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Legal scholars exhaustively debate the substantive wisdom of Supreme Court decisions and the appropriate methods for interpreting legal texts but rarely consider the more pragmatic need to craft rules that will be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of cases. Political scientists, in contrast, invest tremendous effort seeking to determine whether lower courts "comply" with Supreme Court directives, but find themselves unable to explain why their own studies generally find high levels of compliance. This Article argues that part of the answer lies in the Court's ability to craft legal doctrines that both shape a trial court's initial decision and increase the efficacy of appellate monitoring. After identifying numerous strategies for increasing lower court control, this Article argues that appreciating the links between them helps illuminate recent developments in three areas of public law: the constitutional law of punitive damages; the rules governing "officer suits" brought under 42 U.S.C. § 1983; and the concept of "reasonable" searches and seizures under the Fourth Amendment.

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INTRODUCTION

Legal scholars exhaustively debate the substantive wisdom of Supreme Court decisions and appropriate methods for interpreting legal texts. Yet even scholars who emphasize the need to consider the more pragmatic process of translating first-order legal meaning into second-order legal doctrine[1] have tended to neglect one critically important consideration: the need to craft rules that *can* and *will* be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of litigated cases. "[J]udicial policies," we lawyers too often forget, "do not implement themselves."[2]

In contrast, political scientists have invested great effort in determining whether lower courts have "complied" with Supreme Court directives, both during the Warren era and more recently.[3] But com-

1 *See, e.g.*, RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 50–61 (2004); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–30 (1975); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1658–86 (2005); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213–20 (1978).

2 BRADLEY C. CANNON & CHARLES A. JOHNSON, JUDICIAL POLICIES 1 (2d ed. 1999). Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983), is a notable exception. Because Professor Gewirtz dealt exclusively with desegregation decisions and examined resistance by both public and private actors, however, his focus was both narrower and much broader than mine. For a more recent exception that focuses on interactions between the Supreme Court and state courts with regard to arbitration, see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Development of Arbitration Doctrine*, 83 N.Y.U. L. REV. (forthcoming 2008), *available at* http://ssrn.com/abstract=1114977.

3 For surveys of the literature, see Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 394–96 (2007), and Donald R. Songer, *The Circuit Courts of*

mitted as they generally are to the view that legal reasoning and legal doctrines are merely means by which judges seek to advance their policy aims,[4] these scholars have been unable to advance a convincing explanation for why their own studies almost invariably find high levels of compliance.[5]

This Article is different. Like the political scientists, it takes seriously the challenge the Supreme Court faces as it attempts to control lower court behavior.[6] But, like most legal scholarship, it also presumes that law actually matters. Building on those premises, this Article's central arguments are the descriptive claims that (1) the Supreme Court has at its disposal a number of doctrinal[7] tools that *can* be used to shape and direct lower court behavior, and (2) a number of recent developments suggest that the Court *does in fact* seek to use legal doctrine in this way. This Article does not, however, attempt to answer the difficult normative questions about whether the Court *should* behave in such a way.

Appeals, *in* THE AMERICAN COURTS 35, 43–46 (John B. Gates & Charles A. Johnson eds., 1991).

4 *See* Kim, *supra* note 3, at 384.

5 *See id.* at 396–404 (reviewing political scientists' explanations and identifying problems); *see also* Frank Cross, *Appellate Court Adherence to Precedent*, 2 J. EMPIRICAL LEGAL STUD. 369, 371–78 (2005) (same).

6 I recognize that "the Supreme Court" is a continuing collective body whose members have no direct influence over the appointments process and little ability to control other Justices; I also recognize that the necessity of rendering group decisions imposes serious limitations on the Court's ability to develop a coherent set of principles. *See, e.g.*, Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813–23 (1982); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 83 (1986). Despite the inevitable risks of distortion, I will, for ease of clarity, largely ignore group dynamics within the Court itself, citing as only partial defense the fact that scholars who have examined the nature of the Court as a group decisionmaker have generally assumed away the existence of lower courts entirely. *See, e.g.*, Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 INT'L REV. L. & ECON. 169, 170 (1992) (assuming "the judicial system consists of a single court that decides all cases").

7 This Article uses "doctrine" in the broad sense of including not only various "rules" or "tests," but also procedural and administrative directives to lower courts. *See* Akhil Reed Amar, *Foreword: The Document and the "Doctrine,"* 114 HARV. L. REV. 26, 79 (2000) (noting that to decide cases under the Constitution "judges will offer interpretations of its meaning, give reasons for those interpretations, develop meaningful interpretations, develop mediating principles, and craft implementing frameworks enabling the document to work as in-court law" and defining doctrine as encompassing "[t]hese interpretations, reasons, principles, and frameworks").

The Supreme Court can seek to improve its control over lower court outcomes in two general ways.[8] First, the Court can aim to channel a trial court's initial decision. Second, it can increase monitoring by itself and other reviewing courts.[9]

The Court has numerous techniques for influencing trial court decisions. Because complicated or open-ended standards increase the risk of good faith misunderstandings and create opportunities for disguising deliberate noncompliance, the Court may be better served by laying down simple rules whose application depends on only a few factors. The Court can also bar trial courts from relying on criteria it deems irrelevant or too difficult to verify on appeal—such as, for example, the presence or absence of a particular state of mind—and it can enforce these rules of exclusion by imposing upon trial courts duties to explain their decisions. Finally, the Court can nudge trial courts towards a favored result or away from a disfavored one by adjusting the background legal baseline (such as whether a particular type of law is presumed unconstitutional) or by adjusting the level of proof necessary to dislodge it.

On the monitoring side, there is likewise a great deal the Court can do. It can expand the availability of appellate review by creating exceptions to the final judgment rule—a review-limiting doctrine that generally bars an appeal until a trial court has issued a decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment."[10] It can increase the intensity of appellate monitoring by characterizing certain issues as presenting questions of law rather than questions of fact and by otherwise adopting nondeferential standards of appellate review. And the Supreme Court can enforce the restrictions it imposes on trial courts' initial determinations by adopting appellate presumptions—such as one that

8 As is generally the case with taxonomies, these two categories are not entirely distinct. *See infra* notes 45–46 and accompanying text.

9 Both of these strategies are, at least in principle, available to any appellate tribunal seeking to increase its control over trial court outcomes. I focus on the Supreme Court for two reasons. First, the literature I seek to engage has tended to focus on that Court. Second, the situation confronting intermediate appellate courts is complicated by the fact that their efforts to secure greater control over trial court outcomes are themselves subject to override by the Supreme Court. *See, e.g.*, KSR Int'l Co. v. Teleflex, Inc., 127 S. Ct. 1727, 1734–35, 1739–43 (2007) (rejecting an attempt by the Federal Circuit to specify in greater detail the manner in which federal district courts should decide whether invention was "obvious" for purposes of federal patent laws).

10 Catlin v. United States, 324 U.S. 229, 233 (1945) (citing St. Louis, Iron Mountain & S. R.R. Co. v. S. Express Co., 108 U.S. 24, 28–29 (1883)).

all trial court errors have an adverse effect on a verdict—to be applied when those directives are not followed.

All of the strategies just mentioned share certain overlapping downsides. Some techniques—including, to varying degrees, all of them that seek to control a trial court's initial decision—can be difficult to use well without possessing the sort of information that the Justices may have a difficult time gathering. Other strategies—most notably rules and significant adjustments to the required proof level—risk generating new undesirable outcomes even as they work to prevent certain others. Some strategies raise concerns about legitimacy, and still others can be difficult to implement or costly to apply and enforce.

In addition, no strategy for increasing Supreme Court control over lower court outcomes is foolproof. All of the techniques discussed in this Article rely on the assumption that basic norms regarding appropriate judicial behavior (including, most especially, the one that lower court judges will not simply lie about the basis for their decisions[11]) have at least some constraining effect.[12] In addition, sheer numbers alone will always preclude fully effective monitoring of trial courts by intermediate appellate courts or of those appellate courts by the Supreme Court itself.[13] Far from making the extravagant claim that legal doctrines alone can generate perfect Supreme Court control of lower court outcomes, this Article will simply advance the more modest one that they represent one underappreciated tool for doing so.

The remainder of this Article is organized as follows. Part I will describe the challenges the Supreme Court faces in attempting to control lower court outcomes. Part II will turn to legal doctrine, describing a number of ways in which the Court can use it to shape and direct lower court behavior and discussing the relative advantages and disadvantages of each. Part III will apply the insights of Part II to recent developments in three areas of public law—the constitutional law of punitive damages, the rules governing "officer suits" against state officials, and the concept of "reasonable" searches and seizures under the Fourth Amendment. These examples, it will argue, suggest

11 *Cf.* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) ("[T]he fidelity of judges to law can be fairly measured only if they believe what they say in their opinions and orders . . . .").

12 *Cf.* McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636 (1995) (stating that authors "do not wish to deny in total the notion that law school education and legal experience produce a 'judicial temperament' that influences decisions by judges").

13 *See infra* notes 33–39 and accompanying text.

that Supreme Court attempts to control lower court behavior are very much alive and illustrate why the Court might sometimes choose one strategy for doing so over another. A brief conclusion will identify some implications of this analysis and suggest areas for future research.

I. THE SUPREME COURT'S PROBLEM

"If men were angels," James Madison wrote, "no government would be necessary."[14] Something similar is true of the relationship between the Supreme Court and lower courts. If a lower court judge was nothing more than "the simple (and perhaps simple-minded) enforcer of the Supreme Court's dictates"[15]—or if appellate review were perfectly accurate, costless, and instantaneous—there would be no need for the Justices to consider the possibility of good faith error or deliberate lower court resistance when formulating legal doctrines. But that is not the world in which we live. Indeed, as this Part explains, the Supreme Court cannot simply assume that lower courts will implement the Court's decisions in a manner that a majority of Justices would view as correct.[16]

Although the degree to which lower courts do or do not follow Supreme Court precedent is "[u]ltimately . . . an empirical" question,[17] any fully successful demonstration of the risk of lower court noncompliance must, at least for now, be largely conceptual rather than entirely empirical.[18] Fortunately, such a framework already

14 THE FEDERALIST No. 51, at 32 (James Madison) (Clinton Rossiter ed., 1961).

15 Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993). Professor Levinson's piece criticizes, rather than defends, this common supposition.

16 Because this Article views matters from a top-down, Supreme Court–focused perspective, its sole test for assessing the correctness of a lower court decision is whether it is the outcome that would be reached by a majority of fully informed Justices. This Article offers no method for how the Justices themselves should decide cases, nor any metric for assessing whether their decisions are correct.

17 Cross, *supra* note 5, at 398.

18 Because the Supreme Court has almost total freedom in deciding what cases it will hear, *see* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 468, 1580 (5th ed. 2003), one cannot take its raw reversal rate as representing the Justices' views about overall lower court behavior. And despite a number of high profile counterexamples involving the white-hot issues of federal versus state supremacy, *see, e.g.*, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Tarble's Case, 80 U.S. (13 Wall.) 397 (1872); race, *see, e.g.*, J.W. PELTASON, FIFTY-EIGHT LONELY MEN 7 (1961); *22 Negroes Fined in Bus Bias Case*, N.Y. TIMES, Mar. 22, 1957, at 14 (discussing an Alabama state court judge who refused to follow a Supreme Court ruling that segregation of municipal busses was unconstitutional); and religion, *see, e.g.*, Jaffree v. Bd. of Sch. Comm'rs, 554 F. Supp. 1104, 1128

exists, one originally developed to analyze economic organizations but since applied to a number of public actors, including judges: principal-agent theory.[19]

Broadly speaking, a principal-agent relationship exists whenever one person or group (a principal) must rely on others (agents) to accomplish the principal's goals.[20] Reliance on others has two disadvantages vis-à-vis a do-it-yourself approach. First, the agent may be less skilled at performing her assigned tasks than the principal would have been, be it because of less training, ability, workload, or lack of sufficient direction from the principal.[21] Second, principals and agents will likely have at least somewhat different preference structures.[22] These twin disadvantages, in turn, create "agency costs"—the deadweight loss created by the fact that agents are inevitably somewhat imperfect proxies for their principals.[23]

(S.D. Ala. 1983) (holding, in conceded contravention of decades of Supreme Court precedent, that "the establishment clause of the first amendment to the United States Constitution does not prohibit [a] state [government] from establishing a religion"), *aff'd in part, rev'd in part sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985), instances in which lower court judges claim to be doing anything other than making a good faith attempt to apply existing high court authority are basically nonexistent. Accordingly, one could not obtain a fully accurate empirical measure of the extent of lower court noncompliance without devising some method for determining what a majority of Justices would think about cases the Court never hears and then applying that technique to some appropriately selected subset of all lower court rulings. *See* Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 271 (2006) (highlighting the dangers of ignoring unpublished opinions when attempting to draw general conclusions about judicial behavior).

19 By invoking principal-agent theory, I do not mean to deny that there other existing theoretical frameworks, such as, for example, game theory that might illuminate important features about the relationship between the Supreme Court and lower courts.

20 *See, e.g.*, Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 433–34 (1989); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134, 134 (1973).

21 Of course, one reason principals retain agents is because they possess skills or knowledge the principal lacks, though it may also be that the scope or complexity of the activity in which the principal seeks to engage is beyond the capacity of any single person. *See, e.g.*, Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756 (1984).

22 *See, e.g., id.*

23 *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308–09 (1976).

If one conceives of the Supreme Court as a principal and lower courts as its agents,[24] it is clear that the Court lacks the ability to employ many of the methods traditionally used to address agency costs. Take agent selection. Although Justices have sporadically advised Presidents about the appointment of some federal judges,[25] they have no direct role in such appointments and no right to block the appointment or promotion of any particular lower court judge.[26] Instead, state and lower federal court judges are appointed by a host of independent political processes that may well select for things other than ideological compatibility with Supreme Court preferences, high judicial competence, or willingness to subordinate one's personal views to those of one's judicial superiors.[27] What is more, because appointments tend to be made on a rolling basis, even a Justice who is confident that most lower court judges appointed at the same time as her share her general views may still worry that those whose service pre- or postdates hers may not merit that description. And finally, because lower court judges generally hear cases either alone or in panels of less than the size of the full court—and are assigned to do so via processes over which Supreme Court Justices have no control[28]—even a relatively small number of unreliable lower

24 Although this characterization is fairly standard among political scientists, *see* Kim, *supra* note 3, at 386 n.13 (citing sources), it is nonetheless hardly free of controversy. In particular, Professor Pauline Kim has argued that viewing the relationship between the Supreme Court and lower courts through a principal-agent framework often rests on a series of unarticulated and difficult-to-defend normative presuppositions regarding the nature of the judicial hierarchy. *See id.* at 434–41. My use of the principal-agent framework, however, is for the limited purpose of explaining why a Justice who wants her own preferences followed has cause to worry about lower court noncompliance. Of course, whether it is legitimate for a Justice to act on such concerns is a different matter entirely. *See infra* text accompanying notes 314–15.

25 *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 13, 159–60 (1979) (reporting instances in which Chief Justice Burger offered advice to President Nixon regarding judicial appointments); Walter F. Murphy, *Chief Justice Taft and the Lower Court Bureaucracy: A Study in Judicial Administration*, 24 J. POL. 453, 459–73 (1962) (detailing efforts by Taft to influence judicial appointments during several administrations).

26 *See* U.S. CONST. art. II, § 2, cl. 2 (giving to the president the power to appoint "with the Advice and Consent of the Senate").

27 *See generally* Nina Totenberg, *Will Judges Be Chosen Rationally?*, 60 JUDICATURE 92, 93–97, 99 (1976) (describing the selection process for federal judges as it existed in the middle part of the twentieth century).

28 *See* 28 U.S.C. § 46(a) (2000) ("Circuit judges shall sit on the court and its panels in such order and at such time as the court directs."); *id.* § 137 (authorizing federal district courts "having more than one judge" to divide cases "as provided by the rules and orders of the court").

court agents will have the potential to affect the outcome of a great many cases.

