DISCRETIONARY DOCKETS

Randy J. Kozel and Jeffrey A. Pojanowski[*]

Fifty-five years ago, Professor Henry Hart examined "the volume of the [Supreme] Court's business and . . . the ways in which the business is done."[1] After estimating how much time the Justices had available to deliberate and draft opinions in a given Term, Hart concluded that the Court was resolving far too many cases by full opinion.[2] He also drew a connection between the Court's overstuffed docket and the quality of its work. For Hart, the absence of time necessary for "the maturing of collective thought" ensured that few of the Court's opinions could "genuinely illumine the area of law" in question; others failed "even by much more elementary standards."[3] Reasoned and principled elaboration of the law, Hart contended, takes more time than the Supreme Court was able to give.

Judging by the numbers, one might think Professor Hart would be happier today. Hart assumed an average of 117 opinions of the Court each Term.[4] During October Term 2014, the Court issued only 74 such opinions, of which eight were summary reversals.[5] That performance was almost identical to the Court's October 2013 Term, which yielded 73 opinions, including six

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1. Henry M. Hart, Jr., *The Supreme Court—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 84 (1959).

2. *Id.* at 99.

3. *Id.* at 100.

4. *Id.* at 90–91.

5. *Final Stat Pack for October Term 2014*, SCOTUSBLOG (June 30, 2015, 11:23 AM), http://www.scotusblog.com/2015/06/final-stat-pack-for-october-term-2014/. Two cases were dismissed after argument. *Id.*

summary reversals.[6] These numbers are typical of a Court that now rarely decides more than 80 cases in a Term.[7] And the Court's docket shows no signs of expanding. If anything, the Justices are becoming more cautious in selecting cases for review. Recent years have witnessed the emergence of an informal "cooling off" period between the Court's initial discussion of a case and its order granting certiorari.[8] Assuming that this certiorari two-step holds, we can expect even more petitions to be rejected as "fact-bound" or beset by "vehicle problems," two phrases that the Justices' law clerks customarily invoke.

In theory, the Court's slim docket should allow it to leverage the luxury of time to enhance the clarity of its pronouncements and rationales. By crafting broad and comprehensive opinions, the Court could counterbalance the infrequency of its interventions. Such a *Rulemaking Court* would "illumine the law" through the reasoned elaboration Hart thought incumbent upon the nation's highest tribunal.[9] Likewise, maintaining a smaller docket gives the Court more time to ensure that the choices undergirding its rules are grounded in sound empirical, normative, and historical judgments.[10] While the Court's contributions may be relatively few and far between, they could be wide-ranging and deeply reasoned.

The corollary is that if the Supreme Court's docket were markedly larger—as it was for much of the twentieth century—its ability to function effectively as a rulemaker would suffer, as Professor Hart suggested. The natural mode of decisionmaking for a Court that confronts an onerous docket is not wide-ranging

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6. *Final Stat Pack for October Term 2013 and Key Takeaways*, SCOTUSBLOG (July 3, 2014, 12:47 PM), http://www.scotusblog.com/2014/06/final-stat-pack-for-october-term-2013-and-key-takeaways-2/. As in October Term 2014, two cases were dismissed after argument. *Id.*

7. *See generally* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012).

8. *See* John Elwood, *Relist Watch: What Does the Court's Relist Streak Mean?*, SCOTUSBLOG (Apr. 23, 2014, 11:50 AM), http://www.scotusblog.com/2014/04/relist-watch-what-does-the-courts-relist-streak-mean/.

9. *See* Hart, *supra* note 1, at 100.

10. *See, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING 25–26 (2008) (arguing that courts either "reason deductively from rules posited by others; or they posit law, relying on moral and empirical judgment, as any lawmaker must").

rulemaking, but fact-specific adjudication.[11] To be sure, an *Adjudicating Court* is aware that its pronouncements will affect subsequent cases by informing the rule of decision that future judges deduce and apply.[12] Yet the Adjudicating Court does not try to set out broad rules to govern situations beyond the case before it. Rather, such a Court makes its impression over time by resolving a string of disputes, each of which represents a marginal and incremental contribution to the development of the law.

We can compare the Rulemaking Court and Adjudicating Court with the *Reluctant Court*, which decides few cases and does so narrowly. The same impulses—such as a restrained vision of the judicial role or a deferential posture toward the political branches—that drive a court to limit its docket may also lead it to be guarded and tentative in the decisions it renders. Even so, from a guidance perspective the Reluctant Court does precious little. It calls to mind Professor Hart's lament about questions being "ducked which in good lawyership and good conscience ought not to be ducked" and opinions that "fail to build the bridge between the authorities they cite and the results they decree."[13]

There is one other option for how case selection can interact with decisionmaking mode. An *Experimental Court* resolves numerous cases and does so with comprehensive, wide-ranging rules. Notwithstanding its impressive ambition, the Experimental Court raises in fullest form the central concern noted by Professor Hart: a court that does too much might not do anything well.

