

Modesty, Of a Sort, in the Setting of Precedents

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Much speculation about and early analysis of the Roberts Court has focused on its treatment of existing precedents, as observers wonder at what pace it will dismantle what legacy remains of earlier courts, especially the Warren and early Burger Courts.² This essay explores an issue that receives less attention than the treatment of precedents but is arguably about as important: how a court goes about creating precedents—more specifically, to what extent it issues legal pronouncements that would be expected to fetter the discretion of other judges committed to following its precedents faithfully. In the first section of the essay, I analyze various reasons why one precedent can be more or less constraining than another and discuss strategies for empirically assessing the amount of constraint imposed. The second section presents preliminary data allowing some comparisons of precedent-setting styles—the Roberts Court versus previous courts and individual justices against each other. I conclude the essay with thoughts about how consequential different styles of precedent setting are and suggestions for future research.

I. MAKING LAW MODESTLY

In nominating John Roberts for chief justice, President Bush maintained that Roberts would “strictly apply the Constitution and laws, not legislate from the bench.”³ At their hearings Judges Roberts and Alito both promised to eschew judicial activism and approach the work of judging with modesty, even humility. Terms like “activism” and “legislating from the bench” are often employed loosely⁴, especially around judicial confirmation hearings. And the nominees’ promises covered a good deal of ground, including giving respect to precedent and the views of other judges. But in describing what they saw as the proper judicial role, both gave considerable emphasis to their views of how a justice should create precedents and made it clear that their definition of judicial modesty extended to this facet of judging. In response to Senator Hatch, Judge Alito said:

I think that my philosophy of the way I approach issues is to try to make sure that I get right what I decide. And that counsels in favor of not trying to do too much, not trying to decide questions that are too broad, not trying to decide questions that don't have to be decided, and not going to broader grounds for a decision when a narrower ground is available.⁵

Judge Roberts repeatedly made statements along the same lines at his hearings.

It would be unwise, of course, to read too much into statements made by a judicial nominee in the course of hearings. And some of the goals and principles announced by nominees Alito and Roberts might conflict with each other. In particular, setting a modest precedent limited to the specific facts of a case now before a court does little to

² In addition to the other papers in this symposium, see Ronald Dworkin, *The Supreme Court Phalanx*, THE NEW YORK REVIEW OF BOOKS 54(14) (<http://www.nybooks.com/articles/20570>), decrying what Dworkin sees as unacknowledged overrulings of precedents.

³ <http://www.whitehouse.gov/news/releases/2005/07/20050719-7.html>

⁴ For careful examinations of these terms, see Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in STEPHEN C. HALPERN AND CHARLES LAMB, EDS., *SUPREME COURT ACTIVISM AND RESTRAINT* (1982) and Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, LEWIS & CLARK L. REV. 11:185 (2007).

⁵ <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>

ensure that precedent guides the court's decisions in future cases.⁶ But their statements give us reason to think both of these justices care about how they make precedent. Furthermore, observers of the Court have frequently claimed to see differences in how justices approach setting precedents. For instance, Justice O'Connor was widely viewed as being unusually averse to broad rules, writing opinions in ways that often provided little guidance for deciding future cases.⁷ Similar claims have been made about Justice Kennedy.⁸ At the other end of the spectrum is Justice Scalia, who has forcefully argued in opinions and articles that justices should decide cases on the basis of clearly articulated rules, in order to impose constraint both on other judges and themselves.⁹ Reputations for precedent-setting styles can even attach to whole courts, with the Warren Court probably thought of by many as exemplifying a penchant for immodest rule making.

There might be no cause to care whether Roberts and Alito will be different from other justices or the Roberts court different from other courts if the form precedents take did not matter for the quality and legitimacy of judging. But judging by the confirmation debates, politicians and the media think it matters, and many academics agree. A good portion of Cass Sunstein's manifesto for judicial minimalism¹⁰ is aimed at Scalia, Sunstein agreeing with the justice that precedential forms are consequential but disagreeing vigorously about the desirability of broad rules. In Sunstein's view, while broad rulings are sometimes justifiable, even necessary, it is usually preferable for judges to "render decisions that are no broader than necessary to support the outcome,"¹¹ thereby reducing the threat of costly mistakes and refraining from undermining democratic deliberation.

The large literature on standards and rules shows the same concern with form. While studies have considered a wide variety of reasons when and why rules might be preferable to standards or vice-versa, they tend to share an assumption that judges' decisions to cast statements of law one way rather than another are consequential.¹²

⁶ Consider these thoughts from Judge Sykes:

"Given the Chief Justice's apparent inclination in favor of rulings that clearly articulate "what the law is," it seems unlikely that he will be a fan of the weighing-and-balancing middle-ground compromises that characterize some of the late-Rehnquist Court's work. When the Chief Justice announced his preference for narrow decisions as a means of producing greater consensus on the Court, I don't think he meant "narrow" in the sense of fact-specific rulings that resolve the case before the Court but do not produce a clear legal rationale.... Also, fact-based balancing tests tend to enlarge the role of the courts at the expense of the other branches, and our new Chief Justice seems positively allergic to that.

Diane S. Sykes, "*Of a Judiciary Nature*": *Observations on the Chief Justice's First Opinions*, 34 PEPP. L. REV. 1027, 1042 (2007).

⁷ See, e.g., Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated"*, 39 AKRON L. REV. 373 (2006); Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUP. POL'Y 107 (2006).

⁸ "Kennedy's ruminations produce cases that have outcomes, but no settled rationale." Douglas W. Kmiec, *Overview of the Term: The Rule of Law and Roberts's Revolution of Restraint*, 34 PEPP. L. REV. 495,497 (2006-07).

⁹ See Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹⁰ CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

¹¹ *Ibid.*, p. 11.

¹² For helpful overviews, see Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992-993); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L.

We have good reason, then, to think that judges vary in how they approach the laying out of legal principles in their opinions and that the variation in their approaches is worthy of our attention. But is it possible to analyze that variation systematically? If so, how should we go about it, and what precisely should we look for? Here the literature does not provide ready answers, partly because there is no broad agreement as to what aspects of precedent setting are most important, partly because differences in approaches to precedent setting are difficult to define and measure. Nevertheless, a survey of characteristics of legal rules that have been deemed important in the literature is a good place to start.

I have already mentioned Sunstein's concept of narrowness—saying no more than is necessary to decide the case at hand. The concept is fairly clear, and Sunstein makes a persuasive case for its importance and utility. But the aim of Sunstein's book was not to provide a measurable version of the narrowness, and it is not easy to see how to get to one.¹³ The same is true of his concept of depth.

Differences in the construction of legal principles have received particularly sustained attention in the rules and standards literature, so we may find more help there. Let us begin with this succinct statement from Louis Kaplow: “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.”¹⁴ Sunstein makes much the same distinction: “By the aspiration to a system of rules, I therefore mean to refer to something very simple: approaches to law that try to make most or nearly all legal judgments under the governing legal provision in advance of actual cases. We have rules, or (better) ‘rule-ness,’ to the extent that the content of the law has been set down in advance of applications of the law.”¹⁵ Central to this approach to the rules-standards debate is a concern with the predictability of the law and the consequences of that predictability for those who have to obey it. As Russel Korobkin writes: “under a rule it is possible for citizens (with good legal advice) to know the legal status of their actions with reasonable certainty *ex ante*.”¹⁶

While Korobkin shares this concern, at the definitional level his distinction between rules and standards is more precise: “Rules establish legal boundaries based on the presence or absence of well-specified triggering facts... Standards, in contrast,

REV. 22 (1992 - 93); and Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000). For more skeptical views, see Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) and Frederick Schauer, *The Convergence of Rules and Standards*, 2003 NEW ZEALAND L. REV. 303 (2003).