Not only do the Justices lack the ability to select their lower court agents, their ability to incentivize what they would regard as good performance is limited at best. Judges on a given lower court are generally paid the same amount, and their level of compensation is determined by the jurisdiction (federal or state) in which they sit and their position within that judicial hierarchy rather than their level of compliance with Supreme Court decisions.[29] The Justices cannot fire, demote, transfer, or financially penalize bad lower court judges[30] any more than they can promote or give raises to good ones. They cannot order that a specific lower court judge be precluded from hearing certain kinds of cases, even if the judge in question has repeatedly shown herself to be an unreliable executor of Supreme Court policy. In theory, the Justices could hold a particularly recalcitrant lower court judge in contempt, but the Court has never done so, and it has threatened it only a handful of times.[31] Reversals accompanied by sharp criticism may have some effect on lower court behavior,[32] as may affirmances accompanied by effusive praise, but the success of these techniques depends on the sensitivity of particular lower court judges to Supreme Court feedback (and the public attention that often accompanies it), as well as the likelihood of monitoring in any given case.

Perhaps the biggest problem, however, is that the Court simply lacks the capacity to monitor more than a tiny fraction of lower court decisions. First, there is the matter of raw numbers. The Supreme

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29 *See id.* § 44(d) (setting a single salary for federal circuit judges); *id.* § 135 (setting the salary for federal district judges); *see also* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993) ("[A]lmost the whole thrust of the rules governing compensation and other terms and conditions of judicial employment is to divorce judicial action from incentives . . . .").

30 I mean "bad" solely in the sense of being poor agents of the Supreme Court.

31 The most recent example was in 1969, when the Supreme Court considered a motion for an order to show cause why an Alabama state judge should not be held in contempt for violating an order issued by the Court in a voting rights case. *See In re* Herdon, 394 U.S. 399, 399–400 (per curiam). Although Justices Douglas and Harlan would have granted the motion, *see id.* at 400–03 (Douglas, J., dissenting), a majority voted to stay consideration pending a determination of whether the same judge had violated an earlier order by federal district court, *id.* at 399 (majority opinion).

32 *See* WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 104–06 (1964). At least one study, however, has found that a district judge's "reversal rate" has no effect on likelihood of promotion. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 137 (1980).

Court itself has never issued more than 298 merits decisions in a single year,[33] and in recent years it has generally issued around 80.[34] In 2005 alone, nearly 1000 federal district judges[35] disposed of more than 300,000 cases[36] and nearly 30,000 state trial court judges[37] resolved nearly 19,000,000 cases.[38] It is true that the Justices can get help from the thirteen United States courts of appeals and various intermediate state appellate courts, which handed down 61,975 and 240,957 decisions in 2005, respectively.[39] But even these other appellate courts, the numbers make clear, cannot possibly review anywhere near all trial court decisions, and, at any rate, Supreme Court reliance on other appellate courts to monitor trial courts simply introduces another principal-agent relationship—one between the Supreme Court and the members of those other appellate courts.[40]

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33 The year was 1886. *See* LEE EPSTEIN ET AL., SUPREME COURT COMPENDIUM 228 tbl.3-2 (4th ed. 2007).

34 *See, e.g.*, David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 964–65 (2007) (book review). For various explanations of why the Court has been deciding so few cases during recent years, see, for example, Erwin Chemerinsky, *The Incredible Shrinking Docket*, TRIAL, Mar. 2007, at 64, 64–65; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366–77 (2006); and Stras, *supra*, at 965–96. Although it can be no more than a guess, another possible, albeit partial, explanation may be an increasing preference to shape the course of lower court decisionmaking through the front-end creation of doctrine rather than the more time-consuming back-end process of direct monitoring by the Justices themselves.

35 *See* ANALYTICAL SERVS. OFFICE, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.1.1 (2006) [hereinafter FACTS AND FIGURES], *available at* http://www.uscourts.gov/judicialfactsfigures/2006/alljudicialfactsfigures.pdf (reporting that there were 642 active and 292 senior federal district court judges in 2005).

36 *See id.* tbl.6.1 (reporting that federal district courts terminated 338,314 cases in 2005).

37 COURT STATISTICS PROJECT, NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, 2006, at fig.g (2007) [hereinafter COURT STATISTICS PROJECT], *available at* http://ncsconline.org/D_Research/csp/2006_files/StateCourtCaseloadStatistics2006.pdf (reporting that there were 11,349 state trial court judges sitting on general jurisdiction courts and 18,161 sitting on limited jurisdiction courts in 2005).

38 *Id.* tbl.1 (reporting that in 2005, 9,871,127 civil and 9,474,354 criminal cases were disposed of by state trial courts). The state court numbers are misleadingly high, however, because the only state court cases the Supreme Court may review are those that include a contested issue of federal law. *See* Murdock v. City of Memphis, 87 U.S. 590, 603–07 (1875).

39 For data on the United States Courts of Appeal, see FACTS AND FIGURES, *supra* note 35, tbl.2.1. For state courts of last resort, see COURT STATISTICS PROJECT, *supra* note 37, at 153 tbl.10.

40 One technique the Supreme Court can use to address its principal-agent problem vis-à-vis the courts of appeals or state supreme courts is the summary reversal, a procedure whereby the Court issues a single order and opinion that both grants certi-

To make matters worse, factors other than sheer numbers further hinder appellate courts' ability to monitor trial courts and the Supreme Court's ability to monitor either. Appellate courts cannot review any lower court ruling unless the losing party files an appeal (or, in the case of the Supreme Court and many state courts of last resort, multiple appeals). Even if a litigant who receives an unfavorable ruling from a lower court determines that an appeal is worth the cost, a number of generally applicable doctrines—including, most notably, the final judgment rule and deferential standards of review—operate to limit the effectiveness of appellate monitoring.[41] And even if noncompliance is detected, there is little tangible an appellate court can do other than change the outcome of that particular case, and often the necessity of further factfinding or the availability of other bases for decision will conspire to prevent even that.[42]

II. LEGAL DOCTRINE AS A TOOL FOR SUPREME COURT CONTROL

So what's a poor Supreme Court Justice who wants to exert at least some control over lower court outcomes to do? She might daydream about the power to hire and fire lower court judges,[43] or even to set their salaries. She might wish for the ability to reorganize cer-

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orari and reverses a lower court decision without the benefit of briefing and oral argument. *See, e.g.*, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam). Not only is this procedure less costly in terms of Supreme Court time and resources than full merits consideration, its summary nature may itself send a stronger signal to the lower courts. On the other hand, as the numbers cited in the text reveal, the Supreme Court simply lacks the capability to engage in *any* sort of monitoring of the vast majority of even appellate court decisions. Because my primary focus is on the principal-agent problem between the Supreme Court and federal and state trial courts, fuller consideration of the usefulness of summary reversals is beyond the scope of this Article.

41 *See infra* notes 102–08 and accompanying text.

42 *Cf.* FALLON ET AL., *supra* note 18, at 517 (stating that even when the Supreme Court reverses a state supreme court on a federal issue, the state court may simply reinstate the initial judgment on state law grounds). For dated, but still fascinating, examinations of the fate of Supreme Court decisions on remand to state courts, see Note, *Evasion of Supreme Court Mandates in Cases Remanded to State Courts Since 1941*, 67 HARV. L. REV. 1251 (1954); Note, *Final Disposition of State Court Decisions Reversed and Remanded by the Supreme Court, October Term, 1931, to October Term, 1940*, 55 HARV. L. REV. 1357 (1942); and Note, *State Court Evasion of United States Supreme Court Mandates*, 56 YALE L.J. 574 (1947).

43 *See, e.g.*, Burke Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1 & 3), 28 MICH. L. REV. 485, 488 (1930); *id.* at 870, 875 (arguing it would be constitutional to have "[a]ppointment of inferior federal judges by the judiciary branch itself" and asserting it would be constitutional to authorize the federal judiciary to remove "unfit" judges).

tain structural features of the United States judicial system, perhaps eliminating the state courts[44] or changing the number of layers of appellate review or the allocation of resources between trial and appellate courts.[45] But let's take current institutional arrangements as given: there is actually quite a lot the Justices can do to shape and direct lower court behavior.

The source of this power lies in the Court's ability to formulate and later to adjust legal doctrines based on the perceived risk of lower court noncompliance. Speaking broadly, a Justice who wants to limit the number of outcomes with which she disagrees can employ one of two approaches: (1) aim to shape and direct the underlying merits determination; or (2) lower barriers to effective monitoring by the Court itself or trusted appellate courts.

There is obviously a great deal of overlap between these approaches. Techniques that channel the primary merits decision can also facilitate monitoring by making nonconforming decisions easier to spot. And strategies that focus on removing obstacles to effective monitoring can reduce the number of initial errors if, as commonly believed, lower court judges generally dislike being reversed.[46] In fact, one of this Part's key objectives is to demonstrate how the various strategies that the Supreme Court can use to increase its control over lower court outcomes overlap with, and are—at least to a certain extent—substitutes for, one another.

A. Shape the Initial Decision

A trial court[47] can reach a result other than the one a majority of Justices would desire for one of two main reasons. First, the trial court may misunderstand or misapply the standards laid down by the

44 *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118 n.48 (1977) (arguing there are deeply entrenched differences between state and federal courts).

45 *Cf.* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 859–74 (1984) (describing six models of setting up a judicial system and various values served by each); Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 412–24 (1995) (discussing rationales for permitting appeals and for generally limiting appellate review to two layers).

46 *See, e.g.*, Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1, 7 (1958) ("I don't enjoy getting reversed any more than any other judge . . . .").

47 In reality, the point made in the text applies not only to trial courts, but also to intermediate appellate courts engaged in nondeferential review of earlier trial court decisions. Because the next subpart focuses on doctrines directed exclusively at reviewing courts, I will, for clarity's sake, generally speak in this subpart of tactics that aim to control a trial court's initial decision.

Supreme Court and thus commit *legal error.* Second, even perfectly faithful application of the Supreme Court's directives may sometimes produce what a majority of Justices would regard as a *bad outcome.*[48] To make matters even more complicated, the Justices may see certain *kinds* of bad outcomes as worse than others, as reflected by the adage that it is "better that ten guilty persons escape, than that one innocent suffer."[49] Accordingly, perhaps the biggest challenge facing a Justice who seeks to influence lower court behavior is how to craft doctrines that will minimize the number of legal errors while simultaneously avoiding at least the most objectionable sorts of bad outcomes.

The risk that an initial decisionmaker will commit legal error is largely a function of what Professor Maurice Rosenberg termed "primary" discretion—the extent to which the trial court is empowered to make "a wide range of choice[s] . . . free from the constraints which characteristically attach whenever legal rules enter the decision process."[50] The most obvious way to reduce the number of legal errors, therefore, is to limit this discretion by placing restrictions on the number of factors a trial court may consider or the range of outcomes it may reach.

The most familiar strategy for reducing an initial decisionmaker's primary discretion involves use of *rules rather than standards.* Although the distinction invariably grows fuzzy around the margins, standards typically call for a situation-specific, all-things-considered type inquiry whereas rules direct consideration of a relatively small number of factors and prescribe rigid consequences based on their presence or absence. To use a familiar example: "no one shall drive faster than is safe under the circumstances" is a standard; "Speed Limit 55" is a rule.[51]

The existing literature about the choice between rules and standards has generally neglected its implications for the relationship

48 Again, by "bad outcomes," I mean simply those a majority of Justices would regard as undesirable. To cite a classic nonjudicial example of what most people would regard as a bad outcome: a prohibition on lying would, if strictly followed, require telling a killer the location of his intended victim. *See, e.g.*, Immanuel Kant, *On a Supposed Right to Lie Because of Philanthropic Concerns*, *in* GROUNDING FOR THE METAPHYSICS OF MORALS 63, 63–64 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1799) (discussing an argument made by Benjamin Constant).

49 WILLIAM BLACKSTONE, 4 COMMENTARIES *358; *see generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997) (discussing the "Blackstone Ratio").

50 Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971).

51 *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992).

between the Supreme Court and lower courts.[52] That said, it is easy to see why a Justice concerned about lower court compliance may often prefer to set forth legal doctrines in rule form.[53] As a number of prominent scholars have pointed out, perhaps the fundamental characteristic of decisionmaking by rule is its ex ante character: the rulemaker performs a before-the-fact assessment of all relevant considerations and then declares what consequences should follow in a wide variety of circumstances.[54] Because the Supreme Court is so rarely the initial decisionmaker in any case,[55] its own power is enhanced—and lower courts' primary discretion is reduced—when the Justices formulate legal doctrines in such a way as to make as many of the hard choices as possible at the doctrine-creation phase.[56] In addition, reducing the number of facts that may be considered and restricting

52 *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES 10–12 (1991) (noting generally that "modern legal systems often avoid the use of mandatory rules"); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 257 (1974) (dealing generally with "the degree of precision or specificity with which a legal command is expressed as a determinant of the efficiency of the legal process"); Kaplow, *supra* note 51, at 557 (setting forth an "economic analysis of the extent to which legal commands should be promulgated as rules or standards"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1713–24 (1976) (analyzing the choice between rules and standards in relation to values of "individualism" and "altruism"); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62–69 (1992) (focusing on general arguments favoring rules or standards in the creation of constitutional doctrine and the importance of group dynamics within the Supreme Court itself). For a notable exception, see Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 274 (2006) ("[T]he United States Supreme Court can and should sometimes calibrate its role to provide different types of guidance depending on whether an area of law is governed largely by rules or by standards.").

53 Of course, a Justice might prefer to use rules for other reasons, including a desire to provide greater certainty to primary actors or even because of that particular Justice's assessment about the nature of the rule of law. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (exploring "the dichotomy between general rules and personal discretion").

54 *See, e.g.*, Kaplow, *supra* note 51, at 559–60; Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 961 (1995).

55 *See* FALLON ET AL., *supra* note 18, at 268–318 (discussing the Court's "original" jurisdiction).

56 *See* SCHAUER, *supra* note 52, at 159 (noting that "[r]ules . . . operate as tools for the *allocation of power*"). For the same reason, rules may seem attractive to a Justice who wants to influence the outcome of *future* Supreme Court decisions, *see, e.g.*, Scalia, *supra* note 53, at 1179–80, though one must confront the impressive body of social science research suggesting that Supreme Court Justices are, at the very least, highly resistant to efforts at doctrinal control. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 94–96 (2002)

an initial decisionmaker's options (both characteristics of rules) will tend to reduce the number of good faith mistakes and facilitate more effective monitoring by reviewing courts.[57]

So why not use rules all of the time? The answer is that rules—like every other strategy for increasing Supreme Court control over lower court outcomes—have costs as well as benefits. Indeed, in the case of rules, the downsides are basically the advantages in reverse, and they will often be substantial.

For one thing, Justices can confront serious *informational barriers* when attempting to formulate rules. Because rules seek, in effect, to resolve certain categories of cases before they arise, it can be hard to create good ones without extensive information.[58] A Justice may lack adequate understanding of the current state of affairs in the lower courts, and find it hard to predict the precise consequences of various possible rules on lower court behavior. Even if these problems can be overcome, the Justice may find it difficult to express her own preferences in terms of just a few basic criteria, to say nothing of the challenges posed by trying to anticipate what she will think about situations that have not yet even arisen.[59]

A related drawback of rules—one they share with all strategies that rely on contracting a trial court's primary discretion—is that they tend to reduce the number of legal errors only at the cost of generating *new bad outcomes.* Rules gain their power to control lower court decisionmaking by constricting the range of relevant information and limiting a trial court's ability to take account of situation-specific equities in choosing what course to follow. By doing so, however, rules almost inevitably generate situations in which the outcome dictated by

(noting that the lack of political accountability and absence of a superior judicial body limit the ways to control the decisions of the Justices).

57 *See, e.g.*, Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 990 (2000) ("Because lower courts are rarely willing to explicitly flout binding precedent, . . . if the Supreme Court were to establish and explicate clear, doctrinal rules with determinate consequences, such rules might be quite effective in actually binding lower court decision-making and limiting the avoidance of precedent."); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 39 (2000) (noting that even if initial adjudicators can engage in *bad*-faith manipulation of rules as easily as they can with standards, "errors in rule application will tend to be more obvious and, therefore, more susceptible to correction on appeal").

58 *See* Ehrlich & Posner, *supra* note 52, at 267 (making a similar observation).

