ARTICLES

CONSTITUTIONAL LAW'S CONFLICTING PREMISES

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Doctrinal inconsistency is constitutional law's special feature and bug. Virtually every salient doctrinal domain presents major precedents operating in tension. Bodies of precedent are rarely abandoned simply because a newer strand makes an older one appear out of place. And when an earlier strand is redeployed or substituted, the once-newer strand likewise persists. This dynamic process tasks law students, often for the first time, with reconciling the seemingly irreconcilable. These doctrinal phenomena share as their root cause dual persistent conflicting premises.

Some examples: Standing protects congressional power to monitor the executive branch, or it limits congressional monitoring when the selected means risk foisting the judiciary into executive prerogatives. The Commerce Clause empowers Congress to resolve structural coordination challenges among states, or it ensures a discrete regulatory sphere into which Congress may not enter even as needed to ameliorate such coordination challenges. Equal protection protects African Americans against racially discriminatory laws, or it lets such laws stand provided they are nonsubordinating. Similar conflicting premises pervade such high-profile areas as separation of powers and free speech.

Beneath each of these, and other, conflicting bodies of caselaw rest two persistent conflicting premises. Identifying these premises, and explaining the dynamic processes that generate them, proves essential to understanding several of constitutional law's most critical features, including how various bodies of caselaw fit together. This Article provides the first systematic exploration of this phenomenon along with essential insights that explain several of constitutional law's most notorious anomalies. These include structural constitutionalism, individual rights, and free speech.

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INTRODUCTION

Despite the enthusiasm law students bring to the subject, constitutional law presents unique pedagogical challenges. The problem is not merely doctrinal complexity or inconsistency. Such attributes also characterize common-law or code-based domains. An important dynamic nonetheless distinguishes constitutional law from such bodies of law as contract, tort, and property. Although many legal domains raise challenges of doctrinal cohesion, constitutional law is especially prone to a phenomenon that this Article describes as dual persistent conflicting premises. This phenomenon provides the basis for a deeper understanding of several of constitutional law's most salient doctrines, for unmasking endemic features of constitutional lawmak-

ing, and for exploring important relationships across otherwise disparate bodies of law.

Some preliminary definitions are essential in defending this claim. Premises must be distinguished from outcomes, goals, and values. Premises are not outcomes. Case outcomes can conflict for any number of reasons, including faulty analysis, inattentiveness to precedent, and infusing equitable principles to mitigate problematic outer edges of defined rules. Premises are not goals. Across various institutional settings, policymakers, including legislators or bureaucrats, routinely embrace myriad goals,[1] often as divergent as the policymakers themselves, or their constituencies. Although early formalists imagined that judges eschew personal or ideological goals in resolving cases, since the advent of legal realism most judicial observers regard that assumption as naïve.[2] Subject to institutional constraints, sophisticated jurists pursue various goals, including furthering ideological commitments.[3] Premises are also not values, although values may influence how premises are selected or formed. Whereas values can be expressed at varying levels of abstraction, premises, properly understood, reside at the most granular level of the logical system of which they are a part.

A premise is a foundational supposition assumed to be true, but not proven by the larger system that it helps construct.[4] Premises have three essential features: (1) they are irreducible minima—there might be more than one—operating at a granular level; (2) they form a foundational part of the system of which they are part; and (3) they cannot be proven deductively within that system, but rather, are suppositions on which the logical system rests. All logical systems are built upon, or derive from, at least one premise.[5]

Individual cases, and bodies of caselaw, embed premises. Legal premises are frequently unarticulated, requiring special training to discern. Developing this skill in the context of caselaw and other legal sources occupies much early law school pedagogy, especially in the first year. Whereas goals or values are potentially unlimited, premises are both limited and limiting, cabining values and constraining goals. Within law, premises potentially impede desired doctrinal objectives and case outcomes.

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1 *See generally* MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009) (reviewing rational choice models of legislators, bureaucrats, and judges).

2 For a comprehensive history of the rise of legal realism at the Yale Law School, see generally LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 (1986).

3 *See* STEARNS & ZYWICKI, *supra* note 1, at 406–79.

4 *See* KURT GÖDEL, ON FORMALLY UNDECIDABLE PROPOSITIONS OF PRINCIPIA MATHEMATICA AND RELATED SYSTEMS 37–40 (B. Meltzer trans., Oliver & Boyd 1962) (1931). For discussions relating Gödel's theorem to law, see John M. Rogers & Robert E. Molzon, Essay, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 993–1002 (1992); Mike Townsend, *Implications of Foundational Crises in Mathematics: A Case Study in Interdisciplinary Legal Research*, 71 WASH. L. REV. 51, 95–129 (1996).

5 *See* GÖDEL, *supra* note 4, at 37–40.

Broadly conceived or within specified domains, the law comprises discrete logical systems.[6] To be sure, formal logical systems, such as mathematics or philosophy, are susceptible to a level of internal consistency rarely observed in law. Although legal systems are more loosely structured, bodies of caselaw are nonetheless systems of reasoning resting upon premises. Premises can derive from precedent or external authorities, including constitutions, statutes, regulations, or even scholarly works.

Although all bodies of caselaw rest on premises, the tendency toward dual persistent conflicting premises endemic to constitutional law distinguishes that domain from others.[7] Formally demonstrating this raises the inexorable challenge of proving a negative. Thankfully, disproving that other legal domains are prone to dual persistent conflicting premises is unnecessary. This Article instead provides two corroborating, and mutually reinforcing, proffers, one inductive and one deductive.

The inductive proffer takes a familiar form: this Article presents five prominent constitutional doctrines, each revealing dual persistent conflicting premises. None is obscure or selected to make a point. Each resides at the core of standard constitutional law curricula[8]: *standing*, *the Commerce Clause*, *separation of powers*, *equal protection and race*, and *incitement and obscenity*. None reveal singular, serial, or unlimited premises. Instead, each reveals two premises in persistent conflict.

Although disproving that other domains possess this characteristic is impossible, the second, deductive proffer, models the dynamic processes giving rise to this phenomenon within constitutional law and compares the alternative dynamics operating within specified common-law domains.[9] Applying a simple game theoretical insight, the analysis presents dual persistent conflicting premises as a pure-Nash equilibrium among salient constitutional law domains. A pure-Nash equilibrium is an outcome or set of outcomes following each player's rational response to the expected rational strategies of other players absent specific knowledge of those strategies or

6 *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 186–90 (1986) (distinguishing the common law as a logical system from statutes, which are not deductive); *see also* STEARNS & ZYWICKI, *supra* note 1, at 273–75 (assessing Posner's treatment of the common law as a logical system).

7 This claim is distinct from Critical Legal Studies, which posits general legal indeterminacy. *See* Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917, 917 (1985) (exploring the manifestation of legal indeterminacy based on historical and philosophical analysis). Dual persistent conflicting premises imply controlled determinacy, with caselaw in ongoing tension, but not entirely open-ended.

8 These doctrines are embedded in Constitutional Law I: Structure and Governance; Constitutional Law II: Individual Rights; and Advanced Constitutional Law: Free Speech. *See infra* Part I.

9 *See infra* Section II.B (illustrating with tort and contract).

coordination among players, and from which no player can obtain an improved payoff with a unilateral change in strategy.[10]

Within salient constitutional domains, effective jurists seeking to shift the direction of caselaw in tension with an extant premise will seek to recast that premise to yield the favored result while persuading a majority to join. The strategy typically requires attracting one or more of the Supreme Court's median Justices, who typically resist dramatic doctrinal change. More generally, Supreme Court Justices are averse to overturning precedent, preferring to distinguish even seemingly problematic precedents.[11] Persuading a majority, therefore, ordinarily demands a sufficient nexus between the extant and recast premises to avoid signaling immediate or projected overruling of notable cases resting upon the earlier premise. An effective strategy requires constructing a revised premise connected with, yet departing from, the extant premise. This strategy facilitates the desired case outcome while condoning earlier precedents. Dual persistent conflicting premises emerge as the pure-Nash equilibrium.

Not all jurists pursue this strategy effectively. Some go it alone, effecting desired case outcomes, albeit at a price. Jurists insisting on a premise disconnected from an extant premise risk isolation on a fragmented Court. Concurring in the judgment can provide a critical vote, but by failing to attract a majority in favor of a recast premise, doing so is unlikely, generally, to move doctrine in a preferred direction. That strategy requires a majority coalescence on a recast premise without entirely abandoning the earlier premise.

These combined proffers reveal doctrinal inconsistency as constitutional law's special feature and bug. Virtually every salient domain presents major precedents operating in tension. Bodies of precedent are rarely abandoned simply because a newer strand makes an older one appear out of place. And when the earlier strand is redeployed, the once-newer strand likewise persists. This dynamic process leaves law students, often for the first time, tasked with reconciling the seemingly irreconcilable.

Some notable examples: Standing protects congressional power to monitor the executive branch, or it limits congressional monitoring when the selected means risk foisting the judiciary into executive prerogatives. The Commerce Clause empowers Congress to resolve structural coordination challenges among states, or it ensures a discrete regulatory sphere into which Congress may not enter even as needed to ameliorate such coordination challenges. Equal protection protects African Americans against racially discriminatory laws, or it lets such laws stand provided they are nonsubordinating. Similar conflicts pervade such high-profile areas as separation of powers

10 For a more detailed discussion, see *infra* Section II.A.; *see also* MAXWELL L. STEARNS, TODD J. ZYWICKI & THOMAS J. MICELI, LAW AND ECONOMICS: PRIVATE AND PUBLIC 579–80 & n.21 (2018) (defining Nash equilibrium and collecting authorities).

11 For a general discussion of the frequency of overturning precedent and the factors the Court employs when evaluating stare decisis, see BRANDON J. MURRILL, CONG. RSCH. SERV., R45319, THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 11–22 (2018).

and free speech. Identifying these premises, and understanding the mechanisms that produce them, helps explain several of constitutional law's most notorious anomalies, affecting structural constitutionalism, individual rights, and free speech.

The Article proceeds as follows. Part I provides the inductive proffer, reviewing five salient constitutional doctrines, each revealing dual persistent conflicting premises. Part II provides the deductive proffer, relying upon elementary game theory to model how goal- or policy-oriented Supreme Court Justices successfully extricate doctrine from prior constraints by deploying a sufficiently related premise as to appeal to the Court's center while moving doctrine in a favored new direction. Surveying tort and contract law, this Part then models the differing dynamics affecting premise formation in such common-law courts. Part III considers several special constitutional domains, including well-settled doctrines where competing premises are less apt to emerge; unsettled doctrines toggling among multiple competing premises without settling on one; and the hybrid category of default constitutional law, demonstrating how multiple institutions can combine to settle affected doctrine. The combined analysis identifies dual persistent conflicting premises as a pure-Nash equilibrium within salient constitutional domains, in contrast with other identified doctrinal contexts.

I. The Inductive Proffer: Five Doctrines with Dual Persistent Competing Premises

The five doctrines presented below are foundational to the core curricula in most constitutional law textbooks and courses.[12] We begin with constitutional structure and governance.

A. Dual Persistent Conflicting Premises in Structural Constitutional Law

After reviewing dual persistent conflicting premises in the context of standing doctrine, this Section continues the analysis with the Commerce Clause doctrine and separation of powers.

1. Standing

This first subsection involves standing, which proves especially significant. First, standing is the Supreme Court's most prominent self-imposed antidote to the power of judicial review. Second, standing erects a conceptual barrier distinguishing Supreme Court cases arising, most notably, in constitutional criminal procedure, where justiciability is generally presumed, and constitutional law, where justiciability must be affirmatively established. And third, standing establishes the foundation for a hybrid category of default

12 *See, e.g.*, Erwin Chemerinsky, Constitutional Law, at xi–xx (4th ed. 2011); Noah R. Feldman & Kathleen M. Sullivan, Constitutional Law, at xi–xxiii (20th ed. 2019); Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, Constitutional Law, at xiii–xviii (8th ed. 2018).

constitutional law, meaning doctrines Congress may change with ordinary legislation, revisited in Part III.

The discussion that follows will trace dual persistent conflicting premises within standing to the tension between *Allen v. Wright*[13] and *Lujan v. Defenders of Wildlife*.[14] *Allen* denied standing to parents of African American public-school children raising an equal protection challenge to an Internal Revenue Service (IRS) policy that effectively subsidized white flight.[15] *Lujan* denied citizen standing to two women who relied upon a statutory standing provision in the Endangered Species Act to challenge the failure of statutorily required interagency consultation.[16] The women alleged that the process failure facilitated funding projects harmful to habitats of endangered species in Egypt and Sri Lanka.[17]

Allen rests standing on the separation of powers premise of protecting Congress's power to monitor the executive branch. *Lujan* likewise rests standing on separation of powers, but it recasts the premise as protecting the executive branch from judicial interference. This protection applies even when Congress's chosen means of executive monitoring involves citizen standing. A complete analysis of these conflicting premises requires three sets of caselaw comparisons, each centered on *Allen*. Together, these doctrinal comparisons explain the foundations of judicial review and the nature of the Supreme Court's self-imposed defense against exercising that power unless particular conditions are established.

Marbury v. Madison famously declared: "It is emphatically the province and duty of the judicial department to say what the law is."[18] Standing shines a light on the "duty" component of the *Marbury* formulation. Standing cases demonstrate that the "duty . . . to say what the law is" corresponds to an identifiable series of constitutional and prudential triggers that, in combination, ascribe a specific meaning to the Article III case or controversy requirement.[19] This doctrinal ascription is optional in that it is not universal among judicial systems, even within the United States at both the state and federal levels. Unlike some state courts[20] and Article I federal courts,[21] Article III

13 468 U.S. 737 (1984).

14 504 U.S. 555 (1992).

15 *Allen*, 468 U.S. at 739–40.

16 *Lujan*, 504 U.S. at 557–58, 578.

17 *Id.* at 563–64.

18 5 U.S. (1 Cranch) 137, 177 (1803).

19 *Id.*

20 For examples of state certification procedures, see CAL. R. CT. 8.548(a); COLO. APP. R. 21.1(A); IND. R. APP. P. 64; MD. CODE ANN., CTS. & JUD. PROC. § 12-603 (West, 2020); OKLA. STAT. tit. 20, § 1602 (2020).

21 *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 247–56 (1999) (describing *Smith v. Commissioner*, in which the tax court allowed a dispute to proceed despite a taxpayer's concession of liability in order to resolve an open legal question as illustrating the differing justiciability norms in Article III versus Article I courts (citing 78 T.C. 350 (1982)).

courts do not have a duty to say what the law is simply because providing an answer would be expedient to those making the request.

As a matter of black letter doctrine, to establish standing, claimants must demonstrate an *injury in fact*, *caused by* the defendant, and *susceptible to judicial redress*.[22] As a prudential matter, the Supreme Court presumes against the power of litigants to raise claims on behalf of others or that are diffuse.[23] Standing thus establishes a rebuttable presumption against justiciability, defined as the capacity of a claimant to demand judicial resolution of her or his claim, *unless* the specific constitutional and prudential standing criteria are met.

The first, three-way, comparison juxtaposes *Allen* with *Marbury*, on one side, and with several landmark criminal procedure cases, on the other. This comparison helps distinguish judicial contexts in which justiciability is or is not presumed and provides the conceptual foundation for default constitutional lawmaking.

Relying for jurisdiction on section 13 of the Judiciary Act of 1789, William Marbury demanded the delivery of a commission for Justice of the Peace.[24] President John Adams had made the appointment, conveyed with the President's signature and seal, prior to leaving office.[25] John Marshall, Adams's Secretary of State, and also the Chief Justice who authored the *Marbury* opinion, holding both positions for one month, failed to deliver it.[26] Marbury sought to compel the issuance via writ of mandamus, for which he invoked the Supreme Court's original jurisdiction, relying upon section 13 of the Judiciary Act.[27]

Marshall construed section 13 as authorizing the Supreme Court to issue the writ of mandamus as a matter of original jurisdiction against James Madison, who, as President Thomas Jefferson's Secretary of State, was an officer of the United States, given the absence of an alternative legal or equitable remedy.[28] Marshall further determined, however, that section 13 exceeded the scope of the Supreme Court's original jurisdiction under Article III, Section 2, Clause 2.[29] That Clause, Marshall determined, authorized

22 *See, e.g.*, *Lujan*, 504 U.S. at 560–61; *Allen*, 468 U.S. at 751.

23 Another presumptive category implicates allegedly unconstitutional laws that adversely distort markets in a manner detrimental to claimants. *See infra* Table 2 and accompanying text.

24 *Marbury*, 5 U.S. (1 Cranch) at 137–38, 148.

25 *Id.* at 138.

26 *Id.* Marshall held both positions, Secretary of State and Chief Justice, from February 4, 1801, to March 4, 1801. He was no longer holding both positions when *Marbury* was decided in February of 1803. *Biographies of the Secretaries of State: John Marshall (1755–1835)*, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/departmenthistory/people/marshall-john (last visited Jan. 23, 2020).

27 *Marbury*, 5 U.S. (1 Cranch) at 138.

28 *See id.* at 173, 175–76.

29 *Id.* at 176.

the Supreme Court to issue the writ of mandamus only as a matter of appellate jurisdiction.[30]

Marshall's *Marbury* opinion lauded written constitutions, emphasizing their vital role in prescribing clear demarcations of power.[31] And yet, Marshall failed to acknowledge that not all written constitutions establish judicial review. Marshall sidestepped assessing whether Congress, pursuant to a properly enacted statute, or the Supreme Court, held final decisional authority to determine the scope of the Court's original jurisdiction under Article III, the ultimate question on which the case logically rested. Instead, Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[32] The three-way comparison expresses three stylized holdings. We begin with *Marbury*: *when Congress* acts, *by enacting a statute, and when congressional action* violates the Constitution, *by exceeding the Article III jurisdictional mandate, the Supreme Court has the power ("province") and obligation ("duty") in a proper case or controversy* to invalidate congressional action *by striking the offending provision down.*

After presenting *Allen v. Wright*, we will construct a parallel expression of its holding. In *Allen*, parents of African American schoolchildren throughout the United States challenged an IRS policy that, among other features, presumed tax-exempt status of private schools operating under the umbrella of institutions, such as churches, that already possessed tax-exempt status.[33] Parents of African American public school students alleged that following this policy, numerous private schools throughout the United States engaging in racially discriminatory admissions and hiring practices nonetheless benefited from tax-exempt status in violation of the Fourteenth Amendment Equal Protection Clause.[34]

The affected children had not applied to, and thus had not been rejected from, these allegedly discriminatory private schools.[35] Instead, the parents maintained that a consequence of the IRS umbrella policy was to undermine the racial integration of public schools that the minority children did attend. The IRS policy accomplished this, the parents claimed, by lowering the cost of discrimination among the private schools in their communities. Justice Stevens, writing in dissent, captured the claim as effectively alleging federally subsidized white flight.[36]

Justice O'Connor, writing for the *Allen* Court, declared that because the case implicated decisions of several nonparties, and because a favorable ruling might not redress the injury in the sense of discernibly effecting the inte-

30 *Id.* at 175–76.

31 *Id.* at 176–80.

32 *Id.* at 177.

33 Allen v. Wright, 468 U.S. 737, 743–44 (1984).

34 *Id.* at 744, 745 n.12.

35 *Id.* at 746.

36 *See id.* at 788 (Stevens, J., dissenting) ("This causation analysis is nothing more than a restatement of elementary economics: when something becomes more expensive, less of it will be purchased.").

gration of specific public schools the claimants' children attended, the claimants lacked standing.[37] Justice O'Connor maintained that allowing the legal claim to proceed, thereby questioning a policy of the IRS, an executive agency, with potential nationwide effects, risked having the judiciary impede the function of Congress, whose job it is, first and foremost, to monitor the executive branch.[38] In theory, Congress could have remedied the *Allen* claim by mandating prospectively that any school seeking tax-exempt status must be assessed on its individual merits, without regard to the tax status of its parent institution. Private schools engaging in the alleged discriminatory policies would then have been disqualified from receiving tax-exempt status.