¹³ Siegel attempts to render Sunstein's concept of minimalism more useful by providing an operational definition of it: “[T]o be minimalist according to the operational definition, a decision must have two components: it must (a) result from the (apparently) intentional choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available. To say the same thing a slightly different way, a decision is minimalist if and only if at least five Justices had reasonably available a broader and deeper result, but consciously (as best one can tell) decided the case as narrowly and shallowly as reasonably possible.” Neil S. Siegel, *A Theory in Search of a Court and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1963-64 (2005). But even this definition does not bring us very close to a workable measurement strategy.

¹⁴ Kaplow, *supra*, n.9, 560.

¹⁵ Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 961 (1994).

¹⁶ Korobkin, *supra* n.9, 25.

require adjudicators...to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule.”¹⁷

Duncan Kennedy also sees the types of facts involved in a judgment as integral to the distinction between rules and standards. In his argument, rules possess more “formal realizability” than standards, where “[t]he extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.”¹⁸ But Kennedy also offers a subtly different distinction: “A standard refers directly to one of the substantive objectives of the legal order...The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.”¹⁹

Kathleen Sullivan agrees that the connection to underlying values is one thing distinguishing rules and standards, writing that “[a] legal directive is standard-like when it tends to collapse decisionmaking back in to the direct application of the background principle or policy to a fact situation.”²⁰ But she identifies an additional ground for distinguishing them: “Standards allow for the decrease of errors of under- and over-inclusiveness by giving the decisionmaker more discretion than do rules.”²¹

Finally, Alexander and Sherwin also agree that “a standard is transparent to background moral principles...[while] rules can be applied without regard to questions of background morality. They are opaque to the moral principles they are supposed to effectuate.”²² But they offer a specific definition that differs from the others considered so far: “Standards are posited norms that contain vague moral or evaluative terms in their formulations.”²³

Like Sunstein’s concept of judicial minimalism, each of these approaches to the rule/standard distinction seems plausible and capable of accounting in part for widely shared intuitions that some legal formulations are quite different in character from others. Nevertheless, the distinction was not developed with empirical measurement in mind, and it seems to me that it has only limited utility for the researcher hoping to make systematic appraisals of legal formulations. Confronted with a set of legal statements, the researcher attempting to categorize them as rules or standards would fairly quickly run into difficulties.

Consider, for instance, Sullivan’s discussion of the three-tier approach to judicial review. In her view, the “recurring distinction in constitutional law between ‘categorization’ and ‘balancing’ is a version of the rules/standards distinction. Categorization corresponds to rules, balancing to standards.”²⁴ She illustrates this point through an argument that the development of the two oldest tiers, strict scrutiny and rational basis, imposed a rule-like quality on decision making in areas where they

¹⁷ *Ibid.*, 25-26

¹⁸ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1689 (1976).

¹⁹ *Ibid.*, 1690.

²⁰ Sullivan, *supra* n. 9, 59.

²¹ *Ibid.*, 58-59.

²² LARRY ALEXANDER AND EMILY SHERWIN, *THE RULE OF RULES* (DUKE U. PRESS, 2001), 30.

²³ *Ibid.*, 29.

²⁴ Sullivan, *supra* n. 9, 59.

applied, while the more recent subjection of some types of laws to intermediate scrutiny represents a movement back toward balancing and standards. It seems indisputable that intermediate scrutiny is different from the others; it would appear to require more difficult judgments, about which reasonable people would be more likely to disagree. But is this really because intermediate scrutiny is more standard-like and less rule-like than the other two levels of scrutiny? It is not easy to see why we should view the problem this way. The logical forms of all three tests are identical, each requiring a judgment as to how important a state interest is and how well tailored the law is to serve this interest. None of the three is tied more closely to background principle than either of the others, uses vaguer language, or calls for different types of evaluations or attention to a different set of facts. To preview a point that will be developed more fully later, I would argue that what separates intermediate scrutiny from the other tests is simply where it sets the threshold of decision. To pass strict scrutiny, a law must pass a very high threshold, to pass the rational basis test a very low one. For most laws, we could safely predict failure of the former test and passage of the latter. But intermediate scrutiny, as its name suggests, sets a threshold somewhere in between, where confident predictions are harder to make. In short, the difference in formulations Sullivan points to is an important one, but it seems best understood as tangential to the rules/standards distinction.

The definitions that Kaplow and Sunstein offer are vulnerable to much the same objection. Imagine that strict scrutiny required not that a law be narrowly tailored to serve a compelling state interest but only that it be rationally related to a compelling state interest. It is difficult to see how grafting together two elements from formulations that are roughly equally rule-like could yield one that is more standard-like, and I doubt that many people's intuitions would tell them that this new formulation of strict scrutiny was truly different in form from the original. And yet the new formulation would seem to leave more to be determined in the future. Certainly, we would frequently find it harder to predict whether a law would pass muster under this hypothetical standard than under the actual one.

Or consider two different hypothetical statements of a test for whether punitive damages can be imposed in a product liability case. Under one test, punitive damages may be assessed only if a) defendant was aware of the danger of injuries such as plaintiff suffered; b) the cost of modifying the product to reduce the likelihood of injury would have been half or less of the resulting reduction in expected cost of injuries, as viewed from defendant's perspective at the time; and c) the defendant chose not to modify the product. Under the other, punitive damages may be awarded only if defendant's behavior showed such disregard for the life and safety of others as to amount to a crime against society. I believe that if members of the legal community were asked to categorize these tests, an overwhelming majority would agree that the first test is more rule-like, the second more standard-like. But it seems unlikely that a manufacturer attempting to predict the future consequences of its behavior would be able to make more confident predictions under the first test than under the second; in fact, it is easy enough to imagine the opposite. If this is right, then while "rule-ness" may be associated with the extent to which legal judgments are determined in advance of the action, it is not defined by this trait.

A similar point can be raised against Kennedy's and Alexander and Sherwin's background-principles definitions. Few cases present better or more famous examples of

replacing a standard-like formulation with a rule-like one than *Miranda v. Arizona*²⁵, and the new framework it set out fits the background-principle definition perfectly, as it calls for no understanding or application of the principles underlying the Fifth Amendment (or the Sixth). But notice that a judge applying the standard supplanted by *Miranda*—whether, considering the “totality of circumstances,” a confession appeared voluntary—would also have no need or reason to think about underlying principles.

On the other hand, the first definition from Kennedy, above, seems to fit perfectly. We see *Miranda* as replacing a standard with a rule because it directs judges to consider “a list of easily distinguishable factual aspects of a situation” and, in case of a violation, to intervene “in a determinate way.” As this example suggests, different scholars’ definitions or even different elements from the same scholar’s definition sometimes appear to be in tension with each other. To take another example, note that where Korobkin locates the key difference between rules and standards in the types of facts they require judges to assess, to Alexander and Sherwin what is important is that standards require evaluative judgments, not factual determinations.

Perhaps despite appearances, the point of this discussion is not to criticize the rules and standards literature or individual scholars’ definitions—especially as I do not have a better definition to offer. Rather, the point is that as valuable as this literature might be for some purposes, focusing too much on the rules/standards distinction can impede the development of theoretical frameworks that might be even more useful.

A final example of how talk of rules and standards can cloud otherwise clear and careful theoretical expositions comes from Ehrlich and Posner.²⁶ The authors are interested primarily in a legal formulation’s specificity or precision (they use the terms interchangeably). However, they invite readers to understand this trait in terms of rules and standards, with precision equating to ruleness and rules distinguished from standards in this way: “standard” denotes “a general criterion of social choice,” while “[a] rule withdraws from the decision maker’s consideration one or more of the circumstances that would be relevant to decision according to a standard.”²⁷ When it comes to precision, they import the quantitative element of this definition, maintaining that “the fewer and simpler the facts to which definite legal consequences attach, the more precise is a legal obligation.”²⁸ This move strikes me as a slight, but definite, mistake, as the following two examples demonstrate.