59 *See* H.L.A. HART, THE CONCEPT OF LAW 128 (2d ed. 1994) (identifying "relative indeterminacy of aim" as one of "two connected handicaps" that afflicts efforts "to regulate unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions").

the rule's application does not further—and may affirmatively contradict—the purposes that led to the rule's creation in the first place, and the frequency of such occurrences will generally increase as the rule grows simpler and more determinate.[60] Assuming that at least one reason why a Justice would seek to control lower court behavior is to maximize the overall number of what she would regard as correct outcomes, the prospect of generating new bad ones would seem to be cause for serious concern.[61]

A third downside is largely unique to the use of rules. Rules often have at least two audiences—an out-of-court actor, whose conduct the rule governs, and the officials who will later decide whether the rule has been violated.[62] Because there is rarely perfect "acoustic separation" between these two audiences,[63] there may be situations in which even a rule that is well designed to control lower court decisionmaking may have *undesirable impacts on nonjudicial actors.* Take, for example, the Supreme Court's decision in *County of Riverside v. McLaughlin*,[64] which addressed how best to operationalize the principle that a person detained without a warrant must receive a judicial hearing "'promptly after arrest.'"[65] Although the Court's rule-like holding—that hearings held more than forty-eight hours after arrest are presumptively invalid—undoubtedly limits a trial court's primary discretion, it may also, the Court's contrary protests notwithstanding,[66] be seen as giving executive branch officials free rein to decide when within the first forty-eight hours such hearings should be held.

Finally, use of rules may sometimes raise *concerns about legitimacy.* Justice Scalia may be correct that it is often possible to construe "even the most vague and general text" as having "some precise, principled content."[67] In some situations, however, the controlling legal text may be phrased so broadly as to make it difficult for the Court to characterize creation of a clear rule as an act of judicial "interpreta-

60 *See* Ehrlich & Posner, *supra* note 52, at 268; Sunstein, *supra* note 54, at 990.

61 A Justice might find rules attractive for reasons other than maximizing the number of correct outcomes, such as ensuring similar outcomes for similarly situated litigants.

62 *See* Ehrlich & Posner, *supra* note 52, at 261; Sunstein, *supra* note 54, at 960.

63 *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 631 (1984).

64 500 U.S. 44 (1991).

65 *See id.* at 52 (emphasis omitted) (quoting Gerstein v. Pugh, 420 U.S. 103, 125 (1975)).

66 *See id.* at 56.

67 Scalia, *supra* note 53, at 1183.

tion," and doing so may instead, at least to some people, begin to resemble an act of impermissible judicial "legislation."[68]

For all of these reasons, rules may not always be an attractive option for a Justice seeking to limit trial courts' primary discretion. What should not be overlooked, however, is that there are a number of other possible options.

A second strategy involves what I will call *rules of exclusion.*[69] As explained earlier, rules operate by taking a relatively small number of facts and making their presence or absence outcome determinative. Rules of exclusion are more limited: they tell an initial decisionmaker not to consider certain facts. To cite a fairly well-known example, when the Supreme Court held in *North Carolina v. Pearce*[70] that although trial courts may impose a longer sentence following a second trial for any number of reasons, they may not do so to punish the defendant for having taken a successful appeal,[71] it was announcing a rule of exclusion. Another example would be situations in which the Supreme Court has barred consideration of a party's subjective intent.[72]

As a strategy for increasing lower court control, rules of exclusions' chief selling point is that they permit the Supreme Court to obtain at least some of the benefits of rules while minimizing the downsides. Rules of exclusion can increase the number of initially correct lower court decisions by barring resort to considerations that the Justices have concluded will, more often than not, lead lower

68 The classic debate here is the one regarding the legitimacy of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Compare, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 107–11 (1985) (arguing that *Miranda* is illegitimate), *with* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 191–95 (1988) (arguing that *Miranda* is legitimate), *and* Berman, *supra* note 1, at 114–65 (same). Although my own sympathies are with Professors Berman and Strauss, this Article need not take sides in that dispute. Rather, my more limited point is that under virtually any interpretive theory there are at least *some* doctrinal moves that are deemed out of bounds.

69 Professor Ehrlich and Judge Posner would say that what I call rules of exclusion are simply comparatively less precise rules. *See* Ehrlich & Posner, *supra* note 52, at 258 ("A rule withdraws from the decision maker's consideration one or more of the circumstances that would be relevant to decision according to a standard."). As explained in the text, however, there are several important distinctions between rules and rules of exclusion when used as tools of ensuring greater Supreme Court control over lower court decisionmaking.

70 395 U.S. 711 (1969).

71 *See id.* at 723–26.

72 *See infra* notes 224–27, 290 and accompanying text.

courts in the wrong direction,[73] or are too likely to lead to a particular type of disfavored result. Rules of exclusion can also facilitate monitoring by precluding trial courts from relying on variables whose presence or absence is particularly hard to verify on appeal or whose precise significance would be hard to confirm or refute based on a cold record. Although they do require some effort to formulate and may generate some new bad outcomes if the forbidden consideration has even a slight connection to the underlying purpose of the inquiry, rules of exclusions' more limited nature means that they will generally require less information to create than rules, and the negative impact of excluding a single variable from consideration will generally be less severe than making the entire decision turn on just one or two facts. Finally, rules of exclusion will rarely suffer from serious legitimacy problems, because the Court can simply construe the underlying constitutional or statutory provision as making the excluded fact legally irrelevant.[74]

Rules of exclusion, of course, are no panacea. For one thing, the very characteristic that will often make them less problematic than rules—that is, their more limited nature—will also make them relatively less effective at securing lower court decisions with which a majority of Justices would agree.

Rules of exclusion also have another downside vis-à-vis rules, one they share with virtually every other technique for enhancing Supreme Court control over lower court decisionmaking. As compared with rules, rules of exclusion can be both *hard to implement* and *costly to apply and enforce.* It is comparatively easy to determine whether the evidence in the record was sufficient to support a trial court's conclusion that a driver was going ninety miles per hour in a fifty-five zone and whether the fine it imposed was the one set by the governing statute. But absent an on-the-record declaration, it will often be both challenging and time consuming to deduce whether a trial court relied on a forbidden consideration in reaching an otherwise permissible result.

One way to address this last problem is to couple rules of exclusion with a third strategy and to impose a *duty of explanation.* Indeed, the Supreme Court did precisely that in *Pearce,* the case that held that trial courts may not seek to punish defendants for taking successful

73 *See* SCHAUER, *supra* note 52, at 150 ("Often we fear that some class of decisionmakers, whether through unconscious bias or conscious ill-will, cannot be trusted to take certain types of factors into account.").

74 *See, e.g., infra* notes 224–27 and accompanying text (discussing decisions barring lower courts from considering a defendant's subjective intent in ruling on motions for summary judgment based on qualified immunity).

appeals.[75] Citing the need "to assure the absence of such a motivation,"[76] Justice Stewart's majority opinion stated that a trial judge who decides to impose an enhanced sentence must make an on-the-record declaration of her reasons.[77] The main advantages of this strategy should be obvious. Duties of explanation require little information to adopt. And, at least standing alone, they are extremely unlikely to generate new bad outcomes.

But duties of explanation also have their downsides. For one thing, the explanation may well not be forthcoming unless the duty is backed up by an *appellate presumption*, a review-expanding technique discussed in the next subpart,[78] and one possessing its own problems. In addition, it will often be easy for a trial judge who seeks to avoid reversal to say that she is not relying upon any forbidden considerations, and hard for a reviewing court to tell if she is lying. And if all that is not enough, many people view judicially imposed duties of explanation as having serious legitimacy problems.[79] Although seemingly everyone agrees that the Supreme Court may prescribe tests for determining whether a given governmental act violates the Constitution, a number of Justices have argued that the Court simply has no legitimate authority to tell state courts how they must go about *explaining* their decisions.[80]

What if the Supreme Court wants to influence the course of initial trial court decisionmaking, but concludes that the techniques discussed so far would be impractical, unwise, or ineffective if imposed alone? At least two options remain.

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75 *See supra* notes 70–71 and accompanying text.

76 *Pearce*, 395 U.S. at 726.

77 *See id.*

78 *See infra* notes 116–22 and accompanying text.

79 A number of statutes and Federal Rules impose duties of explanation on federal trial judges. *See, e.g.*, 18 U.S.C. § 3553(c) (2000 & Supp. V 2005) (directing a federal district court charged with sentencing a criminal defendant to "state in open court the reasons for its imposition of the particular sentence"); FED. R. CRIM. P. 12(d) (directing federal district courts to make express findings of fact when ruling on pretrial suppression motions); *id.* 12(f) (requiring federal district courts to record findings of fact or conclusions of law made during a proceeding). In addition, the Fourth Amendment imposes a duty of explanation on federal and state judges alike. *See* U.S. Const. amend. IV (stating that all "Warrants" must "particularly describ[e] the place to be searched, and the person or things to be seized").

80 *See* Dickerson v. United States, 530 U.S. 428, 460 (2000) (Scalia, J., dissenting); *Pearce*, 395 U.S. at 740–41 (Black, J., concurring in part and dissenting in part). Professor Amy Coney Barrett has recently gone further and challenged the Court's seemingly well-settled authority to impose duties of explanation on lower federal courts pursuant to its "supervisory power." *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 360–66 (2006).

A fourth strategy for controlling a trial court's primary discretion is to *adjust the baseline presumption.*[81] By "baseline presumption," I mean the background principle that controls in the absence of legally cognizable evidence to the contrary or when the evidence is in equipoise. Baseline presumptions can be broad and general, or narrow and context specific. To cite an example of the former: the baseline presumption in all criminal litigation and at the threshold of virtually all civil suits between private parties is that the defendant is not liable. In contrast, the baseline presumption can ping-pong back and forth several times: governmental activity is generally presumed constitutional,[82] unless it implicates constitutionally protected rights,[83] unless the person whose rights are being affected is in prison,[84] or unless the right in question is the one to be free from purposeful race discrimination.[85]

Standing alone, baseline presumptions have both limited downsides and a limited capacity to influence lower court decisionmaking. Unlike rules or rules of exclusion, setting a baseline presumption does not require the Court to be able to specify in advance that any particular facts may—or may not—be considered. In addition, because a legal system simply cannot function without ways for deciding what happens absent proof to the contrary,[86] neither the difficulty of choosing the appropriate presumption nor the risk that picking the wrong ones will generate additional bad outcomes can justify—or even make possible—failure to select one. For similar reasons, it is difficult to lodge legitimacy objections against the use of presumptions (at least of the "rebuttable" kind[87]), though there may be situations in which

81 Of course, presumptions—like burdens of proof, the next technique I discuss—have other uses besides influencing lower court decisionmaking. Most obviously, they also serve to advance substantive policies, such as the facilitation or avoidance of certain preferred or undesirable outcomes.

82 *See* Fairbank v. United States, 181 U.S. 283, 285 (1901).

83 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

84 *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

85 *See* Johnson v. California, 543 U.S. 499, 511–12 (2005).

86 *Cf.* Berman, *supra* note 1, at 10 (explaining that because courts invariably "lack[ ] unmediated access to the true fact of the matter," they must by necessity adopt certain "decision rule[s]" to help them deal with epistemic uncertainty).

87 One of *Miranda*'s leading academic critics argued that the Supreme Court lacked authority to establish "conclusive" presumptions, though he viewed "rebuttable" presumptions as constitutionally unproblematic. *See* Joseph D. Grano, Miranda*'s Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 179 (1988) (asserting that conclusive presumptions are illegitimate); Grano, *supra* note 68, at 141 n.271, 141–48, 156 (asserting that rebuttable presumptions are legitimate). For a period that spanned the mid-1960s through the mid-1970s, the Supreme Court invalidated a series of laws on the theory that they rested on impermissible "irrebut-

either a controlling legal text or widespread and longstanding practice, such as in criminal prosecutions, would make it difficult to justify setting the presumption in one particular way. And finally, although there can be situations in which it can be difficult to figure out which of several possible presumptions should apply,[88] once the appropriate presumption is identified, it is comparatively easy for trial courts to assess, and appellate courts to monitor, whether there is no evidence to dislodge it.

At the same time, however, baseline presumptions alone are a fairly limited tool for securing greater Supreme Court control over trial court decisionmaking. It is a comparatively rare situation in which there is literally no evidence that is even arguably relevant with respect to an important point in litigation. And it may be even rarer to find a situation in which the evidence that does exist is self-evidently in equipoise.

Baseline presumptions can become quite a bit more effective, however, when paired with a fifth and final strategy for shrinking a trial court's primary discretion: *raising the level of proof* necessary to justify a departure from the presumptive state of affairs. Sometimes these adjustments are overtly framed in terms of the burden of proof, such as the requirement of clear and convincing evidence in certain libel cases[89] or proof beyond a reasonable doubt in criminal trials.[90] Other times, they are framed in terms of levels of scrutiny, such as the requirement that a party who challenges the constitutionality of a statute regulating economic activity must demonstrate that there is no set of facts that could even arguably justify the law.[91]

As a strategy for limiting a trial court's primary discretion, the chief upsides of adjusting the level of proof should be largely familiar by now. Raising proof requirements should push all but the most recalcitrant trial judges in the favored direction and ease monitoring

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table presumptions" about a person's ability to work; interest in, or ability to engage in, parenting; or other factors. *See, e.g.*, Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1466–69 (2000) (discussing the cases within this timespan in which "the Court insisted on individualized adjudication rather than reliance on overbroad presumptions").

88 *Compare Johnson*, 543 U.S. at 505–15 (holding that strict scrutiny is the proper standard of review for a prison's race-based policies), *with id.* at 528–32 (Thomas, J., dissenting) (disagreeing whether a case involving racial segregation in prisons was governed by the presumption that race-based classifications are unconstitutional or by the presumption that prison regulations are constitutional).

89 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

90 *See In re* Winship, 397 U.S. 358, 361–64 (1970).

91 *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–91 (1955).

by reviewing courts.[92] Not only can this technique thus be particularly useful to a court seeking to avoid certain kinds of particularly disfavored outcomes—such as, for example, convicting the innocent—but there are even situations in which increasing the required level of proof "can, perhaps counterintuitively, reduce" the *total* number of undesirable outcomes.[93] Finally, unlike rules, adjusting the level of proof does not require specifying all relevant considerations in advance, and, unlike rules of exclusion, it does not even require saying that any particular facts may not be considered.

At the same time, playing with proof levels is a blunt-force tactic, one that can easily generate as many problems as it solves. Levels of proof that deviate farthest from the preponderance standard will generally be most effective in influencing trial court behavior and facilitating appellate monitoring, but they will, at least in general, also generate more new bad outcomes.[94] On the other hand, less severe adjustments will tend to have a lesser impact on trial court decision-making and make it harder and more costly for reviewing courts to monitor compliance. And to make matters worse, because the overall impact of any particular adjustment will depend on both the number of trial court errors that were occurring before the change and the circumstances that produced those errors in the first place, there can be serious informational barriers to setting the optimal proof level.

All of the strategies discussed so far—rules, rules of exclusion, duties of explanation, baseline presumptions, and adjustments to the level of proof—directly regulate proceedings in trial courts. In so doing, they seek both to reduce the initial number of trial court errors and to ease their detection by appellate courts. But there is another family of techniques the Supreme Court may use when it seeks to

92 *See, e.g.*, Fitzgerald v. Racing Ass'n of Cent. Iowa, 539 U.S. 103, 110 (2003) (reversing a state supreme court's invalidation of a state tax law under rational basis review).

93 Berman, *supra* note 1, at 140. In general, "[i]f the goal is to minimize the number of erroneously decided cases . . . , the preponderance-of-the-evidence rule emerges as the superior choice." Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1172 (1983). But this reasoning, Professor Berman has explained, "crucially depends on the assumption that the factfinder's degree of subjective confidence regarding a given factual proposition . . . accurately corresponds to the statistical probability that that proposition is true." Berman, *supra* note 1, at 139. In contrast, if the Supreme Court has reason to believe that lower courts "systematically overestimate or underestimate the probative value of a particular type of evidence, or are otherwise systematically biased for or against a particular class of litigant," *id.* at 140, a heightened proof standard can reduce the total number of bad outcomes.

94 *See supra* note 93.

increase its control over lower court outcomes: those that aim to eliminate barriers to effective appellate monitoring.

