter of public concern and that Matthew Snyder's life did not constitute a matter of public concern, but the Justices could not agree on which of the two topics counted as the "matter" of relevance to the case.

"purposes" satisfy an overarching germaneness requirement[162]—a test that requires judges to characterize the relevant purposes whose germaneness must be assessed.[163] In the dormant Commerce Clause context, courts must sometimes ask whether commercial regulations serve a "traditional government function"[164]—a test that requires judges to characterize the function whose traditional or nontraditional nature is at stake.[165] And I suspect that other examples could be found

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162. *See, e.g.*, Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U. L. REV. 913, 941–46 (2006) (highlighting examples of germaneness requirements within constitutional doctrine).

163. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), for instance, the Court struck down a conditional land use permit as a violation of the Takings Clause, finding no "essential nexus" between the regulatory purpose of the permit condition and the regulatory purpose of the permitting regime itself. *Id.* at 837. To Justice Scalia and four other Justices, an essential nexus was lacking: the purpose of the permit condition was to facilitate free public use of the ocean, whereas the purpose of the permitting regime was to protect views of the coastline. *See id.* at 838 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."). But alternative characterizations could have supported a different result. Both components of the permitting scheme, for instance, could be said to pursue the unitary goal of ensuring adequate public enjoyment of the beach, with the permitting requirement facilitating the visual aspects of that enjoyment and the easement requirement facilitating the physical aspects of that enjoyment. And if that degree of fit was not good enough, one might instead have characterized the two requirements as jointly facilitating "responsible use of land," "the development of a public-friendly coastal community," or simply "public welfare of Californians." *See* Nathaniel S. Lawrence, *Means, Motives and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L.J. 231, 243 (1988) ("There was nothing in the majority opinion which argued for adopting its characterization rather than California's, except that it spared the Court from openly admitting its use of heightened scrutiny."); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1399 (1991) ("If the California Coastal Commission were permitted broadly to describe its goal as promoting the best use of state beaches and adjacent land, however, the Commission could easily argue that restricting the building of private beachfront homes and demanding that members of the public be permitted to walk across the beach served the same purpose.").

164. United Haulers Ass'n Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 345 n.7 (2007); *see also* Dan T. Coenen, *Where* United Haulers *Might Take Us: The Future of the State-Self-Promotion Exception to the Dormant Commerce Clause Rule*, 95 IOWA L. REV. 541, 594 (2010) (highlighting the Court's reliance on a "traditional-government-function" test as a means of determining whether certain types of flow-control ordinances pass constitutional muster).

165. In *United Haulers*, the Justices disagreed as to whether a local ordinance requiring the processing of local waste at a government-owned "local transfer facility" served a traditional government function, and this disagreement stemmed largely from differing characterizations of the function that the facility served. *United Haulers*, 550 U.S. at 357. To the majority, the ordinance dealt with a "typical[] and traditional[] . . . local government function"—namely, the problem of "waste disposal." *Id.* at 344. But the dissenters saw things differently. As they put it, "a 'traditional' municipal landfill is for present purposes entirely different from a monopolistic landfill supported by the kind of discriminatory legislation . . . in this case," given that the latter sort of landfill "has been deemed unconstitutional until today." *Id.* at 369–70 (Alito, J., dissenting). In sum, the majority understood the relevant governmental function in *United*

as well.

The bottom line is this: input-characterization problems frequently surface but only sometimes grab the judicial limelight. They are influential but often unaddressed. That fact should give us pause. If characterization choices really influence the outcomes of constitutional cases as frequently as they appear to, then we need to think seriously about where these choices come from and how they should be made.

The next two Parts of this Article attempt to do just that. Each does so from a different perspective. Part III first considers whether, and if so how, constitutional decision rules might be designed so as to avoid being influenced or manipulated by characterizations of their inputs. As it turns out, this goal can be achieved in at least three different ways—the problem, however, is that eliminating the influence of characterization choices will likely come at the expense of significant tradeoffs that will not always be worth making. That observation sets the stage for Part IV, which works through various means by which courts might develop principled approaches to rendering the characterization choices that a given decision rule demands. Put another way, we will first consider the possibility of *avoiding* characterization problems by constructing decision rules that can resist the influence of characterization choices, and we will next consider the possibility of *mitigating* characterization problems through the development of constraints on the characterization process.

III. CHARACTERIZATION-RESISTANT DOCTRINE?

We have seen that characterization problems arise when the outcomes of legal tests depend on how we characterize the inputs that go into those tests. This observation suggests that characterization problems might be managed, or at least mitigated, at the level of decision rule design. Rather than solve the problem of characterization by articulating a coherent and principled approach to the making of characterization choices, we might instead dissolve the problem by formulating decision rules that avoid difficult and consequential

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Haulers to be "the disposal of waste," which in turn qualified as "traditional" under the test the Court applied understood the relevant government function to be the operation of a "monopolistic landfill," which did not qualify as "traditional" within the framework of the same doctrinal test. *See also* Coenen, *supra* note 164, at 594 (noting that application of the "traditional-government-function" test can "depend on the level of generality at which the court characterizes the relevant government activity").

characterization choices altogether.

This Part considers three potential approaches to avoiding characterization problems through the strategic design of legal decision rules. First, courts might formulate decision rules that operate on objectively identifiable facts requiring little to no characterization of their own. Second, courts might formulate decision rules that operate on the entirety of a given fact pattern. And finally, courts might formulate decision rules that, while requiring characterization choices at the outset of the inquiry, are structured in such a way as to render characterization choices relatively inconsequential to the overall outcome of the case. As we will see, each of these options carries some promise, but none provides a panacea.

A. Targeted Inputs

The decision rules we considered in Part II share the important feature of requiring inputs of an abstract and ethereal nature. Concepts such as activities, functions, injuries, interests, rights, and rules do not define themselves, and their latent complexities therefore make it difficult for courts to characterize particular instances of these concepts in uniform and unambiguous terms. When courts must translate the factual specifics of a case into the language of a capacious doctrinal input, the capaciousness of the input often gives rise to a difficult characterization choice. The concept of an "injury" is consistent with a complaint about one's failure to obtain a good, but it is also consistent with a complaint about having to compete for that good on an unequal basis.[166] The concept of an "interest" is consistent with a highly detailed and fact-specific regulatory objective, but it is also consistent with big-picture objectives like "national security," the "protection of children," and the "wellbeing of the nation."[167] The concept of an "activity" is consistent with a description of a single individual's conduct, but it is also consistent with a description of the workings of an entire field of business.[168] Simply put, the fuzzier the doctrinal input, the wider the range of different characterizations it can accommodate. And the wider the range of potential characterizations, the harder it becomes to choose one among the many possible characterizations that the facts might make available.

An initial characterization-avoidance strategy would attempt to

166. *See supra* Part II.E.

167. *See supra* Part II.C.

168. *See supra* Part II.D.

reduce the abstractness of the input itself by employing decision rules that operate on targeted inputs drawn directly from the facts. Consider, for example, the well-known rule of *Miranda v. Arizona*,[169] which requires investigators to apprise suspects of certain constitutional protections before initiating a custodial interrogation.[170] Most applications of the *Miranda* rule require no abstract characterization of the facts; one simply cross-references the statement made at the beginning of the custodial interrogation against the mandatory components of the *Miranda* warning and determines on the basis of that comparison whether the rule has been satisfied. The relevant input—the statements made to the defendant—can be lifted directly out of the fact pattern of the case; the rule requires no characterization of that input into a higher-level set of abstractions. The *Miranda* rule thus turns out to be "easy-to-apply," not just in the sense that it is usually easy to determine whether a given communication satisfies its bright-line requirements,[171] but also in the sense that it is usually easy to identify what that communication is.

Here is another example. The "actual malice" requirement of *New York Times v. Sullivan*[172] imposes special free-speech limits on the ability of public figure plaintiffs to obtain defamation judgments.[173] It is not always easy to determine whether a given defamation plaintiff qualifies as a public figure,[174] but it is very easy to say *who* exactly that defamation plaintiff is. To identify the relevant input of the public figure decision rule, one usually need only consult the caption of the case itself—the caption will tell us the identity of the defamation plaintiff and thus, by extension, the identity of the relevant doctrinal input. No additional characterization of the input is required: the person is the person, and courts will therefore rarely, if ever, disagree as to how to characterize the entity whose public or nonpublic status will help to determine the case's outcome. Thus, the *New York Times* rule, like the *Miranda* rule, avoids characterization problems by calling

169. Miranda v. Arizona, 384 U.S. 436 (1966).

170. *Id.* at 444.

171. *See* David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1350 (2005) (noting that the Court in *Miranda* "put in place an overprotective, easy-to-apply rule").

172. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).

173. *Id.* at 283 (setting forth an "actual malice" rule applicable in cases involving "public officials"); *see also* Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 665 (1989) (noting that "public figure libel cases are controlled by the *New York Times* standard" (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967) (plurality opinion))).

174. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (outlining criteria according to which a plaintiff's status as a "public" or "private" figure might be judged).

for the evaluation of a concretized and specified input—an input that emerges directly and uncontroversially from the fact pattern of a given case.

Consider finally the Court's suggestion in *State Farm Mutual Automobile Insurance v. Campbell*[175] that the Due Process Clause disfavors the awarding of punitive damages equal to or in excess of ten times the amount of compensatory damages.[176] Characterization problems will not often accompany the determination of whether a civil judgment satisfies this criterion.[177] Rather, courts can simply extract from the fact pattern two readily apparent numerical values (the amount of punitive damages and the amount of compensatory damages), calculate the ratio between those values, and then determine whether that ratio is higher or lower than ten-to-one.

These decision rules all manage to avoid characterization problems by homing in on objectively identifiable facts within the fact pattern and rendering those facts at least partially dispositive of the constitutional inquiry. Courts need not apply abstract descriptive labels to factual information within the record; they instead need only select out the particular fact or facts on which the rule's applicability depends. The mine-run *Miranda* claim does not require us to characterize a transaction between suspects and police in terms of "interests," "liberties," "activities," and the like. It instead requires us to look at the words exchanged prior to an interrogation to determine whether those words communicated an adequate warning within the meaning of the *Miranda* test. Similarly, the *New York Times* rule does not require us to characterize a defendant's allegedly defamatory conduct in terms of a relevant "purpose," "function," or "subject

175. State Farm Mut. Auto Ins. v. Campbell, 538 U.S. 408 (2003).

176. *Id.* at 425 ("[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

177. Characterization problems, to be sure, might still emerge when courts apply other components of the *State Farm* test. The test also instructs courts to consider, for instance, how a given damages award compares to "the civil or criminal penalties that could be imposed for comparable misconduct." *See* BMW of N. Am. v. Gore, 517 U.S. 559, 583 (1996). And that prong of the test appears to be somewhat characterization-dependent, at least insofar as it requires a court to characterize the relevant "misconduct" in which a punitive damages defendant engaged. Suppose for example, that a defendant kills a plaintiff when driving while drunk and that the plaintiff's estate collects a large punitive damages award. If we were to consider the validity of the award by reference to the "comparable sanctions" prong of the *State Farm* test, we would need to consider how the award aligns with other criminal and civil penalties that the state imposes on similar misconduct. But to know what penalties to look at, we need to define the relevant misconduct in this case—misconduct that could alternatively be characterized as drunk driving, reckless driving, vehicular homicide, negligent homicide, homicide, and so forth.

matter." Rather, it simply requires us to single out one particular variable within the fact pattern—namely, the plaintiff bringing the defamation suit—and to evaluate that variable in terms of the criteria that distinguish a public from a nonpublic figure. And, finally, while other components of the *State Farm* rule may require us to characterize facts in abstract-ified terms, the ratio presumption itself circumvents this difficulty; the only input of importance to that particular test is a numerical value that the facts can usually furnish in a straightforward and unambiguous way.