In practice, the lines between these decisionmaking modes are often blurred. That, we submit, is all the more reason to pay attention to them. Whether the Supreme Court is understood as a unified institution or a collection of individual actors (or both),[14] its willingness to shift between decisionmaking modes raises important questions about its role—and its own conception of that role—in the constitutional order. These questions are salient

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11. *Cf.* SEC v. Chenery Corp., 332 U.S. 194, 201–07 (1947) (discussing an administrative agency's choice to develop law through rulemaking or adjudication).

12. *See, e.g.*, MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 6 (1991) ("[T]he judicial establishment of legal rules would occur even if the sole function of the courts was to resolve disputes.").

13. Hart, *supra* note 1, at 100–01 (quoting Alexander Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957)).

14. See, e.g., Adrian Vermeule, The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division, 14 J. CONTEMP. L. ISSUES 549 (2005).

as the Court moves forward from a 2014 Term marked by contentious debates over the judiciary's place in the political and social landscape,[15] followed by a 2015 Term in which the death of Justice Antonin Scalia forced the Court to examine how to fufill its role with only eight members. It is a good time to step back and consider more broadly the different modes of decisionmaking and their interaction with the Court's principles for deciding when and where to intervene.

It is common knowledge that the Supreme Court's docket is almost entirely discretionary. That means the Justices decide for themselves which cases to review and which to let pass. What we wish to emphasize is that while the Court's docket is indeed discretionary, its strategy in selecting cases should affect how it crafts its opinions—at least if the provision of guidance is among the Court's core objectives. Case-selection may be discretionary and still create important obligations for the way in which judges go about their work. Or so we claim.

This Essay examines the dynamics of the Rulemaking Court, the Adjudicating Court, the Reluctant Court, and the Experimental Court. We highlight the relationship between a court's mode of decisionmaking, docket management, and sense of institutional role. Our focus is the Supreme Court's treatment of constitutional law, whose derivation and evolution provides a rich topic of study. Whether the Supreme Court operates with a large docket or a small one, it can decide cases in a manner that crystallizes legal norms and provides guidance to the legal community and society at large. Yet for the Court to serve these functions effectively, its mode of decisionmaking must align with its strategy in filling (or not) its docket.

We suggest that in seeking to furnish guidance and enhance clarity, a supreme court that resolves a small number of cases is well served to decide those cases in relatively broad terms supported by relatively deep reasoning. By comparison, a court that decides a greater number of cases will have more opportunities to clarify the law through incremental interventions. General rules can emerge over time through the

15. *See* Adam Liptak, *Justices' Opinions Grow in Size, Accessibility, and Testiness, Study Finds*, N.Y. TIMES, May 4, 2015, at A17. The most obvious example is Obergefell v. Hodges, 135 S. Ct. 2584 (2015). Others include Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015); Glossip v. Gross, 135 S. Ct. 2726 (2015); and Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015).

repeated application of law to fact. This gradual evolution is important, because a court that is busy with an onerous docket will have less time to devote to any single case. We also examine the Reluctant and Experimental approaches to constitutional law, which we conclude are ill-suited to the provision of sound guidance. They become attractive only if a court understands itself as primarily concerned with something other than the development and crystallization of legal principles.

I. LEGAL GUIDANCE AND DECISIONMAKING STYLE

The U.S. Supreme Court contributes to the development of constitutional law by offering reasoned results. The Court issues not merely *decisions*, but *opinions*. This point may seem almost too banal to mention, but it turns out to be crucial to the structure of American constitutional law, for it connects the Supreme Court to the common law tradition.

Here we are adopting a more capacious definition of common law judging than is sometimes employed. Owing to the thoughtful work of scholars such as David Strauss, common law constitutionalism is often depicted as standing in tension with text-centric methodologies such as originalism.[16] To some, that tension might suggest that one can be faithful to the common law tradition or to the Constitution's enacted text, but not to both. And, indeed, there are ways in which particular versions of originalism and common law constitutionalism find themselves in conflict. But in general, there is no contradiction in the view that original meanings and judicial precedents both have a significant role to play in shaping the trajectory of constitutional law. For example, one might conclude that the development of constitutional law can and should proceed through the accretion of judicial decisions even while recognizing value in adhering to the Constitution's text.[17] Or one might give primacy to the Constitution's original meaning while falling back on judicial precedent when the original meaning is too uncertain to resolve a

16. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (juxtaposing originalism and common law constitutionalism).

