

STATUTORY CONSTRAINTS AND CONSTITUTIONAL DECISIONMAKING

ANTHONY O'ROURKE*

Although constitutional scholars frequently analyze the relationships between courts and legislatures, they rarely examine the relationship between courts and statutes. This Article is the first to systematically examine how the presence or absence of a statute can influence constitutional doctrine. It analyzes pairs of cases that raise similar constitutional questions but differ with respect to whether the court is reviewing the constitutionality of legislation. These case pairs suggest that statutes place significant constraints on constitutional decisionmaking. Specifically, in cases that involve a challenge to a statute, courts are less inclined to use doctrine to regulate the behavior of nonjudicial officials. By contrast, in cases where no statute or regulation is at issue, courts are more likely to construct regulatory doctrinal rules. The Article supports this hypothesis by identifying three structural reasons why statutes are likely to have this influence on judicial constitutional decisionmaking. By drawing upon work in legal philosophy and the social sciences, this Article shows that statutes can shape constitutional law in ways that judges fail to reflect upon and usually take for granted.

Introduction	88
I. Textual and Nontextual Constitutional Review	94
A. The Characteristics of Textual Review	95
1. Two-Layer Textual Interpretation	96
2. Nontextual Review and Unexamined Texts	97
3. As-Applied Cases and Textual Review	99
B. The Significance of Textual Review	101
II. Statutory Constraints & Regulatory Decisionmaking	106
A. Defining Regulatory Decisionmaking	106
B. Regulatory Decisionmaking and Textual Review	114
1. Criminal Procedure	114
2. Affirmative Action	119
3. Protected Speech and Buffer Zones	123
4. Intellectual Property	127

* Associate Professor, SUNY Buffalo Law School. For their feedback on earlier drafts, I am deeply indebted to Anya Bernstein, Eric Berger, Guyora Binder, Michael Boucai, Erin Delaney, James Gardner, Aziz Huq, Meredith Lewis, Henry Monaghan, Steve Morrison, Bertrall Ross, Meghan Ryan, Jim Wooten, and participants of conferences and workshops at the ABA Criminal Justice Section Fall Institute, Loyola Law School, SUNY Buffalo Law School, and the Baldy Center for Law and Social Policy. Thanks also to Earl Cantwell, Anna McCarthy, and Caitlin O'Neil for their excellent research assistance.

III. Structural Reasons for Statutory Constraints	132
A. The Textual Canonicity of Statutes.....	134
B. Formalizing Rules of Governance	138
C. Institutional Design and Legislative Constitutionalism	146
IV. The Limits of Statutory Constraint	148
Conclusion.....	151

INTRODUCTION

In constitutional cases, is the presence or absence of a statute likely to influence a court’s doctrinal choices? The question would seem to be both obvious and of obvious importance. Obvious in the sense that any student of statutory interpretation is well versed in the debate over whether and how statutes operate to constrain judges in nonconstitutional cases.¹ Important because most constitutional cases involve judicial review of a statute or some other form of codified text.²

Interestingly, however, scholars have paid little attention to whether the presence or absence of a statute is likely to influence judicial constitutional decisionmaking. Of course, there is a deep body of

1. See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532–33 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)) (discussing the statutory interpretation debate between “new textualists, who maintain that the rule of law as well as democracy requires that judges be tightly ‘constrained’ by strict rules,” and “pragmatists and purposivists, . . . who believe that the process of legal reasoning from text, legislative purpose, and precedent constrains judges”).

2. Consider, for example, the seven constitutional cases from the Supreme Court’s October 2013 Term that SCOTUSblog identifies as “major cases.” See *Statistics*, SCOTUSBLOG, <http://www.scotusblog.com/statistics/> (last visited Feb. 6, 2015) (presenting a table of dispositions by month of sitting that lists “major cases” in red). The case that raised a criminal procedure question did not involve a constitutional challenge to a statute or regulation. See *Riley v. California*, 134 S. Ct. 2473 (2014) (holding that police generally may not conduct a warrantless search of digital information on a suspect’s cell phone). Four out of the six remaining cases, by contrast, involved a constitutional challenge to legislation or a state constitutional provision. See *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (invalidating the Illinois collective bargaining statute as applied to require state-subsidized home health care employees to pay union agency fees); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) (invalidating a Massachusetts “buffer zone” statute restricting protests around abortion facilities); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (upholding a Michigan constitutional provision prohibiting public universities from adopting race-conscious admissions policies); *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014) (invalidating a federal campaign statute limiting the aggregate amount of money individuals may donate to multiple candidates in an election cycle); cf. *Noel Canning v. NLRB*, 134 S. Ct. 2550 (2014) (holding that the Recess Appointments Clause did not permit the president to fill agency vacancies during a three-day Senate recess); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (upholding a town’s practice of opening public board meetings with prayer).

scholarship using the lens of deference to examine the relationship between courts and legislatures.³ However, with one notable exception, legal scholars have not considered the related, but substantively different, relationship that exists between courts and *statutes*.⁴ Although scholars will sometimes suggest that the mere presence or absence of a statute shapes a particular area of constitutional doctrine,⁵ there has been no sustained analysis of *why*, or indeed whether, statutes would have such an effect.

This omission owes, in part, to the limited domain of cases that scholars examine when analyzing questions of legislative and judicial deference. Somewhat understandably, scholars who are interested in the

3. See *infra* notes 69–78 and accompanying text.

4. The exception is Anthony Amsterdam, who once speculated that in constitutional cases where there is a legislative text at issue, the Court’s decisionmaking “is informed and greatly assisted by the very fact that it *is* legislation or a regulation or a rule of some sort that is in question.” Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 791 (1970). By contrast, Amsterdam observed, constitutional criminal procedure has largely developed in a legislative void that both forces the Supreme Court “into the role of lawmaker . . . and makes it virtually impossible for the Court effectively to play that role.” *Id.* at 790.

5. In the four-and-a-half decades since Anthony Amsterdam first observed that the lack of criminal procedure cases involving statutes might explain a great deal about that area of constitutional doctrine, see *supra* note 4, a few articles have independently suggested that the presence or absence of statutes might be relevant to the development of particular subareas of constitutional law. The fact that these articles (including one by this author) do not cite Amsterdam (or each other) for this proposition might speak to lasting, subconscious influence of Amsterdam’s observation. Compare Amsterdam, *supra* note 4, at 790 (“In most areas of constitutional law the Supreme Court of the United States plays a backstopping role, reviewing the ultimate permissibility of dispositions and policies guided in the first instance by legislative enactments, administrative rules or local common-law traditions. In the area of controls upon the police, a vast abnegation of responsibility at the level of each of these ordinary sources of legal rulemaking has forced the Court to construct all the law regulating the everyday functioning of the police.”), with Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 445 (2013) (“In most constitutional adjudication, the court reviews a regulatory strategy that was designed by a legislature or executive agency In crafting criminal procedure rules, however, judges must design regulatory strategies with the benefit of only a few law clerks helping research and draft opinions”), and John Rappaport, *Second Order Regulation of Law Enforcement*, CALIF. L. REV. (forthcoming 2015) (“In most constitutional adjudication, the Supreme Court reviews regulation authored by a legislature or agency (hence ‘judicial review’). In criminal procedure, by contrast—whether or not it sees itself as doing so—‘the Court typically writes the regulations itself.’); see also Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1, 74–79 (2013) (arguing that the statutory nature of copyright law has constrained the extent to which courts deliberate over its constitutional dimensions); Dru Stevenson, *Judicial Deference to Legislatures in Constitutional Analysis*, 90 N.C. L. REV. 2083, 2093 (2012) (arguing that there is “reason to believe that the Supreme Court shows deference to state legislatures when considering the constitutionality of state statutes in the context of the Fourth Amendment”).

relationship between courts and legislatures have restricted their inquiry to constitutional cases that involve statutes. They may focus, for example, on cases about whether a statute violates the Commerce Clause,⁶ whether a statute governing executive detentions is acceptable under the Suspension Clause,⁷ or whether a statutorily codified school voucher program is acceptable under the Establishment Clause.⁸ This Article demonstrates, however, that we can learn something by expanding the domain of inquiry to cases that do *not* involve statutes. For example, when a court decides whether a traffic stop complies with the Fourth Amendment, it must directly evaluate the constitutionality of a police officer's conduct without reviewing the constitutionality of a statute or regulation.⁹ By comparing the reasoning in these cases with the reasoning in cases that raise similar constitutional questions but involve the review of legislation, one can better appreciate how statutes might constrain constitutional decisionmaking.

Consider, for example, two recent Fourth Amendment cases upholding warrantless police searches. In one, the Supreme Court rejected an as-applied challenge to a statute authorizing police officers to collect DNA samples from arrested suspects.¹⁰ In the other, in which no statute was at issue, the Court held that an officer had probable cause to use a trained, drug-sniffing police dog to conduct a vehicle search.¹¹ In both cases the Court confronted a Fourth Amendment question arising from a biotechnology,¹² and in both cases the Court decided in the government's favor.¹³ But did the presence or absence of a statute influence how the Court used doctrine to regulate the ways in which police officers use these investigatory technologies going forward?

6. *E.g.*, *United States v. Morrison*, 529 U.S. 598 (2000).

7. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008).

8. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

9. This is, of course, an oversimplification. As discussed below, the police officer is likely subject to detailed departmental regulations governing traffic stops. For purposes of this Article, however, the operative question is whether the court has *identified* and *interpreted* a statute or regulation governing the officer's conduct. *See infra* notes 54–57 and accompanying text.

10. *See Maryland v. King*, 133 S. Ct. 1958, 1962 (2013).

11. *See Florida v. Harris*, 133 S. Ct. 1050, 1051 (2013).

12. *See* Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 161 (2013) (arguing that the opinion in *Maryland v. King* “represents a watershed moment in the evolution of Fourth Amendment doctrine and an important signal for the future of biotechnologies”); Irus Braverman, *Passing the Sniff Test: Police Dogs As Surveillance Technology*, 61 BUFF. L. REV. 81, 85 (2013) (analyzing the Florida Supreme Court's decision in *Harris* and arguing that drug-sniffing dogs should be understood as a form of biotechnology).

13. *See King*, 133 S. Ct. at 1962; *Harris*, 133 S. Ct. at 1051.

Or consider two cases that were both (at least short-term) victories for opponents of affirmative action. In one, the Court invalidated a “special admissions” program that a state medical school adopted without any statutory guidance.¹⁴ The controlling opinion in that case proposed a detailed framework for implementing race-conscious admissions policies, and this framework became the template for higher education affirmative action programs throughout the country.¹⁵ In the other case, decided last Term, the Court upheld a state constitutional provision that prevented public universities from using race as a factor in admissions.¹⁶ In reaching this conclusion, the Court expressly disavowed any authority to prevent voters from deciding whether or not to permit universities to adopt race-conscious admissions policies.¹⁷ As a matter of constitutional doctrine, these cases are perfectly compatible. As a matter of judicial decision-making strategy, they are radically different. Can the absence of a statute in one case, and the presence of a statute in another, help to account for this difference?

The answer to this question, I argue, is yes. By examining these pairs of cases, and other pairs that raise similar constitutional questions but differ with respect to the presence or absence of a statute, this Article shows that statutes do in fact influence and constrain constitutional decisionmaking.¹⁸ More specifically, in cases involving what I call “textual review”—that is, in constitutional cases that require courts to interpret a statute or regulation to rule on the merits—courts are less likely to use doctrine as a way of regulating the behavior of nonjudicial officials.¹⁹ In cases that do not involve textual review, by contrast, courts are more apt to use doctrine as a tool for governing the activity of nonjudicial officials.²⁰ Thus, cases involving textual review are likely to produce what one might call “regulatory” modes of decisionmaking with

14. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 266–67 (1978).

15. See *infra* notes 152–56 and accompanying text.

16. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1623 (2014).

17. See *id.* at 1635 (“The constitutional validity of some of those choices regarding racial preferences is not at issue here. The holding in the instant case is simply that the courts may not disempower the voters from choosing which path to follow.”).

18. A few words about this methodology are in order. The case pairs were selected based on (1) the similarity of the constitutional issues in each case and (2) to examine a cross-section of constitutional subareas in which the court reviews both cases involving a statute or regulation and cases that do not. Importantly, they were not selected based on how strongly they confirm this Article’s statutory constraint hypothesis. Nor did I identify reject case pairs on the ground that they posed a challenge for this Article’s hypothesis. Cf. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 112–14 (2002) (discussing the danger of selection bias in small-*n* studies).

19. See *infra* Part II.

20. See *infra* Part II.

respect to how courts use doctrine to incentivize and monitor the behavior of nonjudicial officials.²¹

There are sound theoretical reasons for why statutes might serve this important constraining function in constitutional decisionmaking.²² First, statutes consist of a fixed and canonical formulation of words, and this textual canonicity may lead judges toward a shared understanding of the issue before them in constitutional cases that involve legislation.²³ By contrast, in cases that do not involve legislation, judges may be more apt to disagree about the scope of the constitutional issue before them and to frame the issue in whatever way best enables them to implement their policy aims.²⁴ Second, with respect to constructing a system of rules, courts play a structurally different role in textual review cases, where they review a formal regulatory policy that a legislature has established, than in nontextual review cases, where the court may perceive itself as having to fill a regulatory void.²⁵ This structural difference, I argue, will lead courts in nontextual review cases to adopt more detailed doctrinal rules and to focus on the operational realities of the officials who must conform to the courts' orders.²⁶ Third, in textual review cases courts may decide to take advantage of what they believe to be the superior institutional design of legislatures with respect to resolving some constitutional questions.²⁷ If a court recognizes that a constitutional issue involves considerable policy complexity, it may enlist the legislature's aid in resolving the issue and will accordingly construct a less regulatory doctrinal rule.

21. This Article argues that statutes act as an exogenous constraint on constitutional decisionmaking. A rival hypothesis is that, as a rhetorical strategy, courts may omit any mention of a statute when they wish to engage in regulatory decisionmaking and invoke the existence of a statute when they wish to rule in a less regulatory fashion. However, my examination of the parties' briefs for the cases discussed in Part II of this Article suggests that courts do not regularly engage in this type of strategic manipulation. *See infra* notes 242–43 and accompanying text.

22. *See infra* Part III.

23. *See* JEREMY WALDRON, *LAW AND DISAGREEMENT* 77–78 (1999).

24. *See infra* Part III.A. In constructing this argument, I draw upon Jeremy Waldron's arguments concerning the epistemic benefits of the fact that rules enacted by statutes have a canonical linguistic formulation. *See* WALDRON, *supra* note 23, at 77–82.

25. *See infra* Part III.B.

26. *Cf.* ARTHUR STINCHCOMBE, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* (2001) (analyzing ways in which formal systems [including legal systems] are constructed to adequately guide those whose actions the systems are meant to govern).

27. *See infra* Part III.C.; *cf.* Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *DUKE L.J.* 1277 (2001) (analyzing the institutional features of Congress that would enable it to play a greater role in constitutional lawmaking).

There are, however, two significant limits to the scope of this Article's examination. First, and somewhat artificially, the Article focuses on the ways in which statutes constrain constitutional decisionmaking and brackets the question of how administrative regulations do so.²⁸ Second, the Article does not claim that the presence or absence of a statute can explain which side will prevail in a constitutional dispute. Instead, it argues that statutes can influence the doctrinal reasoning by which a court justifies the outcome of a case. (And, of course, this Article does not deny that there are other, countervailing influences that may sometimes lead courts to adopt relatively nonregulatory modes of decisionmaking in textual review cases.) Accordingly, while this Article may lay the theoretical groundwork for future statistical work on judicial behavior, its hypothesis is compatible with the view that a judge's ideology is the best predictor of her vote in a constitutional case.²⁹

Notwithstanding its scope limitations, this Article lays the groundwork for understanding a phenomenon that may have significant consequences for constitutional law. William Eskridge and John Frerejohn have recently argued legislatures shape constitutional meaning through the *content* of the laws they choose to enact.³⁰ The phenomenon of statutory constraint, however, suggests that legislatures may also shape constitutional meaning in ways that are independent of the content of the statutes they enact. If the mere *existence* of a statutory text can alter a court's method of constitutional decisionmaking, then legislatures

28. However, many of the theoretical claims of this Article appear to apply with equal force to both statutes and regulations. I therefore intend to address the question of regulatory constraint in a subsequent piece.

29. That is, this Article's claims are compatible with the "attitudinal" model of voting to which most political scientists subscribe. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 312–56 (2002) (describing the statistical validity using the Supreme Court justices' ideology to predict their votes); *see also* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* chs. 2–5 (2013) (surveying contributions to the attitudinal model and testing the degree to which judicial ideology influences voting at the Supreme Court, appellate court, and district court levels).

30. *See* WILLIAM ESKRIDGE, JR. & JOHN FREREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 14 (2010) (arguing that "normative commitments are announced and entrenched . . . through the more gradual process of legislation, administrative implementation, public feedback, and legislative reaffirmation and elaboration"); *id.* at 16 (contending that both federal "superstatutes" such as the Civil Rights Act and state "statutory convergences" serve to give specific content to the general norms articulated in the Constitution); *see also* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943 (2003) (locating Congress's power to interpret the Constitution in Section 5 of the Fourteenth Amendment).

can curb the more troubling effects of judicial review simply by passing statutes. By contrast, if legislatures leave officials to execute their duties without statutory guidance, they unwittingly strengthen the judiciary's role in governance. Thus, the phenomenon of statutory constraint may be useful for understanding how constitutional law is likely to evolve in the current era of legislative stasis³¹ and political dysfunction.³²

This Article proceeds in four Parts. Part I introduces the concept of textual review and argues for the methodological importance of examining how the presence or absence of a statute will shape a court's decisionmaking in cases that raise similar constitutional issues. Part II argues that courts engage in less regulatory decisionmaking in textual review cases and supports this hypothesis by analyzing pairs of cases involving criminal procedure, affirmative action, abortion protest, and intellectual property. Part III explores three potential structural causes for the differences between decisionmaking in textual and nontextual review cases. Part IV discusses the limits of this Article's hypothesis and examines cases in which other political or structural pressures overshadow the constraining effect of textual review.

I. TEXTUAL AND NONTEXTUAL CONSTITUTIONAL REVIEW

One of the most well-worn debates in constitutional law concerns the appropriate balance of power between federal courts and the coordinate branches.³³ Despite the extraordinary attention paid to this issue, however, scholars have largely overlooked the differences between constitutional decisionmaking that involves statutory interpretation and constitutional decisionmaking that does not. The distinction is simple, but it nevertheless deserves some explanation given the degree to which it has been ignored in the literature.

31. See Jonathan Weisman, *Congress Avoids Being Least Productive Ever*, N.Y. TIMES (Sept. 26, 2014, 2:50 PM), http://www.nytimes.com/politics/first-draft/2014/09/26/current-congress-looks-destined-for-least-productive-crown/?_r=1 (reporting that the number of bills enacted under the 113th Congress was the second lowest in history, and that the lowest number was enacted under the 112th Congress).

32. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 101–11 (2012) (arguing that the United States' legislative pathologies have rendered the political system "dangerously broken"); Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 YALE L.J. ONLINE 479, 480 (2012) (arguing that "America itself has reached the Age of Dysfunction, when the formal institutions of U.S. constitutional government have become impotent to deal with the nation's most important challenges").

33. See *infra* notes 66–72 and accompanying text.

A. The Characteristics of Textual Review

Simply put, some constitutional cases involve a constitutional challenge to a statute or regulation and thus require courts to interpret that text in order to decide on the merits of the claim at issue. For the sake of brevity, this Article refers to this phenomenon as “textual review.” Significantly, while this Article’s scope is limited to examining how *statutes* constrain constitutional decisionmaking,³⁴ its definition of textual review also encompasses cases that involve the review of agency regulations. Accordingly, a case that does not involve textual review is one in which a court does not need to interpret a statute or regulation in order to decide the merits of a constitutional claim.³⁵

Consider, for example, two recent criminal procedure cases delineating the scope of the search-incident-to-a-lawful-arrest exception to the Fourth Amendment’s warrant requirement. In *Maryland v. King*,³⁶ the Supreme Court upheld a statute authorizing the police to collect a suspect’s DNA after arresting him.³⁷ Like most constitutional cases outside the domain of criminal procedure, *King* involved textual review. By contrast, in *Arizona v. Gant*,³⁸ the Court held that the warrantless trunk search of a suspect’s vehicle was not a constitutional search incident to a lawful arrest.³⁹ However, the Court in *Gant* did not review the constitutionality of any statute or regulation that governed how police

34. See *supra* note 28 and accompanying text.

35. As defined here, a case may involve nontextual review even if it requires a court to interpret statutes that impose procedural or jurisdictional limitations on reaching the merits of a claim. In constitutional tort cases brought under 42 U.S.C. § 1983, for example, a court may have to determine whether a municipality has adopted an unconstitutional policy or “custom” in order to determine whether it can be held liable under a particular constitutional violation. See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that local governments can be liable under § 1983 for injuries caused by the “execution of a government’s policy or custom”). Similarly, under the Anti-Terrorism and Effective Death Penalty Act a federal court may not grant habeas relief to a state prisoner for a constitutional violation unless a state court’s adjudication of the claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254(d)(1) (2012)). In these cases, the court must interpret a statute as a precursor, and possibly a bar, to deciding the merits of a constitutional claim. Unlike in textual review cases, however, the constitutionality of the statute itself, or of some application of the statute, is not being challenged.

36. 133 S. Ct. 1958 (2013).

37. *Id.* at 1962.

38. 556 U.S. 332 (2009).

39. *Id.* at 335.

officers decide whether to execute such searches.⁴⁰ Thus, like most run-of-the-mine Fourth Amendment cases, *Gant* did not involve textual review.

While this working definition of textual and nontextual review is easy to grasp, a more precise account of the phenomenon is theoretically helpful. As the concept is defined here, there are three distinguishing characteristics of textual review.

1. TWO-LAYER TEXTUAL INTERPRETATION

First, the most salient feature of textual review cases is that they require courts to interpret at least two legal texts to decide on the merits of the case. Of course, all constitutional cases require courts to interpret the Constitution.⁴¹ Even when judicial precedent is dispositive with respect to whether a challenged action is unconstitutional, a court will have to at least implicitly turn to the Constitution to identify *which* of its provisions has allegedly been violated.⁴² In cases that do not involve textual review, however, the court's interpretive obligations may end at this step. In cases involving textual review, by contrast, the process requires a second act of interpretation beyond deciding on the meaning of the Constitution itself. Specifically, the court must interpret the meaning of a statute⁴³ or administrative regulation⁴⁴ to decide whether there was a constitutional violation. Accordingly, in textual review cases, the task of deciding how the Constitution was allegedly violated is fundamentally an interpretive endeavor, which requires that a court

40. *Id.* (holding the Fourth Amendment's search-incident-to-an-arrest exception did not authorize the warrantless search of a vehicle where the defendant could not have accessed his car at the time of the search).

41. See PHILLIP BOBBIT, *CONSTITUTIONAL FATE* 9–24 (1982). This is not to say, of course, that all constitutional cases must be decided based solely on the text of the Constitution. As I am using the phrase, “constitutional interpretation” may involve any of the modes of argument (doctrinal, historical, prudential, etc.) that judges and advocates traditionally invoke.

42. Cf. Nicholas Rosenkranz, *The Subjects of the Constitution*, 62 *STAN. L. REV.* 1209, 1227 (2010) (“A constitutional challenge is a challenge to governmental action. Any such challenge should begin with a claim about who has violated the Constitution.”).

43. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572–75 (2012) (upholding the Affordable Care Act's individual mandate requirement and striking down provisions incentivizing states to expand Medicaid).

44. See, e.g., *United States v. Booker*, 543 U.S. 220, 221 (2005) (holding that the mandatory application of the Federal Sentencing Guidelines violates the Sixth Amendment jury trial right); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116–17 (1976) (holding that a Civil Service Commission regulation barring resident noncitizens from federal civil service employment violates the Fifth Amendment's due process clause).

discern the meaning of a statute or regulation in order to decide whether that text prescribes an unconstitutional action.⁴⁵

2. NONTEXTUAL REVIEW AND UNEXAMINED TEXTS

Second, and relatedly, for the purpose of identifying whether a case involves textual review, the operative question is not whether there *exists* a statute or regulation governing an actor's conduct. Instead, the operative question is whether the court *interprets* a statute or regulation in order to decide the constitutionality of that conduct. Broadly speaking, many nontextual review cases will involve actions that are governed by a statute or regulation that is not on the court's horizon while deciding the case. For example, in *Scott v. Harris*,⁴⁶ the Supreme Court held that a Georgia police officer did not violate the Fourth Amendment by using deadly force to stop a high-speed chase that was endangering the lives of bystanders.⁴⁷ The officer's conduct was governed by a Georgia statute that authorizes "peace officers" to use deadly force "when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others."⁴⁸ However, the Court in *Scott* did not review the constitutionality of this statute, and the case therefore involved nontextual review.⁴⁹ By contrast, *Tennessee v. Garner*,⁵⁰ the first Supreme Court case addressing the Fourth Amendment's limits on the use of deadly force by law enforcement officers, involved an as-applied challenge to a statute authorizing the use of deadly force.⁵¹ Conceivably, the litigants in *Scott* also could have framed their Fourth Amendment claim as an as-applied challenge to this statute.⁵² However,

45. Joseph Raz, *Why Interpret?*, 9 RATIO JURIS 349 (1996) (arguing that the legal interpretation consists of establishing the meaning of authoritative legal directives).

46. 550 U.S. 372 (2007).

47. See *id.* at 381. The deadly force at issue in *Scott* involved a pursuing officer ramming the suspect's car from behind. *Id.* at 374; see also *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2016–17 (2014) (holding that officers did not violate the Fourth Amendment by firing shots at a fleeing suspect during a high-speed chase that was threatening the lives of bystanders).

48. GA. CODE. ANN. § 17-4-20(b) (West 2014).

49. See *Scott*, 550 U.S. at 377–78. *Scott* involved a civil claim under 42 U.S.C. § 1983. *Id.* at 375. This jurisdictional posture, however, does not transform *Scott* into a case involving textual review because the Court was not required to interpret § 1983 in order to resolve the Fourth Amendment question at issue. See *supra* note 35 and accompanying text.

50. 471 U.S. 1 (1985).

51. *Id.* at 6–7.

52. Cf. *Skinner v. Switzer*, 131 S. Ct. 1289, 1298–1300 (2011) (holding that under 42 U.S.C. § 1983 a prisoner could bring an as-applied challenge to a Texas statute governing prisoners' access to post-conviction DNA testing).

they did not do so, and the Court treated *Scott* as a Fourth Amendment case that did not require any statutory interpretation to resolve on the merits.⁵³

Thus, to determine whether a case involves textual review, one must consider the court's perspective as to whether the case requires an act of statutory or regulatory interpretation. In a nontextual review case, the court does not perceive an actor to be bound by a statute when engaging in the conduct at issue. This does not mean, however, that the actor himself did not feel bound by a statute. Moreover, even in nontextual review cases where there is no codified text with the force of law governing an official's actions, the official may still have been operating in accordance with some type of regulatory policy. For example, courts sometimes review assertions of executive power that lack legislative authorization and will uphold those assertions of power in situations where Congress had traditionally acquiesced to such assertions.⁵⁴ When the president acts without statutory authority, however, his decisionmaking is typically the product of extensive internal deliberation and, some argue, meaningful legal constraints.⁵⁵ Likewise, lower-level officials, such as police officers conducting a warrantless search, may also be acting pursuant to (sometimes unwritten) departmental policies that a court does not need to interpret in order to resolve a case.⁵⁶

53. *Scott*, 550 U.S. at 377–78.

54. *See Medellin v. Texas*, 552 U.S. 491, 531 (2008) (“[I]f pervasive enough, a history of congressional acquiescence can be treated as a ‘gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.’” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981))); *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1500 (2010) (observing that Justice Frankfurter’s theory of legislative acquiescence “obviously requires” that Congress be given notice of the executive action in question).

55. *See generally* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009) (describing the confluence of internal and external constraints, including legal doctrine, that influence decisionmaking in the executive branch); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011) (reviewing BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010)) (arguing that legal constraints “have real, if imperfect, traction” within the executive branch “even on matters of grave importance and during times of heightened strain”).

56. *See, e.g., Ligon v. City of N.Y.*, 925 F. Supp. 2d 478, 520–22 (S.D.N.Y. 2013) (describing NYPD training practices on when and how to conduct warrantless stops and searches, and concluding the training suggested a departmental policy of promoting unlawful searches). Notably, the Supreme Court will occasionally grapple with the constitutionality of written police department policies in textual review cases.

Furthermore, even a government official who seems to be operating without any external policy guidance may be conducting her duties according to an unwritten set of rules and norms that guide her behavior.⁵⁷ Thus, a case that does not involve textual review is not necessarily one in which an official was acting lawlessly.

Accordingly, although many nontextual review cases involve the constitutionality of actions that are rule-governed, a court does not interpret those rules in the course of deciding the case.⁵⁸ Instead, the court looks only to the action itself, decides whether it is constitutional, and perhaps provides (or invokes) a legal standard to guide officials in future cases.⁵⁹ By contrast, in textual review cases, the court must interpret the statute or regulation that governed the action and decide whether that text was constitutional. Thus, the concept of textual review exposes how a court's perception of a constitutional problem differs when it is interpreting a law from when it is examining real-world actions without engaging in the practice of statutory interpretation.

3. AS-APPLIED CASES AND TEXTUAL REVIEW

Third, it bears emphasizing that the concepts of textual and nontextual review are not coextensive with the categories of facial and as-applied constitutional challenges. Quite obviously, a facial constitutional challenge to a statute is an instance of textual review. So too, however, is an as-applied challenge. In as-applied cases, even if a

See, e.g., Tennessee v. Garner, 471 U.S. 1, 5 (1985) (considering an as-applied challenge to a statute authorizing law enforcement to use deadly force on fleeing suspects and noting that the officer's actions were also governed by a departmental policy that was "slightly more restrictive" than the challenged statute).

57. *See* Meghan Strohine et al., *The Influence of "Working Rules" on Police Suspicion and Discretionary Decision Making*, 11 POLICE Q. 315, 316–18 (2008) (describing the "working rules police officers use to distinguish suspicious from nonsuspicious people, places, and circumstances" and evaluating the extent to which personal, organization, and legal factors influence the development of these rules); *see also* Cass R. Sunstein, *Moral Heuristics and Moral Framing*, 88 MINN. L. REV. 1556, 1558 (2004) (arguing that "moral shortcuts, or rules of thumb, that work well most of the time, but that also systematically misfire" play "a pervasive role in moral, political, and legal judgments").

58. In some cases, the court is explicit in its decision to avoid interpreting the regulations that govern an official. *See, e.g., Whren v. United States*, 517 U.S. 806, 815 (1996) (rejecting the argument that plainclothes police officers violated the Fourth Amendment by stopping a vehicle in violation of departmental policy).

59. *See* O'Rourke, *supra* note 5, at 418 (arguing that in order to implement a constitutional right, "a court must craft doctrinal rules that govern the conduct of law enforcement officials, and determine how significantly it wishes to limit, or expand, the officials' discretion about how best to implement the right—or whether to implement the right at all").

court devotes most of its attention to the actions that allegedly gave rise to a constitutional violation, it must still engage (at least tacitly) in some degree of statutory interpretation. *King*, for example, involved an as-applied challenge to a statute authorizing police officers to obtain DNA samples from arrested suspects.⁶⁰ Theoretically, it would have been possible for the Supreme Court to address this constitutional question in a case that did not involve a challenge to a statute. (That is, the Court could have taken a case from a jurisdiction that did not authorize post-arrest DNA searches by statute or formal agency regulation but where a police department chose to conduct such searches as a matter of policy.) However, the Court's analysis in *King* differed from the type of analysis that would have occurred in such a case because, in *King*, the Court first established the *meaning* of the Maryland statute before it reached a constitutional decision.⁶¹

With respect to the Court engaging in this interpretive step, *King* is not an outlier among as-applied cases. As Richard Fallon has argued, the decisions in as-applied cases range from broad rulings that invalidate many applications of a statute to narrow rulings that are limited to the facts at issue.⁶² Regardless of whether a court's holding is broad or narrow, however, it engages in an interpretive practice that does not occur in a case in which there is no statute at issue. If the court wishes to rule broadly, it must look beyond the facts of the case to consider other potential applications of the statute, and thus it engages in an interpretive practice.⁶³ If the court wishes to rule narrowly on an as-applied challenge, it is likely to consider whether it is possible to invoke the constitutional avoidance canon and adopt some saving interpretation of the challenged statute.⁶⁴

60. *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013).

61. *See id.* at 1967 (discussing the language of the statute).

62. *See* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 924 (2011) (arguing that “when a challenger asks a court to hold a statute invalid in fewer than all applications, there can be a considerable range of choice about just how broadly a ruling of partial invalidity might sweep”); *id.* at 968–69 (arguing that it is “sometimes doubtful” whether the Supreme Court’s description of a challenge as facial or as-applied “should be taken at face value”).

63. *See, e.g., Am. Trucking Assoc., Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429, 433–38 (2005) (interpreting the scope of a state statute to resolve an as-applied dormant commerce clause challenge).

64. *See, e.g., Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 204–10 (2009) (applying the constitutional avoidance canon to avoid reaching the merits of a constitutional challenge to the Voting Rights Act); Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 203–06 (arguing that Justice Roberts’s application of the constitutional avoidance canon in *NAMUDNO* led to an interpretation of the challenged statute that was not supported by the text or the legislative history).

Thus, regardless of a court's preferred constitutional agenda, resolving an as-applied challenge requires some form of statutory interpretation. The distinction between facial and as-applied challenges therefore is a variable that works alongside the distinction between textual and nontextual review in constraining a court's constitutional decisionmaking.⁶⁵ By paying attention to the distinction between textual and nontextual review, it is possible to identify features of constitutional adjudication in statutory cases that cannot be explained in terms of the traditional distinction between facial and as-applied cases.

B. *The Significance of Textual Review*

By introducing the concept of textual review, this Article draws attention to a subject that scholars have overlooked: how statutes, as opposed to legislatures, shape constitutional lawmaking (and likewise how regulations, as opposed to agencies, shape constitutional lawmaking). To be sure, questions about the scope and limits of legislative power are a mainstay of constitutional law and are central to doctrinal debates concerning separation-of-powers,⁶⁶ federalism,⁶⁷ and individual rights.⁶⁸ However, when constitutional scholars discuss these

65. See *infra* notes 197–200 and accompanying text.

66. Questions about the judiciary's role in policing Congress to protect the Constitution's separation-of-powers and federalism values are central to the debate over the "political safeguards of federalism." See Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000) (updating and defending the political safeguards theory); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1460–62 (2001) (summarizing and critiquing contributions to the political safeguards literature); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559–61 (1954) (arguing that the states' structural role in the national political process is sufficient to protect federalism values without aggressive judicial policing of Congress's Article I powers). For a recent discussion of the Supreme Court's specific doctrinal strategies for using Article I to police legislative discretion, see Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 586–614 (2013) (describing how the Supreme Court has developed a "de facto system of 'tiers of scrutiny'" that governs the scope of Congress's enumerated powers under Article I of the Constitution).

67. See *supra* note 66 and accompanying text; see also, e.g., Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2051 (2014) (arguing that recent doctrinal shifts in federalism cases have "partially revived Justice Holmes's conviction that the best way to approach the federalism question is by inquiring into the scope of Congress's powers").

68. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–75 (1980) (presenting the foundational account of political process theory, which holds that courts should be ready to invalidate statutes that are the product of a defective political process, and using the theory to defend the Warren Court's equal protection decisions); Nimer Sultany, *The*

questions of legislative power, they traditionally deploy the concept of deference.⁶⁹ While scholars have not adhered to a consistent definition of “deference,”⁷⁰ the concept is central to debates over whether courts should defer to the coordinate political branches’ understandings of the Constitution—that is, debates over judicial supremacy.⁷¹ It is likewise central to debates over whether courts should defer to legislative findings

State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification, 47 HARV. C.R.-C.L. L. REV. 371, 405–08 (2012) (summarizing and critiquing the contributions of more recent political process theorists). For accounts of how political process theory has tacitly influenced recent equal protection and substantive due process doctrines, see Anthony O’Rourke, *Windsor Beyond Marriage: Due Process, Equality & Undocumented Immigration*, 55 WM. & MARY L. REV. 2171, 2194 (2014) (arguing that the reasoning of *United States v. Windsor* involves an innovative use of political process theory in a substantive due process context); Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 181–83, 223–38 (2012) (explaining and defending the Supreme Court’s holdings in equal protection vote dilution cases on political process grounds). *But see* Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 722 (1991) (arguing that John Hart Ely’s political process theory “simply misdescribes what the Court does when it decides cases”).

69. This vast literature ranges from normative legal scholarship on the extent to which courts *should* defer to legislative judgments, *see, e.g.*, ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77–88 (1980), to descriptive work in political science on the extent to which the political branches do in fact constrain the judiciary, *see, e.g.*, MICHAEL A. BAILEY & FORREST MALTZMAN, *THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE* 164–66 (2011); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

70. *See* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 4–5 (1983) (arguing that deference is “not a well-defined concept but rather an umbrella that has been used to cover a variety of judicial approaches”); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 945 (1999) (“[T]he concept of deference remains malleable, indeterminate, and not well-defined.”); *see also* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 882 (2013) (characterizing the “deference question” as “radically under-theorized” (internal quotation marks omitted)).