B. Increase Appellate Oversight

Trial courts do not always have the last word, but a number of doctrines frequently give them "a right to be wrong without incurring reversal."[95] Accordingly, another strategy the Supreme Court may use to control lower court outcomes is to limit what Professor Rosenberg called "secondary" discretion—"the degree of finality and authority a lower court's decision enjoys in the higher courts."[96]

A certain amount of secondary discretion is both inevitable, given present institutional arrangements, and desirable on its own terms. It is inevitable because the ratio of trial to appellate judges makes it impossible for appellate courts—much less the Supreme Court itself—to engage in full-scale monitoring of every trial court ruling.[97] And it is desirable because monitoring is costly and time consuming for judges and litigants alike and because even the most self-confident Justice would probably agree that there are certain kinds of decisions that trial courts are more institutionally well-qualified to make.[98]

The ultimate form of secondary discretion would be to make all trial court rulings entirely unappealable. But though the Supreme Court has long stated and recently reaffirmed that there is no free-standing constitutional right to an appeal,[99] neither the federal government nor any State has gone that far.[100] What they do, however, is employ a number of doctrines that shield many trial court rulings from effective appellate scrutiny. For my purposes here, the three most important sources of secondary discretion are the final judgment rule, the adversity requirement, and deferential standards of appellate review.

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95 Rosenberg, *supra* note 50, at 637.

96 *Id.*

97 *See supra* notes 33–39 and accompanying text.

98 *See, e.g.*, Lilly v. Virginia, 527 U.S. 116, 137 (1999) (discussing trial courts' assessments of witnesses' in-court demeanor); Gori v. United States, 367 U.S. 364, 368 (1961) (stating that a trial judge may declare a mistrial when the "ends of substantial justice cannot be [otherwise] attained"); Valdes v. Cent. Altagracia, Inc., 225 U.S. 58, 73 (1912) (discussing a trial judge's ability to grant a continuance in a civil case).

99 *See* Halbert v. Michigan, 545 U.S. 605, 610 (2005); Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80–81 (1930).

100 *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 & n.2 (1985) (noting that the federal government and all fifty states provide some form of appeal).

The first two doctrines are closely related. The final judgment rule,[101] which is used in the federal system and most states,[102] generally bars an appeal until the trial court has entered a definitive ruling in favor of one party, such as an award of damages to the plaintiff or a dismissal of the entire case.[103] Because a great many cases settle or are voluntarily dismissed before that point, a huge number of trial court rulings—including those denying motions to dismiss or for summary judgment—are never subject to appellate review at all.[104] The adversity requirement, in turn, bars appellate review unless the party seeking to challenge a particular ruling has suffered some legally cognizable consequence as a result of it.[105] In situations where the final judgment rule is followed, this precept is generally interpreted to bar an appeal unless the party on the losing end of the challenged ruling was *also* on the losing side at the end of the litigation,[106] meaning that some demonstrably incorrect lower court rulings are not reviewable even in theory.

Deferential standards of appellate review, in contrast, come into play once an appeal is successfully taken. Their effect—indeed, their purpose—is to give trial courts a degree of interpretive leeway. The well-settled principle that a trial court's findings of historical fact will not be disturbed absent clear error[107] and various doctrines stating that other sorts of decisions will be overturned only in the event of an "abuse of discretion"[108] all constitute deferential standards of appellate review.

Because these doctrines can pose significant barriers to effective monitoring, it should be unsurprising that a Justice seeking to gain greater control over lower court outcomes may seek to modify them (assuming, that is, that the Justice thinks the intermediate appellate courts are, on balance, more likely to reach a good result than any

101 *See* 28 U.S.C. § 1291 (2000).

102 *See* STEPHEN C. YEAZELL, CIVIL PROCEDURE 627 (6th ed. 2004) (stating that "[m]ost, but not all, states follow a similar pattern").

103 *See* Catlin v. United States, 324 U.S. 229, 233 (1945).

104 *See, e.g.*, Elizabeth G. Thornburg, *Interlocutory Review of Discovery Orders: An Idea Whose Time Has Come*, 44 Sw. L.J. 1045, 1079 (1990).

105 *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980).

106 *See* Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241, 242 (1939).

107 *See* FED. R. CIV. P. 52(a)(6).

108 *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 477 (2003) (stating that a trial court's decision whether to permit permissive intervention under Federal Rule of Civil Procedure 24 is subject to an "abuse of discretion" standard of review); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999) (reasoning that a trial court's decision about how to determine the reliability of expert evidence under Federal Rule of Evidence 702 is subject to an abuse of discretion standard).

given trial court judge). Accordingly, a sixth strategy the Supreme Court may use is to create *exceptions to the final judgment rule*, such as when it held that rulings denying motions to dismiss based on sovereign immunity are immediately appealable.[109]

The upsides of such a strategy are obvious. The main one is lack of informational barriers: like duties of explanation, simply authorizing more appeals requires no ex ante determination of whether certain facts should be dispositive (rules) or irrelevant (rules of exclusion), or even whether and to what extent the inquiry should be stacked in favor of one particular result (baseline presumptions and adjusted levels of proof). In addition, strategies that rely on expanded appellate monitoring should have little impact on incentives for nonjudicial actors, and they are less subject to manipulation by trial judges than those that seek to contract the scope of a trial court's primary discretion.

These sizeable advantages, however, come with severe downsides. Anything that increases the overall number of appeals means reviewing courts will have less time to spend on each one. Permitting multiple appeals in a single case can lead to inefficient use of judicial time and increases the risk that a reviewing court will be required to expend time and resources resolving an issue that may have no impact on the ultimate outcome of a particular case. Even if they are comparatively more likely to reach the correct result, intermediate appellate courts will sometimes overturn trial court rulings that a majority of Justices would have regarded as correct. Creating exceptions to the final judgment rule also raises problems of legitimacy, both because the statutes governing federal court jurisdiction specify very few exceptions[110] and because it would difficult to identify any source of authority for the Supreme Court to prescribe rules governing the timing of appeals in state courts.[111] Finally, assuming the Court is not prepared to eliminate the final judgment rule entirely (a step that would have huge costs and raise massive legitimacy problems), it will need to expend further time and effort devising ways to decide *which* interlocutory orders are nonetheless appealable and then enforcing

109 *See* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 143–45 (1993). Congress has taken a similar step in the criminal context, where the Double Jeopardy Clause has been interpreted to bar governmental appeals after an acquittal. *See infra* notes 270–73 and accompanying text.

110 *See, e.g.*, 28 U.S.C. § 1292(a)–(b) (2000); FED. R. CIV. P. 23(f).

111 *Cf.* Johnson v. Fankell, 520 U.S. 911, 920–23 (1997) (declining to require state courts to permit interlocutory appeals even in situations where the underlying action was based on a federal statute and where an interlocutory appeal would have been permitted had the case been litigated in federal court).

those inevitably over- and underinclusive restrictions against litigants' attempts to evade them.[112]

Of course, having more appeals is likely to be of limited value if the rules governing them require substantial (or even complete[113]) deference to the trial court. For that reason, a seventh strategy for increasing Supreme Court control over lower court outcomes is to *lower the standard of appellate review.* When the Supreme Court has held that various "constitutional facts" are subject to "independent examination" on appeal,[114] it employed this technique.

Whereas the benefits of increasing appellate scrutiny are basically the same as those of expanding the number of appeals, the downsides are somewhat different. Neither legitimacy nor implementation is likely to be a serious problem in most cases, because it is relatively rare for either the Constitution or federal statutes to specify a standard of review and because the standard's application is within the control of the appellate courts themselves.[115] Instead, the biggest problems with this approach are likely to be costs of enforcement (because truly nondeferential review can be quite time-consuming for appellate courts) and creation of new legal errors (because even time-strapped trial courts may simply be better at performing certain kinds of tasks than time-strapped appellate panels).

There are times, however, when neither increasing the availability of appeals nor intensifying their focus will be enough to overcome the difficulties an appellate court can face in attempting to understand precisely what transpired before a different judge in another court-

112 *See, e.g.*, Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (noting that applicability of the "collateral order" doctrine "is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded or a 'particular injustic[e]' averted . . . by a prompt appellate decision" (citation omitted) (alteration in original) (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988))).

113 According to Professor Charles Alan Wright, the once-prevailing rule was that reviewing courts had no power whatsoever to review a trial court's refusal to grant a new trial on the theory that the verdict was against the weight of the evidence. *See* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 758–60 (1957).

114 *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510–11 (1984) (reasoning that whether a statement was uttered with the sort of "actual malice" that is required to support liability under N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964), is subject to "independent appellate review"). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239–47 (1985) (discussing *Bose*).

115 *See* Rosenberg, *supra* note 50, at 641. *But see infra* note 162 (noting that the Founders believed trial courts could, in some instances, disturb jury verdicts when appellate courts would not be allowed to do so).

room. In those situations, the Supreme Court can employ an eighth and final strategy for increasing its control over lower court outcomes: it can use (and direct intermediate appellate courts to apply) various *appellate presumptions.*

An appellate presumption is simply a baseline presumption directed at appellate courts rather than trial courts. To return once again to *Pearce,* when the Supreme Court held that a trial court's failure to state on the record its reasons for imposing a longer sentence following a second trial raises a presumption of vindictiveness on appeal,[116] it was announcing an appellate presumption.

As *Pearce* illustrates, one way appellate presumptions can increase Supreme Court control is by helping ensure trial court compliance with duties of explanation. But their usefulness expands beyond that relatively narrow compass. Indeed, appellate presumptions can be used to enforce nearly any restriction on a trial court's primary discretion, as illustrated by the Court's holding in *Chapman v. California*[117] that *any* uncorrected constitutional error during a criminal trial must be presumed prejudicial on appeal.[118] Were *Chapman*'s holding firmly applied and consistently followed,[119] it would both simplify a reviewing court's task and give trial courts an additional incentive to get it right the first time.

At least in the criminal context, which is where both *Pearce* and *Chapman* hold sway, the chief downside of appellate presumptions is that they can be extremely costly to enforce. Judicial and litigant resources are wasted every time a reviewing court requires further proceedings simply because a trial court failed to say the right thing or because of an error that had no impact on the outcome. To make matters worse, appellate presumptions may also lead to increased costs for appellate courts by encouraging litigants who have suffered

116 395 U.S. 711, 726 (1969).

117 386 U.S. 18 (1967).

118 *See id.* at 24. The opposite presumption applies when a federal court is entertaining a petition for a writ of habeas corpus. Under *Brecht v. Abrahamson,* 507 U.S. 619 (1993), a habeas petitioner cannot obtain relief based on even a conceded constitutional violation unless she "can establish that [the violation] resulted in 'actual prejudice.'" *Id.* at 637 (quoting United States v. Lane, 474 U.S. 438, 449 (1986)); *see also* Fry v. Pliler, 127 S. Ct. 2321, 2328 (2007) (holding that *Brecht* applies in situations where the state appellate courts did not recognize the constitutional error and thus did not apply *Chapman*-style harmless error review).

119 For arguments that *Chapman* as applied has morphed into something quite different than *Chapman* as announced, see Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?,* 70 N.Y.U. L. REV. 1167, 1176–77 (1995), and Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law,* 2005 WIS. L. REV. 35, 58–62.

no concrete prejudice to nonetheless take an appeal.[120] Perhaps for these reasons, the Supreme Court has shown itself quite reluctant in recent years to adopt any such presumptions, either with respect to trial court violations of duties of explanation[121] or more generally.[122]

* * *

As Judge Jerome Frank observed nearly sixty years ago, trial courts will always have one inestimable advantage in any struggle with their judicial superiors: the ability to find (and thus characterize) the underlying facts—findings that for reasons of both necessity and sound practice will almost always be accorded great deference on appeal.[123] Given that reality, it is unsurprising that many of the techniques discussed in this Part can be thought of, at least in part, as attempts to shrink that advantage. Rules restrict the number of facts that are potentially significant. Rules of exclusion bar reliance on certain types of facts whose presence or absence can be particularly difficult to monitor. Presumptions and raising the level of proof change the strength or type of facts required to justify a disfavored result. Duties to explain and appellate presumptions attempt to force trial judges to identify the facts on which they are actually relying, rather than requiring reviewing courts to rule out all bases on which they could possibly be relying. Expanded appellate review facilitates at least some scrutiny of more trial court determinations, including factual ones. And lowering the standard of appellate review lessens the deference owed to certain determinations that may otherwise be seen as "factual" in nature.

At this point, it seems appropriate to move from possibilities to actualities. Part I explained why the Supreme Court has reason to worry about lower court compliance with its decisions. This Part argued that there are a number of ways in which the Justices can craft legal doctrines to address that risk. The next and final Part will iden-

120 *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970) ("Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process . . . .").

121 *See, e.g.*, United States v. Vonn, 535 U.S. 55, 63–74 (2002) (declining to presume prejudice based on a trial court's unobjected-to failure to engage in the full colloquy required by Federal Rule of Criminal Procedure 11).

122 *See, e.g.*, Washington v. Recuenco, 126 S. Ct. 2546, 2553 (2006) (holding that even an objected-to failure to include an element of criminal offense in a jury charge does not invariably mandate reversal); Neder v. United States, 527 U.S. 1, 15 (1999) (same).

123 *See* JEROME FRANK, COURTS ON TRIAL 32, 223 (1949); *accord* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1270 (2005).

tify a number of discrete areas in which the modern Court appears to have done just that.

III. THE STRATEGIES EMPLOYED

The claim that the Supreme Court has sometimes crafted legal doctrines based on mistrust of lower courts should be largely uncontroversial. Distrust of state courts, particularly southern state courts, is generally viewed as an important theme of the Warren Court's jurisprudence.[124]

But distrust of lower courts did not end with the Warren-era Justices and it need not result in doctrines likely to please political liberals. To the contrary, this Part argues that there are at least three areas in which the Supreme Court's recent actions suggest an attempt to exert greater control over all lower courts and to nudge them in directions more consistent with political conservatism. Not only do these developments suggest that concerns about lower courts are alive and well, they also underscore that matters are far more complicated than the familiar debates regarding rules versus standards and provide concrete illustrations of the relationships between various strategies for increasing Supreme Court control over lower court decisionmaking.

Although my three examples are somewhat eclectic, there are reasons for each choice. The first—the constitutional law of punitive damages—supplies the clearest narrative of increasing frustration with lower courts as a motivator for doctrinal development and suggests that concerns about state courts are alive and well nearly four decades after Earl Warren relinquished his seat. The second example—the rules governing "officer suits" brought under 42 U.S.C. § 1983[125]—shows that the Supreme Court is perfectly capable of fashioning doctrine based on mistrust of lower federal courts and of doing so when interpreting statutes as well as the Constitution. The final example—the concept of "reasonable" searches and seizures under the Fourth Amendment—provides the most direct contrast with the Warren Court and makes clear that a desire to rein in lower courts can just as easily afflict a Court looking to narrow federal rights as to expand them.

Two clarifications seem warranted at the outset. First, this Part's approach is largely inductive. Ascribing motivations to a multimem-

124 *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 524–28 (1963); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 889–900 (1994); Neuborne, *supra* note 44, at 1118 n.48.

125 42 U.S.C. § 1983 (2000).

ber body is difficult at best,[126] and it is made more so here by the fact that norms of judicial behavior would seem to prevent Supreme Court Justices from announcing that they are acting in a particular way based, even in part, on distrust of lower court judges. Accordingly, this Part must make the comparatively more limited claim that lower court distrust is one fairly compelling explanation for an overall course of decisions. Second, all of the decisions discussed in this Part could be criticized on one ground or another. Because this Article is largely descriptive, it takes no position regarding proper interpretive methods, nor does it seek to defend the legal correctness or substantive wisdom of any of these decisions.

A. Modern Efforts to Control State Courts: The Constitutional Law of Punitive Damages

Punitive damages awards have long been subject to some sort of judicial review for "reasonableness" in most United States jurisdictions.[127] But it is only recently that the Supreme Court has held that the size of *every* such award is subject to federal constitutional restrictions. More so than in perhaps any other area, the development of the Supreme Court's punitive damages jurisprudence during the last several decades suggests an increasing frustration with lower courts in general and state judiciaries in particular.

Although the Court has long asserted the power to control punitive damages awards in cases brought under federal causes of action,[128] it has been far slower to do so when the underlying dispute

126 *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (suggesting that though "[e]ach member may or may not have a design," a multimember group such as a legislature "has only outcomes").

127 *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 421–26 (1994) (reviewing history from eighteenth-century England through modern practice).