These types of decision rules may well succeed at eliminating, or at least mitigating, characterization problems within the cases that they govern. But as with any effort to increase the predictability and objectivity of the law, insisting that a given doctrinal test operate on targeted facts rather than abstract characterizations of the facts threatens to undermine the nuance, flexibility, and context sensitivity of the doctrine writ large.[178] We are dealing here with a variation on the familiar tradeoff between rules and standards.[179] When we single out objectively verifiable facts as dispositive determinants of a test's application, we necessarily increase the rule-like—as opposed to standard-like—nature of the test and thereby render that test more likely to generate outcomes at odds with the substantive values of the norm it purports to enforce.[180] Within some areas of doctrine, that may be a tradeoff worth making: a rule's over- and underinclusiveness problems may be mild enough to justify the gains realized in the way of consistency, predictability, and ease of application. But within other areas of doctrine, an emphasis on easily definable inputs will result in

178. This thought is consistent with Duncan Kennedy's observation that "ruleness" of a directive depends in part on its reference to "easily distinguishable factual aspects of a situation." Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687 (1976).

179. For an overview of the rules/standards debate (and for citations to key contributions to the voluminous literature on the subject), see Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 652–53 (2014).

180. To be clear, I do not mean to suggest a one-to-one correspondence between "targeted-input" tests and bright-line rules. Some targeted-input tests will be more bright-line than others, with each test's overall level of nuance and context sensitivity dependent on the nature of the evaluative criteria it employs. The *New York Times* test, for instance, probably qualifies as less rule-like than the *Miranda* test, for the simple reason that determining whether a given person qualifies as a public or nonpublic figure will usually be more difficult than determining whether a given preinterrogation statement contains the requisite warnings. That said, I do believe that, all else equal, targeted-input tests will tend to qualify as more rule-like than their abstract-input counterparts.

overwhelming problems of fit.[181]

Still, if courts are determined enough to avoid characterization problems, the targeted-input strategy offers one potential means of achieving their goal. One need not think hard to imagine bright-line replacements for the characterization-dependent doctrines we considered in the previous part. Qualified immunity could be automatically available to defendants who prove to the fact finder that their violation of the law occurred unknowingly.[182] Commerce Clause doctrine could validate any and all congressional enactments that Congress proclaims to be justified by the commerce power (or, for that matter, any and all enactments of Congress, period). Substantive due process doctrine could stipulate that courts must always (and only) rule in favor of claimants whose name begins with the letter "M." And these rules could certainly be applied in a manner that obviated the need to characterize any set of facts in higher-level descriptive terms. The trouble is that these rules, and many others like them, will give rise to other serious problems that independently militate against their use. It is, in other words, always theoretically possible to formulate characterization-resistant decision rules that call for targeted

181. Indeed, even where rules prevail, characterization problems might still creep back into the picture. Legal scholars have long noted that bright-line rules tend to lose their brightness over time, with the sharp edges of categorical boundaries softened, blurred, and qualified so as to avoid otherwise unseemly results. *See, e.g.*, Kennedy, *supra* note 178, at 1701; Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 804 (2005) ("From the American Legal Realists to the present, legal theorist[s] have devoted some attention to the ways in which seemin[g]ly cri[sp] rules may have their edges rounded upon application, interpretation, or enforcement."). Thus, for instance, the Court has crafted a public safety exception to the *Miranda* requirement, permitting officials to conduct warning-less interrogations when they are "reasonably prompted by a concern for the public safety." *See* New York v. Quarles, 467 U.S. 649, 656 (1984). Similarly, the Court has extended the protections of the *New York Times* rule to protect not just public figure plaintiffs but also, in a more limited fashion, private figure plaintiffs who have spoken on matters of public concern. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 348–51 (1974). And, of course, the ratio between punitive and compensatory damages must be assessed in connection with myriad other facts before any final constitutional judgment can be rendered. *See State Farm*, 538 U.S. at 418. Rarely is it the case that the applicability of a constitutional norm depends entirely on a small number of precisely identifiable facts; more often than not, multiple different aspects of a fact pattern will bear on the overall inquiry in multiple different ways. Not surprisingly, the more complex and multifaceted the inquiry becomes, the greater the risk that characterization problems will start to emerge.

182. Notice that this particular example would effectively trade out a difficult characterization problem (the problem of characterizing the relevant law that the defendant violated) for a difficult problem of fact identification (determining the defendant's state of mind with respect to the illegality of the actions undertaken). For a variety of reasons, this might not be a tradeoff worth making. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–20 (1982) (identifying various downsides associated with a "subjective" approach to qualified immunity determinations).

assessments of a handful of isolated facts. But it is by no means easy to formulate those rules in terms that promote the fair and effective implementation of the norm they purport to enforce.

B. Holistic Inputs

We first considered the possibility of eliminating characterization problems by singling out a fact pattern's objectively definable features as the guiding criteria for a decision rule's application. But courts might also avoid characterization problems by taking the opposite tack—namely, by designing decision rules that operate on the entirety of a given fact pattern rather than any particular facts within it. Call this the "holistic input" strategy. The strategy eschews the specificity and rigidity of the bright-line rule in favor of the fluidity and open-endedness of the all-things-considered standard. These sorts of decision rules avoid characterization problems by instructing courts to evaluate all of the facts before them in their raw and uncharacterized form.

In *Rochin v. California*,[183] the Justices ruled in favor of a criminal defendant whose conviction had resulted from an unauthorized entry into his home and the forcible "pumping" of morphine capsules out of his stomach.[184] Notably, the Justices did not attempt to resolve the case by asking whether the government had abridged a fundamental right, and they thus circumvented the need to define with any precision the nature of the relevant liberty interest that the government had abridged.[185] Instead, cutting straight to the heart of the matter, the Court chose to carry out "an exercise of judgment upon the *whole course of the proceedings*" so as to determine whether the state's conduct ran afoul of the basic "standards of justice" that the Due Process Clause served to protect.[186] And having articulated the inquiry in these terms, the Court went on to apply it, concluding that

> the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks

183. Rochin v. California, 342 U.S. 165 (1952).

184. *Id.* at 165–66.

185. *See* Rosalie Berger Levinson, *Time To Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 318 n.64 (2010) ("In *Rochin*, the Court invoked the shocks the conscience test without first identifying a fundamental right.").

186. *Rochin*, 342 U.S. at 169 (emphasis added) (quoting Malinski v. New York, 324 U.S. 401, 416–17 (1945)).

> the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.[187]

The Court in *Rochin* thus managed to evade characterization choices by fashioning a decision rule—the "shocks-the-conscience" test—that took as its input not a particular characterization of the facts, but rather *all* of the facts presented by the case.[188] The analysis involved a holistic evaluation of the entire course of proceeding, and the test thus obviated the need to formulate a single, generalized description of any particular right that the government had abridged—and, for that matter, any particular government interest that the abridgement might have been said to further. The Justices simply surveyed all of the events that took place in the days leading up to Rochin's conviction and rendered a judgment as to whether those events—however one might choose to characterize them—provoked a conscience-shocking reaction. Contestable characterizations of the facts played a minimal role in shaping the Court's analysis of the case.

The shocks-the-conscience test enjoys only a limited scope of application today,[189] but other analogous holistic-input tests are not difficult to find within constitutional doctrine. For example, Fourth Amendment doctrine provides that courts should apply the probable cause standard according to an "all-things-considered approach,"[190]

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187. *Id.* at 172.

188. *Accord* Cty. of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (noting, in connection with an application of the shocks-the-conscience test, that "asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case" (quoting Betts v. Brady, 316 U.S. 455, 462 (1942))).

189. Specifically, the Court has confined operation of the test to substantive due process claims involving allegedly "abusive" forms of executive action, *see Lewis*, 523 U.S. at 846 ("[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."), while further specifying that the question should be considered "antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed." *Id.* at 847 n.8; *see also* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 993 (2000) (noting that "satisfaction of the shocks-the-conscience standard, as employed in *Lewis*, is a necessary but not a sufficient condition for the maintenance of a substantive due process challenge to executive action"). There remains, however, considerable confusion and disagreement within the lower courts as to the precise scope and manner of the test's operation. *See* Levinson, *supra* note 185, at 320–34.

190. Florida v. Harris, 568 U.S. 237, 244 (2013) ("In evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances.").

and that the general reasonableness or unreasonableness of a search or seizure should be evaluated by reference to "all the circumstances" accompanying its execution.[191] Similarly, Sixth Amendment doctrine provides that courts must "consider[] all the circumstances" in determining whether an attorney's representation qualifies as constitutionally deficient.[192] Due process rules governing suggestive identification practices employ a totality-of-the-circumstances approach, "requir[ing] courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'"[193] Within these areas of the law, abstract conceptual descriptions of the facts need not play a significant role in the application of the operative doctrinal test.

In one sense, this holistic-input strategy poses an inverted version of the tradeoff we considered in the previous Section. Whereas an emphasis on targeted inputs threatens to render decision rules unduly rigid and inflexible in application, an emphasis on holistic inputs might render those same rules unduly amorphous and unpredictable, offering too little in the way of ex ante guidance as to how a given decision rule will apply in various cases.[194] To the extent that courts seek some measure of certainty and predictability in the operation of a given doctrinal test, they might have reason to prefer a more structured, but characterization-dependent decision rule over an unstructured, holistic-input alternative. Perhaps, for instance, a fundamental rights approach to substantive due process analysis is superior to a shocks-the-conscience approach for the simple reason that the former constrains and focuses judicial engagement in a way that the latter does not. If so, then characterization problems might be worth enduring for the simple sake that the alternative characterization-resistant rule leaves too much up in the air.[195]

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191. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968).

192. Strickland v. Washington, 467 U.S. 668, 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

193. Perry v. New Hampshire, 565 U.S. 228, 239 (2012) (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)).

194. *Cf.* Am. Broad. Cos. v. Aereo, Inc., 134 S. Ct. 2498, 2517 (2014) (Scalia, J., dissenting) (claiming that "th'ol' totality-of-the-circumstances test" is "not a test at all but merely assertion of an intent to perform test-free, ad hoc, case-by-case evaluation").