71. For a sampling of this massive literature, *see* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); KEITH E. WHITTINGTON, *THE POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* (2007); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001); Frank I. Michelman, *Living with Judicial Supremacy*, 38 WAKE FOREST L. REV. 579 (2003); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004); Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656 (2000); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045 (2004).

in support of statutes that are being challenged as unconstitutional.⁷² Common to most of the constitutional deference literature, however, is a focus on the relationships between the Supreme Court and Congress (as well as between the Court and the executive branch) as distinct political institutions.

This scholarly focus on deference to legislatures, to the exclusion of any serious theoretical examination of legislation, has obscured important questions about how statutes—that is, the actual texts that legislatures produce—shape the constitutional reasoning of judges. Specifically, the deference framework requires scholars to frame constitutional decisionmaking in terms of whether one political institution—the Supreme Court—should (or does) defer to other political institutions—Congress and the executive. This aspect of the deference framework has given rise to a significant methodological limitation that this Article rejects in order to better analyze the ways in which statutes constrain constitutional decisionmaking.

This methodological limitation relates to the domain of constitutional cases that scholars have relied upon to study the dynamics between courts and legislatures. With respect to studies of congressional deference, the domain consists exclusively of cases involving statutes.⁷³ Specifically, legal scholars traditionally have explored questions of legislative deference by using interpretive and doctrinal methodologies to evaluate whether the Supreme Court has deferred to Congress in specific

72. For examples of this scholarship, see DAVID L. FAIGMAN, *CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS* (2008); Araiza, *supra* note 70; Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465 (2013); Caitlin E. Borgmann, *Rethinking Judicial Deference to Legislative Fact-Finding*, 84 IND. L.J. 1 (2009); Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); F. Andrew Hessick, *Rethinking the Presumption of Constitutionality*, 85 NOTRE DAME L. REV. 1447 (2010); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69 (2008); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985). Additionally, scholars and judges also invoke the concept of constitutional deference to analyze the degree to which courts defer to the legal interpretations and factual findings of administrative agencies. See Solove, *supra* note 70, at 945; see also Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029 (2011) [hereinafter Berger, *Individual Rights*]; John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992). Because the scope of this Article is limited to the relationship between courts and statutes, I will forego any deeper discussion of this use of the concept.

73. And, with respect to studies of executive deference that are largely outside the scope of this Article, the domain of cases consists of cases in which the president's actions are constitutionality challenged.

cases.⁷⁴ Based on such case-specific analyses, these scholars tend to make generalizable inferences about the Court's decisionmaking based on these case studies.⁷⁵ Thus, if a constitutional scholar wishes to evaluate whether the Court exhibited deference when reviewing a statute, she will focus on the holding of the case in which the statute was being challenged and will explore the specific doctrinal moves that the Court made in the majority opinion. Given the interpretive demands of this technique, legal scholars will often focus on a subset of cases that are particularly current or that have achieved canonical status.⁷⁶

Surprisingly, political scientists have also disregarded cases that do not involve statutes when studying the extent to which Congress can constrain the Supreme Court's constitutional decisionmaking. The statistical approach to studying Supreme Court decisionmaking requires that scholars amass sufficient data to test rival hypotheses that might be superior to the scholar's favored hypothesis in terms of explaining a certain set of observations.⁷⁷ Given this methodological imperative, it would seem that political scientists who study the dynamics between the Supreme Court and Congress should examine both constitutional cases that involve a statute and cases that do not involve a statute but which involve substantively similar constitutional questions. It appears, however, that political scientists who examine whether the Supreme Court defers to Congress in separation-of-powers cases have restricted their inquiry to those cases in which the Court is reviewing federal legislation.⁷⁸

74. See Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 155 (2002) (explaining that, in contrast to empirical political science literature, "[t]he substance of much legal scholarship is doctrinal, interpretive, and normative").

75. See, e.g., Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 27–64 (2012) (concluding that the Roberts Court is insufficiently respectful of the democratic political process based on the Court's holdings in *Citizens United v. FEC*, 558 U.S. 310 (2010), *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), and a range of other constitutional and statutory cases).

76. Cf. Goldsmith & Vermeule, *supra* note 74, at 159 (defending legal scholars' tendency to examine cases that "have attained canonical status in the relevant academic community, or have become focal points around which academic communities organize their debates").

77. See Epstein & King, *supra* note 18, at 76–82 (discussing the need to identify control variables in order to make reliable causal inferences).

78. For example, the most comprehensive empirical assessment on whether Congress constrains the Supreme Court's constitutional decisionmaking relies on a data set of every Supreme Court decision involving the constitutionality of federal legislation. See Tom S. Clark & Keith E. Whittington, *Ideology, Partisanship, and Judicial Review of Acts of Congress, 1789–2006* (Jan. 1, 2011) (unpublished manuscript) (on file with author) (concluding, based on the same database, that the Supreme Court is more likely to facially invalidate statutes when it is in ideological conflict with Congress, but finding no

This restriction limits the depths to which one can explore how Congress might constrain the Supreme Court's constitutional decisionmaking. As this Article argues, the existence of a statute might shape a court's constitutional decisionmaking for reasons that are distinct from those that deference scholars have identified.⁷⁹ In order to make a case for these claims, I engage in a comparative analysis of cases that address similar constitutional issues but differ with respect to whether the Court is reviewing a statute.⁸⁰ Although I employ the doctrinal and interpretive methodologies of traditional legal scholarship, my comparative analysis makes use of a promising control variable—constitutional cases that do not involve statutes—to identify unexamined constraints on courts' constitutional decisionmaking.

By expanding the denominator of cases that one examines, it is possible to explore features of constitutional lawmaking that deference scholars have thus far overlooked. Consider, for example, the difference between the as-applied Fourth Amendment challenge in *King* to a statute authorizing post-arrest DNA searches and a hypothetical challenge to a post-arrest DNA search that a police officer undertook pursuant to an unwritten departmental policy. The constitutional issue in each case—whether the search was reasonable within the meaning of the Fourth Amendment—would be identical, and a Supreme Court holding in one case would govern the outcome in the subsequent case. In the as-applied case, however, the Court must engage in statutory interpretation as a step toward deciding whether the search is unconstitutional.⁸¹

Does this practice influence the ways in which a court reasons its way through a constitutional problem? This question is impossible to answer by focusing exclusively on the reasoning of *King*, and it is difficult to answer by limiting oneself to imagined hypotheticals like the one above. However, one can compare the decision in *King* to other

such correlation with respect to as-applied challenges); Richard H. Pildes, *Is the Supreme Court A "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 143 (2010) (characterizing Clark and Whittington's article as "the most comprehensive study" of the Court's deference to the coordinate branches in constitutional cases); see also, e.g., BAILEY & MALTZMAN, *supra* note 69, at 164–66 ("To identify cases where a doctrine of deference to Congress is particularly applicable . . . [w]e . . . read each case identified . . . to ensure that they involved the constitutionality of a law enacted by Congress and the president."); Jeffrey A. Segal et al., *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89 (2011) (testing whether Congress constrains the Supreme Court's constitutional decisionmaking by estimating the ideological preferences of the Court and Congress over legislation that has been challenged as unconstitutional).

79. See *infra* Part III.

80. See *infra* Part II.

81. See *supra* notes 61–64 and accompanying text.

Fourth Amendment cases that involve similar constitutional issues but that do not involve any legislative text.⁸² Thus, by rejecting the simplifying assumptions of the deference framework, one can make use of the conceptual tools necessary to ask this question—and perhaps even to answer it.

II. STATUTORY CONSTRAINTS & REGULATORY DECISIONMAKING

A primary goal of this Article is simply to argue that scholars should begin to think more rigorously about the ways in which statutes constrain constitutional decisionmaking. As an affirmative project, however, this Article offers a hypothesis about how constitutional cases involving statutes differ from those that do not. Specifically, this Part argues that courts are less likely to use doctrine to aggressively regulate the behavior of nonjudicial officials. This is a descriptive claim, which I support by examining the Supreme Court's analyses in cases that involve similar constitutional questions but differ with respect to whether the Court must interpret a statute to decide that question. I do not purport, however, to provide an exhaustive or even fully representative survey of the court's analysis in cases involving statutes. Instead, my aim is to provide an account of constitutional decisionmaking in statutory and nonstatutory cases that is plausible, if not persuasive.⁸³ If this account is sufficiently compelling, it will adequately justify the deeper exploration (provided in Part III of this Article) of the structural features of textual review that might motivate courts to analyze those cases differently than they do cases which do not involve textual review.

A. *Defining Regulatory Decisionmaking*

This Article's descriptive claim might best be articulated in the inverse: in constitutional cases that do not involve textual review, courts tend to engage in what one might call a "regulatory" mode of decisionmaking, characterized by doctrinal rules that impose more detailed and burdensome obligations on the officials they govern. Inversely, in constitutional cases that require the court to interpret a statute or regulation to decide on the merits, courts are less likely to engage in this type of regulatory decisionmaking. This concept of regulatory judicial decisionmaking is one that scholars of constitutional

82. See *infra* notes 125–38 and accompanying text.

83. Cf. Jeffrey R. Lax, *The New Judicial Politics of Legal Doctrine*, 14 ANN. REV. POL. SCI. 131, 134 (2011) (urging legal scholars to examine "how judges use doctrine to get what they want" and arguing that such scholarship is valuable as a springboard for formal and empirical work).

law and criminal procedure sometimes invoke⁸⁴ but rarely define. Moreover, those scholars who use the concept of regulatory decisionmaking have not applied it to analyze the dynamics between courts and legislatures.⁸⁵ Therefore, some elaboration on the concept is helpful.

84. See, e.g., Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4 (1984) (arguing that “[t]he Supreme Court is a regulator”); Eric J. Miller, *Putting the Practice Into Theory*, 7 OHIO ST. J. CRIM. L. 31, 38 (2009) (characterizing criminal procedure doctrines as “regulatory strategies” designed to govern the conduct of low-level actors); O’Rourke, *supra* note 5, at 409 (arguing that in criminal procedure cases “the court must . . . act as a regulator and craft a set of doctrinal rules designed to ensure that law enforcement officials will implement . . . [the Court’s] constitutional objective”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (observing that “constitutional criminal procedure is a species of substantive criminal law for cops”); see also Rappaport, *supra* note 5, at 103 n.1 (citing additional scholarship characterizing criminal procedure doctrine as a “substantive form of regulation of law-enforcement officers and other state actors”).

85. When deploying the deference framework, see *supra* notes 66–76 and accompanying text, separation-of-powers scholars will often treat deference as a binary whereby a court is deemed to have deferred to a legislature if it upheld a law and to have not deferred to the legislature if it invalidated the law. See, e.g., Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1073 (2008) (“Deference . . . involves a decisionmaker (D1) setting aside its own judgment and following the judgment of another decisionmaker (D2) in circumstances in which the deferring decisionmaker, D1, might have reached a different decision.”). Political scientists routinely make this simplifying assumption when studying the extent to which Congress constrains the Supreme Court’s constitutional decisionmaking. See, e.g., Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 972 (2009) (concluding from a database of cases in which the Supreme Court upheld or invalidated federal statutes that the Supreme Court is constrained by Congressional efforts to “curb” the Court’s independence); Clark & Whittington, *supra* note 78, at 2–3, 23 (concluding based on the same database that the Supreme Court is more likely to facially invalidate statutes when it is in ideological conflict with Congress, but finding no such correlation with respect to as-applied challenges); Luke M. Milligan, *Congressional End-Run: The Ignored Constraint on Judicial Review*, 45 GA. L. REV. 211, 232–41 (2010) (summarizing additional relevant separation-of-powers literature in political science). However, constitutional scholars also commonly employ this binary assumption. Formally, judges and many deference scholars distinguish between the decision to defer to a legislature’s factual determinations and the ultimate legal decision whether to invalidate the law. See Araiza, *supra* note 70, at 886 (arguing that the Supreme Court assumes a distinction between legal conclusions and deference to factual determinations “by reserving for itself the power to interpret law while recognizing a role for congressional fact-finding”); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233–35 (1985) (arguing that the Supreme Court creates doctrinal confusion when making a sharp distinction between fact-finding and legal analysis because “law and fact . . . are points of rest and relative stability on a continuum of experience). *But see* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (arguing that there is no “qualitative or ontological distinction” between law and fact); McGinnis & Mulaney, *supra* note 72, at 93–94 (“[I]t is ultimately difficult to understand what it would mean to adhere to a

For the purposes of this Article, a court engages in “regulatory” decisionmaking when it uses doctrine to incentivize nonjudicial officials to engage in specific behaviors that are not clearly set forth by a statute, regulation, or constitutional text. To further clarify, a constitutional decision can be regulatory in at least two respects. First, the decision may articulate rules of liability that incentivize officials to either perform or avoid performing specific actions.⁸⁶ In this regard, some of the most familiar rules of constitutional criminal procedure—such as that a warrantless search is presumptively unreasonable,⁸⁷ or that police

metaphysical or epistemological distinction between legal interpretations and social facts since law itself is a social fact.”); Saul M. Pilchen, *Politics v. The Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments*, 59 NOTRE DAME L. REV. 337, 396–97 (1984) (arguing that “characterizing a matter as one of law or a fact is no more than a conclusion . . . that one branch of government rather than another should make the decision in question”). However, even those who defend this fact-law distinction argue that, in practice, the Court’s decision whether to defer to a legislature’s factual findings almost invariably determines the outcome of the case. See Araiza, *supra* note 70, at 957 (acknowledging that “if one controls the facts in a case, one likely controls the result and, for all practical purposes, the law”); Eric Berger, *In Search of A Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 4 (2010) (“The levels of deference—judicial respect for the political branches’ policy judgments and factual determinations—are often outcome determinative in constitutional cases.” (footnote omitted)); see also Solove, *supra* note 70, at 953–54 (“The practice of deference has drastic effects on the outcomes of cases because factual and empirical evidence plays an enormously influential role in the interpretation of the Constitution.”).

86. This description of how courts construct liability rules to implement federal constitutional rights is grounded in what Mitch Berman has described as the “decision rules” model of constitutional adjudication. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). The decision rules model distinguishes between a court’s articulating of the *meaning* of a constitutional provision, which Mitch Berman calls a “constitutional operative proposition,” and the “decision rule” by which courts determine whether the constitution has been satisfied. *Id.* at 9. A government official who wishes to fully honor her constitutional obligations (as defined by the judiciary) will try to comply with the constitutional operative propositions that a court articulates. See *id.* at 87–88 (discussing the constitutional obligations of “conscientious state actors”); see also Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533, 1602–04 (2007) (explaining that under the decision rules model it is the president’s obligation to comply with constitutional operative propositions). Ultimately, however, constitutional decision rules determine what a reluctant government official must do in order to avoid judicial sanction. See Berman, *supra*, at 10–12. For other significant contributions to the decision rules model, see RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1656 (2005); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

87. See *Payton v. New York*, 445 U. S. 573, 586 (1980).

generally must recite the *Miranda* warnings before conducting an interrogation⁸⁸—are exemplars of regulatory decisionmaking. Second, a decision may impose detailed and relatively burdensome remedies to address the violation of a constitutional right.⁸⁹ This type of regulatory decisionmaking is exemplified by cases in which the Supreme Court authorizes judicial orders designed to remedy systemic constitutional violations such as prison overcrowding⁹⁰ and school segregation.⁹¹

In practice, it is frequently difficult, and sometimes misleading, to disentangle the doctrinal linkages between constitutional rights, liability rules, and remedies.⁹² However, with respect to both the process of determining liability and that of crafting remedies, scholars have called attention to the ways in which the Supreme Court constructs precise doctrinal rules to implement open-textured constitutional norms.⁹³ More recently, political scientists and legal scholars have begun to systematically examine the ways in which judges also use doctrine instrumentally to advance their ideological aims and extraconstitutional policy goals.⁹⁴ As Jeffrey Lax has observed,⁹⁵ legal doctrine can act both

88. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

89. For important systematic examinations of the relationship between constitutional rights and judicial remedies, see, for example, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635 (2006); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Owen M. Fiss, *Foreword: The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 1–2 (1979); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CALIF. L. REV. 735, 740 (1992); Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1110 (1969).

90. See *Brown v. Plata*, 131 S. Ct. 1910, 1922–23 (2011).

91. See *Milliken v. Bradley*, 418 U.S. 717, 721, 745 (1974) (authorizing interdistrict school desegregation remedies when constitutional violations in one school district have a “significant segregative effect” in another). *But see Missouri v. Jenkins*, 515 U.S. 70 (1995) (limiting judicial authority to such remedies for intradistrict constitutional violations).

92. See Fallon, Jr., *supra* note 89, at 683 (arguing that “justiciability, substantive, and remedial doctrines are substantially interconnected and that courts frequently face a choice about which doctrine to adjust in order to achieve acceptable results overall”); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 873–89 (1999) (arguing that the undesirability of certain remedies shapes the ways in which courts define the scope of particular constitutional rights).

93. See *supra* notes 86, 89.

94. See, e.g., Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045 (2008); O’Rourke, *supra* note 5, at 445. Outside legal scholarship, political scientists contributing to the “new judicial politics” literature have developed innovative formal models to examine the ways in which ideological differences between judges are reflected in doctrine and how judges can strategically use doctrine to advance their policy goals. See Lax, *supra* note 83 (surveying the “new judicial politics” literature); see also Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political*

as a tool by which judges can pursue their policy aims (as political scientists typically argue)⁹⁶ and as a meaningful constraint on judicial decisionmaking (as legal scholars traditionally assume).⁹⁷ In order to effectively advance their policy goals, judges must craft doctrinal rules that effectively communicate those goals to the officials who are empowered to execute them.⁹⁸ Thus, even ardently ideological judges will care about doctrine, precedent, and other forms of legal discourse “because they wield these as communicative devices to achieve policy goals.”⁹⁹ However, because legal discourse is an imperfect tool for communicating an explicitly ideological goal, this mode of communication will constrain judges to a greater degree than if they were able to dictate their preferred outcome of a case without engaging in traditional modes of legal reasoning.¹⁰⁰

As this new judicial politics literature suggests, a judicial opinion can be regarded as “regulatory” to the extent that the judge uses doctrine to influence and regulate the behavior of nonjudicial officials. Specifically, the Supreme Court frequently uses constitutional doctrine to influence the substantive outcomes of lower court cases—for example, by establishing a rational basis standard of review for equal protection

Control, 23 J.L. ECON. & ORG. 326 (2007) (modeling the judicial choice between creating determinate and indeterminate legal doctrine in light of factors including the expected ideological preferences of lower court judges); Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765 (2012) [hereinafter Lax, *Political Constraints*] (elaborating upon Jacobi’s and Tiller’s model to the ways in which judges’ doctrinal choices are influenced by factors including the desire to control case outcomes and conflicts with lower courts). Until recently, scholars of judicial decisionmaking have overlooked this research question in their haste to affiliate with either the “attitudinal” or “legal” model of judicial behavior. See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1740–41 (2010) (arguing that “[t]he widespread adoption of a theoretical vocabulary that pits the ‘legal model’ against the ‘attitudinal model’ has perhaps encouraged a tendency” to erroneously view the models as mutually exclusive).