Federal law and most state laws distinguish between first and second degree murder in similar ways. This is how the crimes are defined under federal law:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

²⁵ 384 U.S. 436 (1966)

²⁶ Isaac Ehrlich and Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

²⁷ *Ibid.*, 258.

²⁸ *Ibid.*, 261.

Any other murder is murder in the second degree.²⁹

Determining whether a first-degree murder was committed requires a decision maker to consider many more facts than a case of second-degree murder would. But it is hard to imagine any widely acceptable definition of either precision or specificity under which the definition of first-degree murder could be viewed as the *less* precise or specific of the two. In fact, I suspect that the vast majority of English speakers would agree that the definition of first-degree murder is *more* precise and specific.

For an example of judge-made law, consider *New York Times Co. v. Sullivan's* ruling that a public official defamed by a false statement cannot win damages for libel unless he or she also proves that “the statement was made with ‘actual malice’ - that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁰ The rule adopted by the Court requires decision makers to take into account more circumstances than they would have to under a simpler rule requiring only proof of falsity and defamation. But would the actual rule be considered less precise or specific under any natural use of those terms? Again, the answer clearly seems to be no.

In my view, then, while the literature on rules and standards provides a helpful starting point for the empirical study of lawmaking, we would do well to develop it in a different direction. Specifically, we should shift our attention away from typologies, focusing less on what a formulation of law should be called than on what it is about the formulation that makes it importantly different from others.

Insofar as the definitions and discussions canvassed above relate to judge-made law, they address two related but distinct questions: 1) Given two precedents with differently formulated legal principles, what differences would be expected in how these precedents affect potential litigants, other judges, and other actors? 2) What is it about the ways the principles are formulated that leads us to predict these different consequences? These questions are probably equally important, but the first is logically prior, so let us begin with it.

There are a host of possible consequences that could be worthy of our attention. The one I choose to focus on—and the manifestation of judicial (im)modesty analyzed here—is how much and why a given precedent would be expected to constrain the choices of other judges who attempt to follow it faithfully. A more modest precedent, on this dimension, is one that permits greater discretion to judges bound by it. For stylistic variety, I will also sometimes refer to precedents or formulations of law that impose significant constraint as “strong.”

By no means would a measure of constraint-imposing capture everything of importance to scholars working in the literatures discussed above. But I believe it is fair to say that all of the theoretical discussions we have considered so far share a deep concern with the degree to which a statement of law is able to impose constraint on judges. This is easy to see in Kaplow's definition: insofar as the court deciding a case now specifies how the legal principle should apply in future cases, later judges are left with fewer decisions to make. Similarly, if a more maximalist decision, as defined by Sunstein, decides more than necessary for the case before the court, it will, all else equal, leave less discretion to later judges than a minimalist decision. A focus on constraint also

²⁹ 18 U.S.C. 1111 (2004)

³⁰ 376 U.S. 254, 280-81 (1964)

fits well with Alexander and Sherwin's discussion of "determinateness."³¹ The more determinate a rule, the less disagreement there will be over how to apply it. A perfectly determinate rule would generate the same answer for anyone attempting to apply it to any given case. Hence a more determinate rule has a greater ability to impose constraint on other judges. From the perspective of potential litigants or others governed by the law, a rule that imposes more constraint on judges provides greater certainty and predictability.

It is also true that a focus on constraint cannot begin to capture all that is meant by judicial modesty. It is especially important to note here that this kind of modesty is entirely distinct from judicial restraint. Deferring to the decisions of elected officials is typically considered a restraintist position, but an announcement that courts should never overturn a statute unless no reasonable person could view it as constitutional would be highly immodest by the standard employed here. Similarly, a decision overturning a strongly constraining precedent would be modest by this essay's standard yet activist under some definitions of activism.

So the amount of constraint a legal formulation imposes is only one of many characteristics we should care about—but it is a crucial one. The rules and standards literature shows how valid and important goals can conflict with each other; for instance, greater predictability versus the requirement of justice that relevant differences between cases be taken into account in decisions. More constraining rules promote predictability but bring an increased danger of unjust decisions in specific cases. To Justice Scalia and some other judges and scholars skeptical of judges' ability to keep personal values from entering into their decisions, strong precedents can ultimately produce more legitimate decisions by reining in judges' discretion. On the other hand, that same skepticism might lead someone (like Sunstein) to see a greater danger in announcing overly broad rules in the first place.

Discussions of the nature of case-based lawmaking by Professors Devins and Meese and Schauer³² give us more cause to wonder whether it might be better for judges to refrain from creating strongly constraining precedents. The particular case before a judge will often be unrepresentative of the set of cases in which a given legal issue may arise, and we cannot always count on the judge to recognize the ways in which it is unrepresentative and to give them appropriate weight in formulating doctrine. Insofar as unrepresentativeness represents a problem that judges have difficulty overcoming, wisdom would seem to counsel that judges exercise modesty in the setting of precedents, allow doctrine to develop gradually as more and more cases are decided, and leave more ambitious rulemaking to officials with more information and broader perspectives.

Beyond normative issues like these, the amount of constraint imposed by precedents also has major implications for how a judicial system operates in practice. For one thing, it can affect the distribution of power between higher and lower courts. To the extent the high court in a system writes in strongly constraining terms, lawmaking should come primarily from above and tend to be more unified. Where a high court sets precedent more modestly, lower courts will enjoy more power and we would expect to see more diversity in doctrine, at least at certain stages. Similarly, it can affect the balance of temporal power. Where the first court to decide a case announces a clear and

³¹ ALEXANDER AND SHERWIN, 30-32.

³² Neal Devins and Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. L. REV. 323 (2004-05); Frederick Schauer, *Do Cases Make Bad Law*, 73 U. CHI. L. REV. 883 (2006).

easily applicable statement of law, it has the most say over the direction doctrine will take. In a system where principles are allowed to emerge over time and retrospectively, more power resides with the courts that confront an issue later.³³

Refining the Definition

So far I have defined the phenomenon of interest as the extent to which a precedent would constrain the decision making of judges who attempt to apply it faithfully. But this is only a small step toward an operational definition that would allow for empirical analysis of the phenomenon. How can we tell how much constraint a precedent would impose or whether one would impose more than another?

As an additional step, we can reframe the concept in numerical terms. Imagine one hundred judges chosen at random and tasked with applying a precedent to a large set of cases involving the same issue, very broadly defined, as the precedent-setting case (e.g., product liability, equal protection, price fixing). In each case, judges would achieve a certain level of agreement as to the proper outcome; for instance, in the first case, 92 of the 100 judges agree that the plaintiff should prevail, in the second case, 76% agree that the defendant should. By averaging across all cases, we could calculate a mean agreement rate for applications of a particular precedent. This mean agreement rate would constitute the numerical measure of a precedent's strength. An extremely strong, constraint-imposing, precedent would produce a mean agreement rate near 100%. A very weak precedent would generate an agreement rate close to 50%.