195. There is another reason to worry about the constraining effect of a holistic-input decision rule: the rule itself says nothing about *which* facts should be included within the "transactional frame" to be evaluated. This problem of "framing transactions," as Professor Daryl Levinson has called it, cannot be resolved by simply telling courts to assess the "whole fact pattern" according

At the same time, we should be careful not to overstate the guidance-based downsides of a holistic-input decision rule. For one thing, precedent-based decisionmaking might sometimes clarify and concretize the substance of a holistic-input test over time, with courts articulating subsidiary principles, presumptions, and rules of thumb that help to guide and constrain the test's application to future cases.[196] More importantly, we must remember the baseline against which these holistic-input tests are being compared—namely, an abstract-input decision rule that requires the making of a difficult characterization choice at the outset of its application. If the characterization process itself turns out to be just as freewheeling and undisciplined as a holistic, totality-of-the-circumstances inquiry, then characterization-dependent decision rules may not prove to be any less amorphous and unconstrained in operation than their holistic input counterparts.[197] In

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to one criterion or another, because there still exists the ancillary challenge of determine what facts to include within the "fact pattern" in the first place. Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1314 (2002). As Levinson explains:

> The question of whether government has harmed some individual citizen (or vice versa) is meaningful only relative to some transactional frame that determines how much of that relationship, which of the multitudinous benefits and harms, should be included within the constitutionally relevant transaction. All the rest, left outside the transactional frame, will dissolve into the background or baseline from which harm is measured.

Id. Should it have mattered in *Rochin*, for instance, if the defendant had had several previous run-ins with the police? Should it have mattered if the police officers had subjected other defendants to similarly abusive conduct? Should it have mattered if other members of the police force had done the same, or for that matter other police departments around the country? The point, in short, is that even the most capacious constitutional decision rules still require courts to make threshold choices regarding the *definition* of the transaction being processed, and that definition cannot be guided by the content of the decision rule itself.

Notice, however, that the challenge of transactional framing does not vanish when holistic-input rules are replaced with abstract-input rules. Indeed, where a rule operates on a characterized input rather than an uncharacterized fact pattern, the problem of arbitrariness becomes only worse. With an abstract-input rule, a court must first select a transactional frame and then recharacterize that frame in terms of the input the rule demands. With a holistic-input rule, by contrast, the court need only select the transactional frame before proceeding to evaluate it. Thus, while not free from unconstrained definitional choices, holistic-input rules at least carry the virtue of requiring one such choice rather than two.

196. For an overview of this process, see Coenen, *supra* note 179, at 653–58.

197. For example, while a fundamental rights approach to substantive due process analysis may initially seem more structured and predictable than a shocks-the-conscience approach, this will only be true to the extent that we can identify a structured and predictable approach to characterizing the right whose fundamentality will prove dispositive of the substantive due process inquiry. *See, e.g.*, Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 858 (2003) (noting that "without additional guidance about how to determine the appropriate level of generality," the fundamental-rights standard "is as indeterminate as any that can be used by a court").

sum, we might sometimes have certainty- and predictability-based reasons for crafting a decision rule in characterization-dependent, abstract-input terms, but the benefits to be gained in the way of certainty and predictability may turn out to be more apparent than real.

Apart from concerns about guidance and predictability, another set of considerations might militate against reliance on a characterization-resistant, holistic-input test. These considerations become apparent when we recall that judges strive for consistency in deciding constitutional cases, taking care to ensure that their present-day applications of a rule accords with past applications of the rule in previous cases.[198] Where that is so, characterization-dependent decision rules may permit judges to test for and illustrate precedential coherence without having to reexamine the factual details of all their previous cases. Holistic-input rules, by contrast, make it harder for courts to avoid this time- and labor-intensive task.

To see the point, recall the hypothetical with which this Article began—namely, I have been tasked with determining whether the subject of a given photograph is a "thing that makes me happy." That task, as we have already seen, implicates difficult characterization choices: I must choose one out of many possible characterizations of each picture's "subject" before asking whether that subject is a thing that makes me happy. As our discussion here reveals, however, a simple reform to the operative decision rule could make all my characterization problems go away. Specifically, rather than look for pictures whose *subjects* make me happy, I could instead look for pictures that, when viewed in their entirety, simply make me happy. In other words, we avoid the characterization problems associated with our abstract-input test ("select pictures of *things* that make you happy") by adopting a holistic-input test instead ("select pictures whose overall effect on you is to make you happy").

To the extent that each individual application of the decision rule

198. As a real-world matter, of course, the extent to which prior precedents actually constrain Supreme Court decisionmaking is by no means clear. *See, e.g.*, Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 399 (2007) ("Because the Supreme Court's docket is dominated by cases of exceptionally high moral, political, and policy consequence, the Supreme Court may actually be the last place to look to find actual traces of stare decisis."). But even assuming that the Court's own decisions are only weakly bound by prior precedent, the Justices might still have reason to care about doctrinal effects on lower court decisionmaking—decisionmaking that itself may adhere more strongly to both vertical and horizontal stare decisis norms.

occurs independently of the others, the first variant of the rule seems clearly preferable to the second. Why bother with the difficult intermediate step of characterizing the *thing* depicted by the picture when I could instead simply consult my reaction to the picture and make my decision based on that? But the choice between the rules starts to look more complicated if I am obligated to adhere to a consistency norm in selecting pictures from your pile. Simply put, if I must evaluate Photograph 10 holistically and do so in a manner that coheres with my previous holistic evaluations of Photographs 1 through 9, then I will likely have to go back and look at all nine of the prior photographs, figure out why I decided that those photographs made me feel happy or unhappy, and then determine whether those same reasons compel me to reach a particular finding in connection with Photograph 10. If, by contrast, I am asked to evaluate the *subject* of Photograph 10 and do so consistent with my previous evaluations of the subjects of Photographs 1 through 9, I do not need to reexamine Photographs 1 through 9 themselves. Rather, I need only (a) characterize a subject out of Photograph 10, (b) refresh my recollection as the characterized subjects of Photographs 1 through 9, and (c) ask how my previous evaluations of those subjects should affect my current evaluation of the newly characterized subject before me. Critically, by employing a decision rule that operates on characterized inputs rather than holistic inputs, I obviate the need to consider all the previous features of all the previous photographs. I need only consult the simplified list of characterized facts that my previous decisions have already generated.

Returning to the real world, we might associate similar efficiency-promoting benefits with similarly nonholistic decision rules. For example, a perhaps underappreciated virtue of a fundamental rights approach to substantive due process analysis is its tendency to generate over time a generalized understanding of those rights that do and do not qualify as fundamental—an understanding that we can quickly consult when asking how to decide a new case in light of past precedents.[199] Were we instead applying a shocks-the-conscience test, the only way to ensure fidelity to our past decisions would be to delve back into the factual details of each prior case and to judge whether those details, when cross-referenced against each case's respective holding, militated against or in favor of a conscience-shocking finding

199. *But see* Tribe, *supra* note 52, at 1936 (disparaging "the 'Trivial Pursuit' version of the due process 'name that liberty' game arguably validated by *Glucksberg*").

in the case before us. In a world of infinite cognitive resources, this might be the ideal approach; but where resources are limited, the characterization-based shortcut might ultimately prove to be the wiser and more manageable means of achieving precedential consistency.

To be sure, this argument assumes that precedential concerns should indeed matter when courts decide cases according to a totality-of-the circumstances analysis. It also assumes that the characterization process itself can be carried out without reference to the facts of prior cases. Both of these assumptions may turn out to be false, or at least overstated. Some holistic-input rules might best be applied in a manner that de-emphasizes consistency and coherence and that instead treats each case as its own independent problem to be solved by reference to its own distinctive facts.[200] And some characterization-dependent rules might require courts to consider the facts of previous cases when determining how to characterize the input at issue in the present-day case.[201] If either proposition is true, then the efficiency-based case for characterization-dependent doctrine becomes much tougher to make. The less that precedential considerations should guide a court's application of an open-ended test, the lower the number of outside facts a holistic-input rule will require a court to consider. And the more that the characterization process requires attention to prior cases' facts, the higher the number of outside facts an abstract-input rule will require courts to consider. Either way, the abstract-input rule would lose its comparative efficiency-related benefits over its holistic input counterpart.

C. Neutralized Inputs

A final approach to decision rule design would attack characterization problems in a different way. Rather than select for inputs that do not require characterization choices in the first place, this strategy would acquiesce to the presence of characterization choices while attempting to minimize their consequences. Call this the "neutralized-inputs" approach. It attempts to formulate decision rules in such a way as to confer on characterization choices a set of influences that are offsetting rather than unidirectional, effectively muting a choice's overall effects on the outcome of a particular case.

Means/ends analysis provides an illustrative example. The

200. *See* Coenen, *supra* note 32, at 711–13 (considering this possibility).

201. For a discussion considering a precedent-based approach to the characterization process, see *infra* Part IV.C.

standard means/ends test requires that a law be sufficiently related to a sufficiently important government interest in order to survive constitutional attack. We earlier saw how characterization choices might influence the determination of whether a given government interest qualifies as sufficiently important to pass constitutional muster. All else equal, interests characterized at a high level of generality (for instance, "an interest in protecting children") will more easily qualify as compelling than interests defined at a lower level of generality (for example, "an interest in reducing the extent of a child's inadvertent exposure to profane language on network television"). But what we have not yet considered is the possibility that these particular outcome-influencing dynamics will be counterbalanced by a separate set of dynamics that run in the other direction. And here, some level of self-correction may be at work. More specifically, any gains to be had from a high-generality characterization at the compelling interest stage of the inquiry may yield corresponding losses at the narrow tailoring stage. Thus, as Professor Craig Green has suggested, "generality affects each of these components in opposite ways."[202]

Consider, once again, the question presented in *Holder v. Humanitarian Law Project*.[203] There, recall, the Court applied heightened scrutiny in rejecting an as-applied First Amendment challenge to the federal "material support" statute, brought by plaintiffs "seek[ing] to facilitate only the lawful, nonviolent purposes" of foreign groups designated to be terrorist organizations.[204] As we have seen, one can characterize the relevant government interest in *Humanitarian Law Project* in a number of different ways.[205] Running from most to least specific, the interest might be characterized as that of (1) "cutting off support for the lawful, nonviolent activities of foreign organizations designated as terrorist groups," (2) "undermining foreign organizations designated to be terrorist groups,"

202. Green, *supra* note 17, at 454.

203. Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010).