17. *Cf. id.* at 906–16 (discussing the role of constitutional text within common law constitutionalism).

particular question.[18] This overlap is reinforced by the fact that the common law tradition encompasses fidelity to judicial precedents and enacted texts just as it does fidelity to other sources of legal meaning.[19]

The relationship between text, precedent, and the common law method also bears on recent debates over constitutional "construction." Some commentators contend that when the Constitution's text is underdeterminate—when efforts at semantic "interpretation" leave multiple options on the table—judges must rely on normative commitments to assist in "constructing" constitutional law.[20] There are a variety of intriguing dimensions to constitutional construction, and there are important challenges to the legitimacy of construction as a judicial enterprise.[21] For present purposes, we take no sides on the interpretation/construction debates, and we surely take no sides on larger questions such as the validity of originalism as an interpretive methodology. We simply note that whether it is labeled as common law constitutionalism or constitutional construction or something else, much of what the Supreme Court does is consistent with the idea of developing constitutional rules through the creation, crystallization, and reconsideration of doctrine over time. As a descriptive matter, "our written constitution has . . . become part of an evolutionary common law system."[22] But evolution need not entail marginalizing constitutional text or original meanings. The validity of constitutional development through precedents and doctrines does not depend on one's allegiance to originalism, living constitutionalism, or any other interpretive methodology. There are myriad ways for judges—even judges whose primary allegiance is to text and history—to interpret the Constitution in a manner that bears hallmarks of the common law method.

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18. *See* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 108 (2015) (defending a substantial role for judicial precedent "when the Constitution's original meaning cannot confidently be discerned").

19. *Cf.* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015) (extending this argument to the context of statutory interpretation).

20. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMM. 95, 104–06 (2010).

21. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 141 (2013).

22. Strauss, *supra* note 16, at 885.

To be sure, the practice of constitutional interpretation does not share every feature with classical conceptions of the common law. Most importantly, where constitutional text is clear, it is not subject to judicial override in the same way that judicial precedents are.[23] Nevertheless, through its use of caselaw to flesh out legal norms and rules, American constitutional practice stands as a "central case of common law methodology."[24]

For present purposes, the key question is how the Supreme Court should exercise its common law mandate within the constitutional context. Fashioning an answer requires an accommodation of past and future: a respect for precedents that have come before combined with awareness of the path of constitutional law going forward.

The relationship between fidelity to the past and responsibility for the future is a central theme in the story of the common law. As early as 1601, the English scholar-lawyer John Selden identified the common law with the Roman god Janus, whose two faces look both to yesterday and tomorrow.[25] The starting point for a court—including a constitutional court—operating in the common law tradition is where the law has been.[26] But after engaging with the past, the court confronts a choice regarding the future. It may act as an Adjudicating Court that concentrates on applying (and, if necessary, adapting) extant legal principles to the specific facts at hand. Or it may act as a Rulemaking Court by articulating a broadly applicable rule, along with a comprehensive description of rationale, to govern subsequent cases. Whichever approach it adopts, the court's

23. *Cf.* Frederick Schauer, *Is the Common Law Law?*, 77 CAL. L. REV. 455, 455 (1989) ("[T]he lawmaking power of common law courts is more than interstitial, and extends to modifying or replacing what had previously been thought to be the governing rule . . . .").

24. *Id.* at 470 n. 41.

25. *See* Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONW. L.J. 155, 155 (2002) (citing Paul Christianson, *Young John Selden and the Ancient Constitution, ca. 1610–18*, 128 PROC. OF THE AM. PHIL. SOC'Y 271, 310 n. 19 (1984)).

26. *See* Strauss, *supra* note 16, at 891–92 (linking the common law with the idea that "one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time," because "[j]udgments of this kind embody not just serious thought by one group of people, or even one generation, but the accumulated wisdom of many generations").

prerogative is to respect the past while shining light on the future through the issuance of practical guidance.[27]

In this Part and the next, we examine the Adjudicating and Rulemaking modes of decisionmaking, which take different paths toward the common goal of elucidating the meaning of constitutional law through judicial opinions.

A. ADJUDICATING

The Adjudicating Court draws "on the fund of accumulated experience recorded in the common law"[28] and applies it with precision to the particular facts at hand. Faced with a challenging case, the Court "look[s] longer, harder, and deeper" into its store of exemplars and, by analogy and rational extension, discerns a resolution from "within the law."[29] This approach, which has deep roots in classical common law jurisprudence, offers practical guidance through the steady accumulation and refinement of judicial reasoning.[30] The development of the law is deliberate in pace and incremental and organic in character.

For an illustration of the Supreme Court operating in Adjudicating mode, consider its recent Confrontation Clause jurisprudence originating with *Crawford v. Washington*.[31] Finding that the Clause's text does not specify what kind of out-of-court statements are admissible against a defendant in a criminal trial, the Court turned to the "historical background."[32] After an extensive survey of English and American common law history, the Court concluded that the Clause's requirements apply to

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27. *See, e.g.*, Gerald J. Postema, *Law's System: The Necessity of System in Common Law*, 2014 NEW ZEALAND L. REV. 69, 93 (explaining that common law "reasoning is public and practical, so it is meant to serve the purpose of normative guidance of official and lay decisions and actions in and for a public").

28. Postema, *supra* note 25, at 177.

29. *Id.* at 178–79.