Of course, in actuality we would never be able to calculate a precedent's strength this way. The utility of this thought experiment is in making it clearer what we should be asking. Unfortunately, though, the refinement is only partially successful. It runs into two related problems. The first is that we cannot always describe a court's decision in terms of a single outcome. Perhaps a plaintiff prevails on one claim but not another or wins a judgment but is awarded very little in damages. A criminal defendant might succeed in having a confession excluded from a trial while physical evidence from a contested search is admitted. More subtly, even when it is possible to specify a single outcome of interest, it will not always be obvious how agreement or disagreement about one particular question of several a judge must address will affect agreement about the ultimate outcome. For example, suppose in deciding a tort case the precedent-setting court laid down a very clear, easily applied test for the imposition of strict liability. We would expect a large majority of the judges applying it to reach the same conclusion about whether a defendant was strictly liable in a given case. But where strict liability was deemed inapplicable, a court could still rule for the plaintiff if it found the defendant negligent, and determinations of negligence might occasion a good deal of disagreement. In fact, it is not difficult to construct scenarios in which greater agreement about one legal issue results in less agreement about the ultimate outcome of the case or, conversely, where a precedent that allows judges considerable discretion still leads to widespread agreement on outcomes.

These problems will not arise in many instances, but they can be avoided entirely by adopting a slightly more complicated approach. Instead of case outcomes, we can focus on discrete questions—of both law and fact—that judges address in a case. Not

³³ For an excellent theoretical and historical discussion of these different modes of lawmaking, see Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187 (2007)

only may different judges answer the same questions differently, but if their approaches diverge enough, they may ask different questions to begin with. Under a perfectly constraining precedent, all judges will ask the same questions and answer them in the same way. Under the weakest possible precedent, we might find a hundred unique patterns of questions and answers among the hundred judges. Under the revised definition, then, “agreement rate” refers to the percentage of judges asking and answering the same questions in the same way in a given case. A stronger, more constraining, rule will produce higher mean levels of such agreement across many cases. Again, I do not suppose that one could actually measure constraint in this way. But it should be possible to engage in thought experiments and roughly estimate the levels of agreement that would be found if the tests could really be run. Engaging in such thought experiments should provide considerably more guidance than asking vaguer questions about a precedent’s general character.

Armed with this definition, we can turn to the separate question of what characteristics of precedents tend to make them more or less constraining. In addition to being interesting in themselves, the answers might provide an alternative, albeit partial, method for empirically assessing constraint.

What Makes Precedents More or Less Constraining?

Of all the decisions a precedent-setting court can make to affect the discretion of later judges, the simplest and most consequential is whether or not to include in its opinion an explicit statement of the law justifying the case outcome. A decision not to include such a statement does not necessarily leave later judges without a compass. They can apply traditional legal methods to identify the implicit rationale behind the first court’s decision, and there may be some cases where the rationale is so obvious that an explicit statement would add nothing to it. But in general the inclusion of a statement of law can be expected to produce more constraint. As Peter Tiersma notes, “When a holding is set forth in such a textual form, it becomes much harder for a court lower in the hierarchy to avoid it by ignoring it or distinguishing it in some way. In fact, an appellate court itself will find it difficult to tactfully avoid mentioning an embarrassing precedent.”³⁴ By the same token, an explicit statement of general law³⁵ will provide more useful guidance to a court that desires to follow precedent faithfully.

Normally, therefore, a precedent that sets out an explicit legal rule³⁶ will be more constraining than one that does not. But the amount of constraint the statement imposes will depend on the character of the statement.

Most obviously, a court can impose more or less constraint on other judges by forbidding or allowing them to do something. In *Rita v. U.S.*³⁷, the Supreme Court did

³⁴ *Ibid.*,

³⁵ RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (CAMBRIDGE, MA: HARVARD U. PRESS, 2001), and Mitchell N. Berman, *Constitutional Decision Rules*, 90 VIRGINIA L. REV. 3 (2004), distinguish abstract statements of what the Constitution means or requires from statements of law that read more as instructions to lower courts for how to decide a constitutional question. Although this distinction strikes me as both valid and valuable, I do not attempt to apply it in this paper, instead counting any statement of law that could provide guidance to other judges, no matter how abstract.

³⁶ To avoid awkwardness, from this point I will use the term “rule” interchangeably with “statement of law” and “legal formulation.” I employ the term broadly, not, as in the rules/standards debate, to denote a particular kind of formulation. A rule here can be broad or narrow, highly constraining or not.

both. It had previously ruled, in *U.S. v. Booker*³⁷, that the federal Sentencing Guidelines were not mandatory and that circuit courts should review the sentencing decisions of district judges under a “reasonableness” standard. In *Rita*, the Court held that: a) It is constitutional for a court of appeals to presume that a sentence falling within the Guidelines is reasonable; but b) the sentencing judge, as opposed to appeals court, may not begin with a presumption that a sentence within the guidelines is reasonable.

A bit more subtly, a court can reduce the constraining force of a rule by including language that turns it into more of a suggestion than a command. For instance, in *Riggins v. Nevada*³⁹, the Court held as follows: “Under *Harper*, forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial.” The Court was similarly noncommittal in the First Amendment case of *Rankin v. McPherson*: “[I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.”⁴⁰

Turning to more specific characteristics of legal statements, it is probably impossible to catalogue all of those that can affect the level of constraint imposed. However, we can hope to identify some of the most important. To begin, consider the following examples of legal formulations:

1) “The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”⁴¹

2) “We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”⁴²

3) “[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. ... We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-

³⁷ 127 S.Ct. 2456 (2007)

³⁸ 125 S.Ct. 738 (2005)

³⁹ 504 U.S. 127, 135 (1992)

⁴⁰ 483 U.S. 378, 391 (1987)

⁴¹ *Roper v. Simmons*, 125 S.Ct. 1183, 1200 (2005).

⁴² *Printz v. U.S.*, 117 S.Ct. 2365, 2384 (1997).

of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration - whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection."⁴³

One characteristic, evident in the first two rules, is what we might call absoluteness or definitiveness. As Professors Schlag, Kennedy, and Ehrlich and Posner all note, a legal principle can usefully be viewed as having an "if p, then q" structure, where p denotes the determination required of a judge and q denotes the legal conclusion that should follow. The *Roper* and *Printz* rules appear strong because they call for no complicated analyses and allow for no exceptions once p has been established. This is not true for all statements of law. Some take a form that could be expressed as "if p, then probably q." We see this, for instance, in rules that create presumptions. One example is the Court's test for Equal Protection violations in the use of peremptory challenges. Under *Batson v. Kentucky*⁴⁴ and later cases extending it, once the objecting party makes a prima facie case of race- or gender-based discrimination, the burden of proof shifts to the other party to come forward with a neutral explanation of its pattern of challenges. Similarly, under *Arizona v. Fulminante*⁴⁵, when confronted with a constitutional violation in a criminal trial, the reviewing court asks whether the violation was a "trial" or "structural" error. If the violation is a structural error, the conviction must be reversed. However, if it is a trial error, the conviction does not necessarily stand. The reviewing court must ask whether the error was harmless beyond a reasonable doubt. If so, the conviction stands; if not, it must be reversed.

Other formulations introduce exceptions more directly. For example, in *People v. Brendlin*⁴⁶, the California Supreme Court held that a passenger in a vehicle stopped by the police is not necessarily seized for Fourth Amendment purposes; there is no constitutional seizure "in the absence of additional circumstances that would indicate to a reasonable person that he or she was the subject of the peace officer's investigation or show of authority." (By rejecting this approach in favor of a definitive rule that the passenger is automatically seized⁴⁷, the U.S. Supreme Court announced a rule, like those in *Printz* and *Roper* that falls far to the constraining side of the constraint/discretion dimension.)

More definitive rules, then, will normally be stronger than ones that call for additional judgments after p has been established. But this does not mean all definitive rules will be equally strong. While the rules in *Roper*, *Brendlin*, and *Printz* appear equally absolute, most observers would probably agree that the rules in the first two cases impose somewhat more constraint than the rule in the last. This is because the conclusions in the first two are triggered by very simple findings of fact—that the offender committed the crime as a minor, and that the vehicle was ordered to stop by police officers. By contrast, under *Printz* a judge must first determine whether Congress has indeed attempted to "compel the States to enact or enforce a federal regulatory program," a judgment that will sometimes, but not always, be obvious. Broadly, while the three cases are alike in that q

⁴³ *U.S. v. Dunn*, 107 S.Ct. 1134, 1139-40 (1987).