Now consider the parallel *Allen* holding: *when Congress* fails to act, *by declining to enact a statute, and when the congressional failure to act* results in an alleged constitutional violation, *here a violation of equal protection, the Supreme Court* will not invalidate congressional inaction *by acting on Congress's behalf, such as by striking down the IRS umbrella policy.* This framing emphasizes that standing protects congressional power to select among a menu of policy options on its own schedule, rather than risking the Supreme Court, by presently selecting one option from that menu, potentially locking in that choice as a consequence of congressional inertia.

Despite the mixed metaphor, the standing analysis requires adding a third leg to the stool. In constitutional criminal procedure, Congress, or state legislatures, routinely fail to act, and the consequence often gives rise to alleged constitutional violations. In this context, however, the Supreme Court routinely invalidates legislative inaction, selecting among the available menu of legislative policy options. This final step in the three-way comparison helps to explain why, until fairly recently, constitutional criminal procedure has generally been construed as default constitutional law.[39] This means caselaw that, although consistent with the Constitution, does not foreclose Congress from revisiting its available menu options and selecting an alternative with ordinary legislation, thereby displacing the judicially selected default rule. This insight lays a foundation for default constitutional law more generally.[40]

37 *Id.* at 758–59 (majority opinion) (reviewing the causal links that render the claim to actual relief speculative as the basis for denying standing).

38 *Id.* at 760 ("Carried to its logical end, [respondents'] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." (alteration in original) (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972))).

39 For a discussion of *Dickerson v. United States*, 530 U.S. 428 (2000), which forges dual persistent conflicting premises based on the default criminal procedure cases described in the text, see *infra* subsection III.B.1.

40 *See infra* Part III.

Consider, for example, the landmark cases of *Weeks v. United States*,[41] *Mapp v. Ohio*,[42] and *Miranda v. Arizona*.[43] Although *Weeks* announced the exclusionary rule as a remedy for violating the Fourth Amendment prohibition against unreasonable searches and seizures,[44] and *Mapp* incorporated that remedy against the states,[45] the constitutional defect was not the failure to apply the exclusionary rule following an alleged Fourth Amendment violation, per *Weeks*, or Fourth and Fourteenth Amendment violation, per *Mapp*. Instead, the alleged constitutional violation in each instance was the impermissible search and seizure itself. Similarly, although *Miranda* announced the requirement that rights warnings be issued at arrest,[46] the constitutional defect was not the failure to *Mirandize* Miranda. Rather, it was the coerced confession in violation of the Fifth and Fourteenth Amendments.[47] In each case, the Supreme Court determined that despite the absence of a legislative remedy for the claimed constitutional violation, it could not decline to act, even if that required selecting a prospective rule from the available menu of legislative options. Otherwise, the Court would effectively condone state or federal criminal sanctions, notwithstanding established violations of the appellants' constitutional rights.

For the third leg, consider this (not quite) parallel construction: *in criminal procedure cases, although the legislature* fails to act, *when that failure to act* results in an identified constitutional violation, *the judiciary* must act *on the legislature's behalf even if doing so requires selecting from among the legislature's available menu of constitutional remedies*. In effect, standing marks the conceptual wall separating civil constitutional litigation, which presumes *against justiciability*, and constitutional criminal procedure, which presumes *in favor of justiciability*. Indeed, the presumption shifts so powerfully that when the Supreme Court occasionally does address standing in the context of such cases, it is prone to applying the doctrine in ways at odds with conventional constitutional applications.[48]

41 232 U.S. 383 (1914).

42 367 U.S. 643 (1961).

43 384 U.S. 436 (1966).

44 *Weeks*, 232 U.S. at 398.

45 *Mapp*, 367 U.S. at 657, 660.

46 *Miranda*, 384 U.S. at 467–68.

47 *Id.* at 467.

48 Clarifying terminology is important. Criminal procedure cases are not generally understood in terms of Article III standing. Such cases generally present constitutional claims in a context in which the justiciability criteria associated with standing coalesce. These criteria include the constitutional requirements of injury in fact, causation, and redressability, and the prudential concerns associated with third-party and diffuse-harms claims.

In the Fourth Amendment context, the Supreme Court has established that the merits of such claims, sometimes expressed in terms of Fourth Amendment standing, do not implicate Article III standing. Instead, standing is used to capture the substantive scope of the claimed Fourth Amendment right, including whether a relevant privacy interest attaches so as to preclude a search or seizure of a vehicle owned or rented by another in which unlawful activity has allegedly taken place, *see, e.g.*, Byrd v. United States, 138 S. Ct.

These criminal procedure cases are consistent with Justice O'Connor's separation of powers underpinnings of standing from *Allen*.[49] O'Connor's premise rests standing on congressional authority to monitor the executive branch.[50] The exception arises in the compelling circumstance involving an appellant facing criminal sanctions despite an alleged constitutional violation. Without addressing standing as a threshold inquiry, the Supreme Court implicitly shifts the presumption to favor justiciability. This is further consistent with treating the criminal procedure caselaw as a set of default rules that Congress may change with ordinary legislation.[51] On the civil side of constitutional law, claimants must establish standing, whereas on the criminal side, standing is generally presumed without regard to the plausibility of the underlying substantive claims.

The second, binary, comparison sharpens the inquiry as to how to overcome the presumption against justiciability, an essential step in exposing standing's dual persistent conflicting premises. In *Regents of the University of California v. Bakke*,[52] Justice Powell, writing the controlling opinion for a divided Court, struck down the University of California at Davis ("UC Davis") Medical School affirmative action program, yet determined that state institutions of higher learning are not altogether precluded from considering race

1518, 1530 (2018) ("Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim."), or of a home in which the party to an illicit transaction has no legally recognized relationship beyond stranger or guest, *see, e.g.*, Minnesota v. Carter, 525 U.S. 83, 91 (1998) (cited in *Byrd*, 138 S. Ct. at 1527).

The presumed justiciability of claims arising in the criminal procedure context, including under the Fourth Amendment as recognized in *Byrd* and *Carter*, is necessarily independent of how the underlying merits are resolved. In the unusual criminal procedure contexts in which the Supreme Court expressly engages with an Article III standing analysis, the visceral presumption favoring justiciability sometimes leads to seemingly counterintuitive results as compared with how standing would be assessed in comparable circumstances within civil constitutional litigation. *See, e.g.*, Campbell v. Louisiana, 523 U.S. 392, 394–96 (1998) (allowing a white criminal defendant to challenge the racial exclusion of a prospective African American grand jury foreperson); Powers v. Ohio, 499 U.S. 400, 402–04 (1991) (allowing a white criminal defendant to raise a *Batson* challenge against the prosecutor's racial peremptory strikes of African American jurors). For a counter example, denying Article III standing in the criminal procedure context, see *Whitmore v. Arkansas*, 495 U.S. 149, 151–54, 161–66 (1990) (denying mandatory appellate review of Jonas Whitmore's next-friend claim on behalf of fellow death row inmate Ronald Gene Simmons, alleging that by waiving further appeals, Simmons disallowed a ruling that, should the claim succeed, might improve Whitmore's prospects in a comparative sentencing proceeding if Whitmore were subsequently granted habeas relief).

49 Allen v. Wright, 468 U.S. 737, 752 (1984) ("More important, the law of Art. III standing is built on a single basic idea—the idea of separation of powers.").

50 *See id.* at 760.

51 This result has been drawn into question. *See* Dickerson v. United States, 530 U.S. 428 (2000); *see also infra* subsection III.B.1 (discussing default status of criminal procedure cases and agency deference rules).

52 438 U.S. 265 (1978).

in admissions.[53] In the controlling part of his opinion, which no one else joined, Powell reasoned that race may be used as a plus factor in the context of a multifactored integrated process.[54]

Bakke had been twice rejected from UC Davis Medical School, which had set aside sixteen of one hundred seats for specified minorities and had more generally segregated its admissions processes.[55] As in *Allen*, Bakke alleged that the UC Davis policy violated equal protection. He also maintained that, absent the policy, he would have a greater prospect of admission even though, also as in *Allen*, he could not prove that *but for* the problematic policy, he would have achieved that result.[56] That too was influenced by decisions of nonlitigants. Despite the opposing case outcomes, *Bakke* and *Allen* thus fall within the same analytical category. In contrast with *Allen*, however, Justice Powell avoided the standing difficulty by defining Bakke's injury as the limited opportunity to compete for all seats.

Flipping the *Allen* and *Bakke* framings produces opposite standing determinations in each case. If the *Allen* claim is recast as seeking an opportunity for integrated public schools, unencumbered by the problematic IRS policy, standing should be granted based on *Bakke*. If the *Bakke* claim is recast as ensuring actual admission to the medical school, standing should be denied based on *Allen*. The solution does not rest on a categorical distinction between the underlying claims. Rather, it returns us to Justice O'Connor's separation of powers standing premise.[57]

Standing disempowers litigants to compel courts to act on the legislature's behalf absent a demonstrated basis for doing so. Such bases are presumed in criminal procedure cases and presumed against in run-of-the-mill constitutional law cases. The standing rules can be expressed as staged examples of the claims that, were the standing presumption flipped, it would empower litigants more readily to compel judicial displacement of legislative policy prerogatives.[58] The easiest cases involve raising potential claims others are sitting on, explaining the presumption against third-party standing. This category is exemplified by *Gilmore v. Utah*,[59] in which the Supreme Court

53 *Id.* at 269–72 (opinion of Powell, J.).

54 *Id.* at 318.

55 *Id.* at 272–73, 277.

56 *Id.* at 277–79. This was a legal fiction. By analogizing to Title VII, the California Supreme Court demanded the Regents prove that absent the policy, Bakke would still have been rejected. The Regents conceded they could not, and Bakke was thus admitted before the Supreme Court litigation. *Id.* at 271 ("The Supreme Court of California . . . directed the trial court to order his admission.").

57 The problem is not a failure of pleading such that had the *Allen* lawyers expressed their claim as an opportunity injury, or had Bakke expressed his claim as demanding ultimate relief, the results would have flipped. Rather, the Supreme Court draws inferences concerning justiciability from the nature of the underlying case facts.

58 *See* MAXWELL L. STEARNS, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING 160–70 (2000) (linking these standing categories to litigant path manipulation).

59 429 U.S. 1012 (1976).

denied standing to Gary Gilmore's mother, who sought to challenge the constitutionality of her son's conviction and sentence, even though given her son's refusal to do so, no one else could raise those claims.[60]

Clever litigants can convert third-party claims into first-person injuries by asserting personal concern that the government is violating the rights of others. This category is exemplified by *United States v. Richardson*, disallowing claimants access to CIA budget documents based on the Constitution's Statements and Accounts Clause,[61] and *Schlesinger v. Reservists Committee to Stop the War*, disallowing a challenge to seating members of Congress serving in the military reserves based on the Constitution's Incompatibility Clause.[62] In both cases, the Court pressed the litigants to pursue their claims, however futilely, in Congress. The Supreme Court limits the conversion of third-party claims into first-party claims through its second-layer rule, presuming against legally diffuse claims. Diffusion is not based on the number of persons affected, but rather on whether the claimed injury is legally distinct from harm to the general public.[63]

Although *Allen* and *Bakke* raise categorically similar claims, and although neither is a third-party or diffuse claim, the Supreme Court's analyses reflect an intuitive distinction based on the nature of the differing facts. The *Allen* claimants were pressing a claim with potential nationwide effects that, even if successful, might not have benefited their specific children, whereas Bakke appeared more like a conventional litigant presenting a claim to obtain specific individual relief. The Supreme Court intuitively distinguishes such claims based on whether the purpose appears more closely connected to changing legal doctrine, even if the claim for relief seems attenuated, on one side, versus cases in which the purpose appears to be seeking specific relief, even if the result might force a change in legal doctrine, on the other. The cases thus far reinforce Justice O'Connor's separation of powers standing premise, namely protecting Congress's power to monitor the executive branch. The Supreme Court flips the general constitutional law presumption against standing based on its perceived understanding of the need to resolve the specific case, with the identified standing criteria corresponding to whether such a need is met. Whereas the Court places *Allen* closer to conventional cases presuming against standing, it places *Bakke* alongside the criminal procedure cases presuming in favor of standing.

The third and final comparison reveals how the *Allen* standing premise, protecting congressional power to monitor the executive branch, operates in tension with a newer separation of powers premise, protecting the executive

60 *Id.* at 1012–13; *id.* at 1013–14 (Burger, C.J., concurring).

61 418 U.S. 166, 167–70 (1974).

62 418 U.S. 208, 209 (1974).

63 FEC v. Akins, 524 U.S. 11, 24–25 (1998) ("We conclude that . . . the informational injury at issue . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.").

branch from judicial interference. In *Lujan v. Defenders of Wildlife*,[64] two women rested upon the Endangered Species Act, which conferred citizen standing, to challenge the failure of interagency consultation as a precondition to federal funding for projects alleged to harm the habitats of endangered species in Egypt and Sri Lanka.[65] The women sought to compel such consultation between the Departments of the Interior and Commerce, without which, they alleged, those habitats abroad were at risk.[66] Justice Scalia, writing for the *Lujan* Court, dismissed the suit, finding that given the claimants' attenuated connection to these remote habitats, with no specific travel plans, granting standing would render the federal judiciary "virtually continuing monitors" of executive functions.[67]

The conceptual difficulty *Lujan* raised is that whereas Congress failed to act in *Allen*, thereby inviting the Court to select among available congressional options had it granted standing, Congress expressly conferred citizen standing in the Endangered Species Act.[68] Justice O'Connor joined Justice Blackmun's *Lujan* dissent, stating that the standing denial prevented Congress from exercising its principal function to monitor the executive branch.[69] *Lujan* did not overturn *Allen*, and both cases remain good law.[70] Instead, *Lujan* transformed the *Allen* premise, relying on separation of powers to protect the executive branch from judicial interference, while still retaining the *Allen* premise. Both *Lujan* and *Allen* grounded standing in separation of powers, with *Allen* protecting Congress and with *Lujan* protecting the executive branch. These conflicting premises persist in tension, with the Supreme Court toggling back and forth, sometimes condoning broad statutory standing, and other times restricting standing despite an express statutory conferral.[71]

64 504 U.S. 555 (1992).

65 *Id.* at 558–59, 563, 571–72.

66 *See id.* at 559.

67 *Id.* at 577 (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

68 16 U.S.C. § 1540(g) (1988).

69 *Lujan*, 504 U.S. at 602 (Blackmun, J., dissenting) ("The Court expresses concern that allowing judicial enforcement of 'agencies' observance of a particular, statutorily prescribed procedure' would 'transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.' In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates." (quoting *id.* at 577 (majority opinion))).

70 One aspect of *Allen*, not implicated in the preceding analysis, has been drawn into question, namely whether the diffuse-harm standing category is prudential or constitutional. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014) (suggesting that diffuse-harm standing might implicate Article III).

71 For cases largely consistent with the *Allen* premise, see, for example, *Massachusetts v. EPA*, 549 U.S. 497, 515–21 (2007); *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 185 (2000). For cases largely consistent with the *Lujan* premise, see *Lexmark*, 572 U.S. at 137–40; *Clapper v. Amnesty International USA*, 568 U.S. 398, 408–22 (2013).

TABLE 1: DUAL CONFLICTING STANDING PREMISES

	Standing principally protects against judicial interference with executive prerogatives	**Standing does not principally protect against judicial interference with executive prerogatives**
Standing principally protects congressional monitoring of executive branch	*Allen*	Criminal procedure cases (*Miranda*, *Weeks*, *Mapp*), *Bakke*
Standing does not principally protect congressional monitoring of executive branch	*Lujan*	Null set

Table 1 summarizes the preceding discussion, casting each standing premise along a separate analytical dimension.[72] The premise of standing as principally motivated to protect congressional monitoring of the executive branch, absent a demonstrated justification for selecting among the menu of available of legislative options, is depicted in rows. The premise of standing as principally motivated to protect judicial interference with the executive prerogatives, even at the expense of displacing Congress's selected means of monitoring the executive branch, is depicted in columns. The lower right, with standing performing neither function, is a null set.

The criminal procedure cases, which generally presume in favor of justiciability and which thereby permit courts to select from the available menu of legislative options, are consistent with the congressional-monitoring premise and are depicted in rows. Those cases satisfy the articulated criteria of a demonstrated justification for resolving the underlying constitutional claim absent a statutory remedy. *Allen* and *Bakke* fall within the same standing category, yet they fall on opposing sides along the horizontal axis. The Supreme Court implicitly intuits that, unlike *Allen*, the case facts place *Bakke* closer to the conventional "*A* hits *B*, *B* sues *A*" category, aligning it with cases less plausibly implicating protecting executive prerogatives.

72 *See* Maxwell L. Stearns, Obergefell, Fisher, *and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043, 1048 (2017) (defining dimensions as "normative scales of measurement used to evaluate virtually anything that is being compared," and explaining that dimensionality "studies normative measures and how they interrelate").

TABLE 2: STANDING CASE CATEGORIZATION

Third-party standing	**Diffuse-harm standing**	**Market-distortion standing**		**Criminal procedure cases**
Gilmore	*Richardson*	*Allen*	*Bakke*	*Miranda, Weeks, Mapp*
Presumption of doctrinal motivation ⟷ Presumption of relief motivation				

Table 2 broadens the presentation of the horizontal axis in Table 1 by setting out the various standing categories. The table begins with those cases in which the presumption against conferring standing is strongest, to the left, and continues with those in which the presumption favoring justiciability, typically without addressing standing, is strongest, to the right. *Allen* and *Bakke*, once more, fall within the same general category. Each case challenges a law alleged to have an adverse effect on the market in which the claimant or claimants' children are active, state higher education or public schools, respectively. And each claimant alleges that were the challenged law struck down, the market would potentially produce more favorable results. Despite this, the category splits, with the *Allen* Court presuming a principal doctrinal motivation, and with the *Bakke* Court presuming an individual relief motivation. The Court thus aligns *Allen* more closely with the categories in which standing is presumptively denied, and *Bakke* more closely with the cases in which justiciability is generally presumed.[73]

These tables and this subsection reveal standing as resting upon dual persistent conflicting premises. Although the specific *Allen* holding could be reconciled with both premises as the claimants rested on the Constitution, not a federal statute, for standing, *Lujan*, which implicated statutory standing, required reformulating the *Allen* premise, forcing the second, executive-insulation premise in Table 1.

2. The Commerce Clause

The Commerce Clause, an affirmative delegation of regulatory authority set out in Article I, Section 8, empowers Congress to regulate commerce with foreign nations, Indian tribes, and among the states.[74] Like standing, the Interstate Commerce Clause is especially significant to Constitutional Law I. Although the Clause has also long been construed as providing the judiciary a negative check against state or local laws that, absent a federal statute,

73 Although guilty offenders engage in the underlying criminal activity giving rise to prosecution, the goal, almost always, is to get away with it, implying that ongoing appeals are motivated by the desire for relief, not precedent creation. *See* Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on* Hollingsworth *and* Windsor, 65 ALA. L. REV. 349, 370 (2013).

74 U.S. CONST. art. I, § 8, cl. 3.

impinge upon interstate commerce,[75] this subsection focuses on the Supreme Court's affirmative Commerce Clause jurisprudence.

The analysis, once more, reveals two competing premises, first protecting the power of Congress to resolve structural coordination challenges that threaten to undermine desired policies unless implemented at the federal level, and second, protecting a discrete sphere of state regulatory activity even when doing so undermines congressional efforts to resolve such coordination challenges.

The Commerce Clause doctrine arises from a historical understanding, a product of early eighteenth-century thinking, of a clear demarcation between commercial activity that was local, or within a state, on one side, versus commercial activity transcending a single state, whether among states, with Indian tribes, or with foreign nations, on the other. The seemingly intuitive distinction proved problematic from the start. The Supreme Court quickly recognized that regulating interstate commercial activity necessarily requires regulating operations within states, for example, when ensuring that particular goods destined for commerce satisfy federal regulatory requirements.[76] In an early attempt to distinguish intrastate from interstate commerce, Chief Justice John Marshall posited that intrastate regulations, such as quarantine laws, touched upon goods *before* they entered commerce, whereas other regulations, such as licensure of ships navigating interstate waters, affected those ships in commerce.[77]

Despite its initial appeal, the chronological analysis ultimately yielded to alternative formalistic distinctions. These included, for example, determinations as to whether the regulation affected goods exerting direct versus indirect effects on commerce;[78] whether the regulation affected conduct intended to disrupt commerce;[79] or whether the regulation was tantamount to a prohibition on commerce.[80] From the 1824 decision, *Gibbons v. Ogden*, through the New Deal, the Supreme Court grappled with ongoing efforts to permit Congress to regulate activity within an increasingly integrated economy, one that eschewed such formalistic distinctions, while preserving the appearance of a clear boundary delineating what Congress can and cannot

75 Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 199–200 (1824). For a discussion of the dormant Commerce Clause doctrine as a body of default constitutional law, see *infra* subsection III.B.2.