204. *Id.* at 8. It bears noting that the Court in *Humanitarian Law Project* never specified the level of scrutiny that it was applying. *See* Eugene Volokh, *Speech That Aids Foreign Terrorist Organizations, and Strict Scrutiny*, VOLOKH CONSPIRACY (June 21, 2010, 5:43 PM), http://volokh.com/2010/06/21/speech-that-aids-foreign-terrorist-organizations-and-strict-scrutiny [https://perma.cc/JG9M-P8ZE]. What matters for our purposes here, however, is simply that the Court applied some variation on the means/ends test, inquiring into both the strength of the government's interest and the extent to which the law's restrictions on speech were necessary to serve that interest. *See id.* (suggesting that the Court in *Humanitarian Law Project* did apply strict scrutiny, while noting the Court's failure to define the test it was applying).

205. *See supra* Part II.C.

(3) "undermining foreign terrorist groups," (4) "combating terrorism," or (5) "promoting national security," with a bunch of intermediate options in between. And as the generality level of the government interest increases, so too should the ease of demonstrating that interest's overall importance.[206] All else equal, the government will have less difficulty in highlighting the vital importance of "promoting national security" than the vital importance of "cutting off support for the lawful, nonviolent activities of foreign organizations designated to be terrorist groups." In that sense, the operative decision rule looks to be at least somewhat sensitive to characterization choices, with some characterizations of the facts more likely than others to yield a government-friendly result.[207]

But things turn out not to be so simple, as something interesting happens when we proceed to ask whether the law is sufficiently closely *related* to the government interest we have identified. Here, we encounter something akin to the opposite relationship between generality levels and justificatory ease: the more generally we have characterized the government interest, the more difficult it becomes to demonstrate the requisite means/ends fit. We would have little trouble demonstrating that the material support statute is necessary to further the government's interest in "cutting off support for the lawful,

206. *See* Green, *supra* note 17, at 454 ("As an interest is defined more generally, it becomes more important . . . .").

207. Militating in the other direction is Professor Dov Fox's recent suggestion that broadly defined government interests might actually end up facilitating, rather than frustrating, courts' efforts to demonstrate the requisite means/ends fit. Fox suggests that broadly defined government interests might give rise to the phenomenon of "interest creep," whereby courts permit "an "uncritical expansion of a government reason that courts have endowed with justificatory force to swallow discrete sources of concern over time." *See* Fox, *supra* note 6, at 284–85. Put differently, broadly defined government interests might end up lending support to the government at both the "weightiness" and "relatedness" stages of the means/ends inquiry, and they would do so for the simple reason that broadly defined interests bring into play a wider range of prior progovernment decisions that a reviewing court might invoke. *Id.* As Fox explains:

> Once a court of last resort designates an imprecise interest like national security or child protection as the canonical kind capable of overriding constitutional guarantees, agencies and legislatures predictably glom onto it the disparate kinds of concerns that arise in related controversies. Lower court judges—who do not want their decisions reversed any more than lawmakers want their policies overturned—approve these varied concerns in the underspecified terms of that controlling authority without explaining why or how that interest applies in that new context. Its contours thereby swell over time to encompass this wide swath of rubberstamped concerns.

Id. at 277. The phenomenon of interest creep might thus provide some reason to be skeptical of the extent to which the means/ends test can operate successfully as a neutralized-input decision rule. Interest creep may instead result in broadly characterized interests exerting a uniform and unidirectional tilt of the means/ends inquiry in the government's favor.

nonviolent activities of foreign organizations designated as terrorist groups"—that objective, after all, is precisely what the material support statute purports to do. But would the law count as necessary to further the more generally defined interest in "promoting national security" or "combating terrorism"? Maybe, but maybe not. The problem is that the government can "protect national security" or "combat terrorism" in many more ways than it can "cut off support for the lawful, nonviolent activities of foreign organizations designated to be terrorist groups." And the wider the range of potential means of achieving an interest, the more likely it becomes that a less restrictive or less discriminatory means will emerge from the heap—thus demonstrating that the chosen means was fatally over- or underinclusive with respect to the interest in question.[208] In other words, broadening our characterization of the government interest may make things easier for the government (and more difficult for the challengers) when evaluating the strength of the interest, but it will then make things more difficult for the government (and easier for the challengers) when evaluating the degree of fit between the interest and the law.

One might imagine similar mechanisms at work in Article III standing doctrine. Recall our earlier exploration of the connection between characterization choices and the redressability prong of the standing test.[209] There, I suggested that courts can stack the deck in favor of a pro-redressability finding by characterizing injuries in opportunity-based, as opposed to actuality-based, terms. But when we recall the additional requirement that an injury must also qualify as "concrete" and "particularized" (as opposed to "abstract" and "generalized"), the picture becomes more complicated. A court that defines an injury in opportunity-based terms might have an easier time demonstrating redressability than will a court that defines the injury in actuality-based terms, but it might then have a correspondingly more difficult time demonstrating concreteness. And conversely, a court that defines an injury in actuality-based terms may have an easier time demonstrating concreteness than will a court that defines the injury in opportunity-based terms, but it will then have a correspondingly more difficult time demonstrating redressability. The first and third prongs

208. *See, e.g.*, Korte v. Sebelius, 735 F.3d 654, 686 (7th Cir. 2013) ("Stating the governmental interests at such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them."); Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 17 (1992) ("If a court chooses to define legislative purpose broadly, the statute will likely be underinclusive.").

209. *See supra* Part I.C.

of the Article III test are each sensitive to characterization choices, but they might be sensitive to those choices in offsetting ways. Thus, while individual components of the Article III standing test may be manipulated by strategic characterizations of the relevant injury, the components taken together might not be.

Self-correcting mechanisms thus strike me as at least a theoretically possible means of lowering the overall stakes of a given characterization problem.[210] Even if turns out that courts must make fundamentally arbitrary choices in describing government interests, injuries, and other doctrinal inputs, perhaps the choices will not much matter in dictating a decision rule's application to the input in question. Still, there are reasons to temper our enthusiasm as to how much a self-correction strategy can achieve. Most importantly, even if multiple components of a doctrinal test predictably respond to an input's characterization in different ways, it does not follow that the *magnitude* of the responses will be precisely, or even roughly, equivalent. When it comes to means/ends analysis, for instance, generality levels might matter more at the first step of the inquiry than at the second, with the chosen characterization of the government interest exerting a major influence on whether that interest counts as compelling, important, legitimate, and only a minor countervailing influence on whether there is a sufficiently close fit between the interest itself and the law under review. Similarly, perhaps the characterization of a plaintiff's injury will affect courts' perception of concreteness more substantially than their perceptions of redressability (or vice versa). In these and other ways, a characterization choice's outcome-influencing effects at one stage of the inquiry might simply overwhelm its purportedly countervailing effects at another stage of the inquiry.

There is another problem too: the equilibrating potential of a multipart rule will often work in only one direction. For reasons we have already seen, the strict scrutiny test might help to neutralize the

210. A further possibility, suggested to me by Jon Romberg, is that a neutralized-input rule might work in connection with a further rule that allocates to a burden-bearing party the power to adopt the relevant characterization choice. *Cf. infra* note 247 (discussing in further detail the possibility of involving litigants in the making of characterization choices). Thus, for example, a court might simply instruct the party tasked with, say, demonstrating that a law withstands strict scrutiny, to identify the characterization that the party wishes the court to use. And the court would then proceed to work with that characterization choice without asking any further questions about it. The equilibrating potential of the rule makes this option feasible. The burden-bearing party cannot egregiously manipulate outcomes via its characterization choice because any outcome-promoting gains conferred by that choice at one part of the inquiry will be offset by losses incurred at another part of the inquiry.

effects of characterization choices when it comes to demonstrating the constitutionality of a suspect law. A broad characterization of the government interest might support the desired conclusion at the "compelling interest" stage of the inquiry while undercutting that conclusion at the "narrow tailoring" stage of the inquiry. But if the aim is to show that the law fails strict scrutiny, then manipulation via characterization remains easy to accomplish, as a court could characterize the relevant interest in narrow and context-specific terms so as to demonstrate that it does not satisfy the "importance" prong of the test and thus by extension the test as a whole. So too with standing doctrine. It may be difficult, as we have seen, for a court to deploy a single characterization of the relevant injury for purposes of demonstrating the existence of Article III standing, but it will remain easy to manipulate the test in the other direction. If, for instance, the court wants to hear a case, its efforts to accommodate the redressability prong of the inquiry will frustrate its efforts to accommodate the concreteness prong, and vice versa. But if a court wishes to avoid hearing the case, it can easily characterize the relevant injury in terms that either the abstractness prong or the redressability prong will find wanting. More generally, the point is simply that self-correcting mechanisms work only when courts need to demonstrate that all prongs of a test have been satisfied. But those mechanisms have no value when the aim is simply to show that one prong of the test has not been satisfied.[211]

At the same time, some amount of self-correction may be preferable to no amount of self-correction, in which case courts should continue exploring opportunities to utilize the neutralized-inputs strategy across different areas of doctrine. At one level, this may mean expanding the already significant presence of means/ends analysis within constitutional law. At another level, it might mean devising new decision rules that respond to a single characterization choice in similarly countervailing ways. To be sure, the presence of neutralized inputs does not in and of itself provide reason to favor one decision rule over another; other factors can and should enter into the calculus. But all else equal, decision rules that respond to characterization choices in a unidirectional manner might ultimately qualify as less desirable than those that respond to such choices in an offsetting manner.

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211. I am grateful to John Rappaport for a helpful conversation on this point.

If nothing else, the previous Part suggests that characterization problems are not likely to go away anytime soon. We may sometimes be able to avoid these problems by devising targeted-input and holistic-input tests, and we may sometimes be able to neutralize the effects of our characterization choices by devising decision rules that reduce the decisional influence of a given characterization choice. But these modifications will not always be available, and courts will therefore often find themselves tasked with applying a decision rule whose outcome depends on a contestable characterization of the input. Assuming, then, that outcome-influencing characterization choices will remain a part of the constitutional decisionmaking process, the crucial question becomes how to confront them.

IV. CONSTRAINING CHARACTERIZATION CHOICES

This Part highlights three types of approaches to the characterization of constitutional inputs. It first considers the possibility of providing ex ante guidance regarding the proper *level of generality* at which the relevant input should be characterized. It next focuses on the possibility of *results-based* characterization, which proceeds by identifying the factual characterization that maximizes the likelihood of generating the appropriate-seeming doctrinal result. And this Part concludes by considering the possibility of *precedent-driven* characterization, which treats old characterizations from previous cases as a guide to rendering new characterizations of present-day facts. As we will see, each of these strategies carries some promise, but none offers a foolproof solution to the challenges that the process poses.