128 *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) (stating that Title VII of the Civil Rights Act of 1964 does not authorize punitive damages against employers based on "the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII'" (quoting Kolstad v. Am. Dental Ass'n, 139 F.3d 958, 974 (D.C. Cir. 1998) (Tatel, J., dissenting))); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (holding that the Federal Employee Retirement Income Security Act of 1974 does not permit punitive damages against a fiduciary whose processing of an employee benefit claim was improper or untimely); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270–71 (1981) (holding that there are no punitive damages available against municipalities under 42 U.S.C. § 1983); Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 260–61 (1964) (holding that the Federal Labor Management Relations Act bars award of punitive damages based on illegal, but peaceful, "secondary activities").

is governed by state law. Indeed, as recently as 1989, Justice Blackmun wrote for a unanimous Court that in situations "where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."[129]

Notwithstanding that statement, the Court had actually begun asserting some modest control over state law punitive damages awards more than two decades earlier. In two decisions issued during the mid-1960s, it construed the federal labor laws as implicitly forbidding state law–based punitive damages in certain situations.[130] And in 1974, it held that the First Amendment creates special restrictions on punitive damages awards in state law defamation actions.[131] But despite saying some fairly critical things about punitive damages in general,[132] these decisions were sharply limited in scope, tied as they were to particular statutory or constitutional commands.[133]

Starting in the 1980s, however, various opinions began intimating that the Federal Constitution may impose more general restraints on state court punitive damages awards. In 1986, a majority opinion that had already resolved the case on other grounds went out of its way to describe a party's argument that both the Due Process and Excessive Fines Clauses limited state law punitive damages awards as raising "important issues which, in an appropriate setting, must be resolved."[134] Two years later, the Court granted review to consider those issues, but failed to reach them after concluding that the appealing party had neglected to raise them with the state courts.[135] In so doing, however, Justice Marshall's majority opinion described the Excessive Fines Clause question as one "of some moment and difficulty,"[136] and Justice O'Connor's concurring opinion declared that "there [was] reason to think" that the Due Process Clause imposed restrictions on punitive damages.[137]

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129 Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989).

130 *See* Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 64–66 (1966); *Morton*, 377 U.S. at 261.

131 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974).

132 *See id.* at 350 ("[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.").

133 *See, e.g.*, *Morton*, 377 U.S. at 260–61 (dealing with punitive damages in relation to the congressional intent behind section 303 of the Labor Management Relations Act of 1947).

134 Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986).

135 *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 76–80 (1988).

136 *Id.* at 79.

137 *Id.* at 87 (O'Connor, J., concurring in part and concurring in the judgment).

The Court's next three punitive damages decisions were characterized by increasingly firm statements that the Federal Constitution imposed at least some limits coupled with an apparent reluctance on the part of a majority of Justices to identify precisely what they might be. In 1989, the Court issued an opinion that pointedly noted that the parties agreed "that due process imposes *some* limits on jury awards of punitive damages,"[138] but nonetheless declined to say more because of the way in which the parties had litigated the case.[139] In a separate opinion, Justice O'Connor claimed that "[a]wards of punitive damages are skyrocketing,"[140] criticized state appellate courts for sustaining punitive awards far higher than those upheld in even the recent past, and stressed that "nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed."[141]

Next came 1991's *Pacific Mutual Life Insurance Co. v. Haslip*,[142] where a five-Justice majority finally found a case where they deemed the issues properly preserved and rendered an opinion that seemed premised on the view that the Due Process Clause imposed both substantive and procedural restraints on punitive damages awards.[143] But although the *Haslip* Court stated that the punitive award "may be close to the [constitutional] line,"[144] it actually *rejected* five specific due process attacks, including the claim that punitive damages should be unavailable absent "clear and convincing" proof of wrongdoing.[145] In addition, the Court stated that it "need not, and indeed . . . cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every

138 *See* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 (1989) (emphasis added).

139 *See id.* at 260. *Browning-Ferris* also held that neither the Excessive Fines Clause nor federal common law limited the size of state law punitive damages awards. *See id.* at 278–80.

140 *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part).

141 *Id.* at 283.

142 499 U.S. 1 (1991).

143 *See id.* at 9, 23–24.

144 *Id.* at 23–24.

145 *Id.* at 23 n.11; *see also id.* at 17 ("[W]e cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional."); *id.* at 14 (rejecting the argument that it violates due process to make a corporation vicariously liable in punitive damages for unauthorized actions by its employees); *id.* at 19–22 (rejecting the argument that state court approved jury instructions gave too much discretion to the factfinder); *id.* at 23–24 (rejecting the due process attack on the size of the award).

case."[146] In dissent, Justice O'Connor argued that the due process issues raised by punitive damages were "ripe for reevaluation," in large measure because changes in state law made them available in more types of cases and because juries were returning, and appellate courts were sustaining, far higher awards than they had in the past.[147]

The apogee of the Court's "talk tough, do little" phase came in 1993's *TXO Production Corp. v. Alliance Resources Corp.*[148] For the first time, a clear majority stated that a "grossly excessive" punitive award would "violate the substantive component of the Due Process Clause."[149] At the same time, the Court declined to upset a punitive award that was 526 times the amount of the compensatory damages,[150] and its language seemed designed to preclude any serious attempt to exert Supreme Court control over punitive damages. Repeating *Haslip*'s rejection of clear rules, Justice Stevens' plurality opinion stressed that "a jury imposing a punitive damages award must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it" and added that any award that was the product of "fair procedures . . . is entitled to a strong presumption of validity."[151] The plurality also declined to adopt two proposed rules of exclusion, describing it as "well-settled" that both a defendant's wealth and alleged wrongdoing in other parts of the country may be considered both by juries in deciding whether to impose punitive damages and by lower courts in deciding whether to uphold such awards.[152]

The first Supreme Court decision to vacate a state court punitive damages award on due process grounds is not terribly well known. And although the five million dollar punitive award in that case was more than six times the already substantial compensatory damages,[153] the basis for the Supreme Court's action was not that the punitive figure was necessarily too high; nor did the Court hold that it had been based on improper information or imposed pursuant to an improper standard of proof. Rather, 1994's *Honda Motor Co. v.*

146 *Id.* at 18.

147 *Id.* at 61–63 (O'Connor, J., dissenting).

148 509 U.S. 443 (1993).

149 *Id.* at 458 (plurality opinion); *see id.* at 479–80 (O'Connor, J., dissenting) ("The plurality does not retreat today from our prior statements regarding excessive punitive damages awards. . . . It is thus common ground that an award may be so excessive as to violate due process.").

150 *See id.* at 453 (plurality opinion).

151 *Id.* at 457.

152 *See id.* at 462 n.28 (citing *Haslip*, 499 U.S. at 21–22 (majority opinion)).

153 *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994).

Oberg[154] was a case about constitutionally compelled *monitoring*: it declared unconstitutional a provision of the Oregon State Constitution that had been interpreted to bar all judicial review of the size of a jury's punitive damages award.[155]

Because Oregon was apparently the only state with this sort of rule, *Oberg*'s impact was necessarily quite limited. The same cannot be said, however, of the decision that first made plain that there had been a real shift in the Supreme Court's approach—its 1996 ruling in *BMW of North America, Inc. v. Gore*.[156]

Gore is significant for two main reasons. One, it was the first time the Supreme Court held that the sheer size of a punitive damages award exceeded constitutional limits. Indeed, the Court did so despite the fact that the Alabama state courts had already reviewed the award using procedures whose constitutionality the Court had blessed in *Haslip* and cut the size of the jury's award in half.[157] Two, although Justice Stevens' majority opinion declared that the Court was still "not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damages award,"[158] it laid down three "guideposts" for assessing constitutionality and gave extensive (albeit largely case-specific) guidance for their application.[159]

Although the Court did not consider the substantive constitutionality of another punitive damages award for a number of years after *Gore*, the pattern of increasing constitutional scrutiny of trial court punitive damages rulings continued unabated. In 2001, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[160] held that the United States Court of Appeals for the Ninth Circuit had erred in deferring to a trial court's application of the three *Gore* "guideposts."[161] In doing so, the Court brushed aside arguments that the appropriate size of a punitive damages award presents an issue of "fact" that the Federal Constitution's Re-Examination Clause shields from scrutiny by a federal appellate court,[162] and described de novo appellate review as necessary to

154 512 U.S. 415.

155 *See id.* at 426–35.

156 517 U.S. 559 (1996).

157 *See id.* at 566–67.

158 *Id.* at 585.

159 *See id.* at 574–85.

160 532 U.S. 424 (2001).

161 *See id.* at 436.

162 *See id.* at 437–39. The Re-examination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Although this provision's text does not speak to the relationship between different courts, the Supreme Court has held that it incorporates the founding-era understanding that trial courts may

permit "'appellate courts . . . *to maintain control of*, and to clarify, the legal principles.'"[163] In short, whereas *Gore* focused on limiting a trial court's primary discretion in entering judgment on a jury's punitive damages award and did so by making the underlying constitutional analysis somewhat more rule-like, *Cooper Industries* aimed to reduce the level of secondary discretion created by mandating a nondeferential standard of appellate review.

Then, in 2003, the Supreme Court issued an opinion that seemed to embody multiple strategies for controlling state court punitive damages awards. Although Justice Kennedy's majority opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell*[164] "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed,"[165] it appeared to move the underlying constitutional test substantially further in the direction of a rule both by pointedly suggesting that ratios above 9:1 are presumptively suspect,[166] and generally discussing each "guidepost" in such detail that Justice Ginsburg accused the majority of converting them into "marching orders" for the lower courts.[167] *State Farm* also appeared to endorse at least two rules of exclusion, stating that courts may not seek to justify punitive damages awards based on "unrelated" out-of-state conduct[168] or a defendant's wealth.[169] In sharp contrast to the Court's earlier declaration in *TXO*, *State Farm* also suggested that the baseline presumption was that *any* punitive damages award—even one imposed pursuant to scrupulously fair procedures—is constitutionally suspect.[170] And finally, without any acknowledgment that the earlier case had been litigated in federal court or that the Due Process Clause had been construed so as to confer no right to appellate review in the first

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disturb jury verdicts in certain situations where appellate courts would not be permitted to do so. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432–34 (1996).

163 *See Cooper Indus.*, 532 U.S. at 436 (emphasis added) (quoting Ornelas v. United States, 517 U.S. 690, 697 (1996)).

164 538 U.S. 408 (2003).

165 *Id.* at 425.

166 *See id.* ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

167 *Id.* at 439 (Ginsburg, J., dissenting).

168 *See id.* at 421 (majority opinion).

169 *See id.* at 427.

170 *See id.* at 419 ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.").

place,[171] *State Farm* flatly stated that *Cooper Industries* had "mandated" that *all* appellate courts "conduct *de novo* review of a trial court's application of [the *Gore* factors] to [a] jury's award."[172]

The Court's decision last Term in *Philip Morris USA v. Williams*[173] is interesting for two reasons. The first is its actual holding: the Court adopted another rule of exclusion, declaring that states may not use punitive damages awards to punish (and courts may not seek to justify the constitutionality of a punitive damages award by making reference to) harms to third parties who are not before the court.[174] But in some ways even more interesting is part II of Justice Breyer's majority opinion, which took pains to reassert, in almost bullet form, the main holdings of *Cooper Industries*, *Oberg*, *Gore*, and *State Farm*.[175]

It may be possible to tell several stories about the development of the Supreme Court's punitive damages jurisprudence.[176] A fairly compelling one, however, would involve an increasing conviction that juries had gotten out of control, and that at least some state courts were unwilling to rein them in, either because the state court judges were themselves sympathetic to large, redistributive awards against largely out-of-state defendants, or because the political environment in various states made state court judges reluctant to take action in the absence of cover from the Supreme Court.[177] Starting with the Court's 1938 abandonment of the "federal general common law" in

171 *See, e.g.*, Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 80 (1930).

172 *See State Farm*, 538 U.S. at 418.

173 127 S. Ct. 1057 (2007).

174 *See id.* at 1063–64.

175 *See id.* at 1062–63.

176 *See, e.g.*, Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356 (2006) (viewing constitutionalization of punitive damages as part of a broader pattern of Supreme Court attempts "to capture the considerable benefits that flow from national regulatory uniformity and to protect an increasingly unified national (and international) commercial market from the imposition of externalities by unfriendly state legislation"); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1146–52 (2006). Siegel uses a punitive damages example to support the claim that "it is impossible to understand the [Rehnquist] Court's complicated intellectual matrix without acknowledging and assimilating the Court's hostility towards the institution of litigation and its concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice." *Id.* at 1108.

177 *See generally* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415, 418–24 (1989) (discussing the irrelevance of a defendant's wealth to the goals of deterrence and retribution).

Erie Railroad Co. v. Tompkins[178] and through the early years of what some perceived as "revolutions" in consumer and mass tort litigation,[179] the Justices were apparently content to leave regulation of punitive damages almost entirely to the state judiciaries, though they made exceptions for two areas of special federal concern (labor and libel).[180] Then, starting with Justice O'Connor—herself a former state court judge[181] and normally a champion of judicial federalism[182]—various Justices became increasingly concerned that at least some state courts were not holding up their end of the bargain,[183] though Court majorities initially declined to do much about it.[184] By the mid-1990s, a majority of Justices were finally willing to take action, though their initial efforts involved invalidating one extreme example of judicial abdication (*Oberg*) and overturning one outlier award in an opinion that hewed close to the facts of the particular case (*Gore*). By the early years of this century, however, the Court had grown bolder and/or more fed up, as demonstrated by its substantial tightening of the *Gore* "guideposts" (*State Farm*) and how the requirement that reviewing courts undertake *some* scrutiny of punitive damages awards

178 304 U.S. 64, 78 (1938). Before *Erie*, the Court had reviewed the permissibility of punitive damages awards in diversity cases litigated in federal court. *See, e.g.*, Lake Shore & Mich. S. Ry. Co. v. Prentice, 147 U.S. 101, 110–11, 115 (1893) (setting forth standards under which a railroad could be held liable for punitive damages based on the behavior of the conductor towards a passenger).

179 *See generally* PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

180 *See supra* notes 130–33 and accompanying text.

181 *See* JOAN BISKUPIC, SANDRA DAY O'CONNOR 2 (2005).

182 *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726 (1991) (beginning the opinion for the Court in a capital case by noting that the "case was about federalism" and "concerns the respect the federal courts owe the states and the states' procedural rules"); *see also* Erwin Chemerinsky, *Justice O'Connor and Federalism*, 32 MCGEORGE L. REV. 877, 878 (2001) ("There is no doubt that federalism is integral to Justice O'Connor's constitutional philosophy . . . .").

183 *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 (1989) (Brennan, J., concurring) ("I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."); *id.* at 282 (O'Connor, J., concurring in part and dissenting in part) (criticizing the large awards of punitive damages as detrimental to research and development of new products); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in the judgment) (criticizing the Mississippi Supreme Court's grant of "wholly standardless discretion" to the jury in determining the amount of punitive awards as inconsistent with due process).

184 The epitome may be the following statement from the *Haslip* majority opinion: "We note once again our concern about punitive damages that 'run wild.'" Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

morphed into a command to performing exacting appellate review (*Cooper Industries*).

At the same time, developments in this area also nicely illustrate the tradeoffs of, and the relationships between, various strategies for controlling lower court behavior. Although the Court's doctrines have certainly grown much more determinative during the last fifteen years, as recently as 2003 it declined to impose a firm bright-line rule, whether because a majority of Justices have decided that hard rules are impractical in this area[185] or because there is no majority for any given one. Unable to coalesce around a simple and easily policeable requirement, the evidence suggests that the Justices have increasingly employed various other strategies, including rules of exclusion, shifting the baseline presumption, and expanding appellate review.

If vigorously implemented by appellate courts, the present system may be adequate to ensure meaningful control over juries and trial courts. Damages are rarely awarded until the conclusion of trial court proceedings. The stakes involved in such cases are likely to make an appeal worthwhile. And the well-settled rule that a reviewing court lacks the power to increase a punitive damages award[186] means that the risks of fighting such awards will usually point in one direction.[187] When all of these factors are coupled with the prospect of de novo appellate review, defendants' incentives to take appeals are quite high.

But all of this starts with a pretty big "if." Indeed, the primary downside of the Court's current approach is that it rests almost entirely on the willingness and ability of *state appellate courts* to serve as proxies for the Supreme Court itself. In situations where the plaintiff's cause of action is created by federal law, either party may generally decide to have the case heard and decided by the lower federal courts,[188] and it has long been argued that one of the primary reasons for the development of the "modern" post-conviction writ of habeas corpus was to permit the Supreme Court to enlist the lower federal

185 *Cf.* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) ("The judicial function is to police a range, not a point.").

186 *See* David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1120 (1995).