95. See Lax, *supra* note 83, at 135.

96. Specifically, scholars who adhere to the “attitudinal model” emphasize the degree to which the Supreme Court Justices’ values and attitudes can predict their votes. See *supra* note 29 and accompanying text.

97. See Law & Zaring, *supra* note 94, at 1674 & nn.83–85 (citing legal scholarship that criticizes attitudinal scholars for providing unsatisfactory accounts of how law shapes judicial decisionmaking and arguing that empirical scholars should not “focus[] upon ideological explanations of judicial behavior to the exclusion of legal explanations”); Lax, *supra* note 83, at 132 (arguing that “the legal-attitudinal-strategic framework has . . . stunted theory development and blocked . . . fruitful” intersections between doctrinal and empirical scholarship).

98. See Lax, *supra* note 83, at 136.

99. See *id.*

100. See *id.*

claims that the Court disfavors.¹⁰¹ Additionally, the Court can (and does) use doctrine to govern the behavior of other government officials even when its formal constitutional authority extends only to regulating the decisions of lower courts.¹⁰² Consider, for example, Mitch Berman's analysis of the rules the Supreme Court established in *Miranda v. Arizona*¹⁰³—a decision that is unquestionably regulatory in character. The Court established the familiar “*Miranda* warnings” to enforce the Fifth Amendment's Self-Incrimination Clause, which, by its terms, guarantees only a trial right not to “be compelled in any criminal case to be a witness against himself.”¹⁰⁴ In *Miranda*, Berman argues, the Supreme Court correctly interpreted the Self-Incrimination Clause only to bar the introduction of a defendant's compelled statement in a criminal case regardless of whether the statement was made outside formal proceedings.¹⁰⁵ However, to enforce this interpretation, the Court established a rule that directed trial courts not to admit any statements that a defendant made during a custodial interrogation unless the defendant was first advised of specific protections—the now-famous “*Miranda* warnings”—and chose to waive those protections.¹⁰⁶ Because this rule is directed toward lower courts and governs admission of evidence, it is a textually legitimate implementation of the Self-Incrimination Clause's trial right.¹⁰⁷ At the same time, however, the rule is obviously intended to affect the conduct of law enforcement officers, who (the Court assumed) wish to ensure that the statements they elicit from criminal suspects are admissible in court.¹⁰⁸ Thus, in *Miranda*, the Court exercised its constitutionally legitimate authority under the Self-Incrimination Clause to regulate the conduct of lower courts, and it

101. See Heytens, *supra* note 94, at 2048, 2065–66. Additionally, the Court can monitor and correct lower court decisions through doctrinal strategies such as characterizing an issue as a question of law (and thus subject to *de novo* appellate review) rather than a question of fact (and therefore subject to deferential appellate review). *Id.* at 2048.

102. See O'Rourke, *supra* note 5, at 415–22 (describing how the Supreme Court uses criminal procedure doctrine to regulate the behavior of police and other nonjudicial officials).

103. 384 U.S. 436 (1966); see Berman, *supra* note 86, at 126–29.

104. U.S. CONST. amend. V; see Berman, *supra* note 86, at 126–29; see also *id.* at 32–35 (providing an exposition of Berman's decision-rules model of constitutional adjudication).

105. See *Miranda*, 384 U.S. at 460–61; Berman, *supra* note 86, at 117–18 (arguing for this interpretation of *Miranda*).

106. Berman, *supra* note 86, at 117–18.

107. See *id.*

108. See *id.* at 129 (arguing that “[t]he *Miranda* majority expected and hoped that police officers wanted inculpatory statements to be admitted and would, therefore, issue the warnings (and respect their invocation by suspects”).

used that authority to create rules that incentivize police officers to engage in a specific type of conduct when conducting an arrest. Accordingly, while Berman conceives of constitutional “decision rules” as directions for lower courts to adjudicate constitutional claims, it is also appropriate to think of courts as engaging in a “conscious process of rule making” for nonjudicial officials.¹⁰⁹

Beyond obviously regulatory decisions such as *Miranda*, constitutional cases fall on a spectrum with regard to whether they are more or less regulatory with respect to the conduct of nonjudicial officials. Decisions are undoubtedly not regulatory if they offer no clear guidance to the officials who are bound to follow whatever constitutional requirement is at issue in a case. An extreme example of such a decision is a *per curiam* opinion in which the court invalidates a statute or reverses a conviction on constitutional grounds without providing any analysis.¹¹⁰ In more subtle cases, a decision is not regulatory to the extent that it is “narrow,” focusing on the particulars of the dispute before the court without attempting to guide officials’ behavior in subsequent cases.¹¹¹ Hence, the task of identifying whether a decision is “regulatory” requires a contextualized analysis of whether an opinion is likely to influence the behavior of nonjudicial officials in specific and predictable ways.

This task does not always admit of easy answers. Scholars who examine the instrumental use of doctrine have assumed that courts use bright-line rules to govern and monitor the behavior of officials and use flexible standards when they do not wish to undertake this form of regulation.¹¹² However, the regulatory/nonregulatory distinction does not fall along such a simple axis. Of course, bright-line rules such as those in

109. Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1470 (1995); Steiker, *supra* note 84, at 2470 (describing constitutional criminal procedure rules as “conduct rules” that “are addressed to law enforcement agents regarding the constitutional legitimacy of their investigative practices”).

110. See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*) (reversing an obscenity conviction without analysis); Mary Anne Case, *Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of Bush v. Gore as a Chapter in the History of Ideas About Law*, 70 U. CHI. L. REV. 55, 63 n.54 (2003) (describing the Warren Court practice of “Redrupping,” whereby the Court would invalidate obscenity laws *per curiam* without any of the Justices offering reasons for their decision).

111. Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 362–64 (2006) (describing minimalist judges as favoring “narrow rulings” in constitutional cases that “do not venture far beyond the problem at hand, and attempt to focus on the particulars of the dispute before the Court”).

112. See Heytens, *supra* note 94, at 2057–58; Lax, *Political Constraints*, *supra* note 94, at 768–70. For two influential contributions to the rules-versus-standards literature, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 586 (1992); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 60–61 (1992).

Miranda are regulatory in terms of incentivizing police to engage in specific forms of conduct. However, courts can also influence the behavior of nonjudicial officials by articulating a balancing test that incentivizes specific sets of behavior. Suppose, for example, that the Supreme Court chose to modify the holding in *Miranda* by requiring that courts evaluate whether a defendant's self-incrimination right was violated by balancing four factors, none of which are dispositive: (1) whether the defendant was read the traditional "*Miranda* warnings," (2) whether the defendant's interrogation was videotaped, (3) whether the defendant was given a 10 to 15 minute break per hour during the interrogation, and (4) whether the interrogating officer either touched or raised her voice at the defendant. Under the rules/standards taxonomy, this balancing test is a standard because it requires judges to make an *ex post* legal determination of whether specific conduct violates the Fifth Amendment.¹¹³ However, this standard would undoubtedly incentivize police departments to adopt specific interrogation policies concerning the reading of traditional *Miranda* warnings, videotaping interrogations, providing breaks, and officers' physical conduct and tone of voice during interrogations.

Admittedly, this definition of regulatory decisionmaking is incomplete. In an important respect, all constitutional decisions involve a choice of how to regulate state action.¹¹⁴ If a court chooses to uphold a statute without further elaboration, it is approving a regulatory system that is meant to guide executive action. If the court invalidates a statute but relies on the legislature to create new rules to govern executive action, it is also making a regulatory choice. This Article, however, reserves the term "regulatory" for decisions in which the court chooses to regulate officials directly through doctrine. In doing so, the Article draws attention to the role that courts cast for themselves alongside legislatures and executive agencies in the task of governing the day-to-day actions of state officials.

113. See Kaplow, *supra* note 112, at 560 (maintaining that "the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act"); Sullivan, *supra* note 112, at 60–61 (characterizing the use of balancing tests as "standard-like in that it explicitly considers all relevant factors with an eye to the underlying purposes or background principles or policies at stake").

114. Cf. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 910 & n.184 (1987) (describing the Holmesian insight that the legal status quo is not a prepolitical baseline and that judicial decisions upholding the status quo do not constitute "inaction").

B. Regulatory Decisionmaking and Textual Review

In order to decide whether a decision is “regulatory” in character, one must carefully assess whether a decision is likely to influence the behavior of nonjudicial officials in ways that are consistent with the court’s apparent policy aims. This is fundamentally an interpretive task, and accordingly this Article supports its hypothesis by examining sets of cases that address similar constitutional questions but differ with respect to whether the constitutional challenge concerns a statute.¹¹⁵ Given this methodology, the cases involve only those doctrinal areas for which there are both statutory and nonstatutory constitutional cases.

By using this methodology, it is possible to identify significant ways in which the presence of a statute appears to constrain constitutional decisionmaking. Specifically, the cases below suggest that courts are less inclined toward regulatory decisionmaking in constitutional cases that involve textual review. By contrast, the holdings in cases that do not involve textual review often include rules that impose more specific, and often more burdensome, substantive obligations on the officials they govern. Rather than simply address whether or not an official’s actions violated the Constitution, these holdings will articulate how such officials could modify their conduct in future cases to avoid constitutional sanction.

1. CRIMINAL PROCEDURE

It is no accident that the governance regime of *Miranda* was established in a case in which there was no statute at issue—that is, in a case not involving textual review. As William Stuntz observed, constitutional criminal procedure functions “like a species of tort law, defining liability rules for a given set of actors in the criminal justice system but using the threat of reversal in criminal litigation rather than damages or injunctive relief to enforce those standards.”¹¹⁶ That is, criminal procedure doctrine is designed to implement the Constitution’s criminal procedure guarantees but often does so by incentivizing specific behaviors on the part of law enforcement officers. As Anthony Amsterdam presaged, a plausible reason for this doctrinal trajectory is that legislatures have been largely absent from the creation of the most

115. See *supra* Part I.B.

116. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 17 (1997).

significant criminal procedure protections that have been developed since the 1960s.¹¹⁷

When a constitutional criminal procedure case involves statutory interpretation, however, the Supreme Court tends to engage in a far less regulatory mode of decisionmaking. In *United States v. Salerno*,¹¹⁸ for example, the Court upheld a provision of the Bail Reform Act¹¹⁹ authorizing the pretrial detention of defendants in cases where no combination of release conditions “will reasonably assure . . . the safety of any other person and the community.”¹²⁰ Rejecting a substantive due process challenge to this statute, the Court recognized that pretrial detention implicated a fundamental right to liberty but held that the Bail Reform Act was adequately tailored to advance a “legitimate and compelling” governmental interest.¹²¹ Because of the famously mercurial nature of its substantive due process doctrine, the Court had considerable intellectual freedom to articulate whatever protections it thought appropriate to safeguard the liberty interest it identified.¹²² For example, the Court could have suggested that pretrial detention is categorically appropriate in any case where the defendant has a record suggesting he

117. See *supra* note 4; see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 76 (2011) [hereinafter STUNTZ, *THE COLLAPSE*] (“Elected state legislators and members of Congress write criminal codes and sentencing rules. Procedure is governed by judges—not just the politician judges who staff state courts, but the appointed, life-tenured judges and Justices who sit on the federal bench”). Stuntz argues that legislatures’ absence from criminal procedure, and focus on substantive criminal law, can be attributed to the regulatory nature of constitutional criminal procedure doctrine. See STUNTZ, *THE COLLAPSE*, *supra*, at 76; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791–807 (2006). One does not have to accept Stuntz’s causal claims, however, to conclude that legislatures’ reluctance to create criminal procedure rules has encouraged the Court to produce broad regulatory constitutional doctrines. Cf. Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1073–79 (2013) (reviewing STUNTZ, *THE COLLAPSE*, *supra*) (challenging Stuntz’s causal claims about the effect of constitutional criminal procedure doctrine on legislative behavior).

118. 481 U.S. 739 (1987).

119. 18 U.S.C. §§ 3141–50 (2012).

120. *Salerno*, 481 U.S. at 742 (quoting § 3142(e)(1)).

121. *Id.* at 750. More precisely, the Court held that the Bail Reform Act’s detention provision did not violate substantive due process because: (1) Congress did not “expressly intended to impose punitive restrictions,” (2) an “alternative purpose to which” the statute “may rationally be connected is assignable for it,” and (3) the statute’s provisions are not “excessive in relation to the alternative purpose assigned to it.” *Id.* at 747 (alterations and internal quotation marks omitted).

122. See, e.g., *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (contending that the “concept” of substantive due process “invests judges with an uncanalized discretion to invalidate federal and state legislation”).

or she presents a flight risk or a public danger.¹²³ The Court, however, deferred to the regulatory structure that Congress constructed to protect the right and held that the safeguards in the Bail Reform Act were both sufficient and necessary to protect a defendant's pretrial liberty interest in noncapital cases.¹²⁴ Thus, rather than construct its own rules to regulate the conduct of trial courts making bail determinations (as the doctrinal freedom of the substantive due process right could have plausibly allowed it to do), the Court entrusted those regulatory determinations to the legislature.

Beyond *Salerno*, recent Fourth Amendment cases governing new technologies offer particularly striking comparative examples of how statutory interpretation constrains decisionmaking in constitutional criminal procedure cases. Relative to other areas of criminal procedure, Congress is relatively active in creating investigative rules governing the use of new technologies.¹²⁵ Additionally, as Orin Kerr has persuasively argued, federal appellate courts have consistently relied on the federal Wiretap Act¹²⁶ to define the scope of the Fourth Amendment's protections with respect to technological surveillance within the United States.¹²⁷ Likewise, in cases involving the wiretapping of American

123. For example, the Colorado Constitution has been interpreted to require judges to deny bail to suspects arrested for capital crimes. See *People v. Dist. Court*, 529 P.2d 1335, 1335–36 (Colo. 1974) (en banc). Traditionally, however, states have permitted courts the discretion to grant bail in such cases. See O'Rourke, *supra* note 68, at 2210–12.

124. Specifically, the Court identified the Act's safeguards—which include a “full-blown adversary hearing” in which “the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person”—as creating the “narrow circumstances” in which the Government's “interest in crime prevention was at its greatest.” *Salerno*, 481 U.S. at 750. It is under these circumstances, the Court held, that the Government interest at stake is “sufficiently weighty” for a defendant's substantive due process right to “be subordinated to the greater needs of society.” *Id.* at 750–51. Elsewhere in its opinion, however, the Court identified a possible exception to the need for individualized bail determinations by stating in dicta that “[a] court may . . . refuse bail in capital cases.” *Id.* at 750.

125. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807, 839–56 (2004) (arguing that “criminal investigations in developing technologies have tended to be governed by statute”).

126. See 18 U.S.C. §§ 2510–22 (2012).

127. See Kerr, *supra* note 125, at 852–54; see also *Clapper v. Amnesty Intern., U.S.A.*, 133 S. Ct. 1138, 1143 (2013) (holding that attorneys and human rights, labor, legal, and media organizations lacked standing to challenge the Foreign Intelligence Surveillance Act (FISA)). Notably, the Federal Wiretap Act was patterned on the holding in *Berger v. New York*, 381 U.S. 41 (1965). See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 4.6(b) (3d ed. 2013). The statute thus illustrates an important dialectic between courts and legislatures in the process of constitutional regulation.

citizens in foreign countries, courts have generally held that the constitutionality of the search rested on whether the wiretapping conformed to the statutory law of the country in which it occurred.¹²⁸ Similarly, in *King*, the Court held that the statutory protections contained in Maryland's DNA Collection Act were sufficient to protect the defendant's Fourth Amendment rights.¹²⁹ Absent from the Court's analysis, however, was any additional direction to police departments or legislatures about safeguards that might better ensure that officers acted within the scope of the Fourth Amendment when obtaining post-arrest DNA samples.¹³⁰ Thus, like the appellate courts that Kerr examines, the Supreme Court in *King* relied on the legislature to establish a regulatory framework that adequately protects suspects' Fourth Amendment rights in a relatively new technological field.

At the same time, in cases involving new technologies where no statute is at issue, the Supreme Court has been quite willing to engage in a more regulatory mode of decisionmaking. In *Florida v. Harris*,¹³¹ for example, the Supreme Court held that a police officer had probable cause to search a vehicle based on signals he received from a drug-sniffing dog—a policing tool that is aptly characterized as a biotechnology.¹³² In approving the search in question, the Supreme Court purported to disavow the use of “rigid rules, bright-line tests, and mechanistic inquiries” in determining whether a search was supported by probable cause.¹³³ In practice, however, the Court set forth detailed guidance as to the steps that a police department should take to ensure that their use of drug-sniffing dogs passes constitutional muster:

[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs. . . .

128. Kerr, *supra* note 125, at 854.

129. *Maryland v. King*, 133 S. Ct. 1958, 1979–80 (2013).

130. *See King*, 133 S. Ct. 1958.

131. 133 S. Ct. 1050 (2013).

132. *Id.* at 1059; *see also* Braverman, *supra* note 12, at 85 (characterizing K-9 sniffs as biotechnology).

133. *Harris*, 133 S. Ct. at 1055.

A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings. Indeed, evidence of the dog's (or handler's) history in the field, although susceptible to the kind of misinterpretation we have discussed, may sometimes be relevant¹³⁴

Thus, in two biotechnology cases decided during the same Term—one involving a statute and one in which a statute was absent—the Court took very different approaches to its use of doctrine as a mechanism for governing police conduct.

Another recent new technology case that may be usefully contrasted to *King* is *Riley v. California*,¹³⁵ which also addressed the constitutionality of search incident to a lawful arrest.¹³⁶ In *Riley*, the Court unanimously held that police must generally obtain a warrant before searching an arrested suspect's cell phone.¹³⁷ In addition to imposing this directive on police officers, the Court delineated potential scenarios in which officers would *not* be expected to obtain a warrant due to the exigencies of the situation, such as “a suspect texting an accomplice who, it is feared, is preparing to detonate a bomb, or a child abductor who may have information about the child's location on his cell phone.”¹³⁸ The Court thus provided far more detailed regulatory guidance than was necessary to decide the merits of the case. It thereby adopted a divergent approach in *Riley* and *Harris* on one hand, and *King* on the other, to analyzing the Fourth Amendment's application to new technologies. This divergence suggests that, in evaluating a court's decision-making style in such cases, the salient variable is not the technology itself, but whether there exists a statute or regulation governing how that technology is used.

134. *Id.* at 1057–58.

135. 134 S. Ct. 2473 (2014).

136. *Id.* at 2480.

137. *Id.* at 2485.

138. *Id.* at 2494.