⁴⁴ 476 U.S. 79 (1986)

⁴⁵ 499 U.S. 279 (1991)

⁴⁶ 38 Cal.4th 1107 (2006)

⁴⁷ *Brendlin v. California*, 127 S.Ct. 2400 (2007)

follows automatically, or nearly automatically, from p, they differ in the extent to which the judgment whether p holds is open to serious disagreement. In *Printz* it may sometimes be, while in the other two cases it will never be.

The distinction may be clearer if we include *Dunn*, the curtilage case, in the comparison. The Court's test for identifying a curtilage is obviously a far weaker formulation than those in *Roper*, *Brendlin*, or *Printz*. The reason is partly that q does not follow immediately from p in curtilage cases: a search of the grounds outside the curtilage falls outside the protections of the Fourth Amendment, but a search within the curtilage is not necessarily unconstitutional. But even more important is that adjudging whether p holds (the search occurred within the curtilage) is a complex task. Why, exactly? Perhaps the main reason is that it calls for a judge to take into account multiple considerations in making that determination. Now, multiple considerations need not always entail a weaker rule. For instance, imagine the Court were to limit the *Roper* rule so that the death penalty could be applied to someone who was convicted of committing more than one murder as a minor. The new rule would allow no more discretion than the existing one. But where, as in the curtilage case, considerations leave room for disagreement, requiring more of them will normally result in greater discretion.⁴⁸

Accordingly, to rein in lower courts' discretion, the Supreme Court will sometimes rule expressly that a particular consideration may *not* be taken into account in judges' reasoning. We see this, for example, in *Colorado v. Spring*: "[W]e hold that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."⁴⁹

Even where the assessment of p requires only a single judgment, some formulations will be more constraining than others. As with the *Roper* and *Printz* rules, the difference will sometimes lie in how precise or narrow a determination is called for. The *Roper* rule seems stronger than *Printz*'s, but both are clearly more constraining than this one: "[W]here an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service" violates the Due Process clause⁵⁰. Reasonable people are more likely to disagree about whether a mechanism is inexpensive and efficient than whether Congress has attempted to compel state enforcement of a federal program.

Unfortunately, the concept of precision is difficult to define or apply systematically. The concept does not lend itself to absolute judgments; we will often be uncomfortable labeling a rule "precise" or "imprecise" and will frequently have trouble telling which of two rules is more precise. Nevertheless, where disparities between formulations are large, we can confidently adjudge one formulation more constraining than another.

⁴⁸ One could reasonably view multiple-considerations formulations as substantially similar to the exceptions and presumptions formulations discussed earlier. But conceptual clarity is aided by the effort to refine categories, and I think it is useful to distinguish between cases that require multiple steps from antecedent to consequent (exceptions and presumptions cases) and those requiring complicated assessments to determine a single antecedent.

⁴⁹ 479 U.S. 564, 577 (1987)

⁵⁰ *Greene v. Lindsey*, 456 U.S. 444, 456 (1982)

Much the same can be said about a distinction between formulations calling for subjective evaluations and those calling for determinations of fact. As a general rule, the former allow more discretion than the latter. And the distinction will sometimes be easy to make. Applying strict scrutiny requires one to make a subjective evaluation: is a governmental interest compelling? Applying the *Roper* and *Printz* rules does not. But other cases will be more difficult to categorize. For instance, where, as in the Due Process case above, a judge is asked to decide whether a mechanism is “inexpensive and efficient,” is the judge being asked to make a subjective or objective evaluation? A plausible argument could be made on either side.

Where a formulation does not call for a judgment that is highly precise and objective, a third characteristic can be important for determining how much constraint the rule will impose. Many decisions can be thought of as requiring a judge to decide whether a certain threshold has been crossed. Consider again the question whether a mechanism is inexpensive and efficient. Inexpensiveness, like efficiency, is not a discrete trait that is simply possessed or not. To judge whether something is inexpensive, one asks whether the cost is low enough—that is, whether it falls below a certain threshold. Often the threshold will not be perfectly defined, and in such instances it will be more difficult to categorize an item that falls near the threshold. (A \$50,000 car is not inexpensive, a \$3000 car is. What about a \$15,000 car? That is harder to say.) Even if one judge has a very well defined threshold (e.g., all and only cars priced under \$13,000 are inexpensive), other judges may set the threshold at a different spot, resulting, again, in more disagreement over items that fall near the threshold. Consequently, if a threshold is set at a point near which many cases would be expected to fall, we would expect it to generate more disagreement than a threshold set farther away.

To repeat a claim made earlier, both the strict scrutiny and rational basis tests should produce more consensus across a broad set of cases than intermediate scrutiny. We would not expect a high proportion of statutes passed by a legislature to fall near either the rational basis or strict scrutiny side of the spectrum; most laws are clearly rationally related to a legitimate interest and just as clearly not narrowly tailored to serve a compelling interest. On the other hand, many laws will fall close to the “substantially related to an important interest” threshold⁵¹, generating more disagreement about which side of the threshold they fall on. For another example, imagine restating the Due Process rule from above as follows: Where a *very* inexpensive and *extremely* efficient mechanism is available to enhance the reliability of an otherwise *manifestly* unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service violates the Due Process clause. The addition of strict qualifiers to the key adjectives would shift the thresholds in directions that should make people less likely to disagree about the average case, resulting in a stronger, more constraining rule.

So far I have argued that the amount of constraint imposed by a legal formulation will depend in part on how assuredly a conclusion (q) follows from a premise (p) and in part on how much room there is to disagree about whether the premise is correct. Levels of disagreement about whether p holds will be affected by: the number of separate judgments required to assess p; how precise the decision rule is; how objective or subjective the determination is; and where the threshold between p and not-p occurs.

⁵¹ These tests are probably better viewed as involving two thresholds, but that is not important for this example.

It may seem like an obvious and important characteristic has been overlooked. Kennedy and Alexander and Sherwin both point to “generality” as an important component of a legal statement and are clearly right to do so. Consider *Tull v. U.S.*⁵², where the Court had to decide whether the Seventh Amendment gave a defendant the right to have its penalty for violating the Clean Water Act determined by a jury. The Court could have contented itself with deciding that there was no right to a jury determination of penalties imposed under the Clean Water Act. However, the Court opted for a broader rule: “[A] determination of a civil penalty is not an essential function of a jury trial, and...the Seventh Amendment does not require a jury trial for that purpose in a civil action.” It seems fair to label such a rule, clearly going beyond what is strictly necessary to decide the case, strong or even immodest.

As important as generality would seem to be, however, it does not turn out to have much direct application to the task of this essay.⁵³ This is because the constraining effects of generality are straightforward only when a court writes on a blank slate, and courts today rarely do. Suppose that the Court were to reconsider *Tull* this term and decide that it was too absolute, ruling instead that there is a right to a jury where the conduct occasioning the penalty could have justified a prosecution under criminal law. The scope of the new rule would be precisely the same as in *Tull*, covering all civil actions. And yet it would introduce a discretionary judgment where *Tull* allowed none. It might be as immodest as *Tull* in some sense, but not in the sense of this essay, as it allows more room for disagreement among judges applying it.

It turns out, then, that the key question for an analysis of constraint is not how general a rule is but whether it expands or reduces the set of cases in which disagreement is likely to occur. One important and recurring type of case where the Court does one or the other involves the question how broadly to interpret the scope of a constitutional right. Compare *Plyler v. Doe*⁵⁴, where the Court ruled that the Equal Protection Clause applies to illegal aliens, with *U.S. v. Place*⁵⁵, where the Court ruled that allowing drug dogs to sniff someone’s luggage does not constitute a search under the Fourth Amendment. The former ruling expands the discretion of other judges by adding more cases to the set in which a violation might be found; the latter reduces discretion by eliminating cases from the set.