76 *Id.* at 205–07.

77 *Id.* at 203–04.

78 *See* Carter v. Carter Coal Co., 298 U.S. 238, 305–10 (1936) (invalidating the Bituminous Coal Conservation Act of 1935 as exceeding Commerce Clause powers).

79 Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295, 310 (1925) (upholding the application of the Sherman Antitrust Act to striking miners given intent of strikers was to restrain coal supply in interstate commerce).

80 Champion v. Ames (Lottery Case), 188 U.S. 321, 355–57 (1903) (affirming ban on interstate transport of foreign lottery tickets notwithstanding the functional equivalence to a prohibition, as opposed to a regulation).

regulate under the Commerce Clause.[81] For a time, the Court practically abandoned all formalistic labels, and from about 1937 through the early to mid-1990s, it afforded Congress seemingly unlimited Commerce Clause authority.[82]

In the 1995 decision, *United States v. Lopez*,[83] the Supreme Court announced its first subject-based doctrinal limit, striking down the Gun-Free School Zones Act of 1990.[84] In the 2000 case, *United States v. Morrison*,[85] the Court extended *Lopez* to strike the civil remedy provisions of the Violence Against Women Act.[86] The *Lopez* Court altered, ever so slightly, the wording of what had been the most expansive category of Commerce Clause jurisprudence. After determining that carrying guns near schools (and then violence against women) did not qualify as regulation of instrumentalities of commerce, or of persons or things traveling in commerce, Chief Justice Rehnquist considered the third category, activity having a "substantial effect" on commerce.[87]

The most notable substantial effects case, *Wickard v. Filburn*,[88] upheld a restriction imposed by the Secretary of Agriculture on the production of wheat on farms above a specified size.[89] Mr. Filburn, who owned a small qualifying farm, was fined for exceeding his quota.[90] The case is sometimes the brunt of classroom humor due to a passage in which Justice Robert Jackson posits that although Filburn's wheat usage might not have affected commerce, if enough farmers followed suit, the aggregate effect would have.[91] Justice Thomas, in *Lopez*, maintains that while clever, the multiplier analysis "has no stopping point"; Congress may regulate even the smallest activity

81 Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1152 (2012).

82 Maxwell L. Stearns, *A Beautiful Mend: A Game Theoretical Analysis of the Dormant Commerce Clause Doctrine*, 45 WM. & MARY L. REV. 1, 25 (2003); *see also* Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 70–72 (1999).

83 514 U.S. 549 (1995).

84 *Id.* at 551. The Supreme Court previously imposed a process-based limitation disallowing congressional commandeering of state legislatures. *See* New York v. United States, 505 U.S. 144, 149 (1992) (invalidating the take-title provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, holding that Congress may not compel states to enact and enforce a federal regulatory program); *see also* Printz v. United States, 521 U.S. 898, 935 (1997) (extending *New York v. United States*' holding to apply to commandeering of chief law enforcement officers).

85 529 U.S. 598 (2000).

86 *Id.* at 610–13 (concluding the civil remedy provision did not fall within the *Lopez* economic activities test).

87 *Lopez*, 514 U.S. at 557, 559 (1995) (quoting Wickard v. Filburn, 317 U.S. 111, 129 (1942)).

88 *Wickard*, 317 U.S. 111.

89 *Id.* at 125–28.

90 *Id.* at 114–15.

91 *Id.* at 127–28.

because if enough people engage in it, the effect becomes large.[92] A closer reading of *Wickard*, however, reveals its more nuanced foundation.

Wickard arose during a wheat glut, with corresponding depressed prices.[93] The scheme was intended to reduce wheat output to sustain a cartelized price. In a footnote, Justice Jackson points out that of the four wheat net-exporter nations, each had implemented such a scheme at the national, rather than local governmental, level.[94] Although the analysis is undertheorized, this datum supports the intuition that private producers, local governments, and states are almost certain to fail in implementing such a scheme. Cartel theory reveals that when curtailed production generates noncompetitive pricing, individual firms, or local governments, are motivated to cheat, expanding output (or in the case of local government, allowing producers to expand outputs), capturing more of the gain, while hoping that others strictly abide by the price-boosting restrictions.[95] The incentives are reciprocal. As each firm, or government catering to local political pressures, captures more and more of the "monopoly rents,"[96] the rents dissipate, restoring the price to the depressed levels.

To be sure, cartelizing wheat benefits wheat farmers, not consumers. The substantial effects cases sometimes sustain laws, such as the wheat cartel, that the public has reason to disfavor. Nonetheless, such cases recognize Congress's authority to choose among available policies provided there is a rational basis for resting decisional authority at the national level, as opposed to leaving it at the state or local levels. The structural impediment to implementation elsewhere, as Justice Jackson's footnote corroborates, was sufficient for the *Wickard* Court to infer a rational foundation for Congress's policy scheme.[97] The *Wickard* case also signaled to farmers above the statutorily specified size not to bother trying to cheat: if the Secretary of Agriculture is willing to invest in pursuing a small farmer like Filburn, surely he will come after you![98] Justice Jackson expressed the *Wickard* rule as follows: "[E]ven if appellee's activity be local and though it may not be regarded as commerce,

92 *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

93 *Wickard*, 317 U.S. at 125.

94 *Id.* at 126 n.27.

95 *See* STEARNS ET AL., *supra* note 10, at 592–93 (discussing cartel theory).

96 Rents are defined as returns above opportunity cost, meaning from the next best use of the same resources. Monopoly rents derive from noncompetitive pricing structures. *See id.* at 54–55 (defining rent and collecting authorities).

97 Rationality review generally does not imply the need for empirical verification; rather, the test simply inquires whether Congress has a legitimate governmental interest and means rationally in furtherance of that interest. *See* Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After* Lopez *and* Morrison, 11 WM. & MARY BILL RTS. J. 403, 406 (2002); James M. McGoldrick, Jr., *The Commerce Clause, the Preposition, and the Rational Basis Test*, 14 U. MASS. L. REV. 182, 184–87 (2019).

98 Had Congress, instead, implemented a triage strategy, with the Secretary of Agriculture pursuing the largest offenders first, this would have risked signaling condoning violations below the output at which the Secretary suspended enforcement. *See* STEARNS ET AL., *supra* note 10, at 28–29.

it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[99]

Wickard reveals a longstanding Commerce Clause premise: the doctrine allows Congress to enact policies for which it has a rational justification in inferring a structural impediment, here taking the form of a prisoners' dilemma,[100] to implementation at a lower level of government. The prisoners' dilemma is one of several helpful games in characterizing when the Supreme Court has determined that Congress could reasonably conclude that only national legislation could effectuate a chosen policy.[101]

In *Heart of Atlanta Motel v. United States*,[102] and *Katzenbach v. McClung*,[103] the Supreme Court sustained the public accommodations provisions of the Civil Rights Act of 1964.[104] The Act took a categorical, rather than case-by-case, approach to determining which places of public accommodation were subject to the rule prohibiting racial discrimination in choosing whom to serve.[105] In these cases, a motel and restaurant, respectively, claimed that the local nature of their business placed them beyond Congress's Commerce Clause powers, or alternatively, that a specific determination was required as to the effect each business had on commerce.[106] The Supreme Court rejected these claims.

In each case, the Court instead focused on the proximity to interstate highways, interstate procurements, and interstate patronage.[107] Each case implicated a limitation on the Fourteenth Amendment Equal Protection Clause, which intuitively seems a more likely source of the congressional policy.[108] Section 5 of the Fourteenth Amendment provides Congress with enforcement authority respecting Section 1, including equal protection.[109] The difficulty is that Section 1 limits state action,[110] and the public accommodations provisions of the Civil Rights Act regulate private businesses.[111]

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99 *Wickard*, 317 U.S. at 125.

100 The theory of cartels is an application of the prisoners' dilemma. For a more detailed discussion, see *infra* Part II; STEARNS ET AL., *supra* note 10, at 592–93 (describing game and presenting authorities).

101 For a more general game theoretical analysis of the affirmative Commerce Clause, see Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 26–28 (2007).

102 Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

103 379 U.S. 294 (1964).

104 *See Heart of Atlanta Motel*, 379 U.S. at 243, 258; *Katzenbach*, 379 U.S. at 302.

105 *See Heart of Atlanta Motel*, 379 U.S. at 258.

106 *See id.* at 258; *Katzenbach*, 379 U.S. at 298.

107 *See Heart of Atlanta Motel*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 298–302.

108 *See Heart of Atlanta Motel*, 379 U.S. at 280 (Douglas, J., concurring) (asserting that basing the ruling on the Fourteenth Amendment would provide a firmer foundation and generate less follow-up litigation over successive venues engaged in similar discriminatory practices).

109 U.S. CONST. amend. XIV, §§ 1, 5.

110 *Id.*

111 *See* A.K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53, 77, 90 (2005) (discussing the

The structural coordination premise underlying the Commerce Clause supports these holdings. Congress could reasonably infer a structural impediment if public accommodations laws were left entirely to the states. Even if, contrary to history, individual Southern states had sought racially liberalized policies, for the scheme to facilitate unimpeded African American travel in the South, all Southern state jurisdictions would have had to go along. A single state could thwart the scheme by continuing to condone racial exclusions over a considerable geographical distance. Doing so would perpetuate the tremendous inconvenience, generally with reliance upon distant, low quality accommodations, as catalogued in the *Green Book*.[112] Once more, the Supreme Court sustained an exercise of Commerce Clause power within the substantial-effects category in a context in which Congress could reasonably determine that a structural coordination problem required a national solution.

The *Lopez* Court sought to restore, with modifications, the intuition dating to Chief Justice Marshall's *Gibbons* opinion, identifying a clear domain of intrastate activity beyond Congress's Commerce Clause powers. Chief Justice Rehnquist's seemingly modest formalist revival required no more than reassigning an adjective. Rather than allowing Congress to regulate activity, whatever its nature, with a "substantial economic effect" on interstate commerce,[113] *Lopez* allows regulation of "economic activity" with a substantial effect on interstate commerce.[114] Restricting the class of activity subject to regulation based on whether the activity itself is "economic" allowed the Court, first in *Lopez*, and then in *Morrison*, to prevent Congress, under the Commerce Clause, from regulating guns near schools and from providing civil remedies for violence against women. Once more, the Court defined a class of activity as local, and thus beyond the purview of Congress's Commerce Clause powers.

Green Book and related history (citing *Heart of Atlanta Motel*, 379 U.S. at 252–53)); *see also Landmark Legislation: Civil Rights Act of 1875*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1875.htm (last visited Oct. 3, 2020). In the *Civil Rights Cases*, 109 U.S. 3, 11–13 (1883), the Supreme Court relied upon the state action doctrine to strike down an earlier public accommodations law enacted pursuant to the Fourteenth Amendment.

112 *The Negro Motorist Green Book* was published annually from 1936 until 1967 and listed restaurants and hotels that were either owned by African Americans or did not discriminate against African American travelers. *See* VICTOR H. GREEN & GEORGE L. SMITH, THE NEGRO MOTORIST GREEN BOOK (1937). A digital scan of the 1937 edition of the *Green Book* is available through the New York Public Library. *See The Negro Motorist Green Book*, N.Y. PUB. LIBR. (1937), https://digitalcollections.nypl.org/items/88223f10-8936-0132-0483-58d385a7b928/book#page/1/mode/2up.

113 Wickard v. Filburn, 317 U.S. 111, 125 (1942).

114 United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is not an essential part of a larger regulation of economic activity . . . [and] cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.").

Lopez declined to overturn *Wickard*.[115] Instead, *Lopez* revived a formalist premise, specifically recognizing an identifiable regulatory domain as off limits to congressional regulation. And, at the same time, *Lopez* retained the longstanding structural coordination premise, exemplified in *Wickard*, which Rehnquist described as the Court's most extreme example,[116] along with *Heart of Atlanta Motel* and *Katzenbach*. *Lopez* could be reconciled with both premises, including *Wickard*, as neither case necessarily implicated structural coordination challenges. *Morrison*, with parallels to the public accommodations cases, presented a closer case.[117] *National Federation of Independent Business v. Sebelius* ultimately forced a clear doctrinal tension.[118]

Sebelius presented a constitutional challenge to the Patient Protection and Affordable Care Act (PPACA), a statute for which Congress had a justifiable rationale in assuming a structural impediment to implementation at the state or local level.[119] The challenge involved pooling insureds to force those at low risk to offset the cost of covering persons with preexisting medical conditions.[120] *Sebelius* is unusual in several respects. Chief Justice Roberts published the controlling opinion for himself, following the breakdown of a coalition to strike down the Act's individual mandate.[121] Roberts sustained the individual mandate under the Tax Clause, not the Commerce Clause.[122]

Chief Justice Roberts extended the *Lopez/Morrison* formalist revival based on "economic activities" within the substantial effects case category. In *Sebelius*, Roberts focused on "activity," rather than its qualifier, "economic." He maintained that the nonpurchase of insurance is "inactivity" and thus beyond congressional regulatory power under the Commerce Clause.[123] Roberts compared the decision not to purchase insurance to the decision not to purchase broccoli, rejecting Justice Ginsburg's "broccoli horrible" rejoinder.[124] Ginsburg maintained that Congress could reasonably determine that

115 *See id.* at 557–60.

116 *Id.* at 560.

117 *Morrison* is arguably in tension with *Heart of Atlanta* and *Katzenbach*, inasmuch as these cases involve reliance on civil remedies to expand public accommodations to women, and to African Americans, respectively. The Supreme Court implicitly rejected the intuition that the absence of civil remedies for women had a comparable effect with the absence of public accommodations laws in the South for persons of color. For a more detailed discussion and analysis, see Stearns, *supra* note 101, at 68–69.

118 567 U.S. 519 (2012).

119 *See* Henry & Stearns, *supra* note 81, at 1154–56.

120 *Sebelius*, 576 U.S. at 548 (opinion of Roberts, C.J.).

121 Avik Roy, *The Inside Story on How Roberts Changed His Supreme Court Vote on Obamacare*, FORBES (July 1, 2012), https://www.forbes.com/sites/theapothecary/2012/07/01/the-supreme-courts-john-roberts-changed-his-obamacare-vote-in-may/#3cce780ed701.

122 *Sebelius*, 567 U.S. at 574. Because the Court sustained the individual mandate, we might consider the Commerce Clause analysis dictum, although such formalism would disallow Justices to determine the scope of their holdings. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 955–56 (2005).

123 *See Sebelius*, 567 U.S. at 556 (opinion of Roberts, C.J.).

124 *Id.* at 558; *id.* at 608, 615 (Ginsburg, J., concurring in part, and dissenting in part).

health insurance pooling required purchasing incentives for healthy young individuals, sometimes called "young invincibles," who might otherwise forgo insurance, to offset the burdens on insurers now required to cover persons with preexisting conditions.[125] Structural challenges inhibit state-level solutions. A state implementing the scheme would risk an influx of persons with preexisting conditions and a corresponding exit of insurers seeking to avoid the additional risk exposure.[126] The pooling dynamics at a microlevel for an insurer reverberate at a macrolevel among states.[127] As Ginsburg observed, no such structural impediments affect purchasing decisions concerning particular vegetables.[128]

The PPACA scheme, like the schemes in *Wickard*, *Heart of Atlanta Motel*, and *Katzenbach*, presents the very structural coordination concerns for which Congress could rationally determine the need for a federal regulatory solution. And yet, by deploying, and extending, the newly devised *Lopez/Morrison* formalism, the *Sebelius* Court determined that the individual mandate exceeded Congress's power under the Commerce Clause.[129] Once more, *Sebelius* does not overturn *Wickard*. Instead, two premises, allowing Congress to resolve structural coordination challenges, and ensuring a protected sphere of state regulatory activity based on whether activity is economic in nature and whether the regulated behavior is "activity" at all, persist in tension.

TABLE 3: DUAL PERSISTENT COMMERCE CLAUSE PREMISES

	Presumption of defined sphere of state regulatory prerogatives	**No presumption of defined sphere of state regulatory prerogatives**
Presumption that Congress may resolve structural coordination challenges under the Commerce Clause	*Lopez*, *Morrison*	*Wickard*, *Heart of Atlanta*, *Katzenbach*
No presumption that Congress may resolve structural coordination challenges under the Commerce Clause	*Sebelius*	Null set

125 *See id.* at 609; David Amsden, *The Young Invincibles*, N.Y. MAG. (Mar. 23, 2007), http://nymag.com/news/features/29723/ (coining the term).

126 Henry & Stearns, *supra* note 81, at 1171–73.

127 *Id.* at 1169–75 (comparing micro- and macro-separating equilibrium game affecting health insurance).

128 *See Sebelius*, 567 U.S. at 615 (Ginsburg, J., concurring in part, and dissenting in part) (describing the "broccoli horrible").

129 *See id.* at 558 (opinion of Roberts, C.J.).

Table 3 depicts, in the upper right, the period from about 1937 through the early to mid-1990s, during which Congress presumptively held broad regulatory power under the Commerce Clause to avoid structural coordination challenges, without defined constraints protecting states and localities from congressional intervention.[130] The upper-left cases reinvigorate formalism, protecting a discrete sphere of activity from congressional regulatory control, but with case facts that can be plausibly reconciled with the expansive reach of the substantial effects doctrine operating in the upper right. The lower left, *Sebelius*, reveals that, as with standing, the dual persistent conflicting premises affecting the Commerce Clause doctrine ultimately produce a doctrinal tension. The specific case facts, which, by implicating a problem of coordination that justifies congressional regulatory power under the traditional substantial effects test, did not allow such power under the inactivity prong of the formalistic economic activity test. The lower right is a logical null set.

3. Separation of Powers

Separation of powers is a broad category implicating several discrete subdoctrines. Despite the category's breadth, a general framing helps to highlight the essential feature of dual persistent conflicting premises. After a general framing, our focus will be on *Morrison v. Olson*, the case sustaining the Ethics in Government Act, which created the now-expired Office of Independent Counsel.[131]

As principal constitutional architect, James Madison recognized the challenge of relying upon parchment barriers to ensure that the respective branches of government not unduly extend their sphere of influence. And yet, Madison's solution was ultimately to construct his own parchment barriers.[132] Although relatively thin as compared with standing or the Commerce Clause, the separation of powers caselaw evinces a conflict between one premise, condoning necessary adjustments to accommodate changing practical dynamics in a world the framers could not plausibly anticipate, and a second premise, insisting that rigid adherence to specified constitutional formulations, even if sometimes in question-begging ways, is essential to preserving the integrity of separation of powers.

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130 A short-lived exception created in *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976), disallowing applying the Fair Labor Standards Act to state and local government employees, was abandoned in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546–47 (1985).

131 Morrison v. Olson, 487 U.S. 654, 659–60 (1988). The independent counsel statute was subsequently allowed to lapse. *See* Abraham Dash, *The Office of Independent Counsel and the Fatal Flaw: "They Are Left to Twist in the Wind,"* 60 MD. L. REV. 26, 26–27 (2001).

132 *See* Louis Michael Seidman, *The Secret History of American Constitutional Skepticism: A Recovery and Preliminary Evaluation*, 17 U. PA. J. CONST. L. 1, 25–26 (2014) (explaining "'parchment barriers' problem").