30. *Cf.* Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONW. L.J. 1, 4 (2003) (stating that common law jurists "not only had to solve the immediate problem at hand, but . . . also had to set an example that could reasonably be followed in other cases"). For some, case-specific adjudication is the only approach that can reconcile the provision of forward-looking guidance with the traditional understanding of the judicial office. *See, e.g.*, Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 594 (2009) ("[T]he Federalist Founders . . . evidently did not foresee the Supreme Court as a superlegislature. The judges they knew merely decided contested cases in the common law tradition familiar to them.").

31. 541 U.S. 36 (2004).

32. *Id.* at 42–43.

"testimonial" statements.[33] Although the Court offered examples of the "core class" of those statements, it declined to articulate a canonical formulation, explaining that the statements at issue were clearly testimonial.[34]

Crawford thus expanded the reach of the Sixth Amendment while leaving unanswered numerous questions about the scope of the confrontation right.[35] The Justices disagreed over *Crawford*'s fidelity to precedent,[36] but there was no question that the opinion left much to be done going forward. The Court responded by returning to the Confrontation Clause on several occasions during the ensuing Terms, incrementally defining the contours of "testimonial" statements.[37] By keeping the issue on its agenda, the Court counterbalanced the uncertainty that initially resulted from its refusal to set forth a canonical formulation in *Crawford*. In this respect, *Crawford* exemplified the Adjudicating mode even as it redescribed or revised (depending on one's perspective) the Court's former approach to the Confrontation Clause. Rather than announcing a new rule that was both general in scope and broadly determinative in guidance, *Crawford* left the elaboration of its approach for future cases.[38] That choice imposed a corollary duty on the Court to continue developing its rule through subsequent applications—an obligation the Court discharged by repeatedly granting certiorari to resolve Confrontation Clause disputes.

The Court's jurisprudence regarding the jury trial right has taken a similar path. In *Apprendi v. New Jersey*, the Court identified in its decisional law a requirement that any fact—

33. *Id.* at 51.

34. *Id.* at 51–52.

35. *See id.* at 69 (Rehnquist, C.J., concurring in the judgment) ("[The majority's rule] casts a mantle of uncertainty over future criminal trials in both federal and state courts, and is by no means necessary to decide the present case.").

36. *Compare id.* ("I dissent from the Court's decision to overrule *Ohio v. Roberts* . . . ."), *with id.* at 58 (majority opinion) (stating that "[e]ven our recent cases [like *Roberts*], in their outcomes hew closely to the traditional line" between testimonial and non-testimonial statements).

37. *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012) (expert testimony on DNA profile is non-testimonial); Bullcoming v. New Mexico, 564 U.S. 647 (2011) (blood-alcohol analysis report is testimonial); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (laboratory analysis of cocaine is testimonial).

38. *See* Larry Alexander, *"With Me It's All or Nuthin'": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 545 (1999) (arguing that "there is a tendency for generality and determinateness to go together" in rule-based decisionmaking).

besides the fact of a prior conviction—that increases the penalty for a crime beyond a statutory maximum must be submitted to the jury and found beyond a reasonable doubt.[39] The carve-out for prior convictions was itself a product of the common law method; that exception, though discordant as a conceptual matter, was well-rooted in the Court's precedent.[40] While recognizing that the exception was hard to square with its holding as a matter of logic, the Court was content to rule more narrowly, focusing on the case at hand rather than aiming to enhance doctrinal coherence more broadly. Thus, even as it ushered in an important development in its constitutional jurisprudence, the Court saw no need to set forth a capacious, internally consistent rule of the sort we might expect from a legislature. Nor did the Court try to explain the ramifications of its rationale for every relevant aspect of the criminal sentencing regime. Instead, it derived a pertinent principle and applied it to the situation at hand.

The *Apprendi* Court left it to subsequent cases to define the contours of the jury trial right. Those cases have sometimes extended *Apprendi* to related issues and contexts.[41] At other times, the Court has cabined *Apprendi*'s sweep, as with the factual findings required for imposing consecutive-running sentences.[42] Through this sustained series of interventions, the Court has generated a body of decisions, distinctions, and analogies that exemplifies the Adjudicating mode.

Beyond high-profile contexts like criminal sentencing and confrontation of witnesses, the Adjudicating mode also emerges in less momentous cases. Consider one of Chief Justice Roberts' earliest opinions, *Jones v. Flowers*.[43] There, the Court addressed a comparatively picayune question of first impression: what steps the Due Process Clause requires a state to take before selling a taxpayer's property when a notice of tax sale is returned in the mail as unclaimed. In ruling for the taxpayer, the Court focused on the particularities of the statutory regime and the specific dispute at hand. It identified "several reasonable steps" the State

39. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

40. *See id.* at 485–89 (discussing cases including *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

41. *See* Alleyne v. United States, 133 S. Ct. 2151 (2013); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002).

42. *See* Oregon v. Ice, 555 U.S. 160 (2009).