An even more direct way of imposing constraint is to declare some cases off limits to the courts. Think of Supreme Court decisions in the last two decades denying parties standing, especially in environmental and Establishment Clause cases, or finding suits against states barred by the Eleventh Amendment. Each decision of this sort imposes constraint by defining a set of cases where judges have no decision to make at all and hence cannot disagree with each other.

⁵² 481 U.S. 412 (1987)

⁵³ Paul G. Mahoney and Chris William Sanchirico, *General and Specific Legal Rules*, 161 J INST. & THEOR. ECON. 329 (2005), provide another reason to think that generality is important, demonstrating that under certain conditions, rules directed at specific activities will be more likely to privilege the interests of regulated actors over those of society generally than would rules governing a range of activities. However, their analysis depends only on generality per se and not on the extent to which general rules are more constraining, as defined here.

⁵⁴ 457 U.S. 202 (1982)

⁵⁵ 462 U.S. 696 (1983)

To label such a ruling strong or immodest might seem odd. A devotee of Bickel or Frankfurter would applaud it as an example of necessary and salutary restraint. One response is to recall that a decision can be modest in more than one way, and this essay is concerned with only one. But there is also an argument to be made that rulings that at first glance seem modest under other definitions may not be. Note, for instance, that given the usual perspectives of plaintiffs in Establishment and environmental cases, denials of standing will typically ensure that conservative policies prevail. Denying access to courts for positions a judge disagrees with is a highly effective way of shaping policy in the judge's desired direction and in this sense can be seen as a significant exertion of power.

II. EMPIRICAL DATA

To this point I have set out an operational definition of the extent to which a precedent imposes constraint on later judges and identified a set of characteristics tending to make precedents stronger or weaker in this sense. Although neither the definition nor the list is complete, they should offer sufficient guidance to allow for some preliminary empirical explorations of how individual justices and the Court as a whole go about setting precedents. The questions I hope to address are whether the Supreme Court as an institution shows any clear tendencies toward more or less modest precedents and whether there are interesting similarities or differences across Courts and justices. More specifically, is there evidence that the behavior of the Roberts Court is likely to diverge much from earlier courts'?

As suggested earlier, how much constraint to impose through a precedent can be viewed as involving two decisions: whether to include an explicit statement of law in the court's opinion and, if a statement is to be included, how to formulate it. There may be rare cases where the logic or principle underlying a decision is so obvious that the decision can guide other judges even where the law is not expressly stated. But most often the decision not to include a statement of law will allow for more disagreement among judges in future cases. On the other hand, the inclusion of an explicit rule will not always result in significant constraint. That depends on the characteristics of the rule. Accordingly, I ask two questions about each case: 1) Does the Court set out an explicit statement of law? 2) If so, how constraining is the statement?

A. Coding Rules

Ascertaining the presence or absence of an explicit rule requires attentive reading of cases but is otherwise typically a fairly straightforward task. A court will often signal that a statement of law is to come with a phrase such as "We hold" or "In our view." Whether or not they are so prefaced, rules typically appear near the beginnings or ends of delineated sections of an opinion. The syllabus of the case can also be helpful in identifying statements of law.

In my coding of cases, two judgments presented the most frequent problems. First, I counted a holding as a rule only if it was framed broadly enough to be understood as intended to govern a non-trivial number of cases. For example, the Court's holding that "application of the Unruh Act to California Rotary Clubs does not violate the right of

expressive association afforded by the First Amendment”⁵⁶ is not counted as a rule. A close reading might uncover logic applicable to other statutes or organizations, but the Court chose to state the law in a way that did not explicitly apply to them. It is difficult to offer a more precise coding rule, so the reader should bear in mind that some narrow holdings that might qualify as rules in some people’s eyes are not treated as rules here. Under the same principle, I did not ask whether a legal statement should be considered a holding or dicta. If the Court announced a rule, I coded it as one, regardless of whether the rule was necessary to the decision of the case. The second sometimes problematic judgment was whether a rule was new. Because this is an essay about the setting of precedents, not the treatment of existing ones, it would not make sense to count simple citations of established rules. However, an extension or limitation of an existing rule could affect levels of constraint, as could an attempt to restate a rule in new terms. For this reason, I coded any alteration of a rule as a new one. A case was coded as making an explicit statement of law only where these guidelines allowed for a confident determination. In cases of doubt, the coding decision was “no rule.”

Ideally, having identified a rule I would be able to assess its strength in absolute terms so as to be able to compare it with rules from other cases. But it would be very difficult to make such an assessment even qualitatively and using few categories (e.g., very strong, fairly strong, fairly weak, etc.). For one thing, a single rule can possess several characteristics that operate in opposing ways, some enhancing discretion, others reducing it. Furthermore, appearances can be deceiving, and rules will not always operate in practice as we would expect them to. Sometimes what appears to be an open-ended rule will turn out to allow few real options to judges in actual cases, while a rule that seems strong and clear will prove confusing in practice.⁵⁷

With multiple coders and the resulting ability to test reliability through inter-coder checks, it might have made sense to code absolute levels of constraint. But coding the cases alone, I do not have sufficient confidence in my ability to do so reliably. Therefore, I chose instead to code the rule in each case relative to an alternative. Specifically, I asked whether the Court’s ruling in a case appeared to impose more constraint, less, or about the same amount as the rule proposed by the party whose position on the relevant issue was rejected by the Court. In many cases, the Court describes the alternative in a summary of the parties’ arguments. Where it omits this summary but reverses the lower court, the alternative can usually be found in its summary of the lower court’s reasoning. In the small minority of cases where the alternative is not clearly spelled out in one place or the other, it is often a fairly simple matter to infer the alternative from the Court’s discussion.

To judge the relative effect of the rule, I drew on both the operational definition and list of characteristics described above. That is, I began by identifying key characteristics and noting their implications: e.g., the Court’s rule is more objective than the alternative (more constraining); the Court’s rule would require judges to make an additional judgment (less constraining). But the ultimate coding question was whether the Court’s rule would be expected to produce higher rates of agreement among the

⁵⁶ *Bd. of Directors of Rotary Int’l. v. Rotary Club*, 481 U.S. 537 (1987).

⁵⁷ For a fuller discussion of this problem, see, especially, the Kaplow and Schlag articles cited in footnote 11.

hypothetical sample of judges (more constraining), lower rates (less constraining) or similar rates (neutral).

Probably the most common reason for coding a rule as neutral was that it constituted an answer to a simple yes-or-no question. For example, in *Sporhase v. Nebraska ex rel. Douglas*⁵⁸, the Court ruled that groundwater is an article of commerce that Congress can regulate. Had the Court ruled the opposite way, the resulting rule would have been no more or less constraining. In the interest of drawing cautious conclusions from the data, I also coded as neutral any rule that I could not confidently assess.

Some cases produced more than one rule. Rather than count a single case more than once, I took into account all rules in assessing the precedent's overall strength. Where the rules tended in the same direction, of course, the coding decision was simple. Where one was constraining and one discretion-enhancing, I attempted to discern which rule should be relevant to a greater number of future decisions. Where this was easy to discern, I coded the precedent according to the direction of the more significant rule. Where it was not, I coded the precedent as neutral.

While this approach does have the benefit of being more reliable than attempts to code constraint in absolute terms, it has the drawback of making comparisons across cases—and therefore comparisons across courts and justices—less valid. That is, if we find that one justice writes relatively constraining rules more often than another, we can view that finding as evidence that the first justice is a greater proponent of strong rules but should be aware that that evidence is far from conclusive.