In the landmark case, *Youngstown Sheet & Tube Co. v. Sawyer*,[133] which prevented President Truman from seizing domestic steel mills to avert a work stoppage and strike during the Korean conflict,[134] Justices Felix Frankfurter and Hugo Black agreed on the outcome, but not on how to achieve it. Black ruled out specific provisions in Article II—(1) the Commander in Chief Clause, (2) the Faithful Execution Clause, and (3) the Power Vesting Clause—as empowering the President to seize private industry property during an undeclared war, and further ruled out two possibly relevant federal statutes.[135] By contrast, Frankfurter surveyed the long history of congressional acquiescence respecting the exercise of presidential powers not explicitly authorized in Article II, and determined that neither they, nor any of sixteen cited examples of analogous presidential powers, condoned the scope of Truman's claimed power.[136]

These differing approaches, emphasizing practical accommodations versus strict adherence to constitutional text, later produced divergent case outcomes. In *Dames & Moore v. Regan*[137] and *Mistretta v. United States*,[138] the Supreme Court took Frankfurter's lead, relying on a premise of practical accommodation, to expand executive authority in the context of the Iranian Hostage Crisis, and to let Congress situate an agency charged with establishing Federal Sentencing Guidelines within the judiciary.[139] By contrast, in *INS v. Chadha*[140] and *United States v. Nixon*,[141] the Court followed Black's lead. *Chadha* disallowed Congress to enact a one-house veto as a means of monitoring agency conduct based on a strict reading of the presentment and bicameralism requirements of Article I, Section 7, even though the underlying statute creating the one-house veto satisfied these very requirements.[142] And *Nixon* disallowed the President complete power to claim executive privilege, even though the privilege itself was judicially crafted.[143]

Although shifting premises are often subtle, requiring close analysis to discern, *Morrison v. Olson*[144] offers a rare moment of candor. A series of Supreme Court cases constructed formalistic distinctions allowing Congress to interpose removal restrictions on appointed officials for whom the scope of responsibility was plausibly attenuated from core executive functions. The cases began, in *Myers v. United States*, with a decision that Congress could not interpose a for-cause removal requirement prior to the expiration of a local postmaster's four-year term because the President retained control over

133 343 U.S. 579 (1952).
134 *Id.* at 582–84; 587–89.
135 *Id.* at 587–89.
136 *Id.* at 589–628 (Frankfurter, J., concurring).
137 453 U.S. 654 (1981).
138 488 U.S. 361 (1989).
139 *See Dames & Moore*, 453 U.S. at 660, 678–81; *Mistretta*, 488 U.S. at 368–70, 384, 396.
140 462 U.S. 919 (1983).
141 418 U.S. 683 (1974).
142 *See* U.S. CONST. art. I, § 7; *Chadha*, 462 U.S. at 945–46.
143 *Nixon*, 418 U.S. at 713.
144 487 U.S. 654 (1988).

appointees performing executive functions.[145] The Court then held in *Humphrey's Executor v. United States* that Congress can interpose a removal restriction for a commissioner on the Federal Trade Commission, whose quasi-judicial and quasi-legislative functions were removed from core executive functions.[146] Finally, in *Wiener v. United States*, the Court determined that although silent on removal, the statute creating the War Powers Commission nonetheless implied presidential removal restrictions given the commission's quasi-adjudicatory functions.[147]

This case trilogy runs parallel with early formalist Commerce Clause doctrine. The combined cases permitted the Supreme Court simultaneously to expand legislative powers and to signal a defined boundary based on a strict construction of the relevant constitutional text.[148]

Morrison v. Olson[149] presented a constitutional challenge to the Ethics in Government Act.[150] The statute established the Office of Independent Counsel, responsible for investigating alleged criminal activity potentially implicating high-level executive officials, possibly including the President.[151] Chief Justice Rehnquist, writing for a majority, situated *Morrison* against the backdrop of these earlier cases as follows:

> We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers*, but *our present considered view* is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive." The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some "purely executive" officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.[152]

This passage is strikingly blunt in recasting an extant constitutional premise. The earlier premise formally distinguished officers performing purely

145 *See* 272 U.S. 52, 106, 163–64 (1926).

146 295 U.S. 602, 628–29 (1935).

147 357 U.S. 349, 349–50, 356 (1958).

148 Strict versus loose construction preceded originalism versus living constitutionalism as the dominant divide in constitutional interpretation. *See, e.g.*, S. Sidney Ulmer, *Supreme Court Justices as Strict and Not-So-Strict Constructionists: Some Implications*, 8 LAW & SOC'Y REV. 13, 18–19 (1973).

149 *Morrison*, 487 U.S. at 659.

150 28 U.S.C. §§ 591–597 (1982).

151 *See Morrison*, 487 U.S. at 660.

152 *Id.* at 689–90 (emphasis added) (footnotes omitted) (first quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935); then quoting Myers v. United States, 272 U.S. 52, 117 (1926); and then quoting *Humphrey's Ex'r*, 295 U.S. at 628).

executive functions, on one side, from officers performing quasi-legislative and quasi-judicial functions, on the other. "[O]ur present considered view" recast that premise euphemistically, indeed humorously, capturing the perceived need for practical accommodations, so long as the effect does not unduly interfere with the President's capacity to exercise executive powers.[153] And as with other dual persistent conflicting premises, the Chief Justice explicitly stated that the newer premise, as applied in the removal context, did not undermine the earlier precedents resting on a conflicting formalistic premise.[154] Table 4, once again, juxtaposes these conflicting premises.

TABLE 4: CONFLICTING SEPARATION OF POWERS PREMISES

	Accommodates realism	**Fails to accommodate realism**
Accommodates formalism	*Youngstown*, *Dames & Moore*, *Mistretta*, *Humphrey's Executor*, *Weiner*	*Myers*, *Chadha*, *Nixon*
Fails to accommodate formalism	*Morrison*	Null set

The cases in the upper-left quadrant, including *Youngstown*, accommodate both formalist and realist premises, as demonstrated by the competing rationales leading to the same result by Justices Black and Frankfurter. The upper-right quadrant lists cases that accommodate formalism but are in tension with realism inasmuch as they disallow practical accommodations based on changed constitutional conditions. *Morrison*, in the lower-left quadrant, is opposite, supplanting the existing formalist premise with realism in light of the Court's "present considered view."[155] The lower right is a null set. Following *Youngstown*, the Court continues to toggle back and forth between an accommodationist understanding of separation of powers, on one side, and a strict textualist understanding, on the other, without definitively resolving the underlying dual persistent conflicting premises.

B. Dual Persistent Conflicting Premises in Equal Protection and Race and in Speech

We begin the analysis with dual persistent conflicting premises in the context of equal protection and race and then extend the analysis to consider two areas of the First Amendment and Speech, the doctrines of incitement and obscenity.

153 *Id.* at 689.
154 *See id.* at 689–91.
155 *Id.* at 689.

1. Equal Protection and Race

Although equal protection caselaw embraces myriad categories, including gender, sexual orientation, and intellectual disability, the doctrine's formative history centers on race. And race jurisprudence affects the manner by which nearly all bodies of equal protection caselaw are framed. The principal means of case analysis involves the tiers of scrutiny doctrines.[156] The counterintuitive nature of tiers of scrutiny reinforces this Article's central claim concerning dual persistent conflicting premises as a feature undergirding salient constitutional domains. In this context, the conflicting premises are, first, ensuring that laws implicating race are nondiscriminatory, and, second, ensuring that such laws are nonsubordinating. Although, historically, laws that discriminated based on race almost invariably subordinated, the confluence is not inevitable. Recent caselaw has forced these premises into conflict.

From the time the Fourteenth Amendment was ratified, the Supreme Court has struggled to ascertain its proper scope, including how to assess laws alleging equal protection violations. The *Slaughter-House Cases*[157] rejected a challenge to a New Orleans slaughterhouse monopoly, commencing divergent caselaw pathways that continue to influence modern doctrine.[158] Justice Miller, writing for the majority, all but eviscerated Section 1 of the Privileges or Immunities Clause, declaring that the Clause protects only rights derived from national citizenship.[159] He rendered the Clause superfluous inasmuch as the Supremacy Clause independently protects against state laws contravening rights arising from, or enacted in pursuance of, the Constitution.[160] Miller drew a further distinction based on the Fourteenth Amendment's historical context, which was motivated to ensure that newly freed slaves were not prohibited by Black Codes, and thinly veiled private officials, perpetuating the pre–Thirteenth Amendment slavery other than nominally.[161] A formal two-tier system, with the Court applying strict scrutiny in race cases, otherwise applying rationality review, emerged later.[162]

156 For a detailed exposition on tiers, see Stearns, *supra* note 72 at 1046–49.

157 83 U.S. (16 Wall.) 36 (1873).

158 *Id.* at 57, 82.

159 *See id.* at 77–79. The sole exception is *Saenz v. Roe*, 526 U.S. 489, 502–04 (1999).

160 *Slaughter-House*, 83 U.S (16 Wall) at 96 (Field, J., dissenting); *id.* at 128–29 (Swayne, J., dissenting); *see also* Kevin Maher, *Like a Phoenix from the Ashes:* Saenz v. Roe*, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 116–18 (2001).

161 *See Slaughter-House*, 83 U.S (16 Wall) at 68–71, 77–78 (majority opinion). Even before "literally" became a Janus word, the use of "thinly veiled" in the text would have satisfied both its actual and figurative meanings. *See Contronyms Are 'Literally' the Best*, VOA LEARNING ENGLISH (June 20, 2019), https://learningenglish.voanews.com/a/everyday-grammar-contronyms/4152424.html (defining "literally" as "figuratively") (emphasis omitted).

162 The first case both to articulate and apply strict scrutiny in the context of a racial classification was *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). *See* Michael Klarman, *An*

Plessy v. Ferguson rejected an equal protection challenge to racially segregated railway cars.[163] The *Plessy* Court sustained the regime, sounding the separate-but-equal doctrine, with Justice Harlan's dissent insisting upon a (mislabeled) color-blind Constitution.[164] Despite important passages that make Harlan's opinion illiberal by modern lights, precisely because of the confluence of race-based discrimination and subordination, color-blindness was liberal for its time. The conflicting equal protection premises explain why that no longer holds. Today, color-blindness is associated with judicial conservatism, with judicial liberals willingly condoning some race-advertent policies.

The shift in liberal and conservative willingness to condone use of race reflects the differing historical circumstances of its use within state and federal regulatory schemes. When race was almost invariably employed to further a racial caste system—favoring whites and subordinating blacks—race neutrality was decidedly liberal. By contrast, when race-advertent policies are designed to benefit African Americans, the analysis becomes more complex.

In the modern era, a shift from the antidiscrimination premise to an antisubordination premise allows striking down legal policies with the intent and effect of harming African Americans, while potentially sustaining legal policies compensating for past adverse historical treatment, even as the formal doctrine is expressed on other grounds. The Court has formally eschewed defending express racial policies based on compensation for past historical disadvantage, instead requiring alternatives such as promoting diversity or role models in particular settings.[165]

This historical anomaly has given rise to several doctrinal puzzles, extending beyond race to other equal protection domains. Although the early formulation presented two tiers, strict scrutiny for race and rationality review for all else, the system now embraces three formal, yet five actual, tiers.[166] Intermediate scrutiny, most commonly associated with gender classifications, began as an attempt at more relaxed scrutiny for benign race-based classifications. Intermediate scrutiny avoided the anomaly of nominally applying the single strict scrutiny tier to strike illicit racial classifications, while sustaining at least some benign ones. After a brief flirtation with intermediate scrutiny for benign racial classifications, culminating in *Metro Broad-*

Interpretive History of Modern Equal Protection, 90 MICH. L. REV. 213, 255 (1991) (discussing case history).

163 163 U.S. 537, 551–52 (1896).

164 *See id.* at 554 (Harlan, J., dissenting). Despite variations, color-blindness implies seeing only black and white. Stearns, *supra* note 72 at 1075 (citing *Plessy*, 163 U.S. at 559).

165 *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–10, 311–15 (1978) (opinion of Powell, J.) (disallowing remediation, but allowing diversity); *see also* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1036 (1986).

166 *See* Stearns, *supra* note 72, at 1046–49. As explained below, one might classify it as six tiers if intermediate scrutiny is subdivided into intermediate scrutiny lite and intermediate scrutiny heavy. *See infra* notes 169–70 and accompanying text.

casting v. FCC,[167] the Court rejected its application to race in favor of strict scrutiny five years later, in *Adarand Constructors, Inc. v. Peña*.[168]

The Court eventually applied intermediate scrutiny in gender cases, although, in that context, the test can be further subdivided into intermediate scrutiny lite, applied to classifications based on real sex differences, and intermediate scrutiny heavy, applied to overbroad generalizations about sex roles.[169] Rationality review also splits. The Supreme Court applies heightened rationality review when striking a problematic classification within particular settings in which it seeks to avoid labeling the affected group "suspect" or "quasi-suspect," as this risks calling into question the presumptive validity of all implicated classifications. Rationality review remains highly deferential save in this narrow class of cases. In such cases, the Court no longer accepts any legitimate interest, instead homing in on a singular illicit rationale as the basis for striking down the challenged law. This is not conventional rationality review.[170]

These combined doctrines include a version of rationality review so piercing as to abut strict scrutiny, and a version of strict scrutiny so lax as to abut rationality review. The resulting doctrinal inversion creates further anomalies.[171] Although the Fourteenth Amendment was principally motivated by the adverse treatment of newly freed slaves, and although the amendment embeds an express adverse gender classification, the resulting tiers system provides greater remedial scope for laws benefitting women than for African Americans. And although all racial classifications are nominally subject to the same level of scrutiny, the result has been sharply differing

167 Metro Broad., Inc. v. FCC, 497 U.S. 547, 564–65 (1990).

168 Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 236 (1995).

169 Treating this as two separate categories increases the number of tiers to six. The scheme in Stearns, *supra* note 72, at 1047, employed five tiers because the doctrinal inversion only affects two categories, strict scrutiny lite and rational basis plus. Although intermediate scrutiny appears to split, the division operates consistently with the lax-to-strict normative spectrum.

170 *See id.* at 1047–48, 1058–62 (describing animus cases as rational in theory but strict in fact, and linking analysis to broader inversion of tiers of scrutiny that include strict scrutiny lite). For other works exploring the relationship between categories of rationality review, see Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319, 1356–64 (2018) (linking tensions in rationality review to the doctrine's role in effecting social change); R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 230–33 (2002) (describing second order rationality review as engaging in independent judicial balancing, and third order as imposing the burden of proof upon the challenger); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1677–79 (2016) (ascribing inconsistent applications of rationality review to doctrinal focus on utilitarian conceptions of rationality).

171 The doctrines are inverted in that rather than strict scrutiny lite proving slightly less strict, or rational basis plus proving slightly more piercing, the applications flip altogether such that strict scrutiny lite presumes in favor of the law, abutting conventional rationality review, and rational basis plus presumes against the law, abutting conventional strict scrutiny. *See* Stearns, *supra* note 72, at 1047.

applications as applied to laws designed to harm African Americans versus laws designed to benefit African Americans.

This is most evident in race-based affirmative action cases, as seen in *Regents of the University of California v. Bakke*,[172] *Grutter v. Bollinger*,[173] and *Fisher v. University of Texas* (*Fisher II*).[174] In each case, the Court applied a degree of deference to the defending state institution in tension with requiring a compelling governmental interest and narrowly tailored means. The tensions run sufficiently deep that Justice Kennedy, as the controlling jurist in *Fisher II*, employed the very deferential reasoning that in *Fisher I* he had chastised Justice O'Connor for employing in *Grutter*.[175]

TABLE 5: DUAL PERSISTENT CONFLICTING PREMISES AND EQUAL PROTECTION

	Applying antisubordination premise	**Not applying antisubordination premise**
Applying antidiscrimination premise	Modern conservative position, corresponding color-blind insistence on strict version of strict scrutiny, e.g., *Adarand*	Null set
Not applying antidiscrimination premise	Modern liberal position, corresponding to relaxation of strict scrutiny for benign racial discrimination, e.g., *Bakke*, *Grutter*, *Fisher II*	Rejected Jim Crow position, which influences modern liberal and modern conservative jurisprudence, albeit in different ways

Table 5 summarizes the preceding discussion. Although the Jim Crow position, which allowed a racial caste system thwarting the principles of antidiscrimination and antisubordination has thankfully been formally discarded, it nonetheless affects the differing jurisprudential positions embraced by modern liberals and modern conservatives. Whereas modern liberals condone the benign use of race, sharing with Jim Crow conservatives a willingness to use race in some way, albeit rejecting its use to create or perpetuate a racial caste, corresponding to the lower left quadrant, modern conservatives regard the central lesson of Jim Crow as disallowing differential treatment of blacks and whites, thereby insisting on a color-blind principle of antidiscrimination, corresponding to the upper-left quadrant. The lower right represents the discarded Jim Crow position, and the upper right is a

172 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–91 (1978) (opinion of Powell, J.).

173 Grutter v. Bollinger, 539 U.S. 306, 328–30 (2003).

174 Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

175 *See id.* at 2209–21 (citing *Gutter*, 539 U.S. at 330); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 310–13 (2013) (citing *Grutter*, 539 U.S. at 326).

null set. Once more, the problem of dual persistent conflicting premises pervades this foundational body of constitutional law, with broad implications across a host of constitutional domains.

2. First Amendment—Speech: Incitement and Obscenity

Although the First Amendment expressly restricts congressional regulatory power—"Congress shall make no law . . . abridging the freedom of speech"[176]—the protection has been extended to other organs of the federal government and incorporated against state and local governments.[177] In this context, the first premise is that speech can be categorized as higher or lower valued, with corresponding differing levels of protection, and the second is that speech must be regulated neutrally without regard to value assessment. Once more, although some case results satisfy both premises, others bring them into conflict.

In the famous case *Chaplinsky v. New Hampshire*,[178] the Supreme Court upheld the conviction of a Jehovah's Witness who preached while condemning organized religion in terms some listeners deemed highly offensive.[179] Writing for a unanimous Court, Justice Murphy established a "fighting words" exception to the protection of speech, and, in doing so, he more broadly structured the premise of high- and low-level speech:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[180]

Although the continued validity of *Chaplinsky*'s specific holding, classifying general statements of religious offense as fighting words absent more specific instigation, is uncertain,[181] the present analysis rests on the general premise of higher- or lower-valued speech. For each listed category, *Chaplinsky* presumes broader regulatory scope, including permissible criminalization, for low-value speech, notwithstanding the protection of speech more generally. Two bodies of caselaw demonstrate the curtailment of the *Chaplin-*

176 U.S. CONST. amend. I.

177 *See* CHEMERINSKY, *supra* note 12, at 511–12; STONE ET AL., *supra* note 12, at 737–38.

178 315 U.S. 568 (1942).

179 *Id.* at 569–70, 73.

180 *Id.* at 571–72 (footnotes omitted).

181 *See* Debra D. Burke, *Cybersmut and the First Amendment: A Call for a New Obscenity Standard*, 9 HARV. J.L. & TECH. 87, 133 n.284 (1996) (questioning *Chaplinsky*'s specific holding (citing *Chaplinsky*, 315 U.S. at 574)); Burton Caine, *The Trouble with "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 441–45 (2004) (calling for *Chaplinsky*'s overruling).

sky premise based on a reconceived neutrality premise, albeit once more, without formally abandoning *Chaplinsky*.

In *R.A.V. v. City of St. Paul*,[182] the Court invalidated the St. Paul, Minnesota, Bias-Motivated Crime Ordinance. The ordinance banned displays of particularly offensive symbols, including burning crosses and swastikas, when the offender knows or has reason to know that the display "arouses anger, alarm or resentment in others" based on "race, color, creed, religion or gender."[183] The Court invalidated the ordinance in a case involving neighbors burning a cross on an African American family's lawn.[184]

Writing for the majority, Justice Scalia cited *Chaplinsky* for recognizing higher- and lower-level speech, but asserted that a law invalidating even low-level speech must do so for reasons that are "based on the very reasons why the particular class of speech" is permissibly banned.[185] This has become known as the "special virulence" exception to the protection of speech.[186] On *R.A.V.*'s facts, Scalia reasoned, the ban risked censorship by prohibiting particular speech offensive to identified targets, but not more generally, including, for example, based on "political affiliation, union membership, or homosexuality."[187] Scalia reasoned: "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[188]

Justice White, concurring in the judgment, responded:

> [T]he majority holds that the First Amendment protects those narrow categories of expression long held to be undeserving of First Amendment protection—at least to the extent that lawmakers may not regulate some fighting words more strictly than others because of their content. . . .
>
> . . . It is inconsistent to hold that the government may proscribe an entire category of speech because the content of that speech is evil, . . . but that the government may not treat a subset of that category [of speech] differently without violating the First Amendment; the content of the subset is by definition worthless and undeserving of constitutional protection.[189]

Justice White's analysis embraces the *Chaplinsky* premise, a binary categorization of high- versus low-value speech. Justice Scalia, by contrast, rested on an alternative speech-protecting premise, viewpoint neutrality, without regard to speech quality. The distinction between these premises can be depicted visually.