A. Controlling Generality Levels

An initial approach to characterization choices might focus on levels of generality. Facts can often be characterized in more or less general terms, and an input's generality level can significantly influence doctrinal outcomes. We saw this point on display in Part II. A right is more likely to qualify as fundamental when we characterize that right as a lofty abstraction rather than a particularized grievance;[212] a rule is more likely to qualify as clearly established when we characterize it as a generally applicable prohibition on conduct rather than a particular

212. *See supra* Part II.A.

application of that prohibition to the facts of a given case;[213] and a government interest is more likely to qualify as compelling when we characterize that interest in terms of a big-picture regulatory objective rather than a targeted and contingent goal.[214] All of this being so, courts might attempt to constrain characterization choices through ex ante specifications of desired generality levels. In other words, a characterization-dependent decision rule might carry its own set of instructions regarding the particular generality level at which its input should be defined. And with the optimal generality level so prescribed, subsequent characterization choices could proceed in a controlled, predictable, and nonarbitrary fashion.

The most familiar example of this strategy comes from a famous footnote in Justice Scalia's *Michael H. v. Gerald D.* opinion.[215] There, Justice Scalia called for an approach to substantive due process cases that would characterize an asserted right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[216] Justice Scalia's prescription—as Professors Michael C. Dorf and Laurence H. Tribe have noted—had an "algorithmic" feel: characterize the asserted right at some minimal level of generality, look for a decisive tradition involving the right so characterized, and, if no such tradition exists, ratchet up the generality level and try again.[217] The prescription thus sought to constrain characterization choices by prospectively dictating that a given factual characterization be pitched at the minimum level of generality that "tradition" permits.[218]

The *Michael H.* approach never won approval from a majority of the Court, but other, less overt attempts at "generality control" are arguably present within the case law. In *Glucksberg*, for instance, a majority of Justices admonished courts to formulate a "careful description" of the asserted liberty interest in substantive due process cases, articulating a requirement that, in practice, appears to favor the characterization of rights in low-generality terms.[219] In the qualified

213. *See supra* Part II.B.

214. *See supra* Part II.C.

215. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion). This footnote was joined only by Chief Justice Rehnquist.

216. *Id.*

217. Tribe & Dorf, *supra* note 6, at 1085.

218. *Id.* at 1086.

219. Washington v. Glucksberg, 521 U.S. 702, 721 (1997); *see* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 157 (2015) (claiming that *Glucksberg*'s

immunity context, the Court has "repeatedly told" its subordinates "not to define clearly established law at a high level of generality,"[220] and it has elsewhere noted that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."[221] Strands of the Court's nonretroactivity jurisprudence warn against defining the relevant rule at an "unduly elevated level of generality."[222] The Court has at least hinted at a preference for low-generality characterizations in the Commerce Clause context, obliquely observing that "depending on the level of generality, any activity can be looked upon as commercial."[223] And two terms ago, Justice Scalia himself voiced a preference for low-generality characterizations in connection with the strict scrutiny test, reasoning that "[t]he State must . . . identify its objective with precision before one can tell whether that interest is compelling and whether the speech restriction narrowly targets it."[224] In various ways, these statements reflect judicial attempts to cabin characterization choices through the imposition of generality-based limits. Some such attempts, like the *Michael H.* approach, prescribe these limits in detailed terms; other such attempts are less ambitious, simply warning against the dangers of taking generality levels too far in one direction. But the underlying intuition is largely the same: courts might attempt to guide the characterization process by stipulating the appropriate level of generality at which the characterized input should be cast.

Prescribing desired generality levels may impose some small measure of discipline on the characterization process. But, for a variety of reasons, the strategy is limited in terms of what it can achieve. The central difficulty is one of measurement: it is often hard to describe with any precision the threshold point at which the desired level of generality lies. We may all agree that a court has gone too far up the

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"[c]areful description" requirement served as "a transparent Trojan horse" for the command to employ a "specific description").

220. Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011).

221. Wilson v. Layne, 526 U.S. 603, 615 (1999).

222. Wright v. West, 505 U.S. 277, 315 (1992) (Souter, J., concurring in the judgment); *see also* Gilmore v. Taylor, 508 U.S. 333, 344 (1993) ("[T]he level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our *Teague* inquiry."); Sawyer v. Smith, 497 U.S. 227, 236 (1990) ("The [*Teague*] test would be meaningless if applied at this level of generality.").

223. United States v. Lopez, 514 U.S. 549, 565 (1995); *see also* Gonzales v. Raich, 545 U.S. 1, 49 (2005) (O'Connor, J., dissenting) (noting that "[t]he Court's definition of economic activity is breathtaking").

224. Williams-Yulee v. Fl. Bar, 135 S. Ct. 1656, 1678 (2015) (Scalia, J., dissenting).

generality spectrum when it characterizes a claimant's liberty interest as amounting to an interest in "enjoying freedom," and we all may also agree that a court has gone too far down the generality spectrum when it characterizes that same liberty interest as amounting to an interest in "not doing precisely what the government is requiring the claimant to do in this particular case." But innumerable other characterization choices lie between these two extremes, and it is hard to know or even imagine how one would further specify where within this vast territory the desired generality-level can be found.[225] We have yet to develop a reliable generality-ometer, capable of assigning to each factual characterization, say, a generality score between 0 and 100 to be cross-referenced against whatever specified generality value the doctrine demands. And that in turn leaves us with vague and largely useless instructions regarding the proper levels of generality to be used. It is, indeed, telling that the Court's very few attempts to specify desired generality levels—e.g., adopt a "careful description" of the liberty interest, define the relevant rule at an "appropriate level of specificity,"

225. One possibility, raised by Professor David Faigman, might involve a comparative assessment of generality levels as between multiple, different inputs that factor into a single doctrinal test. Professor Faigman suggests, for instance, that when courts engage in a "balancing" of government interests against liberty interests, they should take care to "use the same level of generality on both sides of the balance." Faigman, *supra* note 6, at 780. This is an intriguing idea, but it too has its limits. For one thing, even if the comparative approach obviates the need to describe generality levels in an absolute sense, it still leaves open the difficult question of how to determine whether the generality level of one doctrinal variable is or is not the same as the generality level of another. More importantly, the comparative approach, even if fully successful, would enjoy a limited range of application, constraining characterization choices only in connection with rules that balance one characterized input against another.

A further possibility is suggested by Nicholas Quinn Rosenkranz, who draws a sharp distinction between constitutional provisions that concern the validity of congressional action and those that concern the validity of executive action. *See* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1224–26 (2010). Specifically, Rosenkranz suggests that when applying clauses as to whom "Congress" is the relevant subject, courts should accord no doctrinal significance to any "facts of enforcement" that accompany a particular case. *See id.* at 1275–76 (noting that "a claim that Congress violated the Constitution by making a law, when it made the law, is inherently a 'facial challenge'" and that "specific facts of enforcement cannot matter here, for the simple reason that the constitutional violation is complete before those facts arise" (emphasis omitted)). With executive action, however, enforcement-specific facts can and should figure into the merits-based inquiry. *See id.* at 1245 (noting that, when the constitutional inquiry concerns executive action, "the doctrinal test will probably be fact-intensive"). Rosenkranz's approach would likely simplify characterization problems to some extent; especially with respect to Congress-centered norms, his approach would manage to eliminate a number of potential characterization choices by prescribing high-generality characterizations of the relevant conduct under review. But difficulties would still remain, as courts would still need to confront the challenge of deciding which particular legislation-specific facts or enforcement-specific facts to include when characterizing the particular input that a decision rule demands.

and so forth—offer about as much in the way of useful guidance as the encouraging-but-ultimately-banal exhortation to "make it work."[226] Absent a reliable means of describing and measuring generality levels, generality-based limits on the characterization process will be difficult to follow and easy to ignore.

We might try to circumvent the measurement problem by outlining an algorithmic, step-by-step approach to identifying the proper generality level, but even a framework of this sort is likely to leave major indeterminacy problems in its wake. Consider again Justice Scalia's suggestion that the right being evaluated in a substantive due process case should be characterized at the most specific level for which a relevant historical tradition exists. The instruction sounds alluringly straightforward, but it leaves unanswered several vital questions: How do we choose the initial characterization with which to begin our investigation?[227] How (and, dare we ask, at what level of generality) does one identify the relevant tradition to consult?[228] How does one know whether the relevant tradition speaks to or does not speak to the fundamental status of the characterized right? If the relevant tradition is indeterminate with respect to a low-generality characterization of a liberty interest, how far up the generality spectrum should we go before we try again? Generality levels, in short, are difficult to measure, difficult to describe, and difficult even to compare, and we do not gain much of anything by attempting to guide the characterization inquiry by the presence or absence of particular traditions of relevance to a characterized right.

What is more, even if we could figure out a way to specify optimal generality levels, we would still need to devise a way of constraining characterization choices within the permitted generality range. The problem here is that a single set of facts can be plausibly characterized in multiple ways—even at the exact same level of generality. As Dorf and Tribe have put the point, there is no "single dimension of

226. *See Project Runway* (Bravo/Lifetime 2004–present).

227. One might think that this question can be easily answered vis-à-vis an instruction to start with the lowest possible generality level, but this specification turns out not to help very much. If the minimum-generality characterization of a right is simply a restatement of all the facts leading up to a particular rights-based claim, then no "relevant tradition" will ever speak to the existence of the right. And that in turn means that we need to increase the generality of our characterization by abstracting away some of the facts with which we began. But then the (very difficult) question becomes: which facts do we abstract away? *See* text accompanying *infra* notes 229–30.

228. *See* Tribe & Dorf, *supra* note 6, at 1087.

specificity" along which a characterization choice proceeds.[229] The universe of available characterizations does not resemble a single line proceeding from most specific to most general; rather, that universe is better captured by an outwardly branching tree, with more and more potential characterizations becoming available the higher up the generality spectrum we go. Dorf and Tribe illustrate this idea nicely with respect to *Michael H.* As they explain:

> According to Justice Scalia, if "there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, [the Court] would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general." As Justice Scalia states the problem, after traditions regarding the rights of the natural father of a child adulterously conceived, traditions regarding natural fathers in general are the next most specific. But why must this be so? Why not abstract out the father's sex, and consult general traditions regarding parental rights of children adulterously conceived, and reason from these? Perhaps we can learn something from the way the law treats natural mothers of adulterously conceived children. Or alternatively, why not abstract Gerald D. out of the case and consult traditions regarding unmarried fathers' rights in circumstances where the mother was not married to some other man at the time of conception? In other words, when we find no relevant tradition concerning asserted right X under conditions 1 and 2, do we consult traditions concerning right X under condition 1 in general, or do we consult traditions concerning right X under condition 2 in general?[230]

In sum, we cannot count on ex ante instructions regarding generality levels to provide anything more than very rough-cut limits

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229. *Id.* at 1090.