187 If a trial court has reduced a jury's punitive damages award, though not as much as the defendant would have liked, filing an appeal does carry some risk, though in that case it is likely that the plaintiff will appeal even if the defendant does not do so.

188 *See* 28 U.S.C. § 1331 (2000) (original jurisdiction); *id.* § 1441(a) (removal jurisdiction).

courts to help ensure compliance with its revolutionary criminal procedure decisions.[189] In contrast, punitive damages are most often awarded in cases governed by state law and in situations where ordinary preclusion principles would preclude a "collateral" attack in a new federal court proceeding.[190] Accordingly, the Supreme Court is the only federal court authorized to consider the constitutionality of most punitive damages awards,[191] and the highly fact-dependent nature of even the post-*State Farm* "guideposts" and the massive constraints on their time to review certiorari petitions[192] mean that there is little the Justices can do under the present regime to ensure appellate court compliance other than throw out an occasional outlier award.

So what will happen if a majority of Justices continues to perceive that state courts have been insufficiently responsive to its aim to rein in punitive damages awards? At some point, the Justices may find themselves sufficiently informed to formulate—and willing to bear the costs of implementing—a rule, and either impose an absolute or presumptive ratio with respect to compensatory damages that punitive awards may not exceed or hold that punitive damages are categorically unavailable in certain circumstances or absent some specified findings. The Court could also squarely hold that punitive damages are presumptively unavailable as a constitutional matter, or revisit another one of its earlier rulings and hold that punitive damages may not be imposed absent clear and convincing evidence of sufficiently culpable conduct.[193] Having mandated de novo appellate review of punitive damages awards, the Court could conceivably require special verdict forms so that reviewing courts could have the benefit of the jury's actual basis for decision rather than a trial court's attempted

189 *See, e.g.*, Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 273–77 (1988) (asserting that the Supreme Court realized that direct review of state criminal convictions did not constitute meaningful review and so turned to the writ of habeas corpus to ease the pressure on direct review).

190 *Cf.* Pennzoil Co. v. Texaco Inc., 481 U.S. 1, 10–18 (1987) (holding that a federal court should have abstained from considering a constitutional attack on the largest punitive damages award ever rendered as of that date).

191 *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 613–14 (1996) (Ginsburg, J., dissenting).

192 For a dated but still marvelous illustration of just how little time the Justices have, see Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

193 *Cf.* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 n.11 (1991) (noting that while much is said to be in favor of a "clear and convincing evidence" standard, a standard of "reasonably satisfied from the evidence" when buttressed by procedural and substantive protections is constitutionally sufficient).

reconstruction, or hold that the Constitution itself requires a stay of execution of judgment until any appellate review is complete.

Regardless of what happens going forward, however, the events that have already transpired illustrate the usefulness of thinking about distrust of lower courts as a motivating factor in the creation of Supreme Court doctrine. And as the next subpart demonstrates, the distrust need not be limited to state judiciaries or play out in the constitutional arena.

B. Reining in Federal Trial Courts: Constitutional Tort Suits

The previous subpart told a fairly familiar story from the Warren era—increasing distrust of state courts leading to constitutionalization of matters traditionally governed by state law—about far more recent developments in the punitive damages context. But though it has often been believed that the lower federal courts are generally better agents of the Supreme Court than their state counterparts,[194] that does not mean the Justices have been willing to assume perfect compliance by the former. Indeed, as this subpart explains, recent developments in at least one area may be best explained as efforts to control lower federal courts in general—and federal trial judges in particular.

Citizens who believe their constitutional rights have been violated have long been able to sue for money damages. Although sovereign immunity shields the government itself from suits brought by individuals,[195] it is well established that there is generally no sovereign immunity problem with suing the appropriate government official in her "personal" capacity, even for actions performed on the government's behalf.[196] These actions are generally known as "officer suits."

For much of our nation's history, well-settled jurisdictional principles meant that suits seeking money damages from state officials almost invariably had to be litigated in state court under state-supplied rules.[197] The plaintiff would accuse the defendant of committing some traditional common law wrong, such as trespass, assault, or false imprisonment. The defendant would answer by claiming "official privilege"—that is, government authorization—as a defense. The plaintiff would respond by invoking the superior authority of the Federal Constitution and arguing that it stripped the defendant of her

194 *See, e.g.*, Neuborne, *supra* note 44, at 1124–25.

195 *See* Hans v. Louisiana, 134 U.S. 1, 10–12 (1890).

196 *See, e.g.*, Hafer v. Melo, 502 U.S. 21, 25–31 (1991).

197 In contrast, actions filed against federal officers have long been removable. *See* FALLON ET AL., *supra* note 18, at 905.

immunity, leaving her indistinguishable from any other lawbreaker. But because the issue of federal law was not a necessary ingredient of the plaintiff's "well-pleaded complaint," such suits could neither be filed in federal court in the first instance[198] nor removed there by the defendant.[199] It also meant the plaintiff was required to fit her suit into a state-law recognized cause of action, and to contend with any restrictions state law placed on appropriate remedies.[200]

All that changed in 1961 when the Supreme Court dusted off an obscure federal statute,[201] and held that it authorized federal court litigation under federally supplied rules in virtually every situation where a citizen accuses a state official of violating her constitutional rights. Enacted in 1871, 42 U.S.C. § 1983 authorizes "an action at law, suit in equity, or other proper proceeding for redress" against any person who violates another's constitutional rights while acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[202] The principal question in *Monroe v. Pape*[203] was whether state officers whose conduct had violated the constitution and laws of Illinois had nonetheless acted "under color of" that state's law for purposes of § 1983, notwithstanding the fact that the state courts stood able and willing to provide redress.[204]

By an 8–1 vote, the Supreme Court said "yes." And although Justice Douglas' majority opinion is famously difficult to follow,[205] its reasoning appears to rest in large measure on distrust of state court judges. Canvassing § 1983's legislative history, Justice Douglas reasoned that the statute aimed not only to "override certain kinds of state laws" and to "provide[ ] a remedy where state law was inadequate," but also "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[206] But

198 *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152–53 (1908).

199 *See generally* 28 U.S.C. § 1441(a) (2000) (setting out the general rule that a case may be removed only if the action could have been filed [originally] in federal court). In fact, until Congress enacted § 1441(a)'s predecessor in 1875, "no general grant of removal jurisdiction in 'arising under' cases existed." FALLON ET AL., *supra* note 18, at 905.

200 *See* Monroe v. Pape, 365 U.S. 167, 196 & n.5 (1961) (Harlan, J., concurring).

201 One commentator found only twenty-one reported cases brought under the statute between its enactment in 1871 and 1920. *See* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

202 42 U.S.C. § 1983 (2000).

203 365 U.S. 167.

204 *See id.* at 172.

205 *See, e.g.*, JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS 46–47 (2d ed. 2007) (noting several ambiguities with respect to *Monroe*'s reasoning).

206 *Monroe*, 365 U.S. at 173–74.

because *Monroe*'s holding was that the federal remedy is *always* available,[207] this reasoning appears to make sense only if one posits a profound and continuing distrust of state courts' willingness to vindicate federal constitutional rights and a corresponding desire to enable such suits to be brought in the presumably more trustworthy federal courts.[208]

That the birth of the modern § 1983 was founded in large measure on mistrust of state court judges is fairly well recognized.[209] What seems to have largely escaped commentary, however, are several ways in which post-*Monroe* developments can be seen as motivated by concerns about *federal* trial judges.

Monroe largely removed state courts from the picture of what has come to be called "constitutional tort litigation."[210] Because the plaintiff's cause of action is now supplied by a federal statute, these suits may always be filed in federal court.[211] In addition, although the Supreme Court later clarified that § 1983 actions can be filed in state court as well—indeed, that state courts are generally required to entertain them[212]—it is also clear that defendants retain the option to remove such suits to federal court.[213] Barring a mistake, therefore, the Justices know the only way a § 1983 action will be litigated in state court is if both parties choose for it to be there. And given that, the only reason to employ any of the strategies described in Part II would seem to be concerns about the abilities and propensities of the lower *federal* courts.

Yet evidence of those strategies abounds in constitutional tort jurisprudence, most notably in the context of doctrines governing

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207 *See id.* at 183.

208 Another possible justification for *Monroe*'s holding—though not one articulated by Justice Douglas—involves the difficulty of making case-by-case assessments about whether state remedies are "adequate" and "available." *See* JEFFRIES ET AL., *supra* note 205, at 46.

209 *See, e.g.*, Neuborne, *supra* note 44, at 1110 (describing *Monroe* as resting on "thinly disguised assumptions of nonparity between state and federal courts").

210 *See* Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 643 (1987) (defining constitutional tort litigation as a subset of civil rights litigation that "encompasses both actions brought against state and local authorities under 42 U.S.C. § 1983 and similar actions brought against federal officials" (footnote omitted)).

211 *See* 28 U.S.C. § 1331 (2000) (stating that federal district courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"); Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

212 *See* Howlett v. Rose, 496 U.S. 356, 368–76 (1990).

213 *See* 28 U.S.C. § 1441(a) (2000).

various "immunities." Not long after *Monroe* reinvigorated § 1983, the Court began expressing anxiety that both ultimate damages liability and the prospect of being forced to defend against time-consuming and expensive lawsuits risked "over-deterring" vigorous and socially desirable conduct by government officials.[214] In response to these concerns, the Court developed various "immunity" defenses and has continually refined the principles governing their application over the succeeding decades.

The first set of questions involved the nature of the defenses and the identity of the officials entitled to claim them. For a small group of officials—the President of the United States, legislators, and judges—the Court settled on a bright-line rule: absolute immunity for all acts even arguably taken in the relevant capacity.[215] Although the Court has acknowledged that this approach will shield some culpable and socially undesirable conduct from legal consequence, it has stressed the existence of alternate control mechanisms and the need to give the relevant officials an especially wide field in which to operate free from judicial scrutiny.[216]

In the main, however, the nature of the § 1983 context has made it difficult to rely on rules as a strategy for controlling lower court decisionmaking. Having interpreted § 1983 to authorize suits against government officials for what the Justices presumably regarded as good and sufficient reasons, it would seem perverse to hold that those very same officials are all protected by an absolute immunity defense. More generally, § 1983 is transsubstantive—that is, it authorizes suits seeking to vindicate a wide variety of rights against a diverse array of officials who act in an almost limitless variety of circumstances. Given that characteristic, the informational costs of creating any across-the-board rules would be massive and even the best possible ones would almost certainly be substantially over- and underinclusive with respect to their underlying purpose of creating the socially optimal level of deterrence.

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214 *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 241–42 (1974). For the classic scholarly articulation of this point in the context of "street level" officials, see PETER H. SCHUCK, SUING GOVERNMENT 60–77 (1983).

215 Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) ("[T]he President of the United States is entitled to absolute immunity . . . ."); *see also* Bogan v. Scott-Harris, 523 U.S. 44, 44 (1998) ("Local legislators are entitled to . . . absolute immunity . . . ."); Stump v. Sparkman, 435 U.S. 349, 355–56, 361 (1978) ("[A] state district judge [is] entitled to judicial immunity . . . .").

216 *See Bogan*, 523 U.S. at 52–53; *Nixon*, 457 U.S. at 751–53, 757; *Stump*, 435 U.S. at 363–64.

For these reasons, it seems unsurprising that the Supreme Court has generally chosen to articulate the scope of immunity defenses in terms of standards rather than rules. More than three decades ago, it made clear that the vast majority of government officials are eligible for what has come to be called "qualified immunity."[217] And although the Court's precise articulation of the test has varied over the years, the classic one is a quintessential standard: even government officials who have violated a plaintiff's constitutional rights, the Court has stated, "are shielded from liability for civil damages insofar as their conduct [did] not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[218]

Of course, the main downside of an approach that asks whether a given point of law was "clearly established" or what a hypothetical "reasonable person" should have known is that it gives a great deal of leeway to the initial decisionmakers—here, federal trial judges. That said, the Supreme Court has taken a number of steps that seem designed to facilitate effective monitoring of these decisions by the courts of appeals.

Most notably, the Supreme Court has carved out a massive exception to the final judgment rule. Orders denying motions for summary judgment are among the classic "interlocutory" orders generally shielded from appellate scrutiny until all trial court proceedings are complete.[219] Yet in *Mitchell v. Forsyth*,[220] the Court held that orders denying a defendant's request for summary judgment based on qualified immunity are immediately appealable.[221] Not only does *Mitchell* substantially increase the odds that these types of summary judgment denials will be subject to meaningful appellate scrutiny, the very existence of this unique review mechanism may encourage district courts to grant more of the underlying motions in the first place.

The Supreme Court has also taken a number of steps to ensure that the additional appellate monitoring authorized by *Mitchell* will be as effective as possible. For one thing, it has announced a lowered standard of appellate review. Notwithstanding the inherently fact-bound nature of whether the relevant law had been sufficiently established to give an officer "fair warning" that her particular conduct

217 *See Scheuer*, 416 U.S. at 247; *accord* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982).

218 *Harlow*, 457 U.S. at 818.

219 *See* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2715, at 259–62 (3d ed. 1998).

220 472 U.S. 511 (1985).

221 *See id.* at 537.

transgressed constitutional norms,[222] the Court has been adamant in viewing the ultimate question as one of law that is reviewable de novo on appeal.[223]

In addition, the Court has adopted an important rule of exclusion that facilitates more effective appellate monitoring. In *Harlow v. Fitzgerald*,[224] the Court eliminated the requirement that a defendant seeking qualified immunity must establish that she acted with subjective good faith.[225] In doing so, the Court later explained, *Harlow* rendered a defendant's state of mind "simply irrelevant to the qualified immunity defense."[226] Although the Court's main stated justifications for this innovation were that subjective inquiries are intrusive and too often prevent "the defeat of insubstantial claims without resort to trial,"[227] it may also be significant that disputes regarding a person's mental state may be the situation in which trial courts' informational advantage over reviewing courts is the greatest.

Finally, and perhaps most controversially, the Supreme Court has also imposed what can be seen as a duty of explanation on all lower courts. In a line of decisions culminating with 2001's *Saucier v. Katz*,[228] the Court has insisted that lower courts confronting motions for summary judgment based on qualified immunity must analyze whether there has been a constitutional violation before proceeding to consider whether the defense has been made out[229]—a ruling that has been greeted with a pronounced lack of enthusiasm by many lower court judges.[230]

At the same time, developments in the constitutional tort arena also underscore the limitations of, and downsides to, an approach that relies predominantly on close appellate monitoring to secure trial court compliance. In *Johnson v. Jones*,[231] the Supreme Court unani-

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222 *See* Hope v. Pelzer, 536 U.S. 730, 761 (2002).

223 *See, e.g.*, Johnson v. Jones, 515 U.S. 304, 313 (1995) (describing the question of "what law was 'clearly established'" as presenting a "purely legal issue").

224 457 U.S. 800 (1982).

225 *See id.* at 813–17.

226 Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

227 *See Harlow*, 457 U.S. at 813–17.

228 533 U.S. 194 (2001).

229 *See id.* at 201.

230 Judge Pierre N. Leval, for instance, devoted a sizeable chunk of his recent Madison Lecture to criticizing *Saucier*. *See* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006). On March 24, 2008, the Supreme Court granted certiorari in *Pearson v. Callahan*, No. 07-751, and directed the parties "to brief and argue . . . 'Whether the Court's decision in *Saucier v. Katz* should be overruled?'" Pearson v. Callahan, 128 S. Ct. 1702 (2008) (mem.).

231 515 U.S. 304 (1995).

mously held that although a trial court's *ultimate* conclusions that a constitutional violation occurred and that the defendant is not entitled to summary judgment based on qualified immunity are immediately appealable under *Mitchell*, the interpretations of fact on which those conclusions are based are not subject to appellate scrutiny.[232] Though not denying that this holding will sometimes shield erroneous trial court rulings from appellate review,[233] the Court cited, among other things, considerations of institutional competence and a desire to avoid consuming vast quantities of appellate court time on fact-dependent issues that may simply be resolved at trial.[234]

Although the Supreme Court has relied mostly on monitoring strategies in this context, it has not foresworn entirely attempts to influence initial trial court decisions. Despite describing qualified immunity as "an affirmative defense" on a handful of occasions,[235] the Court has also suggested that it represents the baseline presumption by describing the defense as "protect[ing] . . . *all but* the plainly incompetent or those who knowingly violate the law."[236] The Court has also admonished trial court judges to be creative in using the Federal Rules of Civil Procedure to weed out claims before trial or extensive discovery to "protect[ ] the substance of the qualified immunity defense."[237]

But what if the Court concludes that presumptions and the occasional stern talking-to are not enough to move trial courts toward greater recognition of qualified immunity? One option would be to

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232 *See id.* at 319–20.