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182 505 U.S. 377, 396 (1992).

183 *Id.* at 380 (quoting ST. PAUL, MINN., CODE OF ORDINANCES § 292.02 (1990)).

184 *Id.* at 379, 396.

185 *Id.* at 382–83, 393 (citing *Chaplinsky*, 315 U.S. at 572).

186 *Id.* at 392–93; Virginia v. Black, 538 U.S. 343, 382 (2003) (Souter, J., concurring in the judgment and dissenting in part) (crediting *R.A.V.* with creating the "special virulence" exception (citing *R.A.V.*, 505 U.S. at 388)).

187 *R.A.V.*, 505 U.S. at 391.

188 *Id.* (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)).

189 *Id.* at 401 (White, J., concurring in the judgment) (citation omitted) (citing New York v. Ferber, 458 U.S. 747, 763–64 (1982)).

FIGURE 1: SPEECH VALUE VERSUS CONTENT NEUTRALITY

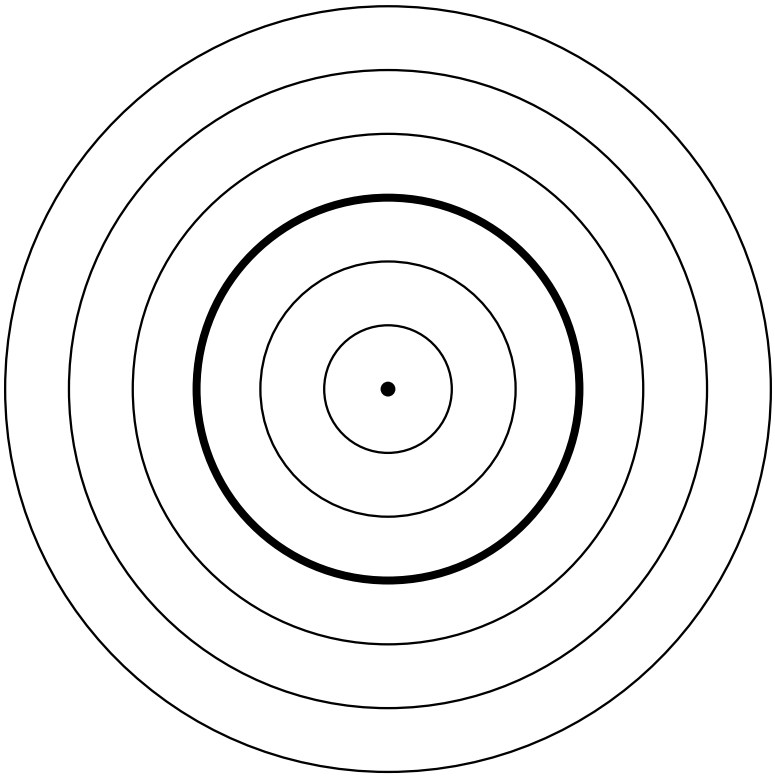

Figure 1 depicts concentric circles around a point, with a relatively small circle in bold. Assume the point represents the most offensive speech or expressive conduct within the low-value speech category. According to Justice White, for whichever concentric circle one deems close enough to the point as to render all of its content valueless, the state may ban part or all of the content since none warrants First Amendment protection. By contrast, Justice Scalia maintains that whichever concentric circle is selected, whether bolded or not, it is only permissible to regulate in a content-neutral manner. This analysis requires the contents of any ring surrounding a smaller, completely banned concentric circle either also be entirely permitted or entirely banned.

Virginia v. Black[190] further complicates the analysis. In *Black*, the Court addressed the constitutionality of the convictions of three men in two consolidated cases arising under a Virginia statute prohibiting cross burning with "an intent to intimidate a person or group of persons."[191] Barry Black was convicted after, as part of a Ku Klux Klan rally, he led a cross burning.[192]

190 538 U.S. 343 (2003).

191 *Id.* at 347 (quoting VA. CODE ANN. § 18.2-423 (1996)).

192 *Id.* at 348–49.

Richard Elliott and Jonathan O'Mara were convicted of burning a cross with a third man on an African American neighbor's lawn after the neighbor complained to Elliott's mother about hearing gunshots in her backyard, where Elliott had engaged in target practice.[193] The Virginia Supreme Court ruled that the state law violated the First Amendment based on *R.A.V.*, or in the alternative, that a separate provision, stating that the cross burning itself is prima facie evidence of an intent to intimidate, rendered the statute facially invalid.[194]

Justice O'Connor, writing for a majority, rejected the first holding, stating that unlike *R.A.V.*, the Virginia statute banned the category of cross burning, with the intent to intimidate, yet without regard to the identity of the victim.[195] Writing for a plurality, she further determined that reliance on cross burning as prima facie evidence of intimidation contradicted any presumption that the basis for the prohibition was defined by the very reason for the category of offense.[196] Justice Souter, writing a partial concurrence and partial dissent, determined that *R.A.V.*'s special virulence exception did not save the Virginia statute on the first ground.[197] Souter claimed the Virginia statute, banning cross burning, failed to prohibit general acts of intimidation. Because, Souter reasoned, this activity could be associated either with intimidation or with a unifying theme associated with white supremacy, the ordinance represented impermissible viewpoint-based discrimination.[198]

Applying Figure 1, Souter's analysis is akin to banning a subset within the bolded concentric circle, rather than its entirety as required for content neutrality.[199] Without regard to the merits, these positions again reveal two previously identified competing premises, first distinguishing low- versus high-level speech as the basis for what is or is not protected, and second insisting instead upon strict viewpoint neutrality.

The Supreme Court's obscenity doctrine operates in parallel. Whereas obscenity is a legal term of art, defined as explicit depictions that appeal to the prurient interest in sex,[200] pornography is not.[201] Professors Andrea

193 *Id.* at 350.

194 *Id.* at 347–48, 351 (citing Black v. Commonwealth, 553 S.E.2d 738, 740, 742 (Va. 2001), *aff'd in part*, *Black*, 538 U.S. at 347–48).

195 *Id.* at 362.

196 *See id.* at 363–67 (O'Connor, J., plurality opinion).

197 *Id.* at 381 (Souter, J., concurring in the judgment in part and dissenting in part).

198 *Id.* at 381–87.

199 *See supra* Figure 1.

200 *See, e.g.*, Roth v. United States, 354 U.S. 476, 489 (1957) (allowing ban on obscenity defined as "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"); Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (plurality opinion) (setting out "utterly without redeeming social value" test for proscribable obscenity); Miller v. California, 413 U.S. 15, 24–26 (1973) (rejecting *Memoirs* test in favor of modified *Roth* standard for proscribable obscenity).

201 By contrast, child pornography is a legal term of art, *see* New York v. Ferber, 458 U.S. 747, 764 (1982), subject to lower prosecutorial standards as compared with obscenity

Dworkin and Catharine MacKinnon proposed model legislation banning pornography, defined as "sexually explicit subordination of women through pictures or words."[202] Their model statute formed the basis for an Indianapolis antipornography ordinance. In *American Booksellers Ass'n v. Hudnut*,[203] the ordinance was challenged before the United States Court of Appeals for the Seventh Circuit.[204]

In striking the ordinance down, Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit stated:

> Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control.[205]

This circuit court decision further highlights the Supreme Court's persistent dual conflicting premises respecting speech. The tension arises between viewing pornography, like incitement, as low-level speech, per *Chaplinsky*, thereby allowing even a subset of the bolded concentric circle to be banned, versus treating pornography regulation, like speech more generally, regardless of value, as subject to a viewpoint neutrality requirement, thereby insisting on like treatment of the entire bolded circle.

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involving consenting adults. *See also* Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 235 & n.150 (2001) (distinguishing First Amendment treatment of child pornography versus obscenity depicting consenting adults).

202 Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 22 (1985). For a collection of hearings that supported the model legislation, see generally IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

203 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (mem.).

204 The MacKinnon/Dworkin model statute, providing the foundation for a Canadian pornography ban, ironically led to banning Andrea Dworkin's book advocating that very statute. *See* NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 205 (2000).

205 *Hudnut*, 771 F.2d at 328.

TABLE 6: DUAL PERSISTENT CONFLICTING PREMISES: INCITEMENT AND OBSCENITY

	Permissible speech regulation requires viewpoint neutrality	**Permissible speech regulation does not require viewpoint neutrality**
Permissible speech regulation distinguishes high- versus low-level speech	*Black* (O'Connor), *R.A.V.* (Scalia) (special virulence)	*Chaplinsky*, *R.A.V.* (White, J., concurring in the judgment)
Permissible speech regulation does not distinguish high- versus low-level speech	*Hudnut* (Easterbrook)	Null set

Table 6 presents both premises, with the *Chaplinsky* speech-quality premise represented in rows, and with the alternative viewpoint neutrality premise represented in columns. *Chaplinsky* occupies the upper-right quadrant, demanding only an assessment of speech value, not viewpoint discrimination. Justice White embraces this position in his *R.A.V.* concurrence in the judgment. The lower-left quadrant, representing Judge Easterbrook's position in *Hudnut*, eschews the speech value premise in favor of strict viewpoint neutrality. In the upper-left quadrant, in *R.A.V.* and *Black*, the Court nominally embraces *Chaplinsky*, yet endorses viewpoint neutrality, establishing dual persistent conflicting premises in the context of speech. The lower right is a null set.

* * *

Each reviewed doctrine—standing; the Commerce Clause; separation of powers; equal protection and race; and First Amendment incitement and obscenity—reveals a familiar recurrent pattern. All five doctrines form a foundational component of the broader corpus of constitutional law in virtually any standard curriculum. The next part offers a theoretical account explaining why this phenomenon is endemic to constitutional law and how differing dynamics affect premises within other notable judicial lawmaking contexts.

II. THE DEDUCTIVE PROFFER: PERSISTENT DUAL CONFLICTING PREMISES

The following analysis relies upon insights from elementary game theory. The central insight is that the observed pattern of dual persistent conflicting premises arises as a pure-Nash equilibrium across salient constitutional domains and is not random. The observed pattern is the product of rational judicial actors' strategic choices based on trained intuitions as to how best to achieve doctrinal objectives in a context of institutional con-

straint. Effective jurists understand that the incentives they confront are affected by the parallel incentives confronting their judicial colleagues. Because these jurists understand that the incentives they and their colleagues face are reciprocal, the combined behaviors can be modeled to reveal a pure-Nash equilibrium.

After constructing the model in Section II.A, Section II.B will juxtapose the observed pattern of dual persistent conflicting premises in salient constitutional domains with a different observed pattern among two notable bodies of the common law: tort and contract law.[206] The analysis reveals that, in general, the common-law domains of tort and contract rest on one identifiable premise.

Part III considers other constitutional law doctrines that fall outside the observed pattern of dual persistent conflicting premises. This includes the different dynamics at play in areas defined as "settled law," which more closely resembles the common law; areas of constitutional law that are sufficiently open ended that no premise has been settled upon from which to begin the dynamic process described in the model set out in Section II.A; and constitutional premise hybrids, which involve revisiting criminal procedure and introducing the dormant Commerce Clause doctrine and agency-deference rules.

A. Dual Persistent Conflicting Premises as a Pure-Nash Equilibrium

Legal scholars and political scientists have observed that, with rare exceptions, Justices, individually or in clusters, generally align ideologically along a spectrum cast as liberal to conservative.[207] This admittedly simplified characterization proves robust in capturing alignments across various doctrinal domains. When choosing, for example, whether to preserve the right to terminate a pregnancy, to carve out an exception to the Fourth Amendment prohibition against unreasonable searches and seizures, or to permit Congress to interpose structural barriers to the President's removal powers, the opinions generally align based on a spectrum capturing broad-to-narrow protection of the claimed right or interest, implicating a liberal-to-conservative normative dimension.

This intuition is also reflected in the cases implicating the narrowest-grounds rule, which applies when the Supreme Court coalition in a given case breaks down such that no opinion commands a majority.[208] Absent a majority opinion, lower courts generally apply the narrowest-grounds rule,

206 *See supra* subsections II.B.1 & II.B.2.

207 The political science literature favors a more granular ranking of individual jurists. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002). The clustered presentation in the text of this Article simplifies without changing the analysis.

208 For a general discussion of related cases, see STEARNS, *supra* note 58, at 139–56 (collecting and analyzing cases).

announced in *Marks v. United States*.[209] Although that doctrine has come under fire in recent years,[210] in most cases it can be applied in a straightforward manner.[211] The doctrine presupposes that opinions within a case align along the dimension of broad to narrow, such that among those opinions consistent with the judgment, one opinion, expressing the views of the median jurist in the case, is narrowest, generally meaning closest to the dissent.[212]

The logic underlying *Marks* applies more generally. The Justices join opinions closest to their preferred analytical position, which political scientists call an "ideal point."[213] Justices will consider breaking away from that opinion if it deviates too sharply from their ideal point. With a simple majority coalition, typically five Justices, the decision to break off is costly. The general understanding is that absent a majority, the Court binds lower courts, per *Marks*, to the narrowest-grounds opinion, but not the Court itself.[214] Overturning a majority precedent requires another majority opinion. As a result, Justices sometimes accommodate opinions setting out positions with

209 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

210 For articles criticizing *Marks*, see, for example, Richard M. Re, *Beyond the* Marks *Rule*, 132 HARV. L. REV. 1943, 2008 (2019); Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 864–65 (2017).

211 For a comprehensive analysis defending *Marks* and explaining how the doctrine should properly be applied, see Maxwell L. Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. (forthcoming 2021) [hereinafter Stearns, *Modeling Narrowest Grounds*]; *see also* Brief of Law Professors as Amici Curiae in Support of Neither Party at 1–4, Hughes v. United States, 138 S. Ct. 1765 (2018) (No. 17-155); Maxwell L. Stearns, *The Case for Including* Marks v. United States *in the Canon of Constitutional Law*, 17 CONST. COMMENT. 321, 321–22 (2000).

212 In this respect, the rule is imperfectly articulated, inviting the possibility of a 4-*1*-**1** set of opinions from broad to narrow (or the reverse) consistent with the judgment, with 3 in dissent. Although the bolded Justice is narrowest and closest to the dissent, the italicized Justice is the median. *See* Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at subsubsection II.B.1.a (describing Fullilove v. Klutznick, 448 U.S. 448 (1980) as a rare case implicating this framing problem in the wording of the *Marks* rule). In another, more significant, respect, the rule is inevitably incomplete. In nonmajority cases in which the opinions align on a single dimension, there is inevitably a narrowest grounds opinion, whereas in nonmajority cases in which the opinions implicate two relevant dimensions, there is not a narrowest grounds opinion. For a more detailed discussion and analysis, see Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at Section II.B (providing guidance on how to identify single and multiple dimensional cases and, more generally, on how to apply the *Marks* rule).

213 Matt Spitzer & Eric Talley, *Judicial Auditing*, 29 J. LEGAL STUD. 649, 655 (2000) (discussing ideal point as related to judicial decision making); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 780 (2008) (same).

214 The propositions in this paragraph are explored in detail in Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at subsection II.A.2.

which they disagree even in important respects to forge a necessary majority.[215]

Assume a body of caselaw resting on an identifiable premise and that one or more Justices wish to move that caselaw in a direction in tension with the existing precedents. For many litigants, the dominant concern might be cobbling together five needed votes, even if the Justices fail to coalesce in a single opinion.[216] By contrast, as repeat strategic players, the Justices are apt to view the case as part of a dynamic game affecting the larger direction of legal policy. To be sure, some litigants are motivated by caselaw trajectories, and sometimes Justices care more about specific case resolutions.[217] As a general proposition, however, we may reasonably assume that whereas litigant motivations vary, Justices are generally concerned both about case resolutions and about how specific cases affect the future direction of legal policy. The most effective jurists might be analogized to outstanding chess players, not imagining every conceivable possibility, but isolating the most significant possibilities likely influenced by an immediate move.[218]

Consistent with the earlier presentation, the standing caselaw imposes limitations on the "who and [the] when" of constitutional litigation.[219] This framing is consistent with Justice O'Connor's separation of powers analysis, viewing standing as protecting congressional monitoring of the executive branch. Within this framing, the constitutional and prudential standing limitations can be expressed as constraining the capacity of litigants to invoke judicial power on command to direct the judiciary to announce rules on open questions of constitutional law when, in doing so, the judiciary risks occupying potentially available legislative policy space. Should Congress address the issue for which justiciability is invoked sometime in the future, unencumbered by the judiciary's immediate need for case resolution, Congress might select an alternative to the judicially crafted rule. The mere fact of judicial resolution, even if contrary to what Congress might have chosen in

215 *See infra* notes 229–33 and accompanying text (discussing Justice Scalia's strategy in *Adarand v. Peña*).

216 Ideological litigants, by contrast, clearly seek to move doctrine in a preferred direction. For a related analysis explaining the relationship between standing doctrine and path dependence, see Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 348–404 (1995) (defending social choice analysis of standing with historical and caselaw evidence); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CALIF. L. REV. 1309, 1314–20 (1995) (providing social choice analysis of standing and justiciability).

217 For a classic illustration, see *Bush v. Gore*, in which the per curiam opinion expressly limited the ruling to the immediate case. 531 U.S. 98, 109 (2000) (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

218 *See* ADRIAAN D. DE GROOT, THOUGHT AND CHOICE IN CHESS 16–19 (2008); *see also* Robert I. Reynolds, *Search Heuristics of Chess Players of Different Calibers*, 95 AM. J. PSYCH. 383, 386 (1982).

219 *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973).

the first instance, risks inviting legislative inertia, thus tending to endure. This helps to explain why certain constitutional doctrines, including aspects of criminal procedure and the dormant Commerce Clause doctrine, assume default status, although even for those bodies of law, congressional inertia remains powerful.

The attributes associated with both constitutional and prudential standing rules generally coalesce in conventional common-law disputes. In an ordinary tort suit—*A* hits *B*; *B* sues *A*—there is no doubt that *A caused B*'s *injury in fact*, which, however imperfectly, judicial relief *redresses*. The same applies if *A* breaches a contract with *B*, or if *B* unlawfully encroaches upon *A*'s property. In such cases, the plaintiff is not raising claims of others or that are legally diffuse.

Standing rules capture these elements, which, although coalescing in common-law suits, risk fragmentation in public interest litigation. In reassembling these disparate correlates to justiciability, standing doctrine raises the cost to interest groups, or other ideologically motivated litigants, of strategically timing cases for doctrinal effect. Constitutional litigants often focus on the impact of immediate cases on doctrinal trajectories, and this is all the more true of Justices. Unlike litigants subject to standing constraints, Justices are paradigmatic repeat players in a long game involving anticipated future effects of present doctrinal moves. By contrast with litigant standing,[220] the dynamic game among jurists, affecting the path of caselaw and resulting doctrine, operates on the supply, rather than demand, side. For the Justices, each case is a potential vehicle that could be used either to push for a singular case result, or, more productively, to help move doctrine in a preferred direction. Consider the tradeoffs Justices make in this outcome-doctrine game.

Forging precedent that other Justices are presumptively obligated to respect and that notably changes doctrinal direction generally requires subordinating the status of a disfavored premise with a recast alternative premise capable of securing majority consensus. For litigants who care primarily about specific case outcomes, cobbling together multiple opinions, even opinions reaching opposing resolutions of controlling questions, is adequate to the task. Although such opinions are uncommon, they can arise in significant contexts.[221] For a notable illustration, consider *McDonald v. City of Chicago*,[222] which incorporated the *District of Columbia v. Heller*[223] ruling, converting the Second Amendment into an individual right to keep and bear arms, to states and municipalities.[224]

220 For a discussion of the standing game, operating on the demand side of developing doctrine, see *supra* note 216 and cites therein. The discussion in the text, by contrast, analyzes the supply side, the game among Supreme Court Justices.