B. The Cases

Although the coding scheme laid out here could be applied to any type of case, I have elected to restrict this analysis to cases involving constitutional issues.⁵⁹ The chief reason is that statutory cases more often present the Supreme Court with precise questions that do not leave as much room for choices about whether and how to set out explicit rules. Other types of cases allow for more variation but are not as common before the Court and would make comparisons across time and justices more difficult.

My sampling strategy was to start with the October 2006 Term and work backwards in five-year steps, coding every constitutional case resulting in a written opinion on the merits, whether signed or per curiam. I was able to go back as far as the 1981 Term. Because the Court's docket has shrunk in recent years and I wanted sufficient data on all of the justices who have served in the past few years, I supplemented the sample by adding the first term of the Roberts Court and the last two terms of the Rehnquist Court. Finally, to include some data from the Warren Court, I coded the 1966 Term. Thus, the dataset comprises all constitutional decisions from the following terms: 1966, 1981, 1986, 1991, 1996, 2001, 2003, 2004, 2005, and 2006.

There are 330 cases in all. According to my coding, the Court explicitly set out a new statement of law in 182 (55.2%) of these cases. While I did not begin this study with

⁵⁸ 458 U.S. 0941 (1982)

⁵⁹ Constitutional cases were identified using the issue variable Harold Spaeth's United States Supreme Court Judicial Database, 1953-2006 Terms, available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>. My thanks to Stefanie Lindquist for providing a do-file to list the cases in STATA.

any very clear expectations, this strikes me as a surprisingly low figure. When a court refrains from laying down a legal rule in the course of an opinion, it almost always leaves more discretion to other judges than it otherwise would. For the single court that defines federal constitutional law for every other court in the country to so refrain in nearly half its cases is, in my view, a fairly striking display of judicial modesty.

Conservative coding rules may be partially responsible for this finding. Recall that I only counted statements of law that clearly included something the Court had not previously said. One could argue that even in cases where the Court only cites an existing rule it can still provide guidance to lower courts by demonstrating how the rule should be applied. This is surely correct, but the fact remains that the Court could provide even more guidance by coupling its example with a new statement of the rule to help clarify it. Moreover, a count of rules announced does not tell the whole story. What did the Court do in those rules? By my coding, in only half (91) of the cases where the Court chose to lay out a rule did it choose the more constraining alternative. In over a third of the cases (62), the rule it announced imposed less constraint on other judges than the rule it rejected would have. In all, the Court was presented with 330 opportunities to issue strongly constraining legal rules. It did so in just over a quarter of these cases.

Is there important variation over time or across justices? Tables 1 and 2 display results by term. Someone looking hard for patterns in the percentages might detect a slight tendency for earlier Courts in the sample to announce rules more readily, and perhaps if the data were extended to include more cases from the Burger and, especially, Warren Courts, a sharper pattern would emerge.⁶⁰ But the disparities shown here are not particularly large or systematic. They look smaller still when we turn to levels of constraint. Note that while the Court in earlier terms was slightly more likely to issue rules, those rules were slightly less likely to be more constraining than the rejected alternatives. Comparing the percentage of all cases that resulted in highly constraining statements of law, we are left with no basis to conclude that recent courts have been more modest. For instance, the rates were 30% in 1981 term and only 17% in OT 1991 term versus 29% in OT 2005 and 32% in OT 2006.

That said, one could argue that modesty is better measured through absolute numbers than percentages. After all, the Court chooses how many cases to take, and it is reasonable to suppose that one reason it takes more cases at one time than another is that the justices on it care more about putting their stamp on the law. Considering totals instead of percentages, the Burger Court of the 1981 term stands out clearly as the least modest, announcing relatively high-constraint rules in nineteen cases.

⁶⁰ We would be even more likely to find a pattern if we surveyed the entire history of the Court. Tiersma, n. 27, shows that the Court was much less inclined in its early years than it is now to state legal rules boldly, using such terms as “We hold.”

TABLE 1. Percentage of cases containing an explicit new statement of law.

Term	No Explicit Rule (%)	Explicit Rule (%)	Total
1966	47.5	52.5	40
1981	38.1	61.9	63
1986	52.5	47.5	59
1991	33.3	66.7	36
1996	41.7	58.3	24
2001	50.0	50.0	20
2003	52.6	47.4	19
2004	45.8	54.2	24
2005	39.1	60.9	23
2006	54.6	45.5	22
Total	44.0	55.2	330

TABLE 2. Level of constraint imposed by statement of law, relative to rejected alternative.

Term	Less Constraint (%)	Same (%)	More Constraint (%)	Total
1966	28.6	14.3	57.1	21
1981	35.9	15.4	48.7	39
1986	10.7	35.7	53.6	28
1991	66.7	8.3	25.0	24
1996	42.9	7.1	50.0	14
2001	30.0	30.0	40.0	10
2003	22.2	0	77.8	9
2004	30.8	7.7	61.5	13
2005	42.9	7.1	50.0	14
2006	0	30.0	70.0	10
Total	34.1	15.9	50.0	182

Interesting variation across justices is immediately apparent in Table 3, which displays results for opinions of the court⁶¹ written by the last eleven justices to sit on the

⁶¹It is possible that justices are constrained in their writing by the types of cases they are assigned or the voting coalitions in those cases. A study of separate opinions might give us more purchase on individual

Court before Roberts joined it. One striking finding is that the scores for Justices Scalia and O'Connor are strongly consistent with their reputations. Scalia announces an explicit rule in the highest percentage of cases; O'Connor is tied (with Justice Souter) for the lowest percentage. Of course, O'Connor might have used her few rules to impose serious constraint on other judges, while Scalia's rules might tend to leave them with more discretion. Taking into account relative constraint does change the picture, but only slightly. Looking in the fourth column of the table, we see that O'Connor still comes out as the most modest justice, announcing a rule more constraining than the rejected alternative in only nine percent of her cases (two of 21). Scalia is no longer the most immodest justice by this measure, losing his spot to Justice Rehnquist, who announced slightly fewer rules but was a bit more likely to make his rules constraining. Justice Blackmun comes in a fairly close third, with numbers that look much like Scalia's. Interestingly, Justice Ginsburg, who is just behind Scalia in rulemaking rate slips back to the middle of the pack under the final measure, as only a small proportion of the rules she announces are relatively highly constraining. Of course, the reader should note that her scores are based on only nine cases and so should be regarded with caution.

TABLE 3. Frequency and relative constraint of rules, selected justices.

Justice	% Explicit Statements	% of Statements High-Constraint	% of Statements Low-Constraint	% of All Decisions High-Constraint	Total Decisions
Rehnquist	63.2	70.8	29.2	44.7	38
O'Connor	42.9	22.2	55.6	9.5	21
Stevens	60.6	40.0	35.0	24.2	33
Scalia	69.0	55.0	30.0	37.9	29
Kennedy	58.8	50.0	50.0	29.4	17
Souter	42.9	33.3	66.7	14.3	14
Thomas	44.4	50.0	25.0	22.2	9
Ginsburg	66.7	33.3	16.7	22.2	9
Breyer	53.9	28.6	42.9	15.4	13
Blackmun	60.0	55.6	11.1	33.3	15
White	54.2	23.1	50.0	12.5	24

Note: High-Constraint means Court's rule is more constraining than rejected alternative; Low-Constraint means the opposite.

justices' tendencies. But someone wishing to undertake such a study would have to think hard about the proper baseline for comparison across justices, since, compared to the opinion of the court, there is less expectation that judges will provide guiding statements of law in dissents and no such expectations for concurrences, which can be written for a whole host of reasons.