233 *See id.* at 309–10.

234 *See id.* at 316.

235 *See* Crawford-El v. Britton, 523 U.S. 574, 587 (1998); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); Gomez v. Toledo, 446 U.S. 635, 636 (1980).

236 Malley v. Briggs, 475 U.S. 335, 341 (1986) (emphasis added); *see also* Saucier v. Katz, 533 U.S. 194, 202 (2001) (quoting this language); Hunter v. Bryant, 502 U.S. 224, 229 (1991) (same); Burns v. Reed, 500 U.S. 478, 494–95 (1991) (same); Anderson v. Creighton, 483 U.S. 635, 638–39 (1987) (same). In addition, at least five courts of appeals have held that the plaintiff bears the burden of negating a defendant's entitlement to qualified immunity. *See* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 136 n.9 (2007).

237 *Crawford-El*, 523 U.S. at 597; *see also id.* at 597–601 (discussing how the trial court should rely on summary judgment and other procedural devices to filter out frivolous claims and thereby ensure "that officials are not subjected to unnecessary and burdensome discovery or trial proceedings"); *Harlow*, 457 U.S. at 819 n.35 ("Insubstantial lawsuits undermine the effectiveness of government as contemplated by our constitutional structure, and 'firm application of the Federal Rules of Civil Procedure' is fully warranted in such cases." (quoting Butz v. Economou, 438 U.S. 478, 508 (1978))).

find additional ways to expand the scope of appellate review. Although it is too soon to tell for certain, something along those lines may have happened last Term in *Scott v. Harris*,[238] a case arising out of high-speed police chase that rendered a man a quadriplegic.[239] The trial judge had denied the defendant's motion for summary judgment based on qualified immunity, but Justice Scalia's majority opinion did not follow what even it described as the "usual[ ]" course of "adopting . . . the plaintiff's version of the facts."[240] Instead, it reasoned that because the record contained "a videotape capturing the events in question," it was appropriate for the Justices to view the tape and draw their own conclusions about the true state of events.[241] Although video records are obviously not available in all situations, *Scott* is far from unique[242] and an increasing number of law enforcement and other agencies appear to be videotaping encounters with the public.[243] In addition, *Scott*'s reasoning could, in principle, be applied to any situation in which a factual dispute is based in part on tangible evidence—including memos, correspondence, or emails—that reviewing courts would be capable of examining for themselves.

Finally, if the Justices conclude that expanded appellate monitoring will not accomplish their aims, one might see a majority overcome its apparent reluctance to impose more stringent limitations on trial courts' initial decisions. Indeed, an effort to do so narrowly failed as recently as 1998. As noted above, the Court's decision in *Harlow* eliminated any consideration of a defendant's subjective intent from the qualified immunity analysis.[244] Yet there remain a few areas of constitutional law—most notably "cruel and unusual punishment" claims under the Eighth Amendment, the Equal Protection Clause, and "retaliation" claims under the First Amendment—where a plaintiff cannot establish an underlying constitutional violation without prov-

238 127 S. Ct. 1769 (2007).

239 *See id.* at 1773.

240 *Id.* at 1775.

241 *See id.*

242 *See, e.g.*, Stewart v. Prince George's County, 75 F. App'x. 198, 202–04 (4th Cir. 2003) (reversing the district court's denial of summary judgment in a § 1983 case involving allegations of excessive force based heavily on the court of appeals' review of a videotape of the encounter).

243 *See, e.g.*, Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 682–92 (1996); Lucy S. McGough, *Good Enough for Government Work: The Constitutional Duty to Preserve Forensic Interviews of Child Victims*, LAW & CONTEMP. PROBS., Winter 2002, at 179, 186 (2002).

244 *See supra* text accompanying notes 224–27.

ing that the defendant acted with an impermissible motive.[245] The question in *Crawford-El v. Britton*[246] was how federal trial judges should deal with motions for summary judgment based on qualified immunity in those circumstances.[247]

The answer was fairly clear under existing law. Consistent with orthodox summary judgment practice, the trial court should begin by resolving any factual disputes in favor of the plaintiff and constructing the most pro-plaintiff account reasonably supported by the record.[248] Accordingly, so long as the plaintiff presents some evidence that can be read to suggest that the defendant acted with the requisite intent, the court should assume the intent's existence and then ask whether the defendant's actions violated the plaintiff's constitutional rights and whether that violation would have been clear to a reasonable official as of the date in question.

But the problem with this approach, at least from the perspective of a Justice who thinks qualified immunity furthers important social policies, is that it can make it quite difficult to grant summary judgment. Because often "the required state of mind [will be] utterly inconsistent with a reasonable belief in the legality of one's conduct"[249]—such as, for example, a defendant whom a court must assume *purposefully* discriminated against a member of a racial minority—resolution of the underlying factual issues in the plaintiff's favor will often dictate denial of the defendant's motion.

Although the *Crawford-El* majority acknowledged that this intersection of summary judgment procedures and the standards for granting qualified immunity posed certain problems,[250] it also declined to do much about them. Reasoning that any further procedural changes would threaten to weed out meritorious suits[251] and raise legitimacy concerns in the absence of action by Congress or the appropriate Rules Committee,[252] Justice Stevens' majority opinion expressed confidence that the best way to deal with the matter was to grant federal

245 *See* Farmer v. Brennan, 511 U.S. 825, 835–40 (1994) (Eighth Amendment); Washington v. Davis, 426 U.S. 229, 238–48 (1976) (Equal Protection Clause); Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (First Amendment).

246 523 U.S. 574 (1998).

247 *See id.* at 577–78.

248 *See, e.g.*, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam).

249 John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 56 (1998).

250 *See Crawford-El*, 523 U.S. at 584–86.

251 *See id.* at 591.

252 *See id.* at 594–97.

trial judges "broad discretion in the management of the factfinding process."[253]

To the four dissenters, this "trust the district courts" approach was wholly unsatisfactory. In an opinion joined by Justice O'Connor, Chief Justice Rehnquist lambasted the majority for making a defendant's ability to obtain a quick dismissal "dependent on the varying approaches of 700-odd district court judges"[254] and proposed what might be best characterized as a broad rule of exclusion: once a defendant offers a facially legitimate reason for the action being challenged, the Chief Justice argued, the *only* way a plaintiff should be able to avoid summary judgment is by producing "objective evidence that the offered reason is actually a pretext."[255] Justices Scalia and Thomas would have gone further and imposed a firm rule: grant immunity whenever the defendant can offer any "objectively valid" reason for the challenged decision, regardless of any evidence of invidious intent.[256]

Although these arguments did not carry the day, *Crawford-El* nicely illustrates the inescapable relationship between techniques for increasing Supreme Court control over lower courts and the underlying substantive goals a Justice hopes to accomplish. The five Justices in the majority may well believe that qualified immunity furthers important social purposes and that district courts are sometimes too slow to recognize the defense. But they also appear to believe, as Justice Kennedy stated in his concurring opinion, that "[p]risoner suits . . . can illustrate our legal order at its best,"[257] and that dismissing a meritorious claim at the pleading stage would represent a particularly bad outcome. In contrast, Justice Scalia acknowledged that his proposed rule would impose a "severe restriction upon 'intent-based' constitutional torts," but wrote that he was "less put off by that consequence than some may be" because he believed that "*no* 'intent-based' constitutional tort would have been actionable under the § 1983 that Congress enacted."[258] Accordingly, future developments in this area may well be influenced as much by the current Court's attitude toward the regime spawned by its 1961 decision in *Monroe* as by its sense for how faithfully the lower courts are implementing the doctrine that has grown up around it.

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253 *Id.* at 601.

254 *Id.* at 610 (Rehnquist, C.J., dissenting).

255 *Id.* at 602 (internal punctuation omitted).

256 *Id.* at 612 (Scalia, J., dissenting).

257 *Id.* at 601 (Kennedy, J., concurring).

258 *Id.* at 612 (Scalia, J., dissenting).

C. *Switching the Directionality: "Reasonable" Searches and Seizures*

Despite their modern guise, the stories of the previous subparts were familiar in one respect: like many of the most famous Warren-era developments,[259] they involved the Supreme Court crafting doctrine for the purpose of broadening and protecting federal law defenses. But the link between distrust of lower courts and sympathy for federally protected rights is not inherent. In fact, as this subpart explains, recent developments in an area closely associated with Warren Court activism now seem to be motivated, at least in part, by a desire to ensure that lower courts are not too generous to criminal defendants.

With the possible exception of desegregation litigation, it would be hard to think of an area in which struggles between the Supreme Court and lower courts have played as prominent of a role as the constitutional law of criminal procedure. During the Warren era, the Court not only constitutionalized (and thus federalized) huge swaths of criminal procedure,[260] it also employed numerous techniques that seemed designed to push trial courts to uphold more claims of federal rights and to facilitate meaningful appellate review when they failed to do so. The Court replaced a number of fuzzy standards with bright-line rules that favored defendants.[261] It established strong presumptions that defendants wished to exercise their federal rights[262] and that any violation of those rights was prejudicial and required reversal.[263] It imposed rules of exclusion and enforced them via duties of explanation.[264] It expanded its own ability to review state criminal convictions by loosening the "independent and adequate state law

259 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 471 (1966); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

260 *See generally* Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 77–79 ("One might say that, in the criminal procedure context, the Nationalist view of federal-state relations triumphed, and the Federalists were routed.").

261 *See, e.g.*, Bruton v. United States, 391 U.S. 123, 135–37 (1968) (holding that certain categories of accomplice confessions are per se inadmissible during a joint trial, thus overriding the discretion that trial courts typically enjoy under Federal Rule of Evidence 403 and comparable state rules); Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (holding that every indigent criminal defendant charged with a felony is entitled to a state-supplied attorney).

262 *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 242 (1969) (overturning a capital conviction because the record did not affirmatively show that the defendant had knowingly and voluntarily waived several enumerated federal constitutional rights).

263 *See, e.g.*, Chapman v. California, 386 U.S. 18, 25 (1967) (holding federal constitutional errors require reversal unless shown to be harmless beyond a reasonable doubt).

264 *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

grounds" doctrine.[265] And it enlisted the lower federal courts' aid by massively expanding the federal post-conviction writ of habeas corpus.[266]

Revolutions often generate backlashes,[267] and this one was no exception. But although legal scholars have spent a great deal of time debating to what extent the Burger and Rehnquist Courts "retrenched" from the Warren legacy both in general[268] and in criminal procedure in particular,[269] I do not intend to join the fray. Instead, the remainder of this subpart will focus on far more recent decisions in one particular area—doctrines governing the "reasonableness" of searches and seizures under the Fourth Amendment—and argue that they suggest an attempt to limit a federal trial court's ability to suppress evidence offered against criminal defendants.

One potentially serious barrier to controlling pro-defendant trial court rulings was removed long ago. Because the Fifth Amendment's Double Jeopardy Clause[270] has long been understood to bar government-taken appeals following an acquittal,[271] strict enforcement of the final judgment rule in this context would have the effect of shielding many trial court rulings from any appellate scrutiny. In apparent response to this concern, both Congress and numerous state legislatures have enacted statutes authorizing interlocutory appeals from

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265 *See, e.g.*, O'Connor v. Ohio, 385 U.S. 92, 92 (1966) (per curiam); Henry v. Mississippi, 379 U.S. 443, 447–48 (1965).

266 *See, e.g.*, Fay v. Noia, 372 U.S. 391, 423–24 (1963), *abrogated by* Coleman v. Thompson, 522 U.S. 722 (1991); Brown v. Allen, 344 U.S. 443, 450 (1953).

267 *See generally* Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 752–54 (1989) (examining the effect of Supreme Court rulings on public opinion); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 452–82 (2005) (illustrating the "unpredictable, and occasionally perverse, consequences of Supreme Court rulings").

268 For essays reviewing the Burger Court's work in a variety of areas, see THE BURGER COURT (Vincent Blasi ed., 1983).

269 *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2467–68 & nn.5–12 (1995) (collecting literature); *id.* at 2470–71 (summarizing Professor Steiker's argument that the Burger and early Rehnquist Courts left largely undisturbed the various "conduct" rules that the Warren Court had developed to regulate police practices while effecting significant change in the "decision" rules that tell judges what to do in response to various police conduct).

270 *See* U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

271 *See* Kepner v. United States, 195 U.S. 100, 126 (1904) (applying this rule to federal trials); *see also* Benton v. Maryland, 395 U.S. 784, 795–97 (1969) (applying this rule to state trials).

trial court rulings that grant a defendant's motion to suppress evidence,[272] and the Supreme Court has construed the federal statutes regulating its own jurisdiction as authorizing it to hear cases in which such interlocutory suppression rulings are affirmed on appeal.[273]

Merely authorizing appellate review, however, is not enough to ensure effective Supreme Court control over trial court decisionmaking. In addition, the Court's task is further complicated by the fact that even Justices who have expressed a strong general preference for formulating legal doctrines in terms of rules rather than standards[274] have suggested that, given the near limitless variety of encounters between citizens and police, a number of basic Fourth Amendment concepts are "not 'readily, or even usefully, reduced to a neat set of legal rules.'"[275]

Based on statements like this, it would be easy to surmise that Fourth Amendment jurisprudence is some sort of rule-free zone. But that would be a serious mistake. In fact, during the last decade alone, the Supreme Court has announced and expanded numerous clear rules in the Fourth Amendment context.[276] It is "reasonable" per se, the Court held in 1996, to pull over a motorist whenever an officer has probable cause to believe that she has violated any traffic regulation, regardless of circumstances or severity.[277] Once a car is pulled over, the Court has further held that officers may always order both the driver[278] and any passengers[279] out of the vehicle. In 2001, a five-Justice majority held that the Fourth Amendment permits arresting any driver whom an officer has probable cause to believe committed any crime in the officer's presence—including misdemeanor offenses

272 *See, e.g.*, 18 U.S.C. § 3731 (2000 & Supp. V 2005); DEL. CODE ANN. tit. 10, § 9902(c) (1999).

273 *See* California v. Stewart, 384 U.S. 436, 498 n.71 (1966) (decided with Miranda v. Arizona, 384 U.S. 436 (1966)).

274 *See generally* Scalia, *supra* note 53, at 1187 ("All I urge is . . . that the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows.").

275 United States v. Sokolow, 490 U.S. 1, 7 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)) (discussing the concepts of "reasonable suspicion" and "probable cause"); *see also* Scott v. Harris, 127 S. Ct. 1769, 1777–78 (2007) (discussing the concept of "reasonable force").

276 As the next several footnotes suggest, the Court first began employing this particular strategy in the 1970s and early 1980s. *See, e.g.*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 257–85 (1984); Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 127–28.

277 *See* Whren v. United States, 517 U.S. 806, 816–19 (1996).

278 *See* Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam).

279 *See* Maryland v. Wilson, 519 U.S. 408, 413 (1997).

such as failure to wear a seatbelt.[280] And once an officer has decided to arrest, the Court has held that she enjoys an absolute entitlement to search the car's entire passenger compartment as "incident" to that arrest[281]—a holding that the Court in 2004 extended to cover a situation in which the suspect was handcuffed in the back of a police cruiser at the time of the search.[282]

Given the sheer number of rules of the road and the ubiquity with which we all violate them, these rulings render it constitutionally permissible for police officers to stop and search the passenger compartment of almost any car at almost any time.[283] Of course, that fact, standing alone, does not prove that these rulings were motivated by a desire to control lower courts. Indeed, it might seem equally plausible that their aim was the one invariably cited in the Court's opinions: the need to provide clear guidance for police officers in the field.[284]

Although this account has a great deal of force, there is a serious problem with treating it as the sole impetus for the Court's recent decisions. Cops no doubt benefit from being given a list of things that they may do. But if—as the Court has repeatedly stated—the basic idea behind the exclusionary rule is to use the threat of suppression to deter undesirable conduct,[285] there are also no doubt circumstances in which the police would benefit from being given a list of things that they *may not* do. But despite this fact, the Supreme Court has been steadfast in refusing to create—or permitting lower courts to begin to develop—any such lists.[286] Indeed, what is perhaps most notable about the Court's recent use of rules in the Fourth Amendment context is their one-way character: the great bulk of them hold that a particular type of police conduct is per se acceptable under the Federal Constitution.[287] More than perhaps any characteristic, this sug-

280 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

281 *See* New York v. Belton, 453 U.S. 454, 458 (1981).