221 For a discussion of such cases, see STEARNS, *supra* note 58, at 139–56 (collecting cases).

222 561 U.S. 742 (2010).

223 554 U.S. 570 (2008).

224 *See McDonald*, 561 U.S. at 791 (plurality opinion).

For a plurality, Justice Alito determined that the Second Amendment was incorporated under the Fourteenth Amendment Due Process Clause, and that it was unnecessary to reconsider the landmark *Slaughter-House Cases*,[225] and, thus, whether to rest the rationale instead on the Fourteenth Amendment Privileges or Immunities Clause.[226] By contrast, Justice Thomas took an opposing view on both controlling issues. Thomas voted to overturn this aspect of the *Slaughter-House Cases* and to incorporate based on privileges or immunities, hoping to end ongoing reliance on due process as the vehicle for incorporating provisions from the Bill of Rights against the states.[227] The dissenting Justices rejected both bases for incorporation.[228] Although *McDonald* added the Second Amendment to the list of incorporated rights, binding lower courts, the ruling lacked a single rationale binding on the Supreme Court.

Contrast Justice Scalia's strategy in *Adarand Constructors, Inc. v. Peña*.[229] In *Adarand*, Justice O'Connor sought to overturn *Metro Broadcasting, Inc. v. FCC*,[230] which had employed intermediate scrutiny to sustain a benign race-based preference, favoring minority business enterprises (MBEs) in government contracting for radio licensing.[231] The sticking point for Justice Scalia was a passage in a critical part of the O'Connor opinion, stating: "Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[232] Justice Scalia wished, instead, to declare racial classifications, unless remedying a specific constitutional violation, categorically invalid, rendering strict scrutiny fatal.[233] Had Justice Scalia insisted on his ideal point, he would have issued a broader concurrence in the judgment, without

225 *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

226 *See McDonald*, 561 U.S. at 753.

227 *See id.* at 812–22 (Thomas, J., concurring in part and concurring in the judgment) (arguing for abandoning due process basis for incorporation in favor of reliance upon privileges or immunities). For a more detailed analysis of *McDonald*, see David S. Cohen & Maxwell Stearns, McDonald *Typifies Need for Consensus*, NAT'L L.J. (July 12, 2010), https://www.law.com/nationallawjournal/almID/1202463394661&iMcDonaldi_typifies_need_for_consensus&slreturn/ (analyzing *McDonald v. City of Chicago* as a voting paradox case). *See also* David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183, 188–204 (2010) (analyzing earlier voting paradox cases).

228 *McDonald*, 561 U.S. at 883 (Stevens, J., dissenting); *id.* at 913 (Breyer, J., dissenting).

229 515 U.S. 200 (1995).

230 497 U.S. 547 (1990).

231 *See id.* at 552, 564–65.

232 *Adarand*, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)). This responded to Justice Thurgood Marshall's claim that applying strict scrutiny to benign race-based distinctions was "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 519.

233 *Adarand*, 515 U.S. at 239. (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia's single exception involved separating inmates by race during a prison riot until tempers died down. *See id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520–21 (1989) (Scalia, J., concurring)).

expressing the holding on the narrowest grounds, and Justice O'Connor would have lacked the requisite majority to overturn *Metro Broadcasting*.

In the multiround chess match O'Connor and Scalia played, it appears Justice O'Connor emerged champion. Although Justice Scalia succeeded in having *Metro Broadcasting* overturned, a result both Justices favored, O'Connor outmaneuvered Scalia in her next move, deeming reliance on race nonfatal under strict scrutiny as applied to affirmative action in state institutions of higher learning.[234] Whereas *Adarand* rested on an antidiscrimination premise, the later affirmative action ruling rested, instead, on an antisubordination premise.[235] When seeking to recast a premise that will appeal to the median jurist, the relationship between a Justice pushing doctrinal redirection and the median Justice is akin to a bilateral monopoly; the two Justices hold mutual power to define the ultimate terms of the resulting change.[236]

These cases help construct a model of judicial strategies affecting constitutional premises. Supreme Court Justices engage in individual and combined strategies, absent any need for coordination, that produce a pure-Nash equilibrium of dual persistent conflicting premises in salient constitutional domains. To fully appreciate this analysis, some definitions will be helpful.

A pure-Nash equilibrium is an outcome or set of outcomes achieved by players, where each pursues her or his own rational strategy, absent coordination with another player or players or specific knowledge as to the other player's strategies, based on the anticipated rational strategy of the other player or players, and where no player has an incentive to depart unilaterally from her or his selected strategy.[237] Some games yield a single pure-Nash equilibrium, and others yield two or more pure-Nash equilibria, along with mixed strategies that avoid a pure-Nash equilibrium.[238]

234 *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 314–15 (2013); Grutter v. Bollinger, 539 U.S. 306, 326–28 (2003). In both cases, Justices Scalia and O'Connor took opposing sides, with O'Connor ultimately prevailing on the proposition that strict is not necessarily fatal.

235 *See supra* subsection I.A.4.

236 A bilateral monopoly arises when a monopolistic seller meets a monopsonistic purchaser. For a discussion in the context of contract law, see STEARNS ET AL., *supra* note 10, at 147–48.

237 *See id.* at 579–80 (defining concept, providing illustrations, and collecting authorities).

238 Pure-Nash equilibrium outcomes are not always desirable. In the prisoners' dilemma, the individual players each obtain inferior results in the pure-Nash equilibrium, with longer sentences, whereas in the driving game, the opposite holds, with reduced risks of serious or fatal collisions. For a general discussion, see *id.* at 571–655 (providing illustrations).

TABLE 7: THE PRISONERS' DILEMMA

(Payoffs for A, B)	B cooperates	B defects
A cooperates	6 months, 6 months	5 years, no time
A defects	no time, 5 years	**3 years, 3 years**

Consider, first, the prisoners' dilemma, depicted in Table 7. Each party is separated and informed that if both parties cooperate, meaning they remain silent, failing to rat each other out, each will be convicted of a minor offense and sentenced to six months. If one testifies against the other, who remains silent, the rat is released, and the other receives the maximum sentence of five years. If both parties rat each other out, each receives some benefit from cooperating, but nonetheless is convicted of a serious offense, serving a three-year sentence. Although each prisoner would receive a lighter sentence, six months, not three years, if both cooperated and remained silent,[239] it is rational for each to defect regardless of the other player's chosen strategy. If Prisoner *B* is silent, Prisoner *A* can reduce her sentence from six months to no time by defecting; and if Prisoner *B* defects, Prisoner *A* can reduce her sentence from five to three years by defecting. The incentives are reciprocal, yielding the pure-Nash equilibrium of mutual defection, with each player defecting and receiving a three-year sentence, the bolded result in Table 7, which neither party can improve upon with a unilateral change in strategy.

TABLE 8: THE DRIVING GAME

(Payoffs for A, B)	B drives left	B drives right
A drives left	**100, 100**	0, 0
A drives right	0, 0	**100, 100**

Now compare the single pure-Nash outcome in the prisoners' dilemma with the multiple pure-Nash outcomes in the driving game bolded in Table 8. Imagine that at the earliest stages of driving, absent formal traffic rules, car owners *A* and *B* drive in close proximity hoping to anticipate on which side of the road the other will drive. Absent actual knowledge, each guesses at the other's strategy. If both drive right, or both drive left, each receives a high payoff, one of the two bolded pure-Nash equilibria. Neither party can improve the payoff with a unilateral change in strategy. If, instead, one chooses right while the other chooses left, the drivers risk colliding, with potentially severe consequences, corresponding to the low payoffs. The lat-

239 Cooperation in the game is from the perspective of the other prisoner, not the state.

ter mixed strategies are not pure-Nash as either party could improve her or his payoff with a unilateral strategy change.

Neither pure-Nash outcome, right/right and left/left, is guaranteed. With guesswork, as opposed to observing how the other behaves, the drivers risk randomizing over the four possible combined strategies. Neither driver cares which side of the road she drives on, but each does care that both elect the same side.

TABLE 9: THE BATTLE OF THE SEXES

(Payoffs for H, W)	W attends theater	W attends football
H attends theater	**12, 7**	5, 5
H attends football	3, 3	**7, 17**

In the battle of the sexes game in Table 9, Husband and Wife care both about coordination and the merits of the available strategies. Each prefers a different activity—theater or football—but each also prefers spending time together, even at a second-choice activity. The Husband most prefers his Wife join him at the theater, and the Wife most prefers her Husband join her at the game. Either result, depicted in bold, is pure-Nash. By contrast, going separately to either's first choice activity, or to the other's first choice activity, is not pure-Nash.

As with the prisoners' dilemma and driving game, starting from a pure-Nash position, neither the Wife nor the Husband can improve upon available payoffs with a unilateral change in strategy, whereas starting from a non-pure-Nash position, either could improve such payoffs by changing strategies, ensuring the spouses join in the chosen activity. Assume that when the couple attends an activity together, the spouse preferring that activity receives the highest payoff of twelve, and the other spouse a payoff of seven. That lower payoff remains higher than the payoff of five associated with each spouse attending her or his first-choice activity alone, or the payoff of three, associated with each spouse attending the other's first choice activity alone. Once more, if each spouse guesses at the other's behavior, the couple risks randomizing and winding up with either a pure-Nash or mixed strategy outcome.

Default constitutional rules can be likened to either a driving or battle of the sexes game, empowering Congress to change a judicial policy determination with ordinary legislation, while still choosing an outcome that is pure-Nash. As shown below in Section II.B, the same holds for common-law rules in which the substantive policy choice often entails selecting among several available pure-Nash options, with the legislature able to change the judicial selection while still ensuring a pure-Nash equilibrium.

Judicial interactions respecting formulated constitutional premises, by contrast, can be likened to a game in which combined strategies generally yield a single pure-Nash equilibrium. Imagine that in a given case, the Jus-

tices align along an ideological spectrum from liberal to conservative, as depicted in Table 10. As repeat players, Justices motivated to move doctrine in a preferred direction will rationally seek to lay a foundation in a given case for future favorable caselaw development. The forward-thinking Justice will strategize as to how best to attract a majority around a preferred reformulated premise capable of the desired doctrinal shift.

The analysis builds upon the median voter theorem, aligning voters incrementally along a liberal-to-conservative spectrum, with two candidates starting at opposing ends. Assuming all voters participate and are principally motivated to affect policy location in their preferred direction, the theorem predicts a pure-Nash equilibrium corresponding to the ideal point of the median voter.[240] In the context of electoral voting, the model is obviously oversimplified. And yet, with a caveat, the assumption proves fairly robust on a multimember en banc court, such as the Supreme Court, where it is generally possible to align Justices from liberal to conservative, granularly or, as shown here, in clusters. The model implies that doctrine will generally locate at or near the ideal point of the Court's median jurist in cases in which the relevant holdings can be expressed along a single normative dimension. This is consistent with how political scientists and legal scholars often analyze the Supreme Court, for example, in attitudinal modeling and social choice framings.[241] The caveat, as shown below, is that even when judicial preferences align on a single dimension, the ultimate position will depend upon the bargaining strategies between the median cohort and the cohort to the right or left, meaning that the outcome is the product of strategies that can move closer to or further from the median Justice's ideal point.

More notably, scholars diverge as to how best to model the Supreme Court when the assumption of a single dimension breaks down. Outcome voting creates occasional anomalies that thwart the embedded assumption underlying the narrowest-grounds doctrine.[242] The doctrine assumes opinions in a fractured case can be cast along a single liberal-to-conservative dimension, which is not invariably true. Social choice helps to explain why, nonetheless, generally abandoning or modifying such common judicial practices as outcome voting and the narrowest-grounds rule to accommodate such exceptional cases risks adverse spillover effects in the larger run of cases in which such anomalies are less apt to occur.[243]

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240 *See* STEARNS ET AL., *supra* note 10, at 734–50 (providing illustrations, and describing theorem and its limitations in electoral settings).

241 *See* SEGAL & SPAETH, *supra* note 207, at 320; STEARNS, *supra* note 58, at 142; STEARNS ET AL., *supra* note 10, at 877–927.

242 *See* STEARNS, *supra* note 58, at 6–14, 139–53 (providing social choice analysis of voting anomaly cases); STEARNS ET AL., *supra* note 10, at 877–88 (same).

243 *See* Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at Part II; Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 VAND. L. REV. 1045, 1050 (1996); Maxwell L. Stearns, *Should Justices Ever Switch Votes?:* Miller v. Albright *in Social Choice Perspective*, 7 SUP. CT. ECON. REV. 87, 104–28 (1999).

The preceding analysis helps to model why dual persistent conflicting premises emerge as a pure-Nash equilibrium over salient bodies of constitutional law. Consider the incentives of a Justice seeking to push doctrine in a direction in tension with an extant premise underlying the relevant body of caselaw. Redirecting a foundational doctrinal premise to accomplish this result generally requires persuading not only those who occupy the same wing of the Court in which that Justice resides, right or left; it also requires persuading whomever occupies the median position, or the median plus one, to ensure some strategic margin.

TABLE 10: PREMISE REFORMULATION GAME

Most liberal								Most conservative
1	*2*	*3*	4	5	6	**7**	**8**	**9**
Formulate premise right to attract median jurist						Formulate premise left to attract median jurist		

To simplify, imagine the Justices form three ideological clusters, with 1 through 3 as *liberal* (*italicized*), 4 through 6 as moderate (roman typeface), and 7 through 9 as **conservative (bold)**. The liberal and conservative clusters, when seeking to forge a new premise, will target the full membership of the median cluster, hoping to attract at least two of the three members in this hypothetical balanced Supreme Court. Almost as a matter of definition, a median jurist on any given Court will tend to internalize her or his role as a source of doctrinal stability, resisting radical doctrinal change, however popular, or populist, it might be.

Such jurists sometimes bear the brunt of academic criticism for failing to stake out positions that are bold, clearly defined, and well-grounded in articulable principles.[244] Academic commentators are oftentimes unenthused by defensible compromise in place of what they view as opinions embracing firmer principled commitments. And yet, there is a long pattern of median Justices resisting attempts to overturn landmark precedents as a means of forging bold new doctrine at odds with longstanding caselaw.

Consider a few historical examples. Justice Powell, in *Bakke*, willingly allowed reliance on race in state institutions of higher learning, albeit under strict scrutiny, thereby striking down the UC Davis Medical School's admissions policy, setting aside a specified number of seats for racial minorities and segregating admissions processes for minority and nonminority applica-

244 For examples, see Keith J. Bybee, *The Jurisprudence of Uncertainty*, 35 LAW & SOC'Y REV. 943, 944 (2001) (discussing Justice O'Connor); Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 47 (1987) (discussing Justice Powell); and Stuart Taylor, Jr., *In Praise of Judicial Modesty*, ATLANTIC (Mar. 2006), https://www.theatlantic.com/magazine/archive/2006/03/in-praise-of-judicial-modesty/304769/ (discussing Justice Kennedy).

tions.[245] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[246] Justices O'Connor, Kennedy, and Souter willingly downgraded abortion from a fundamental right to a protected liberty interest, sustaining all but the spousal notification provision of the challenged Pennsylvania abortion statute, based on stare decisis, not the merits of *Roe v. Wade*.[247] And Chief Justice Roberts saved the Patient Protection and Affordable Care Act, holding that although the individual mandate exceeded congressional Commerce Clause powers, it was sustainable as an exercise of congressional taxing authority, then further threaded the needle, declaring the mandate a tax under the Tax Clause but not a tax under the Anti-Injunction Act.[248]

Such opinions hardly inspire, but they do make a point: to shift the direction of doctrinal premises, jurists seeking to move doctrine must appeal to jurists whose jurisprudence is sometimes apt to frustrate them.[249] The analysis reveals a tradeoff. Justices can avoid seeking to shift the underlying doctrinal premise and instead focus strictly on the immediate case outcome. This strategy is not dependent on converging on a revised premise that will allow, more generally, for doctrine to move over time in a preferred direction. Or Justices can seek a reframed premise sufficiently connected with prior caselaw so as to avoid overrulings. The latter strategy is more likely to pull in some median coalition members, while also moving the law in a preferred direction. Almost as a matter of definition, those areas of law that are highly salient and that continue to experience doctrinal tensions are also

245 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287–91, 318 (1978) (opinion of Powell, J.).

246 505 U.S. 833 (1992) (plurality opinion).

247 *See id.* at 846–55; Roe v. Wade, 410 U.S. 113 (1973).

248 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 543–46 (2012); *id.* at 543–56 (opinion of Roberts, C.J.). Until *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019), a similar account captured Justice Kennedy's treatment of partisan gerrymandering, allowing the possibility of such a claim while repeatedly rejecting proffered tests for assessing such claims. *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 414 (2006); Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring). One consequence of *Sebelius* was inviting a federal district court to later strike the law down in its entirety after Congress repealed the individual mandate, with the United States Court of Appeals for the Fifth Circuit then remanding for a more finely grained severability analysis, albeit one that was superseded by the Supreme Court's grant of certiorari. Texas v. United States, 945 F.3d 355, 369 (5th Cir. 2019), *cert. granted sub nom.* Texas v. California, 140 S. Ct. 1262 (2020) (No. 19-1019); California v. Texas, 945 F.3d 355 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020) (No. 19-840). That case is pending as this Article goes to print. For this author's preliminary assessment of that pending case, *California v. Texas*, see *California v. Texas (ACA case) Supreme Court Preview*, BLINDSPOTBLOG (Oct. 8, 2020), https://www.blindspotblog.us/post/california-v-texas-aca-case-supreme-court-case-preview; Maryland Carey Law, *Faculty Webinar Series: Supreme Court Term Preview*, YOUTUBE (Oct. 7, 2020), https://www.youtube.com/watch?v=p-LBDZFBdHs&feature=emb_logo.

249 This is also consistent with Justice Scalia's strategy in *Adarand*. *See supra* notes 229–33 and accompanying text.

those in which Justices seeking to shift the direction of caselaw have successfully pursued the latter path.[250]

In salient constitutional domains, dual persistent conflicting premises create a pure-Nash equilibrium because the outcomes: (1) are based on each jurist's rational strategy, considering the rational strategies of other jurists; (2) do not depend on coordinated strategizing with other jurists or specific knowledge as to their strategies; and (3) cannot be improved upon with a unilateral change in strategy.[251] To be clear, Supreme Court Justices are interactive repeat players. To that extent they have the capacity to negotiate over specific case outcomes, the content of opinions, and whether to join or defect from a majority coalition. The result is a pure-Nash equilibrium not because the Justices do not interact; rather, it is a pure-Nash outcome because it is what rational jurists would generally achieve without the need to interact.

When we observe highly correlated voting alignments, such as with Brennan and Marshall; Scalia and Thomas; or sometimes Breyer and O'Connor, it is far more likely that their normative views happen to align than that the observed pattern results from negotiated precommitments.[252] If dual persis-

250 Some readers might discern a tautology: dual persistent conflicting premises pervade salient domains, defined as domains prone to dual persistent conflicting premises. As with other seemingly tautological insights, the means of extrication is empirical. The Coase theorem provides the basis for countless empirical insights into legal doctrine despite its resting on an apparent tautology. Empty core bargaining provides no assurance that with zero transaction costs and perfect information, resources will flow to their more highly valued uses regardless of liability rules, that is, unless one salvages the theorem by defining empty core bargaining as a transaction cost, rendering the theorem tautological. *See* Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 J.L. & ECON. 175, 180 (1981); R.H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183, 187 (1981).

The attitudinal model likewise provides the basis for myriad empirical observations about Supreme Court decisionmaking. And yet, absent independent corroboration of judicial ideology, the ideological valence of doctrine, or both, the model is tautological. *See* Shai Dothan, *The Motivations of Individual Judges and How They Act as a Group*, 19 GERMAN L.J. 2165, 2174 (2018) ("If judges behave sincerely the way they think they should behave and if the only way to decipher how judges think they should behave is to look at their actual behavior, the attitudinal model collapses into a tautology." (citing SEGAL & SPAETH, *supra* note 207, at 320)). Rationality modeling offers the basis for significant observations concerning market decisionmaking. And yet, assessing private rationality based on cost-effective pursuits of goods and services, whose valuations turn on those very pursuits, renders the model tautological.