2. AFFIRMATIVE ACTION

Beyond the realm of criminal procedure, the Supreme Court's affirmative action jurisprudence offers two particularly interesting examples of the role of statutory constraint in shaping the outcomes of constitutional cases.¹³⁹ In *Regents of University of California v. Bakke*,¹⁴⁰ the Court invalidated the UC Davis School of Medicine's affirmative action plan, which prescribed that a certain number of spots in an entering class would be reserved for minority candidates who were selected through a special admissions program.¹⁴¹ This admissions plan was not governed by a statute or regulation, and a majority of the Justices concluded that Title VI of the Civil Rights Act did not prohibit any racial classifications that were otherwise permitted under the Equal Protection Clause.¹⁴² Thus, a majority of the Court treated *Bakke* as an equal protection case that did not involve textual review.¹⁴³

Justice Powell's opinion in *Bakke*—the reasoning of which the Court subsequently endorsed in *Grutter v. Bollinger*¹⁴⁴—presents a clear example of regulatory decisionmaking. First, Justice Powell held that strict scrutiny would apply to the UC Davis special admissions program notwithstanding that the program's racial classifications were designed to benefit historically subordinated minorities.¹⁴⁵ In selecting this standard of review, Justice Powell rejected the influential (and, at the time, doctrinally viable) antidisubordination theory of equal protection, according to which a less exacting standard of scrutiny should apply to racial classifications that are designed to remedy, rather than perpetuate, the subordinated status of a historically disadvantaged group.¹⁴⁶ The Court thus adopted a standard of review that it plausibly could have rejected and thereby gave itself a great degree of regulatory control over lower courts and nonjudicial officials.¹⁴⁷ This decision to apply strict

139. I am grateful to Bertrall Ross for suggesting these examples.

140. 438 U.S. 265 (1978).

141. *See id.* at 269–70.

142. *Id.* at 281–87; *id.* at 328–55 (Brennan, J., concurring in the judgment in part and dissenting in part).

143. *Cf. id.* at 412–421 (Stevens, J., concurring in the judgment in part and dissenting in part) (concluding that the UC Davis special admissions program violated Title VI of the Civil Rights Act).

144. 539 U.S. 306 (2003).

145. *Bakke*, 483 U.S. at 295–97.

146. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1532–37 (2004) (arguing for the doctrinal viability of the antidisubordination theory in the context of *Bakke*). For a classic articulation of the antidisubordination theory of equal protection, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

147. *See supra* note 101 and accompanying text.

scrutiny is perhaps better explained by Justice Powell's substantive view on equal protection than by the absence of a statute. The remainder of his analysis, however, further supports the hypothesis that statutes impose meaningful constraint on constitutional decisionmaking.

Two features of Justice Powell's analysis are particularly striking. The first concerns Justice Powell's analysis of whether the medical school articulated a compelling state interest for its admissions program. UC Davis argued that its special admissions program was necessary to counter the historical effects of racial discrimination in medical schools and the medical profession.¹⁴⁸ Justice Powell acknowledged the theoretical legitimacy of this goal.¹⁴⁹ However, he concluded that it was inappropriate to assume that such historical discrimination existed "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violation."¹⁵⁰ In Powell's view, "isolated segments of our vast governmental structures are not competent" to identify such constitutional and statutory violations, "at least in the absence of legislative mandates and legislatively determined criteria."¹⁵¹ Thus, Justice Powell's opinion suggests that if neither a legislature nor an agency has chosen to address historical discrimination in a profession, then a university is not able to do so unless a court has played some role in the regulatory process.

Second, in addition to deciding that UC Davis's special admissions program was unconstitutional, Justice Powell provided detailed guidance as to how universities could construct an acceptable affirmative action policy. Specifically, Justice Powell decided that the medical school had a compelling interest in attaining a diverse student body.¹⁵² However, he concluded that, in reserving places for minority applicants, the medical school had not chosen the least restrictive means to attain this goal.¹⁵³ Justice Powell then proceeded to offer a laudatory and relatively detailed description of Harvard College's admission policy, according to which an applicant's racial identity may count as a "plus" as long as all applicants competed for all available seats.¹⁵⁴ Justice Powell's opinion also included an appendix that comprehensively described Harvard's admissions policy,¹⁵⁵ thereby giving public universities detailed guidance on how to construct an affirmative action program that was

148. *Bakke*, 483 U.S. at 305.

149. *Id.* at 307.

150. *Id.*

151. *Id.* at 309.

152. *Id.* at 311–12.

153. *Id.* at 315.

154. *Id.* at 316–18.

155. *Id.* at 321–24.

constitutionally permissible. Notably, as the Court emphasized in *Grutter v. Bollinger* when upholding the University of Michigan Law School's affirmative action policy: "Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies. Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies."¹⁵⁶ By upholding the University of Michigan's admissions policy in *Grutter*, the Court rewarded the university's reliance on Justice Powell's regulatory framework in *Bakke*.¹⁵⁷

By contrast, in a recent affirmative action case involving textual review, the Court took a particularly nonregulatory approach to its decisionmaking. In *Schuette v. Coalition to Defend Affirmative Action*,¹⁵⁸ the Court upheld a state constitutional provision that barred Michigan's public universities from adopting race-conscious admissions policies.¹⁵⁹ In reaching this conclusion, the Court stressed the narrowness of its holding, emphasizing that the case was "not about the constitutionality, or the merits, of race-conscious admissions policies in higher education."¹⁶⁰ The Supreme Court then addressed BAMN's argument that the constitutional provision was impermissible under *Washington v. Seattle School Dist. No. 1*,¹⁶¹ which struck down a state statute that prohibited school boards from implementing race-conscious busing programs for the purpose of integrating school districts. *Seattle* held that the anti-busing statute violated the Equal Protection Clause on the ground that it "use[d] the racial nature of an issue to define the governmental decision-making structure, and thus impose[d] substantial

156. *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003).

157. Specifically, in *Bakke*, Justice Powell held that universities may not use affirmative action to redress past racial discrimination "in the absence of legislative mandates and legislatively determined criteria," 438 U.S. at 309, but acknowledged that "the attainment of a diverse student body" is a "constitutionally permissible goal for an institution of higher education" to pursue through appropriately tailored measures. *Id.* at 311–12. Consistent with this rationale, the *Grutter* Court endorsed the University of Michigan Law School's use of a race-conscious admissions policy as narrowly tailored to the constitutionally permissible goal of attaining a diverse student body. *See* 539 U.S. at 328–43. In doing so, the Court emphasized the degree to which the law school's policy provided for the type of individualized consideration of merit that Justice Powell endorsed in *Bakke*. *See id.* at 333–36; *cf.* Berger, *Individual Rights*, *supra* note 72, at 2031–32, 2040–42 (arguing that a tension exists between the *Grutter* Court's deference to the university's admissions policy decisions and Justice Powell's analysis in *Bakke*).

158. 134 S. Ct. 1623 (2014).

159. *Id.* at 1638.

160. *Id.* at 1630.

161. 458 U.S. 457 (1982).

and unique burdens on racial minorities.”¹⁶² While the Court’s analysis in *Seattle* was lengthy, it was nonregulatory in that it did not seek to provide detailed guidance as to how a state could repeal an antidiscrimination statute without running afoul of the Equal Protection Clause.¹⁶³ Still, the Court offered some guidance to legislatures by stating that the statute was flawed because it “burden[ed] all future attempts to integrate Washington schools in districts throughout the State[] by lodging decision-making authority over the question at a new and remote level of government.”¹⁶⁴

In *Schuette*, however, the Court went on to disavow the arguably regulatory dimensions of *Seattle*’s reasoning. Instead, the Court adopted a remarkably narrow reading of *Seattle* based on assumptions that were not articulated in that opinion. Specifically, in *Schuette*, the Court rejected what it characterized as a “broad reading of *Seattle*,” according to which “any state action with a ‘racial focus’ that makes it ‘more difficult for certain racial minorities than for other groups’ to ‘achieve legislation that is in their interest’ is subject to strict scrutiny.”¹⁶⁵ The actual constitutional flaw of the Washington statute, the *Schuette* Court reasoned, was only that it reversed a busing program that the school district had likely implemented to remedy intentional racial segregation.¹⁶⁶ Accordingly, the Court adopted a nonregulatory doctrinal rule that prohibited lower courts from finding that racial minorities had any collective political interests that it was unconstitutional for the majority to threaten.¹⁶⁷

To be sure, *Schuette* and *Bakke* raise different constitutional questions relating to affirmative action. However, the fact that both cases

162. *Id.* at 470.

163. *Cf. id.* at 483 (acknowledging that “‘the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification’” (quoting *Crawford v. L.A. Bd. of Educ.*, 458 U.S. 527, 539 (1982))).

164. *Id.*

165. *Schuette*, 134 S. Ct. at 1634 (quoting *Seattle*, 458 U.S. at 470, 474 (internal quotation marks omitted)).

166. *Id.* at 1633. The Court supported this assumption regarding the purpose of the Washington statute by appealing to Justice Breyer’s dissent in *Seattle. Id.* (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 807–08 (Breyer J., dissenting)). Notably, the *Seattle* Court did not make any explicit finding that the Washington statute was designed to remedy *de jure* segregation. *Id.* at 1625 (citing *Parents Involved*, 551 U.S. at 720–21).

167. *See id.* at 1634 (“[T]his Court has rejected the assumption that ‘members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.’” (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993))).

are *about* affirmative action suggests that they have similar degrees of political salience, and that it is therefore worthwhile to consider how the presence or absence of a statute affected the Court's decisionmaking in each case. In terms of outcomes, the decisions in *Schuette* and *Bakke* both make it more difficult for educational institutions to enact affirmative action policies. In terms of reasoning, however, Justice Powell's opinion in *Bakke* stands in sharp contrast to the Court's analysis in *Schuette*. In *Bakke*, Justice Powell provided guidance that incentivized educational institutions to develop specific race-conscious admissions policies.¹⁶⁸ This opinion provided a template for more recent, and equally regulatory, opinions upholding educational affirmative action policies in cases that did not involve textual review.¹⁶⁹ In *Schuette*, by contrast, the Court expressly disavowed a regulatory role in the affirmative action debate and held "that the courts may not disempower the voters from choosing which path to follow" with regard to race-conscious educational policies.¹⁷⁰ Although judicial ideology is undoubtedly a driving force in each opinion, it would appear that the presence of a statute at least correlates with very different modes of decisionmaking in each case.

3. PROTECTED SPEECH AND BUFFER ZONES

The First Amendment provides a wealth of cases that raise similar constitutional questions but differ with regard to whether a statute is at issue. Compare, for example, four cases addressing "buffer zones" that restrict protests outside abortion clinics, two of which involve textual review¹⁷¹ and two of which do not.¹⁷² In *Madsen v. Women's Health Center*,¹⁷³ the Court's "buffer zone" jurisprudence began with the review of an injunction, rather than a statute, and this beginning appears to have significantly influenced the trajectory of the doctrine. In *Madsen*, the Court examined a district court order enjoining antiabortion protesters "from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic."¹⁷⁴ That the case involved an injunction, rather than a generally applicable statute,

168. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

169. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

170. *Schuette*, 134 S. Ct. at 1635.

171. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Hill v. Colorado*, 530 U.S. 703 (2000).

172. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994).

173. 512 U.S. 753 (1994).

174. *Id.* at 758.

was relevant to the Court's choice to apply intermediate scrutiny. Specifically, the Court recognized that injunctions "carry greater risks of censorship and discriminatory application than do general ordinances," and thus merit a higher standard of scrutiny than is applied to a "content-neutral, generally applicable statute."¹⁷⁵ However, the Court further concluded that the injunction was itself content neutral, and hence that strict scrutiny did not apply, because the order was issued to regulate a group who "repeatedly violated the [district] court's original order."¹⁷⁶

Thus, the fact that *Madsen* concerned an injunction triggered a standard of review that gave the court greater ability to influence and monitor the actions of lower courts that are charged with regulating buffer zones.¹⁷⁷ The Court then used this discretion to offer detailed guidance to trial courts as to how they might craft constitutionally permissible injunctions (and, by extension, to police departments that are charged with establishing policies to regulate protests in the absence of any statutory guidance).¹⁷⁸ In a subsequent nonlegislative buffer zone case, *Schenck v. Pro-Choice Network of Western New York*,¹⁷⁹ the Court provided similarly detailed guidance by striking down parts of an injunction establishing a 15-foot floating buffer zone around patients and their vehicles¹⁸⁰ and upholding a part of the injunction establishing a fixed buffer zone around the entranceways of the clinic.¹⁸¹ Significantly, the Court further held that although the government was not a party to the case, the injunction was justified by concern for public safety—a rationale that, as Justice Scalia observed in dissent, gave courts considerable flexibility to craft detailed, speech-restrictive rules to

175. *Id.* at 764. Specifically, the Court held that the proper First Amendment inquiry for content-neutral injunctions is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 765.

176. *Id.* at 763; *see also id.* (concluding that it was irrelevant that "the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic").

177. *See supra* note 101 and accompanying text.

178. *Madsen*, 512 U.S. at 768–71, 773–75. Specifically, in *Madsen*, the Court upheld parts of the district court injunction imposing a 36-foot buffer zone around entranceways of a clinic, and prohibiting protestors from making noise within earshot of the clinic during business hours. *Id.* at 768–71. However, it invalidated parts of the injunction that prohibited protestors from displaying images observable to patients within the clinic, established a floating buffer zone prohibiting protestors from approaching patients within 300 feet of the clinic, and enjoined protestors from picketing within 300 feet of the residences of clinic staff. *Id.* at 773–75.

179. 519 U.S. 357 (1997).

180. *Id.* at 377–80.

181. *Id.* at 380–81.

advance goals that go beyond the interests of the parties to a case.¹⁸² Thus, the fact that both *Schenck* and *Madsen* involved injunctions caused the Court to adopt a more searching standard of review than it would have applied if the cases concerned content-neutral statutes and to endorse detailed, judge-made rules to regulate political protests.

The Court's analyses in its next two statutory buffer-zone cases were certainly influenced by the holdings of *Madsen* and *Schenck*, but were less regulatory in nature. In *Hill v. Colorado*,¹⁸³ the Court reached an outcome similar to those in the prior cases but was somewhat less prescriptive in its regulatory guidance.¹⁸⁴ The statute in *Hill* established an eight-foot floating buffer zone within 100 feet of an abortion clinic and was thus similar to (albeit seven feet smaller than) the buffer zone that was invalidated in *Schenck*.¹⁸⁵ The Court, however, concluded that the statute was content neutral¹⁸⁶ and upheld the statute as being narrowly tailored to "significant and legitimate" governmental interests.¹⁸⁷ Although the differences between the buffer zones in *Hill* and *Schenck* were relatively minor, the Court engaged in a less regulatory mode of decisionmaking when the constitutional question before it involved a statute. Granted, in concluding that the Colorado statute was narrowly tailored, the Court in *Hill* observed that it permitted protesters to "communicate at a normal conversational distance," allowed them to remain in one place even if others came within an eight-foot range, and enabled them to silently distribute leaflets.¹⁸⁸ Beyond this analysis, however, the Court provided little information that would guide police officers seeking to enforce the statute or legislatures seeking to enact similar (but not identical) statutes. Moreover, in *Hill*, the

182. *See id.* at 392–93 (Scalia, J., dissenting).

183. 530 U.S. 703 (2000).

184. *Id.*

185. *See Hill*, 530 U.S. at 707 (observing that the Colorado statute barred protesters from approaching within eight feet of a person "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person" (quoting COLO. REV. STAT. § 18-9-122(3) (1999))).

186. *See id.* at 719 (invoking *Madsen* as grounds for accepting the Colorado Supreme Court's conclusion that the buffer zone statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech" (internal quotation marks omitted)); *cf. id.* at 742–49 (Scalia, J., dissenting) (arguing based on the statute's language and context that it imposed a viewpoint-based restriction on the speech of abortion protesters).

187. *Id.* at 725. The Court distinguished the Colorado statute from the unconstitutional buffer zone in *Schenck* on the grounds that the Colorado buffer zone contains a *mens rea* requirement, allows speakers to "remain in one place," and "permits the speaker to communicate at a 'normal conversational distance.'" *Id.* at 726–27 (quoting *Schenck*, 519 U.S. at 377).

188. *Id.* at 726–27 (quoting *Schenck*, 519 U.S. at 377).

Court referred to the structural protections that inhere in a generally applicable statute as grounds for upholding it. Specifically, in rejecting an overbreadth challenge to the Colorado statute, the Court reasoned that “the comprehensiveness of the statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.”¹⁸⁹ Thus, the decision in *Hill* is a rare instance in which the Court expressly acknowledged that the presence or absence of a statute is significant to its constitutional decisionmaking.

However, the Court’s most recent buffer zone case illustrates that, while statutes might constrain constitutional decisionmaking to some degree, these constraints are imperfect. In *McCullen v. Coakley*,¹⁹⁰ the Court struck down a Massachusetts statute establishing a fixed buffer zone that barred anyone’s presence within 35 feet of an abortion clinic unless they fell under an enumerated exception (including exceptions for clinic employees and passersby).¹⁹¹ As it did in *Hill*, the Court determined that the statute was content neutral and therefore not subject to strict scrutiny.¹⁹² In this respect, the Court deprived itself of a doctrinal tool that offers it a high degree of regulatory control over lower courts and nonjudicial officials.¹⁹³ In other respects, however, *McCullen*’s reasoning is more regulatory in nature than *Hill*’s, if less regulatory than *Schenck*’s or *Madsen*’s. In declaring that the statute in *McCullen* was content neutral, the Court suggested that protesters would have a viable constitutional claim if police officers chose not to enforce the Act against clinic employees who acted outside the scope of their employment and expressed favorable views about abortion.¹⁹⁴ Moreover, the Court concluded that the statute was not narrowly tailored in part because it prevented protesters from distributing leaflets to clinic visitors and from engaging visitors in one-on-one conversations without raising their voice.¹⁹⁵

189. *Id.* at 731. Quoting Justice Jackson, the Court went on to explain that “there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.” *Id.* at 731 (quoting *Ry. Express Agency, Inc. v. New York*, 306 U.S. 106, 112 (Jackson, J., concurring)). Likewise, in *Madsen*, the Court invoked Justice Jackson’s observations to conclude that a greater degree of scrutiny is warranted when reviewing the constitutionality of an injunction than when examining a comparable statute. *See Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 764–65 (1994).

190. 134 S. Ct. 2518 (2014).

191. *See id.* at 2525; MASS. GEN. LAWS ch. 266, § 120E½(b) (West 2012).

192. *See McCullen*, 134 S. Ct. at 2530–34.

193. *See supra* note 101 and accompanying text.

194. *McCullen*, 134 S. Ct. at 2533–34.

195. *Id.* at 2535–37.

Thus, while the Court failed to offer the sort of detailed information it provided in *Madsen* and *Schenck* as to the precise perimeter of a buffer zone that is constitutionally acceptable, it still provided some degree of regulatory guidance. There are, however, two possible explanations for the regulatory aspects of *McCullen* that are consistent with the idea that statutes impose some constraint on decisionmaking. First, the Court's buffer zone jurisprudence began with two cases that did not involve statutes, and the principle of *stare decisis* forced the Court to engage with the regulatory aspects of those decisions in order to resolve the statutory cases.¹⁹⁶ The buffer zone cases thus suggest that the sequence of cases will influence constitutional doctrine based on whether the initial cases involve statutory interpretation.