230. *Id.* at 1090–91 (alteration in original) (footnotes omitted) (citing Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989)). One way around this difficulty would be to stipulate that the operative input of a decision rule should be described at the lowest level of generality possible. But an instruction to maximize specificity (and hence minimize abstraction) in the characterization of an input would, in practice, be no different from an instruction to consider "all the relevant facts" (or the "totality of the circumstances") when disposing of a constitutional claim. Admonishing courts to "characterize inputs at the maximum possible level of specificity" is functionally the same as admonishing courts not to characterize inputs in the first place and instead to apply the relevant decision rule to the entirety of a case's fact pattern. That holistic-input approach to constitutional decisionmaking, as we have seen, may well be appropriate under some circumstances. *See supra* Part III.B. But useful or not, this is *not* an approach that relies on characterization at all. Saying then that characterization problems can be solved by instructing courts to characterize inputs at the maximum possible level of specificity is simply another way of saying that characterization problems can be avoided by instructing courts to evaluate the totality of a case's fact pattern.

on the characterization choices that a given rule demands. Ex ante instructions might suffice to discourage characterization choices at the extreme ends of the generality spectrum, but they rapidly lose their utility as we move away from those extremes. Generality levels, in short, are difficult to describe, difficult to measure, and difficult to compare. What is more, even if clear-cut instructions about generality levels could be rendered, those instructions would leave unanswered the critical question of how to choose among the variety of plausible characterizations that might exist within the desired generality range. If we are to devise a meaningful approach to the making of characterization choices, that approach must involve something more than references to generality levels alone.

B. Results-Based Characterization

A second approach to the input-characterization process would appeal directly to desired results. Call this the "results-based" characterization strategy: it proceeds by characterizing inputs in a manner that helps to generate the appropriate-seeming outcome under a given doctrinal test. Courts would, in effect, collapse the characterization of a doctrinal input into the application of the operative decision rule, citing to a given input's tendency to satisfy or not satisfy the rule's underlying criterion as a reason for or against characterizing the facts in a particular way.

The Court has sometimes been quite explicit about its willingness to render characterization choices in this manner. Recall, for instance, the Court's changed approach to the question whether state antisodomy laws violate the Fourteenth Amendment's substantive due process protections. In *Bowers v. Hardwick*, the Court answered in the negative, finding that the Fourteenth Amendment conferred no "fundamental right upon homosexuals to engage in sodomy."[231] But the Court subsequently reversed course, finding that the majority in *Bowers* had erred by, among other things, characterizing the relevant right in unduly narrow terms. Specifically, in holding that antisodomy laws implicated nothing more than a right to engage in a particular form of sexual activity, the Court in *Bowers* had "fail[ed] to appreciate the extent of the liberty at stake."[232] More specifically:

> To say that the issue in *Bowers* was simply the right to engage in

231. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

232. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

> certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.[233]

This might seem like circular logic, amounting to little more than a claim that the *Bowers* characterization was unduly narrow because the *Bowers* characterization was unduly narrow. But a better take on the argument would see it as rooted in the premise that, however one characterized the liberty interest implicated by antisodomy laws, it was not one that the government should have been able to impinge. In other words, the Court in *Bowers* "misapprehended the claim of liberty there presented to it"[234] *precisely because* it had adopted a characterization that supported (rather than undermined) the conclusion that the liberty interest was nonfundamental. The Court in *Lawrence*, by contrast, had implicitly concluded that antisodomy laws infringed a fundamental right, and it thus chose to characterize the liberty interest in a manner that conduced to that conclusion. Thus, rather than proceed from a characterization of the right to an evaluation of its fundamentality, this argument worked the other way, with the Court in *Lawrence* deriving a more capacious characterization of the liberty interest from what it already perceived to be the necessary constitutional result.[235]

Lest one regard this technique as unique to the *Lawrence* majority, other cases from other doctrinal areas reveal similar analytical moves. Consider, for instance, this description of qualified immunity analysis, authored by Justice Scalia:

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233. *Id.*

234. *Id.*

235. This observation is consistent with several commentators' suggestion that *Lawrence* involved a significant amount of results-oriented reasoning across the board. *See, e.g.*, Adam Lamparello, *Why Justice Kennedy's Opinion in* Windsor *Shortchanged Same-Sex Couples*, 46 CONN. L. REV. ONLINE 27, 34 (2013) ("*Lawrence* is the perfect example of using normative reasoning to establish legal doctrine, instead of using doctrine (and text) to establish constitutional norms.").

> The operation of this standard . . . depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of [the test] . . . . It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[236]

Notice in particular how this passage begins with a description of a characterization problem and ends with a prescription for some form of fair notice-based reasonableness review. Legal rules, the paragraph suggests, should be characterized in a sufficiently particularized manner so as to prevent the withholding of immunity from an officer who acted reasonably. To know whether a rule has been characterized properly, one must therefore peek ahead to the subsequent steps of the inquiry.[237] One must ask whether the rule so characterized would support or undermine a finding of qualified immunity, and one must then ask whether such a finding would cohere with the objectively reasonable or unreasonable nature of the officer's behavior. If so, adopt the characterization; if not, adopt a different characterization that would produce the desired result. In other words, rather than assess an officer's reasonableness by asking whether the violated rule was clearly established, make the violated rule as clearly established or

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236. Anderson v. Creighton, 483 U.S. 635, 639–40 (1987) (citation omitted) (citing Mitchell v. Forsyth, 472 U.S. 511, 535 n.12 (1985)).

237. This idea is reminiscent of Richard Fallon's suggestion that courts sometimes "peek ahead" at the potential remedial consequences of a given substantive outcome before deciding whether to vindicate a legal claim on its merits. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies–And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 642 (2006); *see also* Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211, 1223–44 (2014) (highlighting additional examples of the practice).

not clearly established as needed to ensure that reasonable conduct is immunized and unreasonable conduct is not.

The above-quoted passages reflect express judicial acknowledgments of the connection between characterization choices and desired doctrinal results. But the practice might also occur implicitly, with courts either secretly or subconsciously turning to outcome-based considerations to guide their characterizations of the facts. Want to conclude that Congress has regulated an activity that is impermissibly noneconomic? Then characterize the activity in noneconomic terms.[238] Want to conclude that a federal law preempts a state law? Then characterize each law's regulatory field in broad and overlapping terms.[239] Want to conclude that a plaintiff lacks Article III standing? Then characterize the plaintiff's injury as a grievance that defies easy remediation.[240] In short, where the facts alone lend themselves to myriad different characterizations, courts may simply (and silently) select the characterization that best justifies an outcome that they already want to reach.

At first glance, all of this might look rather untoward; indeed, critics might be quick to dismiss the approach as implicating the ever-dreaded specter of results-oriented judging. But while abusive or manipulative instances of results-based characterization choices are easy to imagine, other instances of the approach might turn out to be less problematic than first meets the eye. Much depends on what sorts of considerations are orienting the court toward the decisional outcome it wishes to reach. Suppose, for instance, that a judge surveys the facts of a substantive due process case and finds herself struck by the extent of the burdens that the claimant has endured. The judge might say to herself: "These facts sure look to me like the facts of a 'fundamental-rights'-type case," and she might accordingly characterize the facts in terms of a right whose fundamentality is manifest. Similarly, suppose that a judge surveys the facts of a qualified immunity case and finds herself thinking that the defendant could not reasonably have known about the illegality of his actions. The judge might say to herself: "These facts sure look to me like the facts of a 'not-clearly-established-law'-type case," and accordingly characterize the facts in terms of a "rule" whose "clearly established" nature could not be shown. In sum, where the motivating values of the

238. *See, e.g.*, Schapiro & Buzbee, *supra* note 104, at 1261.

239. *See, e.g.*, *Preemption*, *supra* note 158, at 1067.

240. *See* Nichol, *supra* note 135, at 80.

characterization choice bear a close resemblance to the underlying values of the decision rule itself, results-based characterization choices may represent a perfectly legitimate approach to a difficult doctrinal problem.

But even where a results-based characterization choice derives from legitimate considerations, there exists another, more serious problem with the reasoning process that it reflects. The trouble is the now-apparent pointlessness of the characterization itself. Our hypothetical judge did not rely on any particular description of the underlying right reflected by the facts to conclude that she was dealing with a fundamental-rights-type case, just as she did not need any particular description of the underlying law to conclude that she was dealing with a not-clearly-established-law-type case. Rather, she reached those respective conclusions by engaging with the facts holistically and consulting her own impressions of those facts. In a very real sense, then, the mode of her analysis departed from the analysis that her decision rule described. She did not identify a right and then consider its fundamentality, nor did she identify a law and then consider its clearly established nature; rather, she saw in one fact pattern the trappings of a fundamental rights-type case, and she saw within another fact pattern the trappings of a not-clearly-established-law-type case. What she characterized as the relevant input of the decision rule did not in fact operate as an input to her decisionmaking inquiry. Rather, the relevant input—to the extent there was one—was simply the entirety of the fact pattern before her.

What all of that suggests is that a results-based approach to characterization choices—even though capable of offering a coherent, transparent, and even determinate basis for choosing among competing characterizations of the facts—will cast doubt on the legal force of the decision rules it guides. Where courts find themselves characterizing inputs by reference to desired doctrinal results, they have not so much arrived at a solution to characterization problems as they have revealed themselves to be evaluating something other than the input being characterized. In this sense, the decision rule they purport to apply will turn out to misdescribe the inquiry being conducted.

C. Precedent-Driven Characterization

Let us now consider a third approach to the characterization process, which calls for the making of characterization choices in a precedent-based manner. At first glance, this approach appears to have

much going in its favor. Courts, after all, routinely rely on precedents when applying law to fact, and a broad and well-established body of case law can help to channel seemingly unbounded legal inquiries. If common-law-like reasoning can discipline courts' assessment of questions like "was this conduct reasonable?," "was this punishment cruel and unusual?," and "was this defendant deprived of due process?," then perhaps it can discipline their characterizations of the facts as well.

An example may help to illustrate the idea. Recall our earlier discussion of the Court's varying characterizations of injuries in Article III standing cases.[241] In cases such *as Linda R.S. v. Richard D.*, *Warth v. Seldin*, and *Simon v. Eastern Kentucky Welfare Rights Organization*, the Court defined the relevant injury as an actual failure to obtain a desired resource; in cases such as *Regents of the University of California v. Bakke*, the Court defined the relevant injury as a failure to compete for the desired resource on an equal footing with others. Suppose that we now confront a case in which a plaintiff claims that an allegedly unlawful activity has frustrated her ability to obtain a resource she desires. We must decide whether the plaintiff has Article III standing, and to do so, we must further characterize the facts in terms of an injury that the plaintiff has suffered. How do we decide whether to characterize the injury in *Linda R.S.*-like "actuality" terms (to wit, "the plaintiff's alleged injury is the failure to obtain the resource she desires") or *Bakke*-like "opportunity" terms (to wit, "the plaintiff's alleged injury is the failure to compete for the resource on an equal basis")? One seemingly straightforward approach to the problem would say: "Compare the facts of this case to the facts of *Linda R.S.*, *Warth*, *Simon*, and *Bakke*; figure out which of those cases is most factually similar to the current case; and adopt whatever type of characterization the most similar case utilized." The approach, in other words, seems to require no peeking ahead to the likely outcome of the Article III standing inquiry. Nor does it seem to suffer from any obvious indeterminacy problems. It simply calls upon courts to compare one set of facts to another and to utilize that comparison as the basis for the characterization choices that they make.[242]

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241. *See supra* Part II.E.