282 *See* Thornton v. United States, 541 U.S. 615, 618–19, 621–24 (2004).

283 *See* David A. Moran, *The New Fourth Amendment Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 820–37 (2002).

284 *See, e.g.*, *Thornton*, 541 U.S. at 622–23; *Atwater*, 532 U.S. at 347; *Belton*, 453 U.S. at 458.

285 *See, e.g.*, Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

286 Scott v. Harris, 127 S. Ct. 1769, 1777–78 (2007) (providing a definition of constitutionally "reasonable" force and refusing to apply a "magical on/off switch"); Maryland v. Pringle, 540 U.S. 366, 370–74 (2003) (applying a "probable cause" standard); United States v. Arvizu, 534 U.S. 266, 273–75 (2002) (applying a "reasonable-suspicion" standard).

287 The main exceptions are two recent decisions holding that certain police actions always constitute a "search" or "seizure." *See* Brendlin v. California, 127 S. Ct.

gests that what may also be going on is an attempt to make it more difficult for lower courts to suppress evidence based on Fourth Amendment violations.

But what about situations for which a majority of Justices have found themselves unable to agree on a rule of per se compliance with the Fourth Amendment? There, recent decisions show use of two different techniques for controlling lower court decisionmaking that mirror those discussed in the previous subparts, as well as a third that illustrates a far more direct method for preventing lower courts from granting relief based on disfavored rights.

For one thing, the Court has both emphatically stated and steadily expanded one very important rule of exclusion. As I explained earlier, a trial court's ability to find and characterize the underlying historical facts may pose the single greatest hindrance to effective appellate monitoring, and this problem is particularly acute when the underlying legal standard invites assessments about someone's state of mind.[288] Accordingly, it should come as little surprise that just as the Court eliminated such considerations from qualified immunity analysis,[289] it has repeatedly stated that a police officer's beliefs, motives, or intentions generally "play no role in . . . Fourth Amendment analysis."[290]

The Court also directed intensified appellate monitoring in its critically important, but little noted, decision in *Ornelas v. United States*.[291] Although the Court has repeatedly emphasized the highly fact-dependent and case-specific nature of both sorts of determina-

2400, 2406–07, 2410 (2007) (determining that passengers in a car are "seized" at the time the driver pulls over in response to a show of police authority); Kyllo v. United States, 533 U.S. 27, 34–40 (2001) (holding that use of imaging technology to gather details about the interior of a home not perceivable to an ordinary observer is a "search"). In each of these circumstances, however, the conclusion dictated by the rule does not compel exclusion of the resulting evidence; it simply directs the trial court to conduct additional Fourth Amendment analysis. *See Brendlin*, 127 S. Ct. at 2410; *Kyllo*, 533 U.S. at 40.

288 *Cf. supra* note 123 and accompanying text (discussing difficulties in characterizing facts found by the trial court).

289 *See supra* notes 224–27 and accompanying text.

290 Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (citing *Whren*, 517 U.S. at 812–13) (finding the existence of probable cause for a custodial arrest); Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (per curiam) (citing *Whren*, 517 U.S. at 813) (same); *Whren*, 517 U.S. at 810 (finding the existence of probable cause for traffic stop); Horton v. California, 496 U.S. 128, 138–40 (1990) (discussing the scope of the "plain view" exception to the warrant requirement); Graham v. Connor, 490 U.S. 386, 397 (1989) (testing the "reasonableness" of a particular use of force without regard to "underlying intent or motivation").

291 517 U.S. 690 (1996).

tions, *Ornelas* nonetheless held that a trial court's assessment of the legal significance of any particular fact and its conclusions about whether the facts as a whole establish "reasonable suspicion and probable cause should be reviewed *de novo* on appeal."[292] Any other standard of review, Chief Justice Rehnquist wrote, risked creating situations where otherwise similar cases could be resolved differently depending how '"different trial judges draw general conclusions."'[293] And although it acknowledged that even de novo review had only a limited ability to "unify precedent" in the absence of clear rules, the Court stressed—in language upon which it would later rely to justify the same conclusion in the punitive damages context—that "independent" appellate review was " 'necessary if appellate courts are to *maintain control of*, and to clarify, the legal principles."'[294]

Even more recently, the Supreme Court has reminded us that there is another technique it can employ if it concludes that lower courts are too quick to grant relief based on a claimed violation of federal rights. In 2006's *Hudson v. Michigan*,[295] a five-Justice majority held that violations of the Fourth Amendment's "knock-and-announce" rule do not require suppression of any evidence seized during the subsequent search.[296] Although it went uncited in Justice Scalia's majority opinion, *Hudson* bears a close resemblance to the Court's decision thirty years earlier in *Stone v. Powell*.[297] Ever since *Brown v. Allen*,[298] the general rule has been that prisoners who believe their federal constitutional rights were violated during state court criminal proceedings may seek relief from the lower federal courts.[299] In *Stone*, however, the Court created a special rule for Fourth Amend-

292 *See id.* at 699.

293 *Id.* at 697 (quoting Brinegar v. United States, 338 U.S. 160, 171 (1949)).

294 Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (emphasis added) (quoting *Ornelas*, 517 U.S. at 697)); *see supra* notes 161–63 and accompanying text).

295 126 S. Ct. 2159 (2006).

296 *Id.* at 2165–68 (applying a balancing test).

297 *Compare id.* (applying a balancing test in light of the fact that the "exclusionary rule has never been applied except 'where its deterrence benefits outweigh its substantial social costs,'" and contending that in many cases where the exclusionary rule is applied it is tantamount to a "get-out-of-jail-free card" (quoting Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998)), *with* Stone v. Powell, 428 U.S. 465, 489–91 (1976) (weighing "the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims" and noting that among these costs is the risk of excluding "the most probative information bearing on the guilt or innocence of the defendant").

298 344 U.S. 443 (1953).

299 *See id.* at 450 (finding that Congress did not intend "to eliminate the right of a state prisoner to apply for relief by habeas corpus to the lower federal courts").

ment claims, holding that arguments that unconstitutionally seized evidence was wrongly admitted at the defendant's trial are simply not cognizable in federal habeas proceedings.[300] *Stone*'s approach has not spread to other types of claims in the habeas context,[301] and only time will tell if *Hudson* has longer legs. Yet both cases demonstrate the basic point that the ultimate way of preventing too frequent vindication of a disfavored right is to bar the granting of a remedy.[302]

Especially in conjunction, these various developments suggest a concerted effort by the Supreme Court to discourage lower courts from suppressing evidence based on Fourth Amendment violations. At the same time, other aspects of the Court's recent behavior underscore the challenges the Justices face in seeking to do so. Although the Court is now regularly deciding only about eighty cases per year,[303] during its last three Terms alone it has issued *thirteen* opinions regarding the constitutional rules governing "searches and seizures," all but one of which it has decided in favor of the government litigant.[304] Because the Court reverses or vacates far more often than it affirms,[305] these numbers suggest that the Justices still perceive the need to spend a relatively large amount of their own time engaged in fact-bound review of lower court decisions that resolve Fourth Amend-

300 *See Stone*, 428 U.S. at 494.

301 *See* Withrow v. Williams, 507 U.S. 680, 686–95 (1993) (refusing to extend *Stone* to statements admitted in violation of Miranda v. Arizona, 384 U.S. 436 (1966)).

302 Another example of this phenomenon would be the retroactivity doctrines that the Supreme Court has developed to limit the ability of lower federal courts to grant habeas corpus relief to state prisoners. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 305–10 (1989). For citations of some of the leading articles discussing and criticizing *Teague* and its progeny, see FALLON ET AL., *supra* note 18, at 1334–35 & nn.5–7.

303 *See supra* text accompanying note 34.

304 *See The Supreme Court, 2005 Term—The Statistics*, 120 HARV. L. REV. 372, 382 tbl.III (2006) [hereinafter *2005 Statistics*] (listing four "search and seizure" cases, three of which were decided in favor of the government); *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 429 tbl.III (2005) [hereinafter *2004 Statistics*] (listing three cases; all decided in favor of the government); *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 507 tbl.III (2004) [hereinafter *2003 Statistics*] (listing six cases; all decided in favor of the government).

305 *See 2005 Statistics*, *supra* note 304, at 380 tbl.II(D) (stating that the Court reversed or vacated lower court's judgment in 58 of 81, or 71.6% of, cases it reviewed on a writ of certiorari); *2004 Statistics*, *supra* note 304, at 426 tbl.II(D) (reversing or vacating 60 of 83, or 72.3%); *2003 Statistics*, *supra* note 304, at 505 tbl.II(D) (reversing or vacating 59 of 76, or 77.6%).

ment issues in favor of criminal defendants, perhaps in order to provide greater "analogical anchoring" for future cases.[306]

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The subject areas discussed in the previous three subparts could easily be expanded,[307] but it is not my purpose to catalogue all of the spheres in which an attempt to shape and direct lower court decisionmaking is a plausible explanation for recent developments in Supreme Court doctrine. Instead, my aim in this Part has been to make three fairly straightforward points:

First, distrust of lower courts as a motivator for doctrine creation did not end with the Warren Court and need not be spurred by a desire to enact policies likely to please the political left. To the contrary, one obvious connection between all three subjects discussed in this Part is that the Court's efforts have been quite consistent with the tenets of political conservatism.

Second, although use of rules may be the technique most commonly associated with efforts to control frontline decisionmakers, it is far from the only tool at the Supreme Court's disposal. Rules were not the sole tactic employed in any of the areas just discussed, and it would be a stretch to label use of rules the primary strategy in any of them.

Third, the various techniques discussed in Part II are in large measure complementary to—and, to a certain extent, substitutes for—one another. In all of the areas just discussed, the Court has employed multiple techniques, and at times it has acknowledged that it is using one because another is not available.[308]

CONCLUSION

Legal scholars who study the relationship between rights and remedies are fond of saying that the real meaning and value of the former are determined by the generosity or stinginess of the latter.[309]

306 *See* Shapiro, *supra* note 52, at 314 (suggesting that "[b]y deciding a series of cases in which it applied a standard, the Court could harness the traditional common law method of analogical reasoning to mark a path for lower courts").

307 Arbitration seems like one particularly promising example. *See* Bruhl, *supra* note 2.

308 *See, e.g.*, *supra* text accompanying notes 291–94 (discussing the Court's adoption of de novo review in the Fourth Amendment context).

309 *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) ("Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.").

This Article suggests an important corollary: the extent to which the Supreme Court values the rights it espouses in its opinions is demonstrated in large measure by the lengths to which it is willing to go to secure lower court compliance with them. The fact that the Justices of the Warren era were willing to bear enormous costs to achieve even partial compliance with their vision of a better, fairer, criminal justice system suggests that they were enormously committed to that goal. In contrast, various rulings by the Burger, Rehnquist, and now Roberts Courts that make it more difficult to overturn criminal convictions based on even conceded constitutional violations indicate a comparatively lesser commitment.[310]

This Article also holds important lessons for political scientists. Its exploration of the various ways in which the Supreme Court can craft legal doctrines to constrain and direct the course of lower court decisionmaking may suggest a partial answer to why every study of which I am aware has found high levels of lower court compliance.[311] More broadly, its demonstration that the power dynamic between trial and appellate courts is far from static illustrates the critical need "to take law and legal institutions seriously."[312]

In addition, my analysis suggests at least three areas for future research. First, if one accepts that the Supreme Court can, and at least sometimes apparently does, craft legal doctrines with an eye toward influencing lower court decisionmaking, it may be useful to consider the extent to which the most effective strategies for exerting such influence depend on what precisely the Justices are attempting to accomplish. At times, such as with respect to many of the Warren Court's most famous doctrinal developments and more modern developments involving punitive damages, the Supreme Court's actions seem designed to push lower courts towards greater protection of federal rights. But at other times, perhaps exemplified by more recent trends in constitutional criminal procedure, the aim appears to be to prevent lower courts from moving too fast. Although this Article's analysis is far too preliminary to make any broad conclusions, it seems entirely plausible that the relevant considerations may be meaningfully different depending on which sort of goal the Court aims to accomplish.[313]

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310 I am grateful to Brandon Garrett for first pointing this out to me. *See also* Steiker, *supra* note 269, at 2468–70.

311 Citations to a number of the studies are collected in Kim, *supra* note 3, at 394–96 & nn.41–47, and Songer, *supra* note 3, at 43–46.

312 Friedman, *supra* note 18, at 262.

313 I am indebted to John Jeffries for bringing this point to my attention.

Second, this Article's largely descriptive account raises important normative questions both about the relationship between the Supreme Court and lower courts, as well as appropriate methodologies in constitutional and statutory interpretation. A number of important pieces have examined the issue from the lower courts' perspective, in particular, the source, extent, and nature of their "obligation" to follow Supreme Court precedent.[314] But there has been very little work addressing what may be seen as the opposite question: the extent to which it is legitimate for Supreme Court Justices to interpret concededly binding legal materials with at least one eye focused on controlling lower court decisionmaking in cases that have not yet arisen and will likely never come before the Court.[315]

Finally, although this Article has focused almost exclusively on doctrine formulation by the Supreme Court in its adjudicatory capacity, another profitable area for further inquiry would be the degree to which concerns about lower courts may shape and be visible in the products of both rulemaking and legislation. As to the former, consider the 1994 amendments to the Federal Rules of Evidence that carved out an exception to trial judges' ability to exclude any evidence that they deem unduly "prejudicial" by declaring evidence about certain categories of criminal convictions per se admissible[316] and others to the Federal Rules of Civil Procedure that created a new exception to the final judgment rule for district court decisions about whether to

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314 *See, e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995); Kim, *supra* note 3, at 434–41; Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–84 (1989).

315 This issue has a certain overlap with, but is nonetheless distinct from, debates about the existence and scope of the Supreme Court's "supervisory power." *See, e.g.*, Barrett, *supra* note 80, at 328, 342–87 (arguing that the "Constitution's text, structure, and history do not support the proposition that the Supreme Court possesses supervisory power over inferior courts by virtue of its constitutional supremecy"). Questions about the supervisory power generally involve whether and to what extent structural features of the Constitution and aspects of our political history authorize the Supreme Court to impose restrictions on lower federal courts *without* claiming that those restrictions are required by some external source of authority, such as the Constitution or a federal statute. *See, e.g., id.* at 353–87. In contrast, the issue flagged in the text implicates broader questions regarding proper interpretive method, such as what sorts of things the Justices may legitimately consider when deciding how to interpret concededly binding sources of authority.

316 *See* FED. R. EVID. 413. *But see* United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (interpreting Rule 413 to allow consideration of prejudice to the defendant in order to avoid any constitutional concerns).

certify a class action.[317] As to the latter, consider the provisions of the Antiterrorism and Effective Death Penalty Act that declare that only decisions by the Supreme Court itself may be relied upon as a basis for granting federal habeas relief,[318] and make federal district courts' ability to entertain second-or-successive habeas petitions contingent on approval by the courts of appeal,[319] the sections of the Prison Litigation Reform Act that require lower courts (but not the Supreme Court) to act on petitions to modify injunctive decrees within a particular time,[320] the parts of the Class Action Fairness Act that dramatically expand the scope of state law actions that may be removed to federal court,[321] or pretty much the entire history of the Sentencing Reform Act[322] and the Federal Sentencing Guidelines.[323] Worries about lower courts, these examples suggest, are hardly confined to the Supreme Court of the United States.

317 *See* FED. R. CIV. P. 23(f).

318 *See* 28 U.S.C. § 2254(d)(1) (2000).

319 *See id.* § 2244(b)(3).

320 *See* 18 U.S.C. § 3626(e)(2) (2000).

321 *See* 28 U.S.C. §§ 1332(d), 1453(b)–(c) (2000).

322 Pub. L. No. 98-473, 98 Stat. 1987 (codified in scattered sections of 18, 28 U.S.C.); *see also* Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1940–44 (1988) (discussing attitudes toward the "unfettered" discretion of federal judges).

323 *See generally* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 1–142 (1998) (discussing the history of the Guidelines as based upon a desire to reduce sentencing disparities by reducing federal judges' discretion).