Second, while *Hill* involved a facial challenge to a buffer zone statute,¹⁹⁷ *McCullen* involved both facial and as-applied challenges.¹⁹⁸ To resolve the as-applied challenge, the district court conducted a bench trial that generated a substantial factual record concerning the experiences of the police officers charged with enforcing the buffer zone, the clinic employees, and the plaintiff-protesters.¹⁹⁹ Thus, the Court's attention was largely focused on the facts of the case before it rather than on the statute at issue. This suggests that although as-applied challenges will impose some degree of statutory constraint on a court's decisionmaking, the degree will vary depending on the extent to which the Court is focused on the facts before it.²⁰⁰

4. INTELLECTUAL PROPERTY

If criminal procedure is a field in which textual review is the exception, intellectual property is one in which it is the rule. As Shyamkrishna Balganesh has observed, there is no question that Congress plays the dominant role in determining "intellectual property's precise content and coverage."²⁰¹ Copyright law, for example, is codified by a federal statutory framework that Congress established with the

196. See generally Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1998) (offering a normative defense of *stare decisis*); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 579–88 (1987) (analyzing the ways in which precedential reasoning may constrain judicial outcomes).

197. See *Hill v. Colorado*, 530 U.S. 703, 708 (2000).

198. *McCullen*, 134 S. Ct. at 2528.

199. *Id.* at 2525–28.

200. See *supra* note 62 and accompanying text.

201. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1544 (2010).

Copyright Act of 1790²⁰² and has since modified with relative frequency.²⁰³ However, in addition to the federal statutory frameworks governing intellectual property, there is a substantial body of state court-made intellectual property law known as “common law intellectual property.”²⁰⁴ For example, the right of publicity, which grants individuals an ownership interest in their name and likeness,²⁰⁵ gradually arose from the common law of torts.²⁰⁶ Some states continue to recognize the right as a matter of common law, while many have codified a statutory cause of action for the right.²⁰⁷ Even in those states that have enacted statutory publicity rights, however, courts frequently disregard the statutes and elaborate upon the right incrementally and in common-law fashion.²⁰⁸

Significantly, these contrasting intellectual property regimes—copyright and the right of publicity—suggest that the phenomenon of statutory constraint is not unique to the Supreme Court or, for that matter, to federal courts. Both of these regimes implicate, and often exist in tension with, the First Amendment’s freedom of expression guarantee.²⁰⁹ Each regime authorizes judges to bar individuals from

202. Copyright Act of 1790, ch. 15, 1 Stat. 124, *repealed by* Copyright Act of 1909, Pub. L. No. 60–349, 35 Stat. 1075 (codified as amended at 17 U.S.C. § 101–122 (2011)).

203. *See, e.g.*, Sonny Bono Copyright Term Extension Act, Pub. L. No. 105–298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.); *see also Eldred v. Ashcroft*, 537 U.S. 186, 194–96 (2003) (summarizing congressional interventions in copyright law from the Copyright Act of 1790 through the Copyright Term Extension Act (CTEA) of 1998).

204. Balganesch, *supra* note 201, at 1544 (quoting Douglass G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 CHI. L. REV. 411, 411 (1983)).

205. *See Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1205 (11th Cir. 2009) (defining the right of publicity “as [an individual’s] right to the exclusive use of his or her name and likeness” (quoting *Martin Luther King, Jr., Ctr. for Soc. Change, Inc. v. Am. Heritage Prods., Inc.*, 296 S.E.2d 697, 700 (Ga. 1982))).

206. Balganesch, *supra* note 201, at 1556.

207. *Id.* at 1558; *see also* Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J.L. & TECH. 3, 58 nn.24–25 (2001) (listing states with common law sources for the right of publicity and states that recognize the right by statute).

208. Balganesch, *supra* note 201, at 1556; *see, e.g., Wendt v. Host Int’l, Inc.*, 125 F.3d 806, 811 (9th Cir. 1997) (“We have held that th[e] common-law right of publicity protects more than the knowing use of a plaintiff’s name or likeness for commercial purposes that is protected by Cal. Civ. Code § 3344. It also protects against appropriations of the plaintiff’s identity by other means.”); Jennifer E. Rothman, *Copyright Preemption and the Right of Publicity*, 36 U.C. DAVIS L. REV. 199, 265 (2002) (commenting on the potential negative consequences of expanding rights of publicity).

209. Significant contributions to the massive literature on this topic include: Erwin Chemerinsky, *Balancing Copyright Protections and Freedom of Speech: Why the Copyright Extension Act Is Unconstitutional*, 36 LOY. L.A. L. REV. 83 (2002); Alan E. Garfield, *The First Amendment as a Check on Copyright Rights*, 23 HASTINGS COMM. &

certain forms of expression and to impose liability on those individuals for having engaged in such expression.²¹⁰ However, as Mark Bartholomew and John Tehranian recently showed, courts have adopted dramatically divergent approaches to the First Amendment concerns that arise in intellectual property and right of publicity cases.²¹¹ Indeed, Bartholomew and Tehranian persuasively defend a thesis which goes even further than the one this Article proposes: that courts not only undertake different modes of constitutional analysis in copyright and right of publicity cases, but that this divergence results in different doctrinal outcomes.²¹²

In the statute-dominated regime of copyright, courts tend to uphold congressional policy choices regarding the scope of defendants' expressive rights and accordingly have declined to develop robust doctrinal protections for these rights. Specifically, the Supreme Court has held that, like the First Amendment, "copyright's purpose is to *promote* the creation and publication of free expression."²¹³ Accordingly, in two recent cases rejecting First Amendment challenges to the Copyright Act, the Supreme Court stressed that the Act contains two "built-in First Amendment accommodations."²¹⁴ First, 17 U.S.C. § 102(b) "distinguishes between ideas and expression and makes only the latter eligible for copyright protection."²¹⁵ Second, the "fair use" defense codified at 17 U.S.C. § 107 "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."²¹⁶ In light of these "speech-protective purposes and safeguards," the Supreme Court declined to apply First Amendment

ENT. L.J. 587 (2001); Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057 (2001); Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1987); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 5–12 (2002).

210. See Bartholomew & Tehranian, *supra* note 5, at 8.

211. *Id.* at 54–60. Bartholomew and Tehranian also analyze courts' treatment of First Amendment concerns in trademark law and, in the respects relevant to this Article, find that it more closely resembles the approach taken in copyright cases than in right of publicity cases. See *id.* at 57–58. For economy's sake, this Article will not recapitulate their analysis of trademark law.

212. *Id.* at 3.

213. *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003); accord *Golan v. Holder*, 132 S. Ct. 873, 889–90 (2012); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985).

214. *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219); see also *Harper & Row*, 471 U.S. at 560.

215. *Eldred*, 537 U.S. at 219.

216. *Id.*

scrutiny to any legislation that does not “alter[] the traditional contours of copyright protection” that are embodied in the Copyright Act.²¹⁷

In light of these holdings, copyright law appears to lock courts into a statutory framework for analyzing First Amendment questions that limits their “ability to give independent consideration to speech-related defenses.”²¹⁸ For example, the fair use defense—one of copyright law’s “built-in First Amendment accommodations”²¹⁹—was codified in 1976.²²⁰ As Bartholomew and Tehranian have observed, “[t]his codification ha[d] consequences.”²²¹ The statute requires judges to consider four factors:

- (1) the purpose and character of the use, including whether such use is of a commercial nature . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;
- and (4) the effect of the use upon the potential market for or value of the copyrighted work.²²²

As courts have recognized, the language of 17 U.S.C. § 107 does not prohibit judges from considering additional factors relevant to whether to recognize a fair use defense.²²³ However, courts rarely consider factors beyond those enumerated in the statute.²²⁴ Regardless of whether the statutory framework of copyright is ultimately sufficient to protect defendants’ expressive interests,²²⁵ it at least correlates with a mode of constitutional adjudication in which courts decline to announce broadly regulatory constitutional rules.²²⁶

217. *Id.* at 219, 221.

218. Bartholomew & Tehranian, *supra* note 5, at 74.

219. *Eldred*, 537 U.S. at 219 (citing *Harper & Row*, 471 U.S. at 560).

220. See Act for the General Revision of the Copyright Law, Pub. L. No. 94-553, § 107, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. § 107 (2012)).

221. Bartholomew & Tehranian, *supra* note 5, at 74.

222. § 107.

223. See, e.g., *Bond v. Blum*, 317 F.3d 385, 394 (4th Cir. 2003) (“These factors are not meant to be exclusive, but rather illustrative, representing only general guidance about the sorts of copying that courts and Congress most commonly have found to be fair uses.” (citations and internal quotations omitted)).

224. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 563 (2008).

225. Cf. Neil Weinstock Netanel, *First Amendment Constraints on Copyright After Golan v. Holder*, 60 UCLA L. REV. 1082, 1086 (2013) (arguing that the *Golan*’s holding can be interpreted as offering a robust conception of the First Amendment protections embodied in the Copyright Act).

226. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (“In view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts

In right of publicity cases, by contrast, courts routinely operate in a regulatory manner to construct “expansive new defenses for expressive appropriations of celebrity.”²²⁷ For example, in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,²²⁸ the California Supreme Court held that an artist sued for a right-of-publicity violation may raise an affirmative First Amendment defense.²²⁹ Although the case involved California’s statutory right of publicity,²³⁰ the court drew upon an earlier, concurring opinion in a common law case to recognize that the right may threaten a defendant’s expressive rights.²³¹ The court then established a detailed test for balancing plaintiffs’ rights of publicity and defendants’ expressive interest:

[T]he inquiry is whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.²³²

In a subsequent right-of-publicity case, *Winter v. DC Comics*,²³³ the California Supreme Court made clear that this test was to be applied in a robust manner.²³⁴ Specifically, the court held that the First Amendment protected DC Comics against liability for a thinly veiled, satirical depiction of two rock musicians, Johnny and Edgar Winter, as the “half-worm” villains of a comic book series.²³⁵ This use of the Winter

and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.”)

227. Bartholomew & Tehranian, *supra* note 5, at 86.

228. 21 P.3d 797 (Cal. 2001).

229. *Id.* at 810.

230. See CAL. CIV. CODE § 990 (West 1998), *renumbered and amended by* Stats. 1999, c. 998 (S.B. 209), § 1 (current version at CAL. CIV. CODE § 3344.1 (West 2012)).

231. See *Comedy III*, 21 P.3d at 803 (“[T]he very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity’s meaning. . . . ‘The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.’” (quoting *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 460 (Cal. 1979) (Bird, C.J., concurring))).

232. *Id.* at 809.

233. 69 P.3d 473 (Cal. 2003).

234. See *id.* at 478–79.

235. See *id.* at 476.

brothers' personae, the court concluded, was sufficiently transformative under the test set forth in *Comedy III*.²³⁶

Comedy III and *Winter* thus illustrate that regulatory decisionmaking is more likely to occur in cases that nominally involve textual review but where the statutory text is not an object of the court's attention. In some areas of law, there are statutes which putatively govern the field but which are so indefinite or antiquated in their guidance that courts do not rely upon the statutory text to resolve the cases before them.²³⁷ Strictly speaking, the courts in *Comedy III* and *Winter* were addressing a right that was codified in statute. The statute in question, however, is one that incorporated a common law concept; and these common law origins appear to have led courts to freely elaborate upon, or even disregard, the language that legislatures used to codify the right.²³⁸ Accordingly, as Bartholomew and Tehranian argue, "the common law's hospitability to searching inquiries as to the overarching concerns behind a particular legal right distinguishes it from statutory lawmaking and can fuel greater consideration of First Amendment interests."²³⁹ These scholars thus touch on a phenomenon that is not specific to the domain of intellectual property: regulatory decisionmaking in constitutional cases where courts do not engage with a statutory or regulatory text.

III. STRUCTURAL REASONS FOR STATUTORY CONSTRAINTS

Superficially, it may seem puzzling that courts would engage in different modes of constitutional decisionmaking in textual and nontextual review cases. Often, the fact that a case involves statutory interpretation will not be directly relevant to the constitutional question that the court is facing. (The DNA collection at issue in *Maryland v. King*, for example, would presumably have been upheld regardless whether or not it was conducted pursuant to a statute.)²⁴⁰ What's more, I do not wish to suggest—and, indeed, highly doubt—that judges regard themselves as engaging in a fundamentally different mode of analysis when reviewing the constitutionality of a statute than when reviewing the constitutionality of an executive action.

236. *See id.* at 479–80.

237. *See, e.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 808 (1983) (citing the Sherman Act, 15 U.S.C. §§ 1–7 (1976), as a statute for which case law, rather than statutory text, is typically the starting point for analysis).

238. *See supra* notes 202–08 and accompanying text.

239. Bartholomew & Tehranian, *supra* note 5, at 73; *see also* Balganesch, *supra* note 201, at 1547–50.

240. *See supra* Part II.

Indeed, if judges consciously felt bound to a less regulatory form of decisionmaking in textual review cases, then they would have a powerful incentive to strategically omit any mention of a statute when they wished to engage in regulatory decisionmaking. In a nontextual review case, a court may be reviewing actions that were governed by a statute which the court simply did not interpret in the course of deciding the case.²⁴¹ Accordingly, it would be possible for a court to reframe a constitutional issue as one that involves nontextual review if it wished to exercise a greater degree of control over state officials.²⁴²

In practice, however, it does not appear that courts typically engage in this kind of rhetorical gamesmanship. To evaluate the degree to which such strategizing occurs, a research assistant and I examined the parties' merits briefs and the court's certiorari orders for each of the case pairs discussed in Part II of this Article.²⁴³ For these materials, we checked whether the court framed any of the cases as involving nontextual review when the parties presented it as involving textual review, or as involving textual review when the parties presented it as involving nontextual review. In none of the cases did the court treat the case as involving nontextual review if the petitioner did not frame it as such, nor did the court treat the case as involving textual review if it was not so presented. This preliminary review certainly does not rule out the possibility that courts will strategically ignore a statute's presence when engaging in regulatory decisionmaking, but it does suggest that statutes might impose a meaningful constraint on courts' decisionmaking.

Indeed, there are a number of structural features of textual review that are likely to shape the manner in which courts decide constitutional cases. Moreover, these structural features will influence judicial decisionmaking regardless of the level of respect the judiciary accords,

241. See *supra* notes 46–53 and accompanying text.

242. Cf. Kevin T. McGuire & Barbara Palmer, *Issue Fluidity on the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 (1995) (analyzing the Supreme Court's power to "create" constitutional questions that differ from those which the litigants presented).

243. For the following cases we examined the certiorari petitions as well as the certiorari orders and parties' merits briefs: *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Riley v. California*, 134 S. Ct. 2473 (2014); *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Golan v. Holder*, 132 S. Ct. 873 (2012); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Hill v. Colorado*, 530 U.S. 703 (2000); *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357 (1997); *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *United States v. Salerno*, 481 U.S. 739 (1987); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). For the remaining cases, we examined the certiorari orders and parties' merits briefs but not the certiorari petitions: *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Winter v. DC Comics*, 69 P.3d 473 (Cal. 2003).

or does not accord, the coordinate branches as a matter of constitutional principle.²⁴⁴ This Part identifies three structural distinctions between textual and nontextual review, and it examines how they might influence courts to adopt a more regulatory mode of decisionmaking in constitutional cases in which there is no legislative text being interpreted.

A. *The Textual Canonicity of Statutes*

One structural distinction between textual and nontextual review is that, in statutory cases, there is a canonical, textual formulation of the rules that are the object of judicial review. There is, as Jeremy Waldron has observed, something unique about legislation as a form of law: it creates an obligation to honor “*the very words* that the legislature produces, to a much greater extent than we do in regard to any other sources of law (or other sources of authority).”²⁴⁵ To explain by way of contrast, judge-made law is, as Waldron describes it, “jurisgenerative.”²⁴⁶ Judicial lawmaking is justified by the fact that judges may announce legal rules only in the service of resolving a particular case.²⁴⁷ Therefore, when a court announces a legal rule that is tailored to settling a specific dispute, it is necessary for subsequent courts to reformulate that rule so that it is appropriate for resolving the dispute in front of them.²⁴⁸ There is therefore no single, authoritative formulation of judge-made legal rules that must be applied case after case.²⁴⁹

Legislation, however, operates differently. Legislative authority is not constrained by precedent and is justified by the fact that statutes

244. Cf. Karlan, *supra* note 75, at 2–5, 29, 64 (arguing that the Roberts Court’s jurisprudence is characterized by a lack of respect to Congress). *But see* Keith E. Whittington, *The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review*, 89 NOTRE DAME L. REV. 2219 (2014) (arguing that the Roberts Court is less willing than prior Courts to strike down legislation).

245. WALDRON, *supra* note 23, at 77.

246. *Id.* at 78.

247. Cf. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2006 (2003) (“The exercise of judicial power is justified and circumscribed by the need to resolve a particular case or controversy, which means that courts enforce constitutional rights if and only if it is necessary in order to decide a case. Legislative power is not circumscribed in this same way.”).

248. *See* WALDRON, *supra* note 23, at 78.

249. H.L.A. HART, *THE CONCEPT OF LAW* 134 (3d ed. 2012); *see also* Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 25 (2012) (“There is no particular reason to be textualist about the general rules figured out or crafted by judges in the course of reaching their decisions: the reasons that justify textualism in the case of legislation don’t really apply here.”).

announce prospective and generally applicable rules.²⁵⁰ Accordingly, rules enacted by statute have a “single, definitive linguistic formulation;”²⁵¹ that is, the rules take a specific form that courts are obligated to respect. There is a deep connection, Waldron argues, between this “textual canonicity” and the way in which members of a legislature deliberate over, settle conflicts concerning, and ultimately decide upon the laws they enact.²⁵² There is also, I argue, good reason to think that the textual canonicity of legislation will lead judges to engage in a fundamentally different mode of constitutional lawmaking in textual review cases than they do in cases that do not require them to interpret a statute.

In textual review cases, the textual canonicity of legislation may lead judges toward a shared understanding of the constitutional issues they are confronting in a particular case. In other constitutional cases, by contrast, judges may lack this shared understanding and consequently feel less constrained about using the case before them to advance a particular regulatory agenda. As Waldron observed, the fact that statutes are texts enable members of a diverse legislative body—members who may lack a shared understanding of the aims they hope to accomplish—to orient their debates around a shared focal point.²⁵³ Likewise, in deciding whether or not a statute (or an application of that statute) is constitutional, each judge on a multi-member court orients himself around a single, textual formulation of the rule. The fact that judges are reviewing the constitutionality of a text may therefore influence how they reason about the issue before them. When judges on a multi-member court decide on the constitutionality of a statute or action, one factor that may influence the decisionmaking is whether each judge agrees on precisely what it *is* that they are reviewing. If judge *x* and judge *y* think they are reviewing the constitutionality of different issues, their decision-making aims are likely to diverge.