242. One might understand in similar terms the court's suggestion in *Obergefell* that the relevant right was a "right to marriage" rather than, say, a "right to same-sex marriage." That former characterization was appropriate, the Court reasoned, because "*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'" *See*

Here too, however, our prescribed approach runs into difficulties. The first difficulty relates back to a point we earlier considered in assessing the virtues of characterization-dependent decision rules as compared to totality-of-the-circumstances tests and other rules that call for a holistic assessment of all the facts.[243] A potential advantage of the former over the latter, I earlier suggested, might relate to the efficiency of precedential analysis: namely, where a decision rule operates on characterized facts rather than the totality of a case's facts, courts can draw guidance from past applications of the rule without having to reappraise themselves of the many different fact patterns to which it previously applied. When, for instance, we ask whether an injury is concrete enough to pass muster under Article III, the characterization-dependent nature of Article III standing doctrine allows us assess the injury's concreteness without having to scrutinize every fact of relevance to every prior decision. We can simply compare our currently characterized injury to previously characterized injuries and decide whether, in light of those comparisons, the injury should qualify as concrete. The characterization process, in other words, forges a sort of informational shortcut along which we can reach precedentially justified conclusions in a quick and easy manner.

That argument collapses, however, if we must consult prior precedents in order to render a characterization of the relevant input itself. If this is true, then the characterization-dependent decision rule turns out not to alleviate any informational burdens. To be sure, we need not consider the raw facts of prior cases when we compare the characterized fact of our case to the characterized facts of previous cases; but we still must consider the raw facts of those previous cases in order to figure out what our new, characterized input should be. If, in other words, we have decided that raw facts of our current standing controversy warrant an opportunity-based characterization of the inquiry because and only because those facts line up more closely to the raw facts of previous cases in which we adopted a similar, opportunity-based characterizations—then we have lost the benefit of the informational shortcut that our decision rule had originally seemed to deliver.[244] True, we need not consider all the raw facts of all the

Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). In other words, precisely because previous substantive due process cases involving marriage had characterized the relevant right as a "right to marriage," that characterization remained appropriate in *Obergefell* as well. Yoshino, *supra* note 219, at 165–66 (considering a similar interpretation of this passage).

243. *See supra* Part III.B.

244. In fact, we are worse off now, because we have to consider the nine "raw" facts of cases

previous cases when evaluating the concreteness of the injury we characterized—at this stage of the inquiry, we can simply compare our characterized injury to previously characterized injuries that did and did not qualify as concrete under our prior decisions. But that is by now a moot point, as we already had to consult all of those prior facts back when we were figuring out how to characterize the injury in question.

But even putting to one side concerns about efficiency and information overload, there exists yet another problem with a precedent-based approach to the making of characterization choices. We thus far have spoken as if analogical reasoning proceeds on the assumption that one set of facts either will be or will not be similar to another set of facts, full stop. But facts can be similar and dissimilar in different respects, and the analogical reasoning process must therefore depend on some additional criterion for evaluating the *relevance* of the similarities and dissimilarities that do appear.[245] We should not deem Case A to be controlled by Case B because the respective plaintiffs have the same first name; but we might have reason to deem Case A to be controlled by Case B because the respective plaintiffs each acted recklessly. Some factual connections matter more than others, and a central challenge of precedential analysis is that of explaining why the relevant connections matter and why the irrelevant connections do not.

What that in turn means is that precedent-driven characterization choices must ultimately appeal to some set of values that lie outside the factual similarities and dissimilarities that they invoke. And if that is so, then it becomes unclear whether a nominally operative decision rule is in fact performing any analytical work above and beyond what the value-driven precedential choices already reflect. This is not, to be clear, a knock on precedential reasoning itself; there are benefits to drawing connections across cases, even if doing so presents some tough analytical choices.[246] Rather, my point is simply to question the need for a decision rule whose input will be determined according to precedent-based reasoning. One cannot ask whether Case A is

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A, B, and C in addition to the three characterized facts that we constructed.

245. *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576–77 (1987) ("Reasoning from precedent, whether looking back to the past or ahead to the future, presupposes an ability to identify the relevant precedent."); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) ("The major challenge facing analogical reasoners is to decide when differences are relevant.").

246. *See, e.g.*, Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1159 (2015) ("Second-best stare decisis reflects the Court's descriptions of the virtues of continuity–and the costs of vacillation–by recognizing a presumption of fidelity to precedent and by separating the treatment of precedent disagreements over interpretive philosophy.").

relevantly similar to Case B without also asking whether the rationale for Case A's result supports a similar result in Case B as well. But once that latter question has been asked and answered, the legal relevance of the decision rule has diminished if not vanished. Having determined that two cases are sufficiently similar to warrant similar characterizations of a given doctrinal input, one has necessarily determined that the two cases are sufficiently similar to warrant a similar doctrinal result. And if that is clear, the question once again emerges: why not cut out the seemingly unnecessary intermediate step of requiring any sort of characterization in the first place?

Put another way, once we acknowledge that a precedent-driven characterization choice must incorporate the past dispositions of cases as the relevant analogical lodestar, our purportedly precedent-based approach to the characterization process may turn out to be nothing more than a results-based approach in precedential disguise. Looking to past decisions for guidance regarding the characterization of constitutional inputs may be no different from looking to past decisions for guidance regarding the proper application of the rule to which it attaches. And if that is true, then it is the desired result, rather than a previous characterization from the previous case, that is moving the characterization choice forward. If the similarities between two Article III standing cases are sufficiently material to warrant similar characterizations of each case's relevant injury, they will also be sufficiently material to warrant the conclusion that each case presents an injury-in-fact situation. If the similarities between two Commerce Clause cases are sufficiently material to warrant similar characterizations of each case's relevant activity, they will also be sufficiently material to warrant the conclusion that each case presents a noneconomic-activity situation. Our precedent-driven characterization choices thus end up reproducing the problems presented by their results-based counterparts—if our characterizations of the facts are operating as nothing more than post hoc justifications for results we have independently derived, then the characterization-dependent decision rule serves no meaningful doctrinal purpose.

There remains, of course, the possibility of developing some other results-neutral basis for distinguishing relevant from irrelevant factual connections across cases. If such a basis could be developed, then a precedent-based approach to the characterization process would steer clear of the problems we associated with its results-oriented counterpart. But while I cannot disprove the existence of any such a method, I am skeptical that it will ever be found. I am skeptical, in

other words, that we can devise a way to make meaningful factual comparisons across cases without in some way thinking about what the underlying holding of our current case should be. And thus, once again, a precedent-driven approach to characterization problems is likely to buy us coherence and determinacy, but only at the expense of rendering our decisions nonresponsive to the decision rules that purport to guide them.

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We have thus failed to identify an approach to characterization choices that affords consistent and concrete guidance without rendering obsolete the decision rules to which they attach.[247] That does

247. But perhaps we have been too pessimistic. Even if we fail to develop a fully satisfactory set of instructions for rendering characterization choices—instructions that usefully channel and constrain characterization choices without replicating the evaluative choices they are meant to precede—we might nonetheless develop some satisfactory shortcuts that simplify the approach. Two possibilities come to mind.

First, courts could rely on common sense. On this view, one need simply consult one's initial psychological intuitions regarding the best way to characterize a given constitutional input. I do not need some abstract theory or scholarly exegesis to explain why I am currently typing this footnote on a "computer" as opposed to a "metal box," "calculating machine," "machine," "Apple," or "keyboard connected to microchips connected to a screen." All of those descriptions are technically accurate, but "computer" *just seems* like the right one to use in this context, even if I cannot explain precisely why that is so. And perhaps a similar point holds for the characterization choices that judges must make. It does not take extensive legal analysis, some might argue, to see why the Gun Free School Zones Act regulates the activity of "gun possession in a school zone" as opposed to the activity of "gun-based school endangerment" or something more abstract. The former *just seems* obviously correct, one might argue, and the latter just seems ridiculous. Judges have to make characterization choices all of the time, and perhaps it is simply enough to say that they should continue to do so by reference to whatever hunches and intuitions have guided them in the past.

But even if we concede that there exist commonsensical solutions to *some* characterization choices, it is unlikely that our intuitions will always identify an obvious path forward—especially with respect to the sorts of "hard," unresolved questions that we have grappled with in this Article. In addition, it may sometimes be difficult to disaggregate our intuitions about how a case should be decided from our intuitions about what the appropriate characterization of an input should be. If so, then the "commonsensical" approach collapses into the results-based approach we have already considered and critiqued. *See supra* Part IV.B. And finally, though commonsense intuitions represent a perfectly appropriate basis for characterizing the things around us in daily life, it is unclear whether such a "just take my word for it" approach reflects an appropriate basis for the making of legal choices—choices that should be justified rather than simply proclaimed. *See, e.g.*, Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 169–70 (2011) (noting that "judges are expected to explain the reasons for the interpretive choices they make").

A second potential strategy might attempt to farm out characterization choices to the parties litigating a case, with judges choosing an authoritative input characterization from a pool of potential characterizations that the litigants propose. If the parties agree to a single characterization choice, the choice gets made for the court and no further effort is required. Otherwise, the parties will have at least narrowed the choice down to a handful of candidates out

not mean that no such approach exists; perhaps, for instance, generality levels can be measured and identified with greater objectivity than I have suggested, perhaps courts could employ some optimal hybrid approach that combines generality-based, results-based, and precedent-based reasoning, or perhaps they could turn to some other set of guiding criterion that I have neglected altogether. But to the extent courts have at their disposal a set of fail-safe, foolproof, and doctrine-preserving approaches to characterizing constitutional inputs, I have not managed to put my finger on any such approaches here.

V. CHARACTERIZING CONSTITUTIONAL OUTPUTS?

Let us assume, then, that the only reliable means of rendering characterization choices is to identify desired outcomes and to choose a characterized input that conduces to that outcome. If true, that conclusion should cast doubt on the utility of prescribing characterization-dependent decision rules; it should suggest in particular that such decision rules will fail to guide judicial decisionmaking any more effectively than various characterization-

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of a multitude of possibilities, and the adversarial nature of the judicial process will help to ensure that each respective candidate reflects a plausible, if somewhat tilted, solution. In effect, courts would enlist the machinery of the adversarial system in an effort to simplify the decision before them—in much the same way that they sometimes solicit parties' assistance in preparing jury instructions, *see* FED. R. CIV. P. 51(a), flagging trial court errors, *see* FED. R. CRIM. P. 52(b) (restricting appellate review of errors not identified at trial), identifying grounds for appeal, *see, e.g.*, Greenlaw v. United States, 554 U.S. 237, 243 (2008) (noting that "we rely on the parties to frame the issues for decision"), and so forth, *see* Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455–70 (2009) (identifying several examples of (and exceptions to) the "party presentation norm").