The correspondence between dual persistent conflicting premises and doctrinal domains routinely treated as salient within standard constitutional law curricula and in leading scholarship, as compared with other legal domains, likewise extricates this Article's thesis from mere tautology.

251 *See supra* note 10 and accompanying text (discussing Nash equilibrium).

252 For a general discussion of judicial ideology, see SEGAL & SPAETH, *supra* note 207; David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/. For a discussion on the

tent conflicting premises were based on cooperation, it would, instead, result from the starting place of a notable failure of ideological alignment. Otherwise, cooperation would be redundant or unnecessary.

Strategic jurists behave *as if* they are engaged in a game in which the other jurists are not coordinating either with them or others, and they devise strategies that will appeal to a predictable majority acquiescing in an alternative framing of the existing doctrinal premise. Likewise, centrist jurists are more apt to acquiesce to the extent that they favor the proffered outcome and that they can reconcile the shift in premise without a major doctrinal disruption as would be apparent if the prior premise were formally discarded or if a disconnected premise were introduced. It is this set of noncoordinated dynamics, in the context of an en banc interactive Court with repeat players, that renders dual persistent conflicting premises a pure-Nash equilibrium.[253]

B. Why Dual Persistent Conflicting Premises Are Not Pure-Nash in Other Doctrinal Settings

Proving a negative is generally impossible. This Article cannot prove that dual persistent conflicting premises fail to arise or prevail across the broad host of alternative legal domains. But it can explain why constitutional law possesses special characteristics as compared with other legal doctrines comprising the standard 1L curriculum, rendering such other domains less prone to dual persistent conflicting premises as a pure-Nash equilibrium. Our focus is tort and contract, subjects central to 1L pedagogy. The necessarily bird's-eye view suffices to underscore the differing nature of the premises underlying those bodies of caselaw as compared with the previously reviewed constitutional domains.[254]

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application and effect of Supreme Court jurisprudence on voting outcomes, see RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 83–104 (2018).

253 The pure-Nash equilibrium of dual persistent conflicting premises as the product of judicial preferences along a single dimension ultimately gives rise to caselaw forcing the two premises along separate dimensions. In each doctrine reviewed in Part I, an eventual case emerged forcing a doctrinal split with earlier cases as a consequence of the newly conceived premise. *See supra* Part I (describing split with *Lujan* in standing; *Sebelius* in the Commerce Clause; *Morrison* in executive removal; *Bakke*, *Grutter*, and *Fisher II* in equal protection and race; and *R.A.V.* and *Hudnut* in First Amendment incitement and obscenity). The resulting combined case outcomes, resting on dual persistent conflicting premises, are pure-Nash. If any of the Justices within each of the three occupied positions (with one position a null set), change position, the result would move doctrine toward a less favorable position given the Justices' respective ideal points.

254 The analysis to follow rests upon a "generation one" law and economics analysis, a methodology well-suited to providing positive, or explanatory, accounts of the underlying doctrines. For a general discussion, see STEARNS ET AL., *supra* note 10, at 3–5.

1. Tort Doctrine

A robust account of tort doctrine, otherwise known as the law of accidents, reveals combined doctrines that serve the goal of minimizing the sum of accident costs. Professor John Brown explained that this requires minimizing not only the cost of accidents that take place, but also the cost of accident avoidance.[255] The pure-Nash equilibrium operating across the various negligence and strict liability regimes results in both potential tort victims and tortfeasors taking cost-effective precautions that avoid inflicting unnecessary risks of harm and that mitigate actual harms when accidents occur.

The counterintuitive aspect of Brown's equilibrium model arises from the insight that whichever regime one chooses—simple negligence, negligence with contributory negligence, comparative fault, strict liability with contributory negligence, or strict liability with dual contributory negligence—the prospective tortfeasor rationally anticipates that the tort victim will engage in cost-effective precautions to avoid the risk of injury or of tortfeasor nonliability, and thus undertakes cost-effective precautions. Anticipating that the tort victim will undertake cost-effective precautions, the tortfeasor rationally does as well. Otherwise, the tortfeasor is liable in the event of an accident that was avoidable with cost-effective precautions. In equilibrium, the tortfeasor will only undertake cost-effective precautions regardless of the liability rule because to do otherwise requires a marginal investment, say $1.25, for a lower marginal rate of return, say $1. Beyond the point at which the marginal benefits and marginal costs of precautions are roughly equal, it is more cost effective to self-insure or to insure in the open market.[256]

Because the tort victim anticipates that the tortfeasor will invest in cost-effective precautions, she anticipates bearing the residual risk, meaning the risk of accidents that remains even when cost-effective precautions are undertaken. The tort victim will also generally invest only in cost-effective precautions. Even when both parties undertake cost-effective precautions, however, yielding the pure-Nash equilibrium, residual risk remains and must be allocated to one of the parties. Although the choice-of-negligence regime does not affect precaution levels in equilibrium, it does affect which party bears the residual risk.

The analysis reveals the premise of tort law as promoting cost-effective risk reduction and clear signaling as to residual risk allocation.[257] One might

255 *See* John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 325 (1973); *see also* STEARNS ET AL., *supra* note 10, at 73–82 (discussing Professor Brown's Nash equilibrium analysis of negligence and strict liability regimes).

256 For a more detailed discussion, see STEARNS ET AL., *supra* note 10, at 72–82.

257 This implies that if the courts select one of these regimes, the legislature may select an alternative, but with the result of shifting from one pure-Nash regime to an alternative pure-Nash regime. Institutional complementarity thus ensures that parties will rely on the knowledge of a single regime even if, over time, that regime is superseded legislatively. Reliance on a single regime is essential for, among other purposes, planning around the

imagine alternative premises, such as a harm principle, wherein the person inflicting harm is presumptively liable solely based on causation,[258] or a laissez-faire principle, with tort victims bearing special responsibility to avoid all risk of personal harm other than with deliberately hidden defects or harms purposely inflicted.[259] Society might also identify particular high-risk activities as justifying special burdens, including notice and liability, on those undertaking them should an accident occur.[260]

These approaches are not necessarily mutually exclusive, and legislatures can supplement common-law tort rules with others that affect risk allocations along particular margins, and in doing so shift from one pure-Nash outcome to another. In addition, private parties can sometimes allocate accident risk contractually, for example, with warranties for fitness for a particular purpose in the event that a nonpurchaser is outside privity but within the scope of harm,[261] or via subrogation when parties anticipate the risk of future accidents, with one party willing to bear the combined risk at a specified price.[262]

Tort doctrine has witnessed a long history of changed regimes from adherence to privity, to the breakdown of privity, to *res ipsa loquitur*, to strict products liability, and likewise from negligence to contributory negligence to comparative fault.[263] What is most striking about these historical transformations, however, is that none undermine the larger premise of tort doctrine as serving the underlying function of minimizing the total cost of accidents, including both precaution costs and the costs of accidents that occur. That is because each combined regime constitutes a pure-Nash equilibrium in a game in which there are several alternatives satisfying these criteria. Residual risk allocation is certainly important, but such risk can be allocated in different ways consistent with this premise, and the preferred allocative method can reflect a combination of evolving technology, including for example, the capacity of firms to pass along such costs to end users and the robust development of various insurance markets, as well as changing fairness norms.

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residual risk allocation, including through insurance, and sometimes contractually between parties. *See infra* note 260 and accompanying text.

258 *See* JOHN STUART MILL, ON LIBERTY 21–22 (London, John W. Parker & Son 1859); *see also* Richard A. Epstein, *The Harm Principle—And How it Grew*, 45 U. TORONTO L.J. 369, 369–70 (1995). For a discussion on Mill's harm principle, see David Brink, *Mill's Moral and Political Philosophy*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), https://plato.stanford.edu/archives/win2018/entries/mill-moral-political/.

259 *See* John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2038–42 (1997); *see also* Kevin A. Kordana & David H. Tabachnick, Essay, *On Belling the Cat: Rawls and Tort as Corrective Justice*, 92 VA. L. REV. 1279, 1309 (2006).

260 *See* Alan Schwartz, *Responsibility and Tort Liability*, 97 ETHICS 270, 272 (1986); *see also* Richard B. Stewart, Essay, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 186–90 (1987).

261 *See* Jeffrey O'Connell, *The Interlocking Death and Rebirth of Contract and Tort*, 75 MICH. L. REV. 659, 659–60 (1977).

262 *See* Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533, 1542–48 (2009).

263 For a general discussion, see STEARNS ET AL., *supra* note 10, at 82–100.

2. Contract Doctrine

A robust account of contract law reveals the premise rests on improving social welfare, rather than ensuring performance. To many law students, and even some professors, this might appear counterintuitive, yet it is supported by the most salient features of contract doctrine. Except in very limited circumstances, courts eschew specific performance, which would be an obvious means of ensuring performance.[264] The problem is that specific performance invites opportunities for what economists refer to as *appropriable quasi rents*, meaning attempts through strategic behavior to secure part of the surplus that, at the time of contracting, the parties intended for the other side.[265]

The most notable doctrine supporting this intuition is expectancy damages.[266] Legal scholars debate whether, as law and economics scholars have long claimed, contract law embeds the theory of efficient breach. To be sure, there is no such formally articulated efficient breach doctrine.[267] But the latter observation is incomplete. An efficient breach doctrine is unnecessary to support the claim because efficient breach embeds itself in the presumption of expectancy damages. Expectancy damages demands the cost of cover, rather than actual performance, should a breach occur.

Efficient breach implicitly recognizes the dynamic of dual markets. Firms or actors induced to breach generally operate within sibling markets for which superior economic opportunities occasionally arise respecting the allocation of valuable resources, typically end products or factors of production. As a matter of fairness, it seems counterintuitive to allow the party seeking to breach only to pay expectancy damages given that the breach itself facilitates a greater surplus value than the initial contract, with gains that could, in theory, be shared with the nonbreaching party, who, after all, is the one not at fault.

The contrary doctrine favoring expectancy damages makes sense only if contract law's premise is improving social welfare even in place of performance. The dual markets phenomenon implies that the breaching party typically will have invested in the good will associated with third parties identifying the firm or proprietor as a source for specific high valued goods or services. Allowing the nonbreaching party to negotiate, bilaterally with the breaching party, or multilaterally also with the party inducing the breach, would invite a rent-dissipation game that could consume the surplus value associated with the superior, breach-inducing, transaction even after the nonbreaching party is made whole with expectancy damages based on contrac-

264 For a general discussion, see STEARNS ET AL., *supra* note 10, at 200–13.

265 *See* Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 240–41 (1979) (defining contractual conditions that give rise to opportunities for appropriable quasi-rents).

266 For a general discussion, see STEARNS ET AL., *supra* note 10, at 178–87 (analyzing relationship between expectation damages and efficient breach).

267 *See id.* at 181–82 (illustrating efficient breach in context of dual markets).

tual expectations.[268] Indeed, the threat of such dissipation bargaining could itself inhibit good will investments, reducing social welfare.

Contract law further improves social welfare in large part by setting out default rules that parties can contractually displace with rules that better suit their needs.[269] As with tort, parties benefit by relying on a single default rule, even as the regime generally allows the legislature to displace that rule, moving from one stable doctrine to another, each of which comports with contract law's social welfare maximizing premise.[270]

III. Settlement, Unsettlement, and Premises

Not all constitutional doctrines struggle with dual persistent conflicting premises. Some doctrines are so firmly entrenched, resting on a single premise, that no serious reformulations are apt to succeed, whereas others are sufficiently fractured that there is no starting premise from which to depart. This might imply selective attention to those doctrines supportive of the Article's central thesis.[271] On closer inspection, however, that is not the case. This Article's central claim is not that all constitutional law doctrines exhibit dual persistent conflicting premises; rather, it is that among the salient domains, dual conflicting premises emerge as a pure-Nash equilibrium.

Settled premises often undergird persistent dual conflicting premises. For example, within standing doctrine, such premises as the power of judicial review; the resolution of cases to devise holdings with precedential effect, rather than merely to resolve immediate disputes; and limits on judicial review relating to the Article III language of "case" or "controversy," are well settled and do not give rise to modern disputes concerning the direction of standing doctrine. By contrast, the identified competing premises under-

268 *See id.* (discussing relationship between efficient breach and the Coase theorem); *see also* Maxwell L. Stearns & Megan J. McGinnis, *A Social Choice View of Law and Economics*, *in* Methodologies of Law and Economics 72 (Thomas S. Ulen ed., 2017) (same).

269 *See* Stearns et al., *supra* note 10, at 147.

270 One doctrine, liquidated damages, at once supports and challenges this premise. In the United States there is a strong presumption against liquidated damages unless they constitute a fair estimate of damages. On one side, disallowing liquidated damages appears to support the claim that contract law is not about performance since stricter adherence to such clauses would bolster performance incentives. On the other side, however, law and economics scholars are critical of the disinclination to enforce such clauses since enforcement would allow one side to signal a higher subjective performance valuation than expectancy damages, thereby improving the surplus value of the contract, with greater shared gains. However, one characterizes the doctrine, the presumption against liquidated damages has not challenged, more generally, contract law's social welfare maximization premise. For a discussion of liquidated damages, including contracting strategies to circumvent the restriction, see Stearns et al., *supra* note 10, at 209–10 (discussing splitting contracts concerning features for which one party holds an idiosyncratic performance valuation).

271 *See supra* note 250 (describing underlying tautology in notable analytical claims).

girding modern standing doctrine are an ongoing basis for caselaw inconsistency.[272]

A. Multiple Premises and Unsettlement

The opposite proposition is also true: some areas of constitutional law express numerous competing positions, or what we might call "unsettlement."[273] Some bodies of constitutional law are not marked by dual persistent conflicting premises because no premise had been settled upon in the past as the agreed-upon starting point from which doctrine might now be moved. It is hard to move a state of flux. Doctrinal categories can also shift such that a once unsettled area settles, closing the body off from future litigation or initiating the process of formulating dual premises.

First, consider partisan gerrymandering, a body of caselaw in which the Supreme Court had failed to settle on any premise and then closed the door altogether, holding the legal claim a nonjusticiable political question.[274] For decades, Justice White, and then Justice Kennedy, the median jurist on this issue, left ajar the door to related claims, yet rejected the available equal protection standards offered to challenge such practices as packing, stacking, and cracking. Whereas these Justices' liberal colleagues willingly offered various tests and methods for analysis, which might have formed a starting premise, their conservative counterparts sought to jettison the entire inquiry as a nonjusticiable political question. Ultimately, when Justice Kavanaugh replaced Justice Kennedy, a conservative majority closed the door to partisan gerrymandering on justiciability grounds.[275] Selecting a standard for a successful partisan gerrymander would have invited efforts among conservatives to recast the starting premise so as to cabin such claims. Instead, deeming the area nonjusticiable, at least for now, forecloses that possibility.

The equal protection caselaw on burden shifting and race further illustrates unsettlement over one or more among three competing premises. In general, to overturn a law based on equal protection, the challenger must establish an illicit racial intent coupled with an adverse racial effect. Within certain domains, including districting for both voting and school attendance zones, proving intent is elusive, and the Justices have shifted over three competing premises in assessing challenged laws. One group of Justices has insisted upon proof of intent, without which effects are deemed insufficient to establish an equal protection violation.[276] A second group, when con-

272 *See supra* subsection I.A.1.

273 Unsettlement's meaning is not entirely settled. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW 8–9 (2001) (positing that unsettled doctrine helps legitimate judicial review by signaling future opportunities for today's losing interests to later prevail).

274 *See, e.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

275 *See id.*

276 *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 257–65 (1973) (Rehnquist, J., dissenting) (insisting upon proof of intent plus effects before finding an equal protection violation respecting the entirety of the Denver School District, even with such proof for the

fronted with proof of an illicit intent for part of the decision-making process, is willing to shift the burden to the state to disprove intent respecting the remainder.[277] Proving a negative is generally impossible; it is akin to asking whether in the absence of the illicit intent, the state can prove that it nonetheless would have failed to achieve a preferred result. In multiple-causation cases, the burden shift is generally fatal to defending against an equal protection challenge. Finally, a third group is willing to shift the burden against the state, not based on subjective intent to discriminate, which can lead to doctrinal inconsistencies in factually similar cases,[278] but rather, based on objective indicia corresponding to an illicit discriminatory intent. Such factors can include, for example, unusual districting lines or decision-making processes that predictably correlate with adverse racial effects.[279] The Court has not settled on any of these approaches; instead various Justices adhere to individual views, and majorities form by cobbling together opinions resting on alternative premises.

Another example involves the Second Amendment. Recall the discussion of *McDonald v. City of Chicago*.[280] The case arose toward the end of the list of incorporated rights. With notable exceptions, including the recent incorporation of the Excessive Fines Clause[281] and the requirement of unanimous criminal jury convictions,[282] most suitable rights listed in the Bill of Rights had been incorporated well before the Second Amendment.[283]

Park Hills section); City of Mobile v. Bolden, 446 U.S. 55, 66–68 (1980) (Stewart, J., plurality opinion) (declining to shift burden to disprove intent to discriminate in at-large voting scheme, which effected all-white representation despite a substantial minority African American electorate).

277 *See Keyes*, 413 U.S. at 209–13 (shifting burden onto the state following proof of intent to discriminate in Park Hills); *Bolden*, 446 U.S. at 137–39 (Marshall, J., dissenting) (proposing to shift burden onto Mobile given longstanding history of racial discrimination).

278 *Compare Bolden*, 446 U.S. at 74 (Stewart, J., plurality opinion) (rejecting equal protection challenge to at-large voting scheme, resulting in no African American representation, absent proof of intent to undermine minority representation), *with* Rogers v. Lodge, 458 U.S. 613, 614–16 (1982) (striking at-large voting scheme based on finding that it had been maintained with an intent to subordinate African American representation).

279 *See Keyes*, 413 U.S. at 235–36 (Powell, J., concurring in the judgment) (shifting burden based on objective factors correlating to discriminatory intent); *Bolden*, 446 U.S. at 92–94 (Stevens, J., concurring in the judgment) (concluding that at-large voting schemes are not objectively unusual, thereby declining to shift the burden of proof).

280 561 U.S. 742 (2010); *see also supra* notes 222–28 and accompanying text.

281 Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (incorporating the Excessive Fines Clause).

282 Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) (incorporating requirement of jury unanimity for criminal convictions). *See* Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at Section I.B.

283 Remaining unincorporated provisions include the requirement of grand jury indictment (states are permitted to also use information), the Third Amendment prohibition against quartering soldiers in peacetime, and the Seventh Amendment right to a jury trial for matters in excess of $20. *See* STONE ET AL., *supra* note 12, at 738 (listing unincorporated rights).

Because most gun regulation takes place at the state level, the decision to incorporate *Heller* was in some respects more significant than *Heller* itself, which held the Amendment protects an individual right.[284] Justice Thomas took the same approach in two recent incorporation cases, *Ramos v. Louisiana*, requiring unanimous state criminal jury convictions, and *McDonald*, incorporating *Heller*, although his strategy had different effects in each case.[285] Although Thomas stood alone in insisting that the Fourteenth Amendment Privileges or Immunities Clause, rather than the Due Process Clause, was the vehicle through which these rights were incorporated, because he provided a critical fifth vote in *McDonald*,[286] the strategy proved significant in that case. Because the list of remaining incorporation controversies is limited, each remaining case is best understood as resolving an essentially binary inquiry, rather than a question that will affect the foundation of a future line of cases. In effect, *McDonald* was more about securing five votes, however assembled, than about an effort to recast an underlying premise.

The controversial *Bush v. Gore*[287] decision, which ended the 2000 election in favor of George W. Bush by preventing the Florida statewide manual recount of undervotes, also implicates this Article's central thesis.[288] The Supreme Court had twice intervened in the problematic Florida presidential election. Article II of the Constitution, as modified by the Twelfth Amendment, delegates to state legislatures the task of devising laws by which the electors for President and Vice President are selected.[289] A federal statute enacted in the aftermath of the disputed 1876 Tilden-Hays election, provides that if states follow state election statutes in place prior to the election, and if the slate of electors is submitted six days prior to the scheduled meeting of electors, that slate cannot be challenged.[290]

The first Supreme Court intervention in this closely contested election produced an en banc remand to determine whether, in altering Florida's division between the statutory "challenge" and "protest" periods, the Florida Supreme Court had relied on the state statute or another source of law, such as the federal or state constitutional requirements of equal protection.[291] After the Florida Supreme Court altered the state election calendar to accommodate specific challenges to election protocols,[292] the Supreme

284 *See supra* note 223 and accompanying text; Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at Section I.C.