43. 547 U.S. 220 (2006).

could have taken under the circumstances, such as addressing the letter to "occupant" or posting a notice on the front door.[44] For scholars of the Court who are accustomed to (or tired of) arguments of high principle, the Justices' discussion of whether the Arkansas tax commissioner must search the Little Rock phonebook for a new address—a discussion that was in service of a narrow, case-specific holding—is remarkably homely.[45] Disclaiming the notion that it was doing anything noteworthy, the Court explained that "under the circumstances" of the case, existing due process principles required the state to take additional measures to give notice of an imminent property sale.[46]

But while it can extend to mundane cases, the Adjudicating mode is most notable when it arises in high-profile constitutional disputes. Take the example of *Free Enterprise Fund v. PCAOB*, which presented major questions about the appointment and removal of officers in independent agencies.[47] Some commentators saw the case as raising the specter (or the promise) of rendering independent agencies unconstitutional.[48] Yet this putative watershed yielded only a trickle of doctrinal development. Clinging closely to precedent, the Court rejected an Appointments Clause challenge to the relevant agency board.[49] And though the majority offered some sweeping rhetoric about the importance of presidential control of executive officers, its constitutional holding was confined to officers insulated by two layers of removal restrictions.[50] While the dissent criticized the majority for the destabilizing implications of its ruling, the majority downplayed those worries and was content to leave remaining questions for another day.[51] The narrow holding of

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44. *Id.* at 234–35.

45. *Id.* at 235–36. For the record, the commissioner does not have to.

46. *Id.* at 225.

47. 561 U.S. 477 (2010).

48. *See, e.g.*, Peter L. Strauss, *On the Difficulties of Generalization*—PCAOB *in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO. L. REV. 2255, 2275 (2011) ("[Challengers] hoped that the Court would reach back to undo the mischief they believe had been done to that view when in *Humphrey's Executor* a unanimous Court permitted Congress to establish agencies whose heads could be removed only 'for cause.'").

49. *See Free Enterprise Fund*, 561 U.S. at 510 ("Petitioners raise three more challenges to the Board under the Appointments Clause. None has merit.").

50. *Id.* at 495–97.

51. *See id.* at 514 (Breyer, J., dissenting) (claiming that the Court's "holding threatens to disrupt severely the fair and efficient administration of the laws"); *id.* at 506

unconstitutionality offered challengers not the broad victory they sought, but only doctrinal and rhetorical fodder for the next day's fight.[52] This approach captures the sensibility of the Adjudicating Court: the province of the Court is to resolve disputes, so once the outcome of a dispute is clear, the Court has no further business to transact.

B. RULEMAKING

The Supreme Court sometimes operates squarely in the mode of Rulemaker. It announces wide-ranging rules that are manifestly designed to guide the resolution of future disputes not presently before it.[53]

A classic example is *New York Times v. Sullivan*.[54] *Sullivan* provided the Court with an opportunity to articulate broad rules for the handling of defamation cases against public officials, and the Court did not disappoint—it offered a "federal rule" that requires a showing of actual malice in suits relating to a plaintiff's official conduct.[55] The application of law to the facts at hand almost seemed an afterthought. Indeed, the Court came close to apologizing for its engagement with the facts before it, explaining that its "duty is not limited to the elaboration of constitutional principles," but rather must sometimes extend to "review[ing] the evidence to make certain that those principles have been constitutionally applied."[56] Implicit in the Court's explanation is an understanding of its role as Rulemaker first and Adjudicator second (if at all). And the Court's sentiments have proved prophetic; while *Sullivan*'s underlying facts are important legally

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(majority opinion) (avoiding "general pronouncements on matters neither briefed nor argued here" and responding that "the dissent fails to support its premonitions of doom").

52. See Richard H. Pildes, Free Enterprise Fund, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration, 6 DUKE J. CONST. L. & POL'Y 1, 9 (2010).

53. Hart himself seemed to embrace this understanding, or at least to reject the alternative. *See* Hart, *supra* note 1, at 99 (deeming inadequate the notion that the Court is "engaged primarily in a technical lawyer's job, applying and distinguishing precedents with relatively little freedom for the play of creative thought").

54. 376 U.S. 254 (1964).

55. *Id.* at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'").

56. *Id.* at 285.

and historically, the case is famous for the general test the Court articulated.