250. Jeremy Bentham, for example, touts this feature of legislation when defending stable, rule-based “statute law” and critiquing the unstable nature of judge-made common law. See JEREMY BENTHAM, *Truth Versus Ashhurst; or, Law as it is, Contrasted With What it is Said to Be*, in THE WORKS OF JEREMY BENTHAM 235 (Edinburgh, Simpkin, Marshall & Co. 1843) (“Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. . . . [T]his is the way the judges make law for you and me. They won’t tell a man beforehand what it is he *should not do* . . . they lie by till he has done something which they say he should not *have done*, and then they hang him for it.”).

251. WALDRON, *supra* note 23, at 79 (quoting Robert S. Summers, *Statutes and Contracts as Founts of Formal Reasoning*, in ESSAYS FOR PATRICK ATIYAH 71, 74 (Peter Cane & Jane Stapleton eds., 1991)).

252. *Id.* at 80.

253. *Id.* at 81–82.

However, to the extent that judges *x* and *y* agree upon the meanings of specific words, a statutory text will help ensure that they are not arguing at cross-purposes. These judges will benefit from what Waldron has called a “determinate focus for discussion—something whose existence is distinct from the will or tacit understandings of particular members.”²⁵⁴ Moreover, the text that orients the judges’ reasoning announces a *rule*, and in so doing creates some constraints with regard to the judges’ evaluation of policy considerations that motivate the rule. One feature of an entrenched legal rule is that it prevents decisionmakers from considering certain factors that they would otherwise take into account when making a decision.²⁵⁵ To paraphrase Fredrick Schauer, a rule stating “no dogs are allowed in restaurants” may have been for the purpose of preventing annoying disruptions in restaurants.²⁵⁶ That rule, however, does not empower a judge to conclude that certain annoying and disruptive *people* should not be allowed in restaurants. Nor does it empower the judge to conclude that, notwithstanding the rule, pleasant and undisruptive dogs should be made to feel welcome in restaurants. In other words, the rule may have been enacted for the *purpose* of preventing annoyances, but its enactment prevents judges from engaging in a multifaceted examination of “annoyingness” when deciding whether a restaurant was justified in denying service to a person or animal.²⁵⁷ As Schauer has argued, this process of screening off certain policy considerations “takes place largely through the force of the language in which rules are written.”²⁵⁸ Thus, the textual canonicity of legislative rules is “the primary tool” by which they serve to constrain judges.²⁵⁹

By contrast, in cases that do not involve textual review, courts review the constitutionality of actions that are likely to be polysemic—possessing multiple meanings—and different judges will interpret those actions differently. The concept that actions in the world can be polysemic is a familiar one to anthropologists and social theorists who account for the ways in which participants in a shared culture agree upon, and contest, the meaning of particular resources and symbols.²⁶⁰

254. *Id.* at 82.

255. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988).

256. See FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE 25–29 (1991).

257. See *id.* at 82 (describing a rule as an “instantiation” of a background justification that is followed “even when that instantiation does not serve its generating justification”).

258. See Schauer, *supra* note 255, at 510.

259. *Id.*

260. See CLIFFORD GEERTZ, *Thick Description*, reprinted in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS BY CLIFFORD GEERTZ 3, 6–7 (1973); WILLIAM H. SEWELL JR., THE LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL

Recent empirical work in legal scholarship suggests that the polysemy of actions can also explain aspects of constitutional decisionmaking. As Dan Kahan and his research collaborators have shown, a significant risk in constitutional lawmaking is the problem of “‘motivated cognition,’ the ubiquitous tendency of people to form perceptions, and to process factual information generally, in a manner congenial to their values and desires.”²⁶¹ In one study, for example, Kahan presented research subjects with a video of a political demonstration and asked them questions relevant to whether the demonstrators were engaging in constitutionally protected speech or unprotected conduct.²⁶² Half the research subjects were instructed that they were watching a protest outside an abortion clinic while the other half were advised that they were watching the protest of the military’s one-time don’t-ask-don’t-tell policy outside a military recruitment center.²⁶³ Within both of these subgroups, subjects with different cultural worldviews disagreed about key facts concerning the video, including whether the subjects were obstructing, intimidating, or threatening pedestrians.²⁶⁴ Such findings suggest that because nonstatutory cases require courts to interpret the meaning of ambiguous actions, judges may be freer to interpret the issue before them in a way that suits their policy agenda.

This is not to suggest that legislative texts are inevitably unambiguous, or that such texts strip judges of the discretion to interpret statutes and regulations in ways that favor their ideological position. There are, of course, notable cases in which members of the same court drew radically divergent meanings out of the same statutory text.²⁶⁵ In

TRANSFORMATION 140–43 (2005); VICTOR W. TURNER, *THE RITUAL PROCESS: STRUCTURE AND ANTI-STRUCTURE* 41–42 (1969).

261. See, e.g., Dan M. Kahan et al., “*They Saw A Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 *STAN. L. REV.* 851, 853 (2012).

262. *Id.* at 862–63.

263. *Id.* at 864.

264. See *id.* at 883–85.

265. One powerful example is *Gonzales v. Carhart*, 550 U.S. 124 (2007), in which a five-justice majority upheld the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531. *Id.* at 132–33. Writing for the majority, Justice Kennedy characterized the statute serving to keep women from terminating pregnancies in ways that they would later come to regret. See *id.* at 159 (“While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . The State has an interest in ensuring so grave a choice is well informed.”). Writing for four dissenters, Justice Ginsburg attacked this justification as both lacking empirical support and reflecting “ancient notions about women’s place in the family and under the Constitution” that “have long since been discredited.” *Id.* at 185 (Ginsburg, J., dissenting). For Ginsburg, the statute “cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.” *Id.* at 191 (Ginsburg, J., dissenting).

many of these cases, it can hardly be said that the judges had a shared understanding of the issue before them. In *National Federation of Independent Business v. Sebelius*,²⁶⁶ for example, the Justices disagreed not only on whether the Affordable Care Act's individual mandate violated the Commerce Clause but also on what *type* of activity the Act was regulating.²⁶⁷ In the view of Justices Roberts and Kennedy, by compelling individuals to purchase insurance, the individual mandate created new economic activity that Congress lacked the power to regulate.²⁶⁸ Justice Ginsburg, by contrast, characterized the individual mandate as regulating an existing market—the medical care which virtually all individuals will consume—that Congress was within its authority to regulate.²⁶⁹

My suggestion, however, is that judges often will feel more constrained when interpreting the meaning of a fixed text than when interpreting the meaning of actions. Judges on a multi-member court may have opposed ideological commitments, while at the same time belonging to a shared linguistic community that agrees upon specific practices for understanding the meaning of words and phrases that are used in a legislative context.²⁷⁰ Therefore, by orienting judges around a common text, and preventing them from reformulating the text to suit their purposes, statutes may temper the sort of motivated cognition to which judges are susceptible in constitutional cases.

B. Formalizing Rules of Governance

Another relevant distinction between textual and nontextual review concerns the structural difference between a court being presented with a regulatory regime (in the form of a legislative text) and constructing one from scratch. Put simply, one of law's central functions is to regulate the conduct of government officials by establishing rules that they have an obligation to follow.²⁷¹ And the answer to a simple question—*who* bears primary responsibility for regulating officials' conduct—has significant

266. 132 S. Ct. 2566 (2012).

267. *See generally id.* I am grateful to Eric Berger for this example.

268. *See id.* at 2647–48 (Scalia, J., dissenting).

269. *See id.* at 2619–20 (Ginsburg, J., dissenting).

270. *Cf.* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1316 n.129 (2010) (“Modern textualists start from the premise that while interpretation is not mechanical, legislators can communicate effectively with judges, administrators, and the public because of their common membership in a linguistic community with shared practices for understanding a vast array of words and phrases in context.”).

271. *See supra* Part II.A.

implications with respect to *how* courts discharge their institutional responsibilities in constitutional cases.

In textual review cases, a legislature or agency is the primary regulator by virtue of enacting a statute or rule that guides the action of government officials.²⁷² If the constitutionality of a statute or regulation is challenged, a court will be presented with a formalized system of regulation that it had no direct role in developing.²⁷³ The court's role in these cases is to determine whether the challenged statute or regulation is unconstitutional. If it upholds the law, then the regulatory system remains in effect. If it rejects the law, it invalidates (in whole or in part) the regulatory system that the law sets out. When this happens, the court may suggest that the legislature or agency enact a new rule that achieves the institution's regulatory goals in a constitutional manner, or it may say nothing whatsoever.²⁷⁴ Ultimately, however, the court is not the principal institution occupying the relevant regulatory space.

By contrast, in cases that do not involve textual review, courts evaluate the constitutionality of actions that may not have been guided by a formalized regulatory system. From a court's perspective, the action it is reviewing involves a policy space that no legislature or agency has decided to systematically regulate. The court might therefore perceive itself to be passing on the constitutionality of an action that occurred in a regulatory vacuum. Of course, this perception may be incorrect. In many nontextual review cases, the executive's actions still will be governed by a complex system of statutes, regulations, and unwritten norms.²⁷⁵ However, if deciding a constitutional claim does not require the court to interpret these statutes, regulations, or norms, then the court may regard itself as having to devise a formal regulatory system from scratch. From the court's perspective, a nontextual review case may create the obligation (or, at least, the opportunity) to construct a system of regulation that will allow officials to execute their duties in a manner that conforms to the Constitution. A court's lawmaking function in such cases is therefore unlike its function in cases wherein the court simply evaluates the constitutionality of a regulatory system that another institution has created.

Thus, the presence or absence of a statute may fundamentally alter the way in which courts construct formal rules of governance. As

272. See O'Rourke, *supra* note 5, at 445.

273. In as-applied cases, the court may also be required to evaluate the constitutionality of a specific action that an official took under the authority of a statute. Significantly, however, the action is an instantiation of a formalized regulatory system laid out in a statute or regulation. See *supra* Part I.A.3.

274. See, e.g., *supra* note 110 and accompanying text.

275. See *supra* Part I.A.2.

sociologist Arthur Stinchcombe has defined them, formal systems (including formal legal systems) consist of sets of variables (such as legal rules) that are “unified by their theoretical function.”²⁷⁶ One of the theoretical functions of a legal system, for example, is to guide the behavior of government officials.²⁷⁷ As Stinchcombe defines the concept, a legal system is “formal” to the extent that the legal rules are written in authoritative texts (which could take the form of judicial opinions as well as statutes) that are sufficiently unambiguous to guide individuals and officials in their conduct.²⁷⁸ Conversely, a legal system is not formal if its rules are too ambiguous or not sufficiently stable to provide officials with meaningful guidance. In such an informal legal system, the conduct of government officials would be guided by the mercurial customs and norms of everyday social life rather than by a predictable and stable set of abstracted rules.²⁷⁹ Thus, as Frederick Schauer has observed, formal rules can serve to allocate power between different decisionmakers.²⁸⁰ If a decisionmaker chooses to establish a formal system of rules, she thereby eliminates the discretion of the officials over whom the decisionmaker has authority. By contrast, an agent who is unconstrained by rules has the power to consider a wide range of factors, and to make broad value judgments, when deciding on the best course of action.²⁸¹

This understanding of formality highlights an important structural difference in the way courts make decisions in textual review cases as compared to constitutional cases that do not involve textual review. In cases involving textual review, courts are typically spared the task of

276. See STINCHCOMBE, *supra* note 26, at 53.

277. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 222 (2d ed. 2009) (“A legal system which does in general observe the rule of law treats people as persons at least in the sense that it attempts to guide their behavior through affecting the circumstances of their action.”); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630 (1984) (differentiating between “conduct rules” that are “directed at the general public and provide[] guidelines for conduct” and “decision rules” that are “directed at the officials and provide[] guidelines for their decisions”); see also Jeremy Waldron, *Vagueness and the Guidance of Action*, in *PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW* 58, 61 (Andrei Marmor & Scott Soames eds., 2011) (stating that “almost everyone writing in jurisprudence today” accepts Raz’s argument that “*guiding action* (or *guiding conduct* or *guiding behavior*) is the mode of governance distinctive to law”).

278. See STINCHCOMBE, *supra* note 26, at 55 (explaining that “[a] community language” is “said to be formalized to the degree to which there exist institutions and understandings that reduce the residual semantic variance . . . , given the text”); see also *id.* at 8–9 (defining formality).

279. *Id.* at 17.

280. SCHAUER, *supra* note 256, at 159. Additionally, rules can be used to allocate power temporally within the same set of decisionmakers, binding individuals in the future to their present assessment of the best course of action. See *id.* at 160.

281. *Id.* at 159.

designing formal rules from scratch that are meant to govern the behavior of government officials. Instead, a court must choose whether to uphold a formal regulatory system that the legislature has chosen to establish (in the form of a statute) or to invalidate the system.²⁸² When evaluating the constitutionality of a statutory text, the court does not have to turn its attention to the messy facts of “raw social life” that the statute was designed to reflect and to govern.²⁸³ Instead, the court chooses whether the abstracted rule is constitutional (if the case involves a facial challenge) or whether an application of that rule is constitutional (if the case involves an as-applied challenge). One could helpfully caricature the choice in such cases as a binary between accepting and rejecting a legal rule. In reality, the choice is more complicated; for example, the court could apply the constitutional avoidance canon to interpret the statute in an unconventional way²⁸⁴ or decide that a portion of a statute is unconstitutional but that it can be severed from the constitutionally permissible remainder of the statute.²⁸⁵ Notwithstanding these complexities, however, the court does not have to look behind the legal rule to evaluate whether it reflects the reality of the situations that it is meant to govern. Or, as Justice Roberts wrote in upholding the Affordable Care Act as a valid exercise of Congress’s taxing power: “Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”²⁸⁶

Thus, in textual review cases, the court is not choosing among formalities, but it is making a decision whether to accept or reject a formal legal rule. If the court upholds the rule as constitutional, then it accepts the formality that the legislature (or agency) developed. If it invalidates the rule entirely, then it rejects the formality and leaves that area to be governed by informal norms until the legislature decides to adopt a new rule to regulate the area. If the court instead deems a portion

282. STINCHCOMBE, *supra* note 26, at 6. Stinchcombe’s example of informally embedded formality is an intermediate appellate court choosing between two controlling cases to decide a difficult issue. *Id.* If an appellate court wishes to distinguish or overturn an earlier case, it “does not go all the way back to the analysis of raw social life” to justify its decision. *Id.* at 5. Instead, it seeks out reasons provided in another controlling case (or in other parts of the same controlling case) to reach its decision. *Id.* at 5–6.

283. This process is similar to what Stinchcombe calls “informally embedded formality,” which occurs when an actor “chooses among embedded formalities by a somewhat informal process.” *Id.* at 6.

284. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO)*, 557 U.S. 193, 206–11 (2009) (interpreting Section 4 of the Voting Rights Act to exclude a local utility district); Hasen, *supra* note 64, at 205–06 (criticizing the Court’s statutory interpretation in *NAMUDNO*).

285. See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607–08 (2012) (severing a portion of the Affordable Care Act).

286. *Id.* at 2600.

of a statute unconstitutional but severs it from the rest of a statute, then it modifies the formal rule while otherwise allowing it to govern officials' behavior. At no point, however, does the court engage in the process of constructing a formal rule from scratch.²⁸⁷

By contrast, in cases that do not involve textual review, the court's decision-making process might be driven by its desire to construct effective formal rules of governance that they perceive to be absent from the legal system. In these cases, when a court does not perceive there to be a rule governing the conduct of executive officials, it may try to formalize a rule that will serve this function.²⁸⁸ Unlike in textual review, this process allows courts to engage in a detailed manner with the social realities that a rule is meant to govern. For a formal rule to be effective, it must do a better job governing social conduct than if officials were free to operate according to informal norms.²⁸⁹ Specifically, if a rule is to effectively guide officials' behavior, it must be what Stinchcombe calls a "cognitively adequate" abstraction of the social and physical world that the officials inhabit.²⁹⁰ This requires the decisionmaker to ensure both that the rule accurately takes account of all the relevant aspects of a situation in which the rule is meant to be applied, and that the rule is sufficiently "cognitively economical" for officials to understand and apply.²⁹¹

287. This is not to say that the social realities underlying a piece of legislation are always irrelevant to its constitutionality. For example, in deciding whether a statute violates the Establishment Clause because it lacks a secular purpose, it is "the duty of the courts to distinguish[h] a sham secular purpose from a sincere one." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (alteration in original) (internal quotation marks omitted). Thus, a court cannot "turn a blind eye to the context in which [a] policy arose" and accordingly must examine the social and political environment in which a challenged statute was enacted. *Id.* at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

288. In contrast to the process of "informally embedded formality," *see supra* note 283, this process resembles what Stinchcombe calls "formality being constructed," a process that can entail either constructing a "more formal, or better, formal system," or "simply patch[ing] up the mistakes that formality would lead to." STINCHCOMBE, *supra* note 26, at 7.

289. STINCHCOMBE, *supra* note 26, at 53. It is not necessary, for purposes of this exposition, to define what is meant by "more desirable." Instead, we can bracket the normative question of what purpose a formal system should serve and define formality as working properly to the extent that it adequately serves whatever purpose one assigns to it.

290. *Id.* at 20.

291. *Id.* at 21. More precisely, according to Stinchcombe, a formal system achieves cognitive adequacy to the degree:

(1) that it accurately portrays the world in a manner that (2) is cognitively economical (it does not have much noise and is not difficult to grasp) to work with to yield the correct diagnosis and the correct remedy, (3) that the description is full enough to include all the aspects of the situation relevant to

Consider, for example, a rule that instructs a police officer how to search the car of a person arrested following a traffic stop. If the rule is too complicated to apply, and is thus not cognitively economical, police officers are likely to disregard it. At the same time, however, the rule must reflect all the aspects of social life that are relevant to ensuring that the officer is being properly governed. These aspects will include the fact that the officer has two powerful incentives to conduct as extensive a search as possible. First, the officer may have a constitutionally illegitimate incentive to obtain all possible evidence against the suspect without going through the trouble of obtaining a search warrant. Second, the officer will have a (legitimate) concern for her safety and will want to ensure that the suspect is unable to endanger her life. If the rule is to successfully balance the officer's safety and the suspect's privacy rights, it must accurately reflect the realities of a spur-of-the-moment arrest. If the officer does not feel that she can apply the rule without endangering her safety, she will ignore the rule and operate according to instinct, custom, or some other norm of everyday social life. However, if the officer can apply the rule in a way that invades the suspect's privacy rights even when her safety is not threatened, then the rule will fail to serve its underlying purpose. In either case, the rule will lack cognitive adequacy and will thus fail to meaningfully govern the officer's conduct.²⁹² Either the rule will fall into disuse, or it will be applied as a sort of ritual that does not serve the purpose for which it was designed.²⁹³

Thus, the process of deciding constitutional cases that do not involve textual review requires courts to attend to the social realities of the policy areas they are seeking to govern.²⁹⁴ If the court constructs a rule that fails to account for these realities, then officials will likely disregard the rule and fall back on informal norms when confronted with an unforeseen situation. Accordingly, as Frederick Schauer has written, the rule must be sufficiently "entrenched" that the official will not "look past" the rule to determine whether its underlying purpose would be served by following it in a particular situation.²⁹⁵ This requires that a rule

the action to be taken, and finally, (4) that the scope to which the abstraction system applies is wide enough that most situations that have to be acted on are included.