The party-driven approach strikes me as promising—and certainly worthy of much more exploration than I have been able to offer here. But two points, I think, must be kept in mind. First, even if party-driven choices manage to narrow the range of candidate inputs for a court to choose from, there still exists the critical question of how to select a winner from the candidates. And since the parties will likely propose candidate inputs that conduce to their respective positions in a case, that selection choice will remain just as consequential as a choice that was made without the parties' initial assistance. Second, party-driven characterization is susceptible to the criticism that it delegates a core component of judicial power away from the courts. *Compare, e.g.*, Frost, *supra*, at 483 (noting that "[j]udicial independence, and the respect for judicial decisionmaking that accompanies it, would be compromised if courts were required to rule on the law as it is presented to them, rather than as they believe it to be"), *with* Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1196 (2011) (observing that "standard American practice does not generally allow parties to stipulate to legal conclusions," while contending "that it should"). Thus, even if it represents a promising means of simplifying characterization problems, the party-driven approach might amount to a constitutionally problematic abdication of the courts' authority to "say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

resistant alternatives that might instead be used. That conclusion, in turn, should prompt us to reconsider the question whether characterization-dependent decision rules ought ever to factor into the doctrine at all. If characterization choices simply function as a stand-in for holistic, all-things-considered assessments of facts and prior precedents, why not simply instruct courts to perform those assessments directly and on their own terms?

The remaining question thus becomes whether characterization-dependent decision rules—rules, for instance, that turn on the fundamentality of an asserted right, the clearly established nature of a violated law, the economic nature of a regulated activity, and so forth—could furnish any doctrinal value apart from that of constraining judicial outcomes. If, in other words, characterization-dependent decision rules offer nothing in the way of increased predictability and control when it comes to reaching judicial results, should they simply be jettisoned altogether or might we still have good reason to keep them around?

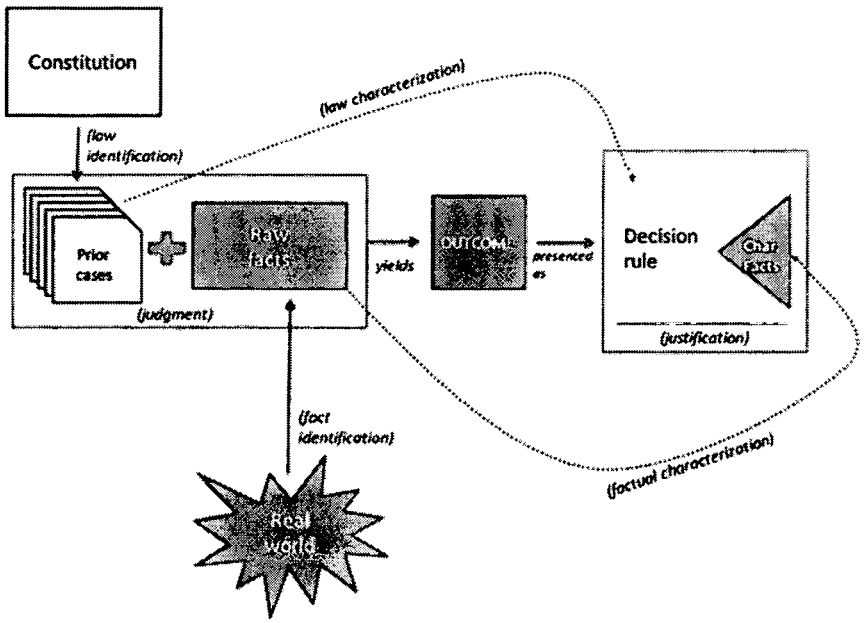
While an in-depth analysis of this question lies beyond the scope of the Article, I want to sketch out one potential response that a proponent of characterization might give. Conceding that characterization-dependent decision rules do not help to determine constitutional results, the response would maintain that such rules remain a useful means of communicating the results once reached. In a nutshell, the claim is this: characterization-dependent decision rules are best understood as output- rather than input-focused. Their primary virtue lies not in dictating or determining judicial outcomes, but rather in situating those outcomes within a single, continuous, and easy-to-digest narrative about the development of the law through time. Characterizations of the facts might in this sense operate not so much as a necessary first step to the process of determining a case's result, but rather as a useful sort of justificatory glue that helps to connect up that result with the results of past cases. If constitutional adjudication turns out to resemble the task of writing a chain novel,[248] characterization-dependent rules might provide the vocabulary necessary to help that novel read smoothly.

Specifically, the argument would begin by inviting us to reconsider the models of constitutional adjudication that we developed in Part I,

248. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 229–38 (1986); *see also* Tribe & Dorf, *supra* note 6, at 1072–77 (discussing Dworkin's analogy that using precedent is like "the composition of a chain novel").

proposing instead a model that looks like this:

Figure 3: Alternative Model of Constitutional Adjudication



Like our previous models, this model highlights law identification and fact identification as the initial steps of the decisionmaking process. But at this point the models would diverge. Whereas the previous models saw the law identification process as yielding a decision rule that courts would then apply to a characterized fact, this model depicts the identified law as some body of sources with relevance to the legal question before the court—sources a court would then consider in conjunction with the entirety of a case's facts before exercising a judgment from which the actual judicial outcome derives. The case's outcome, in other words, no longer depends on a characterization of the facts and an application of a decision rule to the characterized fact; rather, its outcome depends on an unfettered (and largely indescribable) exercise of human judgment—a judgment that attempts to account for and respond to all the factual and legal data that the fact- and law-identification processes have respectively produced.

But identifying the appropriate outcome does not end the judge's work; there remains the task of translating judgment into justification—the task of communicating to the public the reasons why

the outcome is the appropriate one to reach. It is only here that the characterization process enters the picture. Specifically, the judge proceeds to recast (a) the large and complex body of legal precedents that she worked with in terms of a single legal decision rule that all of those precedents can be read to support; and (b) the large and complex body of factual information that she worked with in terms of the single characterized input to which that decision rule applies. From here, one final step remains: that of explaining why the characterized fact does or does not satisfy the evaluative criteria of the decision rule itself.

With that model in place, we can now return to the question with which this Part began: Why bother with the characterization process at all? The best answer to this question, I think, would have to appeal to the value of showcasing apparent continuity across cases. By explaining its judgments in terms of decision rules and characterizations of the facts, courts can employ a vocabulary of justification that facilitates easy comparisons to and from other constituent components of the case law. This language allows them to direct attention away from surface-level dissimilarities by noting higher-level similarities across the relevant interests, rights, activities, fields, or purposes manifested by these fact patterns. It allows them to seize on other, perhaps subtler similarities by characterizing the facts in terms that bring those similarities to the forefront. It perhaps even allows them to foreshadow and encourage future doctrinal developments by highlighting within a present-day fact pattern a new type of characterized fact with emerging legal significance. In short, to the extent that judges wish to articulate a smooth and linear narrative about the development of the law over time, the characterization process may turn out to useful to that goal.

To be sure, judges might still be able to highlight doctrinal connectivity without resorting to characterization-heavy justifications of the legal and factual sources before them. It may be possible, for instance, to draw out clear and simple connections across substantive due process cases without ever speaking of a single unifying right that those cases involved, just as it may be possible to draw out clear and simple connections across Article III standing cases without ever speaking of a single unifying injury that all those cases share. But this is where the open-ended nature of the characterization process might turn out to be a feature rather than a bug. Characterized inputs, unlike raw facts, can be tweaked and tailored to line up with the previous characterized facts that they "need" to line up with. For example, if two cases look different in one respect, that difference can be downplayed via the use of strategic characterizations that make the two cases look

more alike. Similarly, if two cases look similar in another respect, that similarity can be downplayed via the use of characterizations that bring a less immediately apparent distinction to the fore. All of this might well be achievable in a world that abjures abstract-input decision rules and the characterization choices that they require. Nevertheless, characterization-dependent decision rules might still carry the virtue of making the outcome somewhat easier for courts to achieve.

What the characterization process thus accomplishes is the perhaps-valuable task of drawing out thematic connections across cases and showcasing continuity where chaos and randomness would otherwise reign. Even where prior decisions fail to dictate future outcomes, courts might still have reason to cast those outcomes in terms that resonate and accord with the prior decisions ex post. The effect may be largely artificial—akin to that of tracing out a constellation amongst a cluster of unrelated stars—but perhaps the appearance of order and continuity across cases remains worth achieving for its own sake.[249] I'm not sure. On the one hand, it looks like deception; but on the other hand, it may simply describe what precedent-based decisionmaking has always set out to do.

CONCLUSION

Input-characterization problems might best be seen as a byproduct of the Court's efforts to generate outcomes that are consistent in relation to prior decisions and correct in relation to case-specific facts. Characterization-dependent decision rules resemble their targeted-input counterparts in that they prescribe structured assessments of specified inputs rather than freewheeling assessments of everything. But they also resemble their holistic-input counterparts in that the inputs themselves are capacious enough to accommodate some level of tailoring to the individual demands of each case. These decision rules, in short, thus attempt to have their cake and eat it too—imposing a coherence-promoting structure on the decisionmaking inquiry while leaving enough play in the joints to avoid anomalous-

249. In a recent article, Professor Adam Samaha has drawn attention to a variety of ways in which appearance-based concerns might justify government action, regardless of underlying realities. A good example involves campaign finance regulation, which, according to the Court itself, might validly serve a governmental interest in reducing the public appearance of corruption, even where actual corruption is unlikely to occur. *See* Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1599–1620 (2012). Whether a similar sort of appearance-based justification might succeed at vindicating the Court's own utilization of characterization-dependent decision rules is a question that ultimately lies beyond the scope of this article.

seeming judicial results.

What this Article has suggested, however, is that the coherence-promoting benefits of characterization-dependent decision rules may turn out to be more illusory than real. As long as we lack a predictable and results-neutral approach to the making of characterization choices, the tests that they affect may turn out to be no less all-encompassing and unconstrained than their holistic-input counterparts. In other words, characterization-dependent decision rules might *seem* to prescribe approaches to decisionmaking that usefully channel judicial discretion but in reality will involve the same sort of all-things-considered decisionmaking that they purport to disallow.

It remains to be asked whether the appearance of doctrinal coherence might ever be worth pursuing in its own right. Even where the doctrine fails to predict, constrain, or control judicial outcomes in a meaningful way, perhaps courts might still have reason to "talk about" that doctrine in a manner that highlights themes of continuity and consistency over time. This is an issue I have not here resolved, but I hope at least to have highlighted its stakes. If we value apparent coherence, then characterization-dependent decision rules might carry the useful purpose of making constitutional law seem to be more orderly than it actually is. If not, then it becomes more difficult to justify their continued presence within the law.

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