Another prominent illustration of the Rulemaking Court in action is *Miranda v. Arizona*, in which the Court announced detailed warnings to safeguard the privilege against self-incrimination.[57] *Miranda* could have been decided on far narrower grounds; as Judge Easterbrook has observed, Ernesto Miranda "had not been given any warning," meaning the Court surely did not need to articulate *multiple* warnings that must be furnished going forward.[58] Yet the Court used the case as an opportunity to reshape interactions between police officers and criminal suspects. It became, unequivocally and unabashedly, a Rulemaking Court, announcing "in unqualified terms not only what the rule of law now was, but also exactly what frontline agents such as police officers needed to do in order to comply with it."[59]

Roe v. Wade reflects a similar mentality.[60] *Roe* recognized a constitutional right to nontherapeutic abortions under certain circumstances, but it also went further by announcing a trimester framework to guide the treatment of abortion cases in future years. Again, the Supreme Court assumed the mantle of Rulemaker. That fact was made all the starker by the Court's subsequent decision in *Planned Parenthood v. Casey*, which preserved *Roe*'s central holding but replaced the trimester framework with an "undue burden" test that is more receptive to incremental, fact-specific decisionmaking.[61]

A more recent illustration of the Rulemaking Court comes from *United States v. Stevens*.[62] *Stevens* dealt with legislation aimed at depictions of extreme violence against animals. Among the arguments presented by the government was that such

57. 384 U.S. 436, 444 (1966) ("[U]nless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

58. *See* Faheem-El v. Klincar, 841 F.2d 712, 730 (7th Cir. 1988) (en banc) (Easterbrook, J., concurring).

59. Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205, 207.

60. 410 U.S. 113 (1973).

61. 505 U.S. 833, 874 (1992) (plurality opinion).

62. 559 U.S. 460 (2010).

depictions are proscribable because "the banned depictions of animal cruelty, as a class, are categorically unprotected by the First Amendment."[63] According to the government, First Amendment protection yields when a category of speech has societal costs that significantly outweigh its benefits.[64]

The *Stevens* Court rejected this submission, dismissing it as "startling and dangerous."[65] But the Court did not confine its statements to depictions of animal cruelty. Instead, the Court shifted into Rulemaking mode by announcing a test to govern future First Amendment disputes: categories of speech are beyond the First Amendment's protection only when there is a "long-settled tradition of subjecting that speech to regulation."[66] To be sure, the Court asserted that its rule had a historical antecedent.[67] Still, it is difficult to view *Stevens* as merely identifying a trend that had emerged over time or converting a partially-defined standard into a clear rule.[68] Prior to *Stevens*, the caselaw indicated a different approach—one grounded in cost-benefit analysis rather than historical excavation—for recognizing categorical exceptions to First Amendment protection. The effect of *Stevens* was to discard that inquiry and establish a new rule going forward.[69]

The practical import of *Stevens* has also been determined for many future disputes. While the Court left open the possibility that it might recognize additional, historically-rooted exceptions to protection in future cases,[70] the number of such exceptions seems likely to be low. If that prediction is accurate, then *Stevens* did not simply announce a rule relating to the depiction of cruelty

63. *Id.* at 468.

64. *See id.* at 469–70.

65. *Id.* at 470.

66. *Id.* at 469.

67. *See id.* at 471 ("When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis . . . .").

68. *Cf.* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 124 (2012) ("There is a long-standing scholarly tradition arguing that, as cases accumulate, courts are driven to move from standards to rules. Experience accumulates, and judges get familiar with some generic features of situations they repeatedly confront.").

69. *See id.* at 113.

70. *See Stevens*, 559 U.S. at 472 ("Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.").

to animals. It sharply limited an entire modality of constitutional argument as applied to the freedom of speech. What began as a dispute about videos featuring animal cruelty ended up as an inflection point for First Amendment jurisprudence. An Adjudicating Court could never countenance such a result; there is no clearer counterpoint to case-by-case determinations than sweeping rules that range far beyond the facts at hand. In *Stevens*—as in *Sullivan*, *Miranda*, and *Roe*—the Rulemaking Court was at work.[71]

C. PRECEDENT

The distinction between the Adjudicating and Rulemaking modes has implications for a court's relationship with precedent. An Adjudicating Court moves away from disfavored precedents through a series of incremental steps. Barry Friedman contends that the Supreme Court has used this technique—albeit in a way he criticizes for its "stealth"—to distance itself from the *Miranda* decision.[72] Likewise, David Strauss depicts the evolution of First Amendment doctrine during the twentieth century as incremental and halting; he argues that "the key principles were developed

71. The distinction between Adjudicating and Rulemaking bears some similarities to Professor Eisenberg's useful distinction between a "by-product model" of decisionmaking, in which "courts establish legal rules only as an incidental by-product of resolving disputes," and an "enrichment model" of decisionmaking, in which "the establishment of legal rules to govern social conduct is treated as desirable in itself . . . so that the courts consciously take on the function of developing certain bodies of law, albeit on a case-by-case basis." EISENBERG, *supra* note 12, at 6. For present purposes, we prefer the concepts of Adjudicating and Rulemaking for two reasons. First, those concepts highlight the role of the deciding court as an institution, which is this Essay's focal point. And second, the concepts help to emphasize that Adjudicating and Rulemaking can both serve, in design as well as effect, as mechanisms for enriching the field of constitutional law.

72. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona), 99 GEO. L.J. 1, 16 (2010). This is not the only technique that Professor Friedman describes the Court as having utilized; while some of its "cases ate away at *Miranda*'s rationale like termites at the foundation of a house, leaving the precedent ostensibly standing but precarious to the point of being uninhabitable," others "simply hacked off chunks of *Miranda* or the cases initially implementing it."). *Id.* For a different perspective, see Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1865–66 (2014) ("'[S]tealth overruling' is actually neither stealth nor overruling but just a pejorative term for an underappreciated mainstay of modern Supreme Court practice. And, like other powerful techniques, narrowing can be legitimate or not, depending on the situation.") (footnote omitted).

over fifty years, often through trial and error, with many false starts and subsequent corrections."[73]

At other times, the Court is willing to replace an old rule with a new one in fairly short order. Consider *Citizens United v. FEC*,[74] a case that has been the source of extensive debate.[75] *Citizens United* expressly overturned *Austin v. Michigan Chamber of Commerce*,[76] which had taken a restrictive view of the rights of corporations and labor unions to promote or oppose political candidates.[77] In theory, the *Citizens United* Court might have avoided *Austin* rather than overruling it. Among the arguments before the Court was that the relevant statute did not cover the particular speech at issue,[78] that the unique manner of distributing the speech—namely, through an on-demand video service—diminished the government's interests in proscribing it,[79] and that there should be special constitutional rules "for nonprofit corporate political speech funded overwhelmingly by individuals."[80] Justice Stevens drew on these possibilities in contending that "there were principled, narrower paths that a Court that was serious about judicial restraint could have taken."[81] For the majority, however, the "narrower paths" were illusory, as they would have led to the incorrect result. As Chief Justice Roberts explained in his concurrence, "we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[82]

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73. DAVID A. STRAUSS, THE LIVING CONSTITUTION 62 (2010); *see also id.* at 76 ("It developed over time, fitfully, by a process in which principles and standards were tried and sometimes eventually accepted, sometimes abandoned, sometimes modified, in light of experience and an ongoing, explicit assessment of whether they were sound as a matter of policy.").

74. 558 U.S. 310 (2010).

75. *See, e.g.*, Friedman, *supra* note 72, at 39 ("The President criticized it. It became the focus of controversy at the State of the Union address . . . . Polls showed overwhelming dissatisfaction on both sides of the ideological line, and Congress considered action in response.") (footnotes omitted).

76. 494 U.S. 652 (1990).

77. *Citizens United*, 558 U.S. at 365 (overruling *Austin* and embracing the principle, which the majority described as established by other precedents, that "the Government may not suppress political speech on the basis of the speaker's corporate identity").

78. *See id.* at 322–23.

79. *See id.* at 326.

80. *Id.* at 327.

81. *Id.* at 408 (Stevens, J., concurring in part and dissenting in part).

82. *Id.* at 375 (Roberts, C.J., concurring).

Of course, *Austin* was up for grabs because the Court had put it up for grabs. It was at the Court's own urging that the parties briefed the question whether *Austin* should be overruled.[83] A majority of Justices saw the need for a new rule, and they showed no hesitation in announcing it. *Citizens United* thus reflects a sweeping displacement of precedent by a Rulemaking Court. That said, the *Citizens United* opinion is not necessarily incompatible with the common law tradition. The replacement of old rules with new ones is a familiar feature of common law judging.[84] What is more, the Court frequently describes its new rules as informed and inspired by backward-looking analysis—by the consultation of precedents, history, and tradition. A Rulemaking Court accordingly may evince the same attention to the past as an Adjudicating Court.

Indeed, *Citizens United* itself is notable for the majority's emphasis on precedent and its contention that *Austin* was vulnerable based in part on its incompatibility with other precedents.[85] In terms of decisionmaking mode, the defining feature of *Citizens United* is not that the Court ignored what had gone before. It is that, when it came time to look to the future, the Court was unwilling to confine itself to a narrow, case-specific resolution. Whatever might be said of *Citizens United* on the merits, its central lesson—"the Government may not suppress political speech on the basis of the speaker's corporate identity"[86]—came through loud and clear. The Court willingly assumed the role of Rulemaker.

II. DOCKET CONTROL

Having sketched the Adjudicating and Rulemaking modes of decisionmaking, we turn to their effects, assumptions, and

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83. *See id.* at 396 (Stevens, J., concurring in part and dissenting in part) ("[T]he majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation.").

84. *Cf.* Strauss, *supra* note 16, at 909 ("In fact, rules, as well as case-by-case decision making, are an important part of the common law.").

85. *See Citizens United*, 558 U.S. at 348 (majority opinion) ("The Court is thus confronted with conflicting lines of precedent: a pre-*Austin* line that forbids restrictions on political speech based on the speaker's corporate identity and a post-*Austin* line that permits them."); *id.* at 363 (arguing that "*Austin* . . . itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*").