Id. at 21–22.

292. *Id.* at 22.

293. *Cf. id.* (characterizing abstractions with low-cognitive adequacy as "ritualistic").

294. *Cf. id.* at 25 (stating that a cognitively adequate formal variable must account for "everything essential to the governing purposes for a given situation . . . extracted from the relevant reality").

295. SCHAUER, *supra* note 256, at 42–51; *see also* STINCHCOMBE, *supra* note 26, at 26–27 ("In general, if the abstraction in a formality is sufficient, there is no reason for

be grounded in a realistic assessment of the contingencies and risks that an official will confront in situations where the rule is supposed to apply. For example, if officers require some flexibility in applying a stop-and-search rule in order to protect their safety or achieve their law enforcement goals, a court could lower the standard of proof required to conduct a stop.²⁹⁶ This would enable officers to act on incomplete information about whether a particular individual poses a danger and thus would give them more discretion than they would be afforded by a rule that would require probable cause before conducting a search.²⁹⁷ In order to construct such a rule, however, courts must have a great deal of information about the realities that define law enforcement encounters with criminal suspects.

Thus, the process of deciding constitutional cases in the absence of a statute will require courts to construct relatively complex and innovative constitutional doctrine. In order to construct a cognitively adequate rule, courts must adopt doctrinal strategies to supervise and monitor the rules' application in order to assess whether they are cognitively adequate.²⁹⁸ The constitutional adjudication process is well suited to this task because courts are often confronted with instances in which the actions of an official violated the Constitution. A court can therefore get a sense of whether a particular rule would correct the constitutional problem that occurred in a specific case. The court will then adapt and modify the rule as it is presented with new cases, which gives it a more robust understanding of the social realities that it is seeking to regulate. Therefore, in cases not involving textual review, the process of constructing a constitutional doctrine will involve a relatively high degree of experimentation as courts try to identify flaws with a formal rule and decide how to adapt that rule so that it is cognitively adequate to govern future actions.²⁹⁹

the governing process based on the formality to review the reality behind the abstraction.”).

296. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that a police officer may search an individual for weapons if “he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime”).

297. See STINCHCOMBE, *supra* note 26, at 26 (citing arrest rules to illustrate that “many formal systems require people to act on insufficient information, and they sometimes take that explicitly into account”).

298. See *id.* at 35 (observing that the process of formality being constructed “often includes periods of intense ‘supervision’ of the formalities being introduced, because the designers of the formality cannot tell what needs fixing without seeing what goes wrong”); *supra* notes 101–13 and accompanying text (discussing the doctrinal strategies that courts may adopt to supervise and monitor officials).

299. See *id.* at 7 (stating that the process of formality being constructed “can take the form of discussion, experimentation, distinguishing cases, writing memos (or briefs to

Accordingly, in these nontextual review cases, courts tend to be more oriented toward the reality of the situations they are trying to govern. In *Miranda v. Arizona*,³⁰⁰ for example, the Supreme Court developed a detailed set of operational rules that were meant to “dispel the compulsion inherent in custodial surroundings.”³⁰¹ The Court therefore had to ground its decisionmaking on its perception of the physical and psychological realities of encounters between police and suspects. Likewise, in *Maryland v. Shatzer*,³⁰² the Court assumed that once a suspect has been released from custody, 14 days “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”³⁰³ And, in a recent case narrowing the scope of *Miranda*, the Court surmised that “interview tactics” designed to encourage a nonarrested suspect’s confession (such as informing a suspect that her “silence could be used in a future prosecution”) are not so inherently coercive that they “deprive a witness of the ability to voluntarily invoke the privilege” against self-incrimination.³⁰⁴ In terms of restricting and expanding the right against self-incrimination, the outcomes of these cases differ dramatically (as, of course, do the ideological propensities of the Warren and Roberts Courts).³⁰⁵ In each case, however, the Court justified its holding (and constructed or modified the rules that govern police confessions) based on the Justices’ understandings of what interrogations are *actually* like.³⁰⁶

Of course, this regulatory lawmaking process poses significant challenges.³⁰⁷ Appellate courts are notoriously limited in their information-gathering capacities, and the Supreme Court is frequently criticized for making policy decisions based on information outside the

a higher court)—attempts to locate the problems in the abstraction and discern what change or adaptation could grasp the substance sufficiently well for further action”).

300. 384 U.S. 436 (1966).

301. *Id.* at 458.

302. 559 U.S. 98 (2010).

303. *Id.* at 110 (holding that confessions obtained after a 14-day break in custody are valid and do not violate an individual’s *Miranda* rights).

304. *Salinas v. Texas*, 133 S. Ct. 2174, 2183–84 (2013).

305. *See Shatzer*, 559 U.S. at 109; *Miranda*, 384 U.S. at 478–79.

306. *See Shatzer*, 559 U.S. at 113–14; *Miranda*, 384 U.S. at 448–49.

307. *See generally* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (analyzing problems courts and other institutions face in acquiring information and institutional strategies for addressing those problems). For a classic examination of the judiciary’s institutional competence, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394–404 (1978).

record that the Justices are unqualified to interpret.³⁰⁸ Scholars and jurists frequently invoke these institutional handicaps to justify or criticize particular interpretive methodologies³⁰⁹ or to criticize the validity of particular constitutional decisions.³¹⁰ A functionalist analysis of textual and nontextual review, however, suggests that much of this criticism may be beside the point. If courts must construct formalized rules in cases that do not involve textual review, then this type of constitutional lawmaking requires courts to make empirical assumptions about the world they are regulating. Regardless of whether courts are well designed to assess the reality underlying a constitutional rule, doing so is an inescapable part of lawmaking when no statute is at issue.

C. *Institutional Design and Legislative Constitutionalism*

A third, somewhat more obvious structural difference between textual and nontextual review is also linked to the question of which institution a court believes to be better suited to certain forms of constitutional decisionmaking. Advocates of “legislative constitutionalism” have documented the degree to which legislatures participate in the constitutional lawmaking process by enacting statutes that concretize and implement the general commitments set forth in the Constitution.³¹¹ However, in addition to these significant and relatively rare statutory enactments, legislatures can also play a constitutional lawmaking role simply by crafting legislation that pursues their policy aims in constitutionally permissible ways. This role is particularly valuable with respect to addressing constitutional questions that arise from complex legislative and regulatory frameworks, which courts may be ill equipped to address.³¹² Thus, if a court identifies constitutional problems with a statute or regulation, it may wish to rely on the

308. See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 35–42 (2011) (arguing that “empirical factfinding” in ideologically divisive cases can provoke the Justices to engage in “motivated reasoning” and erode public confidence in the Court’s impartiality); Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 SUP. CT. REV. 267, 285–86 (discussing constitutional cases in which the Court made empirical judgments on matters outside the Justices’ expertise based on information outside the record).

309. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 154–57 (2006).

310. See, e.g., Schauer, *supra* note 308, at 295–97.

311. See *supra* note 30 and accompanying text.

312. Garrett & Vermeule, *supra* note 27, at 1279–80 (endorsing James Bradley Thayer’s argument that “many constitutional questions encompass not merely technical legal issues, but instead large questions of constitutional policy and politics that legislators are better suited to decide than judges”).

legislature to craft new laws that adequately address those problems. Although modern legislatures operate under serious constraints of time and information,³¹³ they are nonetheless structured to allow serious deliberation over significant matters that occupy their policy agendas.³¹⁴ For example, as Elizabeth Garrett and Adrian Vermeule have observed, these deliberative structures harness the “collective character” of Congress and thereby serve “to encourage the revelation of private information, to expose extreme, polarized viewpoints to the moderating effect of diverse arguments, to legitimate outcomes by providing reasons to defeated parties, and to require the articulation of public-spirited justifications for legislators’ votes.”³¹⁵ Hence, Congress may be better situated than courts to resolve constitutional issues in a manner that “blend[s] policy considerations with technical legal arguments.”³¹⁶ Similarly, deliberative structures of administrative law may give agencies a unique vantage point with respect to complex constitutional problems.³¹⁷ Moreover, the policy expertise of administrative agencies may enable them to resolve constitutional problems with a greater creativity than courts possess.³¹⁸

Significantly, these considerations may incentivize courts to engage in a less regulatory mode of constitutional adjudication even when, as a factual matter, a legislature or agency does not possess the institutional strengths that courts assume. To the extent that courts are cognizant of their own institutional inadequacies with respect to analyzing complex regulatory problems, there is reason to think they may develop a sanguine (if inaccurate) view of other institutions’ expertise in these matters.³¹⁹ For example, Eric Berger has argued that the Supreme Court

313. See generally BRYAN D. JONES & FRANK R. BAUMGARTNER, *THE POLITICS OF ATTENTION: HOW GOVERNMENT PRIORITIZES PROBLEMS* (2005); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2d ed. 2011).

314. See Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1935 (2011) (observing that procedural “[r]equirements such as bicameralism, discussion in committee, and three readings, as well as the rules that regulate discussion and require minimal periods of time between the several steps of the legislative process, are all designed to enable and promote debate and deliberation”).

315. Garrett & Vermeule, *supra* note 27, at 1291.

316. *Id.* at 1318.

317. See Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 522–30 (2010) (arguing that “[a]gencies . . . hold potential as sites for public deliberation on and engagement with constitutional meaning”).

318. *Cf. id.* at 528 (arguing that “agencies are able to adopt and implement far-reaching reforms that can be more effective than court-ordered relief in avoiding and remedying constitutional problems in administrative settings”).

319. See NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 23–25 (2001) (describing the “single institutionalism” fallacy of

frequently defers to prison officials with respect to constitutionally sensitive issues based on the unfounded (and mistaken) assumption that those officials have the expertise necessary to address such issues.³²⁰ Thus, in *Baze v. Rees*,³²¹ the Court upheld Kentucky's lethal injection procedures on the ground that judicial intervention would "embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures."³²² In reality, however, Kentucky's legislature had delegated the administration of lethal injection procedures to prison officials who had little expertise or qualification to implement the constitutionally sensitive policy.³²³

Nevertheless, cases like *Baze* exemplify the Court's cautious approach to constitutional lawmaking in textual review cases.³²⁴ This is because, with respect to the distinction between textual and nontextual review, the question is not whether legislatures and agencies *actually* possess institutional advantages over courts with respect to some forms of constitutional lawmaking. Rather, the question is whether courts *think* that legislatures and agencies possess such advantages.

IV. THE LIMITS OF STATUTORY CONSTRAINT

While this Article has argued for the existence of a previously unrecognized constraint on constitutional decisionmaking—the presence of statutes—there are important limits to the scope of its argument. Specifically, this Article claims only that the presence of a statute is *a* potential influence on constitutional decisionmaking. However, it is far from the *only* influence on judicial decisionmaking and in many cases will not be the dominant influence. Consider, for example, the many pressures that work alongside statutory constraint to shape Supreme Court decisionmaking. In many contexts, there will be other political or

failing to evaluate institutions' relative competence to address a policy issue); O'Rourke, *supra* note 5, at 443–48 (arguing that the fallacy of single institutionalism leads courts to devolve too much regulatory authority to law enforcement officials in criminal procedure cases).

320. See Berger, *Individual Rights*, *supra* note 72, at 2046.

321. 553 U.S. 35 (2008).

322. *Id.* at 51.

323. See Berger, *Individual Rights*, *supra* note 72, at 2039–40.

324. It bears noting, however, that *Baze* is an example of regulatory rather than statutory constraint. The Kentucky Legislature provided a statutory basis for the State's lethal injection protocol by enacting a statute mandating lethal injection as the method of execution for death-sentenced prisoners. See KY. REV. STAT. ANN. § 431.220(1)(a) (LexisNexis 2010); *Baze*, 553 U.S. at 44. The Kentucky Department of Corrections then developed a written protocol to comply with the statute. See *Baze*, 553 U.S. at 44–45.

structural pressures that are certain to overshadow any effect that statutory constraints might otherwise have on constitutional decisionmaking. To offer just one example of a political concern that appears to override the effect of statutory constraints, consider the Supreme Court's landmark abortion cases.³²⁵ Both *Roe v. Wade*³²⁶ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*³²⁷ involved constitutional challenges to statutes restricting abortion.³²⁸ However, these cases established a detailed framework governing the ways in which state legislatures may regulate women's access to abortion. Specifically, in *Roe*, the Court adopted a "trimester" framework that gave states greater freedom to restrict abortions as a pregnancy progresses.³²⁹ In *Casey*, the Court rejected this framework in favor of an "undue burden" standard that is relatively malleable in theory³³⁰ but which the Court applied to develop a detailed set of rules governing issues of spousal consent, parental notification, and exceptions for the life and health of the mother.³³¹ *Roe* and *Casey* thus illustrate that, in textual review cases involving ideologically fraught issues, the Court is willing to engage in regulatory decisionmaking to limit the discretion of state legislatures that might otherwise seek to ignore or manipulate a more deferential judicial rule.

Even in less politically fraught contexts, there may be structural pressures that override the effects of statutory constraint in textual review cases. Consider, for example, *Zadvydas v. Davis*,³³² in which the Court construed the federal alien removal statute³³³ to contain "an implicit

325. For an account of the politics that inform abortion jurisprudence, see Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (discussing the politics of abortion preceding *Roe v. Wade*); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1706–35 (2008) (discussing abortion politics in the wake of *Casey*).

326. 410 U.S. 113 (1973).

327. 505 U.S. 833 (1992).

328. See *Casey*, 505 U.S. at 844 (addressing a Pennsylvania statute that required married women to obtain spousal consent for abortions except in life-threatening emergencies, and required minor women to obtain parental consent under similar circumstances); *Roe*, 410 U.S. at 117–18 (addressing a Texas statute making it a crime to "attempt" or "procure" any abortion that was not "procured or attempted by medical advice for the purpose of saving the life of the mother" (internal quotation marks omitted)).

329. See *Roe*, 410 U.S. at 162–64.

330. See *Casey*, 505 U.S. at 874 ("Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.").

331. See *id.* at 872–88, 900–01.

332. 533 U.S. 678 (2001). I am grateful to Aziz Huq for this example.

333. 8 U.S.C. § 1231 (2006).

‘reasonable time’ limitation, the application of which is subject to federal-court review.”³³⁴ By its terms, the statute permits the government to detain an alien who is found to be unlawfully present in the United States for longer than 90 days if the alien is “determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.”³³⁵ In order to avoid constitutional concerns, the Court interpreted the removal statute to permit an alien to challenge his or her detention after being held for an “unreasonable” period of time. More specifically, however, the Court held that a detention exceeding six months was presumptively unreasonable, and entitles an alien to release if she can produce evidence that “provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future” and the government is unable to rebut this showing.³³⁶ The Court’s rationale for establishing this six-month window was its interest in “uniform administration” of the reasonableness requirement “in the federal courts.”³³⁷ Thus, in some textual review cases, the Court may engage in regulatory decisionmaking for administrative reasons that trump the effect of statutory constraint.

The power of these additional structural and political influences does not detract from the fact that statutes can *also* influence constitutional decisionmaking. The core aims of this Article are to provide qualitative evidence that the presence of legislative texts correlates with a regulatory mode of constitutional adjudication and to offer theoretical reasons for this correlation. This is not to suggest, however, that the strength of this correlation will match that of more obvious and well-documented factors that shape constitutional decisionmaking.³³⁸ Ultimately, this Article provides a preliminary examination of a phenomenon that has largely gone unexplored in constitutional scholarship. The relative importance of this phenomenon is certain to vary from context to context and merits further exploration.

334. *Zadvydas*, 533 U.S. at 682.

335. § 1231(a)(6).

336. *Zadvydas*, 533 U.S. at 701.

337. *Id.*

338. Cf. Richard Lempert, *The Significance of Statistical Significance: Two Authors Restate an Incontrovertible Caution. Why A Book?*, 34 LAW & SOC. INQUIRY 225, 234–35 (2009) (reviewing STEPHEN T. ZILIAK & DEIRDRE N. MCCLOSKEY, *THE CULT OF STATISTICAL SIGNIFICANCE: HOW THE STANDARD ERROR COSTS US JOBS, JUSTICE, AND LIVES* (2008)) (discussing the distinction between statistical significance and strength of correlation and the relevance of the distinction to legal scholarship).

CONCLUSION

Ultimately this Article is an appeal for a new scholarly conversation. For many years, legislation scholars have recognized the ways in which constitutional norms shape the day-to-day statutory interpretation practices of modern courts.³³⁹ This Article hopes to redirect some of that energy to exploring the obverse question: to what extent do statutes shape constitutional norms? Such exploration, I argue, could generate significant insights into questions of institutional design and constitutional legitimacy. Although my exploration of this question is merely preliminary, I intend for it to motivate constitutional theorists to continue exploring the extent to which legislative texts shape constitutional adjudication.

For example, the distinction between textual and nontextual review could offer a powerful reason for designing legislative and agency structures to facilitate greater constitutional deliberation.³⁴⁰ As Garrett and Vermeule have observed, decisions about the scope of constitutional rights often require a policymaker to decide how to allocate resources and structure policies that will ensure that individuals can avail themselves of those rights.³⁴¹ Moreover, the announcement of a new constitutional right will often place those right holders in conflict with others who wish to exercise a conflicting, and equally valid, constitutional right.³⁴² In other words, sound constitutional lawmaking often requires that some institution impose detailed, substantive regulatory obligations on competing actors. As this Article has shown, courts are likely to occupy this regulatory role in cases where they do not identify a legislative text that serves this function. By examining the structural reasons that explain these patterns of judicial behavior, this Article lays the groundwork for a deeper exploration into the desirability

339. See, e.g., Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 564–65 (1990) (arguing that “phantom constitutional norms” rooted in “mainstream public law” deeply inform contemporary immigration law); Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1205–07 (2011) (describing and critiquing the extent to which constitutional norms have informed the Supreme Court’s recent statutory interpretation jurisprudence); Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 3 n.3 (2004) (citing theories of statutory interpretation that are informed by constitutional principles).

340. See Garrett & Vermeule, *supra* note 27 (exploring how to improve Congress’s capacity for constitutional deliberation); Metzger, *supra* note 317 (describing and defending the ways in which agencies incorporate constitutional deliberation into their lawmaking).

341. Garrett & Vermeule, *supra* note 27, at 1315.

342. See generally Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503 (1989).

and normative legitimacy of constitutional adjudication in the absence of statutes.