We also have too few cases from Justice Alito or Chief Justice Roberts to make confident evaluations, but it is worth noting that Roberts has begun his tenure showing a preference for strong precedents, announcing rules in five of seven cases and choosing the more constraining alternative in four of those five. (Alito has only two cases in this dataset. He announced a relatively constraining rule in one, no rule in the other.)

A larger number of cases across the board would allow for more definitive conclusions, but I think these results lend support to our intuitions that there are real differences across justices and that, say, a Court made up of Scalias would make law quite differently from one made up of O'Connors. On the other hand, the evidence does not give us much reason to suppose that Roberts Court lawmaking will depart in a dramatic way from past practice, in part because it is far from clear that Roberts will act modestly in this respect, in part because the justice replaced by Alito was one of the most modest. If forced to bet, then, I would bet that the Roberts Court will not make law in an unusually modest fashion. That said, this Court is only two years old, and the empirical methods employed here are not sufficiently sound to support strong conclusions. If a study employing more fully developed measures were to be conducted several years from now, I would not be shocked to find I had lost the bet.

III. FUTURE DIRECTIONS

As is probably evident from this essay, developing a valid and reliable measure of the constraint imposed by a precedent is a daunting task, and I do not have a sure sense of how to go about improving it. But it seems likely that the best solution will involve multiple expert coders. Having several coders with legal training estimate the rates of judicial agreement that would occur under particular rules and averaging their estimates would take us some way toward the ideal of testing a rule on many judges in many cases. If this approach turned out not to be precise enough, another option would be to revisit the rule characteristics analyzed in this essay, refine definitions of them where necessary, and have a panel of expert judges code for each characteristic separately. One could then compute a measure of constraint based on the ratio of constraint-promoting characteristics to discretion-promoting characteristics. Alternatively, one could give up on a general measure of constraint and instead focus on comparisons of discrete characteristics: for example, does a court's willingness to allow exceptions to its rules vary over time, or is one court or judge more inclined to call for subjective evaluations than another?

To the extent we are successful in creating valid and reliable measures, we can use them to address more theoretically ambitious questions about the reasons for and consequences of judges' actions. For example, judges' options will sometimes be limited by the posture in which a case reaches them, but they will often have a good deal of freedom to choose a more or less constraining action. Can we say anything systematic about when and why judges opt for constraining rules in their opinions?

One natural hypothesis is that judges choose to impose more or less constraint depending on which approach would do more to further their policy preferences. A liberal judge who feels compelled to decide a case in favor of the government in a criminal case or a coal company in an environmental case might choose to announce only a weak rule in support of the decision or, better yet, not announce any rule at all, leaving

plenty of room for other judges to reach liberal decisions in slightly different cases. A conservative judge deciding a case where established doctrine is liberal might elect to grant lower court judges more discretion in applying it by establishing an exception to the rule or redefining it to allow for a less precise or more subjective judgment.

Alternatively, a higher court judge hoping to promote his or her policy preferences might think more strategically about the preferences of lower court judges and, following *Jacobi and Tiller*⁶², allow more discretion in areas where the preferences of the higher and lower court judges are more consistent, less discretion where the judges are ideologically further apart. Or perhaps the judge might care more about the proper guidance function of the high court than about particular policies and act to improve the balance of constraint and discretion where it appears to be off.

The most important question is one that this essay has largely begged so far: To what extent does the form a precedent takes actually matter? I have written as if we can be confident that a judge's decision to write an opinion in a certain way will have important consequences for decisions in other cases. But a central truth of judging is that the set of judges who issue a precedent can never maintain perfect control over the application of that precedent by other judges. As Sunstein notes:

Courts deciding particular cases have limited authority over the subsequent reach of their opinion... A court that is determined to be maximalist may fill its opinion with broad pronouncements, but those pronouncements may subsequently appear as "dicta" and be disregarded by future courts... A court may write a self-consciously minimalist opinion..., but subsequent courts may take the case to stand for a broad principle that covers many other cases as well.⁶³

From the perspective of a high court like the Supreme Court, the effects of its pronouncements depend very much on how lower courts respond to them.⁶⁴

To begin with, note that if lower courts made no effort to apply higher court precedents faithfully, the way in which higher courts wrote precedent-setting cases would be irrelevant. A substantial empirical literature suggests that lower court judges do indeed take precedents seriously, but it does not indicate a willingness always to subordinate their own views to those of their institutional superiors.⁶⁵ A study of decision making in the U.S. Courts of Appeals by Lindquist and Cross⁶⁶ shows one intriguing way in which a partial commitment to compliance can play out. The authors found that the influence of ideology on circuit judges' opinions is greater in cases involving issues of first impression, suggesting that once the Supreme Court speaks, circuit judges feel greater constraint. However, in an analysis of cases in one particular area of law, the effect of ideology began to increase after a time, presumably because the profusion of sometimes inconsistent precedents from the Supreme Court allowed the circuit judges more flexibility to decide as they wished to. As this study demonstrates,

⁶² Tonja Jacobi and Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007).

⁶³ SUNSTEIN, n. 9, 21.

⁶⁴ In fact, it can depend at least as much on the responses of many other non-judicial actors, such as executive officials, lawyers, and potential litigants. But exploring these variations would require an additional essay.

⁶⁵ ADD CITES HERE.

⁶⁶ Stefanie A. Lindquist and Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. Rev. 1156 (2005).

not only do lower court judges' commitment to compliance shape the effects of higher court decisions, but it can do so in ways too complex to be covered in this essay.

Even where lower court judges make their best efforts to apply precedent faithfully, higher court precedents might not have the effects we expect. For one thing, there is no consensus in the legal community as to how precedent is to be used and understood, whether the job of the later judge is to follow the language in earlier cases or to go deeper, analyzing the facts and outcomes and discerning the principles implicit in the decisions.⁶⁷ Relatedly, judges disagree about whether lower courts are bound to follow the dicta of their superiors and, of course, about how to define dicta in the first place.⁶⁸

Even compliant judges who saw themselves as bound by the language of the Court might not apply that language as its authors imagined. As Schauer argues⁶⁹, there can be large gaps between how a formulation works in theory and how it is applied in practice. Judges attempting to apply a well defined rule may find that it leads to absurd or otherwise unacceptable results and begin to carve out exceptions to it. Judges operating under a more diffuse standard, finding that application of the weak formulation makes their jobs too difficult, might supplement it with their own more determinate formulations.

Thus, in order to know how consequential law-making styles in higher courts are, we would need to know much more than we now do about how lower courts think about and employ precedents. But even that would not be enough, for the consequences also depend crucially on how higher courts treat their own precedents and how they respond to the actions of lower courts. Do they reverse lower courts for departing from established precedents even where those precedents diverge from the policy preferences of the current judges? Do they expect lower court judges to honor their statements of law and reverse them when they do not, or do they permit well-reasoned applications of underlying principles. There are also many more subtle ways in which courts can undermine or solidify their own precedents.⁷⁰

In short, there is abundant reason to question whether the way in which judges choose to write in their opinions ultimately affects the influence the opinions exert on other judges. With solid measures allowing us to distinguish more and less constraining legal formulations, we could test for effects by, for instance, seeing whether cases decided under more constraining formulations produce higher rates of consistency in winning rates for one type of party. In turn this would allow us to reach firmer judgments about how much judicial modesty—at least, of the sort under consideration here—really matters.

⁶⁷ See, e.g., Tiersma, n. 27 and Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989-90).

⁶⁸ Michael C. Dorf, *Dicta and Article III*, 142 U. PENN. L. REV. 1997 (1994).

⁶⁹ Schauer, *supra* n. 11.

⁷⁰ See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 100. 7 U. Pa. J. Const. L. 903 (2005), especially Part II.