285 *See Ramos*, 140 S. Ct. at 689; *McDonald*, 561 U.S. at 750. For an analysis distinguishing the effects of Thomas's approach in these two cases, see Stearns, *Modeling Narrowest Grounds*, *supra* note 211, at Sections I.B–C.

286 *See McDonald*, 561 U.S. at 838 (Thomas, J., concurring).

287 531 U.S. 98 (2000).

288 *See id.* at 110.

289 U.S. CONST. art. II, § 1; *id.* amend. XII.

290 *See* 3 U.S.C. § 5 (2018).

291 *See* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 78 (2000) (per curiam).

292 *See* Palm Beach Cnty. Canvassing Bd. v. Harris (*Harris I*), 772 So. 2d 1220, 1240 (Fla. 2000), *vacated*, *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. at 78.

Court sought to determine if that ruling was based on the Florida Supreme Court's construction of the state election code or if, instead, it risked failing the protection of the safe harbor provision in 3 U.S.C. § 5.[293] On remand, the Florida Supreme Court ultimately claimed to be construing the state statute.[294]

Just after that ruling, the Supreme Court, once more, intervened following the Florida Supreme Court's order of a statewide manual recount of undervotes, relief that extended well beyond the narrower request of Gore supporters for recounts in four specified counties.[295] This intervention produced a 5–4 per curiam majority decision marked by sharp divisions among even the prevailing Justices. The combined opinions exposed fault lines implicating no fewer than three competing premises.[296]

The *Bush v. Gore* Court determined that the Florida Supreme Court's mandated "intent of the voter" recount standard was devoid of sufficient clarity and guidance to ensure compliance with equal protection.[297] With some irony, the conservatives who generally eschew equal protection claims respecting voting rights, determined that the failure to provide a more specific standard gave rise to an unacceptable risk of unequally weighted votes, a risk that could not be cured compliant with the nearly completed timeline under 3 U.S.C. § 5.[298] A group of four Justices determined that there was no basis for overturning the Florida Supreme Court judgment. Although a majority joined the en banc opinion, there are credible bases for assuming that had the three core conservative members adhered to their ideal points, the Court would have fractured, overturning the Florida Supreme Court on two inconsistent bases.[299]

After acknowledging the per curiam's equal protection analysis, which they joined, the core conservatives based their separate concurrence entirely on Article II.[300] The conservatives determined that the Florida court had not properly interpreted the state election code.[301] Although striking down a

293 *Id.* at 75–76, 78.

294 *See* Palm Beach Cnty. Canvassing Bd. v. Harris (*Harris II*), 772 So. 2d 1273, 1282–88 (Fla. 2000).

295 *See* Gore v. Harris, 772 So. 2d 1243, 1247 (Fla. 2000), *rev'd*, Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

296 *See* Michael Abramowicz & Maxwell L. Stearns, *Beyond Counting Votes: The Political Economy of* Bush v. Gore, 54 VAND. L. REV. 1849, 1911 & tbl.1, 1911–41 (2001) (positing strategies that formed a majority coalition despite three ideal points, two of which took opposing views on both controlling issues: to rest claim solely on equal protection (the per curiam), to rest claim solely on Article II (the concurrence), and to reject both equal protection and Article II bases (the dissent)).

297 *Bush v. Gore*, 531 U.S. at 98, 105–06 (quoting *Gore v. Harris*, 772 So. 2d at 1262).

298 *See id.* at 108. On remand, the Florida Supreme Court stated that the General Assembly intended to benefit from the safe harbor of 3 U.S.C. § 5. *Id.* at 111 (Rehnquist, C.J., concurring) (acknowledging the Florida Supreme Court's finding).

299 *Bush v. Gore* would then have exhibited a parallel structure to *McDonald v. City of Chicago*. *See supra* notes 222–28 and accompanying text.

300 *See Bush v. Gore*, 531 U.S. at 111–15.

301 *See id.* at 118–20.

state court decision for failing to abide by state law is unusual, it is not unheard of.[302] More generally this occurs when the state-court construction violates a significant constitutional interest. As Justice Breyer pointed out, *Bush v. Gore* implicated an obviously considerable political interest, settling a presidential election, but less obviously a significant constitutional one.[303] Perhaps for this reason, the Court's centrists, Justices O'Connor and Kennedy, were unwilling to join in the concurrence's Article II rationale.

Had the core conservatives stuck with their ideal point, a majority would have revealed inconsistent premises as the basis for interfering with a Florida court decision concerning the processes by which the state chooses its presidential and vice-presidential electors. A possible account for why the conservatives joined the equal protection opinion was to avoid the appearance of the Supreme Court settling a presidential election for the first time, not only without a singular rationale, but based on conflicting rationales.[304] And of course, a third group of Justices, writing in dissent, rejected either premise as a basis for overturning the Florida Supreme Court.

As with *McDonald*, *Bush v. Gore* might be viewed as a case in which counting votes is considerably more significant than settling upon, or shifting, an underlying premise. Indeed, this might reinforce Justice Breyer's intuition that the case centered on an important political, but not constitutional, question. This also is supported by the per curiam opinion's signaling that the case resolution is intended to have minimal doctrinal effect, thereby limiting the holding to the immediate case facts.[305]

B. Constitutional Hybrids: Agency Deference Rules, Criminal Procedure Revisited, and the Dormant Commerce Clause Doctrine

We have now seen dual persistent conflicting premises as a pure-Nash equilibrium operating in salient constitutional domains, single premises in settled domains, and several premises in unsettled domains. The final

302 *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347, 362 (1964) (rejecting South Carolina Supreme Court's construction of state trespass law as applied to race-based lunch counter protest); NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 454–58 (1958) (rejecting Alabama Supreme Court's unusual construction of state procedural rules applied to foreclose appeal on grounds of inadequate notice); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812) (rejecting Virginia Court of Appeals' resolution of state vesting in disputed property).

303 *Bush v. Gore*, 531 U.S. at 153 (Breyer, J., dissenting) ("Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal.").

304 *See* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS 168 & n.20 (2001) (favorably citing Abramowicz's and Stearns's thesis on *Bush v. Gore*); Abramowicz & Stearns, *supra* note 296, at 1938–41 (positing that avoiding the absence of a singular rationale and risking inconsistent rationales explains why conservative concurring Justices also joined the per curiam).

305 *Bush v. Gore*, 531 U.S. at 109 (per curiam) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

remaining category involves constitutional hybrids, bodies of caselaw in which the Supreme Court announces default constitutional rules that can be supplanted by another institution. These cases thus bear important parallels to common-law doctrines, implicating the driving and battle of the sexes games, with courts and legislatures separately moving among alternative, yet singular, pure-Nash strategies.[306] The cases arise in contexts characterized by the need for simple coordination among alternative pure-Nash rules, or by rules implicating both coordination and policy dimensions. These cases are analytical hybrids, possessing features resembling constitutional law and conventional common law, where the legislature can change the default rule.

1. Constitutional Criminal Procedure Revisited

In constitutional criminal procedure, the risk of dissipating political pressures as a consequence of the judicial selection among available rules might discourage Congress from selecting a preferred alternative, even assuming the default status of such judicial rulings. Conventional analysis long presumed Congress's power to shift such default rules with ordinary legislation. In *Dickerson v. United States*,[307] the Court called this presumption into question.[308] Following *Miranda v. Arizona*,[309] and its requirement that police issue prophylactic warnings at arrest,[310] Congress enacted a statute replacing that rule with a balancing test based on case-specific facts in federal cases,[311] adopting the very approach that *Miranda* rejected.

Writing for a majority, Chief Justice Rehnquist struck down the federal statute. His opinion focused considerable attention on the use of "constitutional" in *Miranda* and on public awareness of *Miranda* warnings in popular culture.[312] *Dickerson* can be read either as challenging the conventional understanding of criminal procedure as a set of default rules that Congress may change with ordinary legislation, or as more narrowly holding that if Congress changes a criminal procedure ruling such as *Miranda*, it must choose an alternative at least as good as the one selected by the Court, which the statute at issue in *Dickerson* failed to do. The unsettled question as to which reading prevails might give rise to dual persistent conflicting premises or might be a simple binary question that will eventually settle. Thus far, it appears that *Dickerson* has not produced substantial additional caselaw holding criminal procedure mandatory, rather than default, constitutional law

306 *See supra* Part II (defining pure-Nash equilibrium and describing games).

307 530 U.S. 428, 432 (2000).

308 *See id.* at 432.

309 384 U.S. 436, 467–68 (1966).

310 *See id.* at 467–68.

311 18 U.S.C. § 3501 (2018), *declared unconstitutional by Dickerson*, 530 U.S. at 443.

312 *Dickerson*, 530 U.S. at 443 ("We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." (citing Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting))).

although, absent a congressional statute supplanting a landmark criminal procedure precedent, the issue remains untested.

2. The Dormant Commerce Clause Doctrine

Along with the affirmative side of the Supreme Court's Commerce Clause jurisprudence, the dormant Commerce Clause doctrine is framed consistently with the Framers' fear of inciting balkanized trade. The concern is protectionist state laws that, if sustained, risk motivating reciprocal state defection, undermining free trade among states.[313] We need not fully embrace Justice Jackson's idyllic dictum that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them,"[314] to appreciate the significant role that open trade among states played in the nation's early economic prosperity.[315]

The dormant Commerce Clause doctrine can be expressed as a judicially enforced most-favored-nation treaty among states. This commitment even precludes states from entering their own bilateral or multilateral pro-trade agreements,[316] at least absent congressional ratification,[317] presuming instead that all states, by virtue of membership in the constitutional union, are already so bound.

This framing situates the dormant Commerce Clause doctrine in a multilateral prisoners' dilemma, raising the concern that industrial trade protections, if sustained, risk reciprocal state defection, with mutual defection emerging as a pure-Nash equilibrium.[318] This result obtains even though by cooperating, opening their borders to trade, each state would receive a

313 *See* Stearns, *supra* note 82, at 124–29.

314 H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949). The passage evokes Adam Smith's conception of benevolent markets. *See* 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 26–27 (R.H. Campbell, A.S. Skinner & W.B. Todd, eds., Liberty Fund 1981) (1776) ("It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages." (footnote omitted)).

315 Another, often overlooked, contributing factor is diversity jurisdiction, ensuring those investing capital in foreign-state jurisdictions access to a neutral judicial forum as compared with presumptively biased state courts apt to favor their own. *See* Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447, 506–08 (1994) (providing historical corroboration of role of diversity jurisdiction in promoting capital mobility).

316 *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 960 (1982). An exception: subject to congressional approval, states may enter interstate compacts. *See* New York v. United States, 505 U.S. 144, 188 (1992).

317 *See* U.S. CONST. art. I, § 10, cl. 3.

318 For a more detailed discussion and analysis, see Stearns, *supra* note 82, at 25–28.

greater payoff.[319] The Supreme Court has identified two features of problematic state laws likely to have this effect: (1) laws expressly discriminating based principally on the out-of-state origin of goods or services, such as import quotas or tariffs; and (2) laws motivated by protectionism, whether or not facially discriminatory.

The black letter dormant Commerce Clause doctrine embeds both features. When both are present, the Court employs a per se rule of invalidity. In *West Lynn Creamery v. Healy*, Justice Stevens stated that discriminatory tariffs are so rare as to find no reflection in the U.S. Reports.[320] Although that is arguably overstated,[321] in general, combining both illicit features is fatal to the challenged law. When presented with only one of these two problematic features, express discrimination or a protectionist motivation, the Court applies strict dormant Commerce Clause doctrine scrutiny, requiring the government to prove a legitimate interest and the absence of a nondiscriminatory alternative.[322] When neither characteristic is present, meaning a facially neutral law is coupled with a legitimate governmental interest, the Court applies one of two relaxed standards, a balancing test or rationality review.[323]

Although doctrinal exceptions arise within each category,[324] the black letter framing is internally sound. Scrutiny is most intense when two problematic features coincide; scrutiny remains intense, but less so, when only one problematic feature is present; and scrutiny is relaxed absent either problematic feature. Despite this, two caveats render this doctrinal account incomplete. The first reinforces the prisoners' dilemma premise, and the second calls it into question. The result in this hybrid category is dual persistent conflicting premises as a matter of black letter law, with holdings that are ultimately reconcilable and that Congress can supplant with ordinary legislation, preferring an alternative on policy grounds, while retaining a pure-Nash coordinated result.

Despite Justice Stevens's assertion,[325] in market-participant cases, both problematic features are present, yet the Supreme Court applies deferential review. And in cases involving facially neutral highway safety laws thwarting

319 For a more formal presentation of the prisoners' dilemma, see *supra* Part II (describing game and collecting authorities).

320 *See* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 193 (1994) ("[T]ariffs against the products of other States are so patently unconstitutional that our cases reveal not a single attempt by any State to enact one. Instead, the cases are filled with state laws that aspire to reap some of the benefits of tariffs by other means.").

321 *See infra* notes 325–27 and accompanying text (discussing the market-participant exception).

322 Strict dormant Commerce Clause scrutiny differs from strict equal protection scrutiny, which requires a compelling governmental interest and the absence of a nondiscriminatory alternative.

323 *See* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 670–71, 678–79 (1981) (plurality opinion); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

324 *See* Stearns, *supra* note 82, at 29–62 (reviewing cases).

325 *See supra* note 320 and accompanying text.

benign coordinated schemes among states, the Court nominally applies deferential scrutiny yet strikes down the challenged law.

The market-participant doctrine generally gives states free rein in choosing with whom to deal.[326] Under this doctrine, the state may favor its own for protectionist reasons without being subject to close scrutiny. This seeming contradiction is ultimately reconcilable with a prisoners' dilemma framing. Along with permissible state subsidies, market-participant preferences are subject to annual appropriations. Such policies transfer wealth from broad-to-narrow in-state constituencies, and although the policies might be regarded as inefficient rent seeking, sustaining them is less likely than tariffs or quotas to incite reciprocal defection.[327]

The second case category implicates a second premise. The Supreme Court has repeatedly expressed a deferential stance toward facially neutral state highway safety laws.[328] As a result, the Court has struggled with the doctrinal basis for striking challenged state highway regulations down. In *Bibb v. Navajo Freight Lines, Inc.*,[329] Illinois demanded curved mudflaps on trucks traveling through the state, when surrounding states permitted or required straight mudflaps.[330] And in *Kassel v. Consolidated Freightways Corp.*,[331] Iowa prohibited, with narrow exceptions benefiting in-state interests, sixty-five-foot twin trailers, when such trailers, although prohibited in other parts of the country, were allowed by surrounding states.[332]

The problem in such cases is not interstate replication of problematic policies. If surrounding states followed the lead of Illinois or Iowa, or, conversely, had those states acquiesced in the policies of states surrounding them, no conflict would arise. The problem instead is that the surrounding states had coordinated around a benign coordinated strategy facilitating interstate commerce, a common mudflap in *Bibb* and truck rig in *Kassel*. By thwarting those schemes with a contrary policy, Illinois and Iowa threatened to substantially raise the cost of interstate commerce. These "burden on commerce"[333] cases appear in tension with the black letter dormant Commerce Clause doctrine framing because they implicate the driving game, not the prisoners' dilemma.[334] This alternative doctrinal premise is not focused

326 For a general discussion, see Stearns, *supra* note 82, at 57–62.

327 Policies apt to become embedded in state legal codes without the need to be annually revisited are more likely to motivate political pressures within other states to enact similar protectionist policies. *See* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965, 983–97, 1002 (1998) (distinguishing lobbying incentive effects for subsidies versus differential tax provisions); Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 868–71 (1996) (same).

328 *See* Stearns, *supra* note 82, at 4955.

329 359 U.S. 520 (1959).

330 *Id.* at 521–23.

331 Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662 (1981) (plurality opinion).

332 *Id.* at 655–67.

333 *Bibb*, 359 U.S. at 526.

334 *See supra* Section II.A; *see also* STEARNS ET AL., *supra* note 10, at 618–35.

on laws that, if sustained, invite reciprocal defection; rather, it focuses on laws that thwart other states' coordinated schemes.

These cases further explain why the dormant Commerce Clause doctrine operates as default constitutional law. In such cases, the Supreme Court faces the binary choice to sustain or strike down the challenged law. The Court lacks the option to impose the challenged minority policy, even if superior, on other jurisdictions. The default status lets Congress supplant one coordinated rule with another, potentially superior one, with ordinary legislation.

Although the caselaw implicates two premises, the doctrinal anomalies arise because the formal doctrine is centered only on one. Even so, reconciling the caselaw is not terribly hard. Simply treat the premises as cumulative: the Supreme Court will presume against both problematic types of state laws, those risking balkanized trade and those undermining coordinated state policies. And the hybrid status creates a vehicle for Congress to improve policy outcomes while retaining a set of coordinated outcomes.

3. Agency Deference Rules

In our final body of caselaw, the Supreme Court has determined that the judiciary must defer to agency interpretation of ambiguous statutory provisions that fall within the scope of the agency's jurisdiction. This rule, announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[335] is subject to an exception, announced in *United States v. Mead Corp.*,[336] when the basis for the agency policy is not the product of sufficiently formal quasi-judicial or quasi-legislative processes, for example, an opinion letter by a low-level bureaucrat. The most significant ruling for our purposes is *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[337] in which the Supreme Court determined that, even if the agency issuing a ruling satisfying *Chevron* deference contradicts a prior federal judicial interpretation of the same statute, the federal court must yield to the agency interpretation rather than embracing its own.[338]

This final ruling might appear in obvious tension with the most settled of settled constitutional doctrines, returning us to where this study of constitutional premises began, namely *Marbury*'s admonition: "It is emphatically the province and duty of the judicial department to say what the law is."[339] And yet, the rulings are reconcilable. If we assume the validity of the *Chevron* rule, and if we further assume a particular instance of a qualifying agency interpretation that happens to follow, not precede, a federal judicial construction of the same ambiguous statutory provision, it would be inconsistent with *Chevron* to condition deference on the fortuity of ordering. Either def-

335 467 U.S. 837, 844–45 (1984).
336 533 U.S. 218, 231–34 (2001).
337 545 U.S. 967 (2005).
338 *See id.* at 980 (citing *Chevron*, 533 U.S. at 843–44, 843 n.11).
339 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

erence is owed or deference is not, an answer independent of which came first, the agency or judicial construction. Moreover, there is no necessary conflict with *Marbury*'s "province and duty" since the statement of "what the law is" can simply be that the agency construction, when *Chevron* applies, is determinative.[340]

The agency deference cases also fit the hybrid category. Here, the agency is presumed to have final decisional authority vis-à-vis the federal courts, even the Supreme Court, but not final decisional authority vis-à-vis Congress. Congress is free to change the agency ruling with ordinary legislation. The institutional complementarity, preserving the policymaking role of Congress, once more reconciles the premises across this important set of hybrid doctrines.

Conclusion

This Article focuses on several doctrines that present specific pedagogical challenges across the standard constitutional law curriculum: standing; the Commerce Clause; separation of powers; equal protection and race; and incitement and obscenity. The theoretical framing undergirding this analysis demanded connections across these, and many other, bodies of law.

The model developed in this Article cannot predict when the Supreme Court will move from doctrinal unsettlement to doctrinal foreclosure. Nor can it predict when unsettlement or foreclosure might finally give way to a premise upon which a new body of law will develop. These developments are affected by, among other considerations, such fortuities as who wins the presidency and who replaces whom on any given Supreme Court. The Article does, however, provide the basis for critical theoretical insights into salient doctrines that students, and scholars, so often struggle to understand.

This framing grounds the causal mechanism of some of constitutional law's most notorious doctrinal inconsistencies in terms of dual persistent conflicting premises. In doing so, it helps distinguish these bodies of constitutional law from other legal domains. Unmasking doctrinal premises is a task especially well suited to the skills of lawyers, beginning with their training in the very first year of law school. Identifying a pervasive pattern in the most salient domains of constitutional law is a critical step for those wishing to gain deeper insight and understanding into several of our most important bodies of caselaw.

340 *Id.*