86. *Id.* at 365.

consequences for the way in which the Supreme Court goes about its business. With respect to both types of courts, we shall emphasize the importance of settlement and guidance. The common lawyers were not motivated solely by "traditionalist" considerations such as humility and restraint.[87] They also "insisted, plausibly in at least some cases, that it was important to have certain matters settled because the costs of further controversy were too great."[88] Matthew Hale described "the end that Men might understand by what rule and measure to live & possess" as "the prime reason . . . that the wiser Sort of the world have in all ages agreed upon Some certain[] laws and rules."[89] Building on the work of Hale, David Hume deemed it crucial to have a publicly salient legal "rule or regularity" that allows parties to "read the same message in the common situation" in order to plan, coordinate, and cooperate.[90] Whether it engages in Adjudicating or Rulemaking, a constitutional court operating in the common law tradition must be mindful of its obligation to offer practical guidance. That obligation frames our analysis in the sections that follow.

A. IMPLICATIONS OF ADJUDICATING

An Adjudicating Court offers guidance "through the careful interstitial working out of shared understandings of common laws and practices."[91] The Adjudicating mode reflects the belief that fashioning incremental, narrow decisions is preferable to "creating a new rule which itself needs interpretation" before it can offer effective guidance.[92] From the Adjudicating Court's perspective, any aspiration for greater generality in judicial utterances is misguided, for the "ordering of civil societies. . . when it comes to particulars" requires practical judgment sensitive to the complexity of life.[93] The Adjudicating Court will

87. Strauss, *supra* note 16, at 908.

88. *Id.*

89. Sir Matthew Hale, *Reflections by the Lord Chiefe Justice Hale on Mr. Hobbes His Dialogue of the Lawe*, *in* SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 503 (3d ed. 1945).

90. Gerald Postema, *Some Roots in Our Notion of Precedent*, *in* Precedent in Law 29 (Laurence Goldstein ed., 1987) (drawing on DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751); DAVID HUME, A TREATISE OF HUMAN NATURE (1738)).

91. *Id.* at 26.

92. *Id.*

93. *See* Hale, *supra* note 89, at 502; Postema, *supra* note 90, at 19–20.

therefore be more interested in the fine-grained parsing and distinguishing of previous decisions and the narrow resolution of disputes based on the particular facts at issue. While the Rulemaking Court strives to articulate a sound rule to govern subsequent disputes, the Adjudicating Court applies specific law to specific fact, leaving future cases to future courts. The guidance of the Adjudicating Court is not an instruction manual, but rather a melody whose next bars the listener can anticipate and continue with confidence.[94]

Because the Adjudicating Court dispenses with the need for articulating a sweeping rule, the costs of error in any given case will tend to be lower. The Court's narrow focus will yield stripped-down majority opinions—opinions that are fact-intensive but relatively terse in developing the implications of the Court's decision for future disputes. In turn, restrained majority opinions will reduce the need for clarificatory concurrences, elaborate dissents, and the consequent rounds of responsive editing that separate writings engender.

These features give the Adjudicating Court the ability to resolve more cases than the Rulemaking Court. And the Adjudicating Court *should* resolve more cases if it is to keep faith with the common law tradition. The nature of the Adjudicating Court is to teach by example rather than edict; the key is what the Court does rather than what it says. But for this approach to be effective in bringing clarity and certainty to the law, exemplars must emerge with regularity. The Adjudicating Court's particularity creates a concomitant demand for frequency. The more bars the Court hums, the better its audience will be at picking up the tune.

Because guidance is a function of the number of decisions issued and the breadth of each decision, the Adjudicating Court must compensate for its narrowness on the latter score by maintaining a sizable docket. This requirement has implications for the criteria upon which certiorari is granted. For an Adjudicating Court, a request for error correction in the absence

94. It is fitting that some of today's most prominent defenders of classical theories of the common law draw connections between law and melody. *See* Allan Beever, *Formalism in Music and Law*, 61 U. TORONTO L.J. 213 (2011); Gerald J. Postema, *Melody and Law's Mindfulness of Time*, 17 RATIO JURIS 203 (2004). *Cf.* RONALD DWORKIN, LAW'S EMPIRE (1986) (analogizing law to a chain novel authored by successive interpreters).

of a circuit split should not doom a petition for review, particularly if the case is of some practical importance. Likewise, constitutional uncertainties should not linger in the lower courts for the sake of letting them "percolate."[95] Even a shallow split among the lower courts may highlight an area of genuine confusion or a challenging legal question worth resolving. Of course, there are limits on the number of interventions an Adjudicating Court can undertake. If every zone of constitutional law received the attention the Court has recently devoted to areas such as the Confrontation Clause and the jury trial right, the constitutional docket might swell to the point of unmanageability regardless of whether the Court opted to issue concise, narrow-gauge opinions. That is to say nothing of the nonconstitutional docket: The Supreme Court has ultimate responsibility for resolving federal statutory questions and stands atop a vast administrative state that guarantees a steady stream of litigants seeking review. Given the scope and complexity of modern government, an Adjudicating Court has considerable challenges in front of it.

Yet those challenges are not insurmountable. A Supreme Court that decided twenty, thirty, or forty additional cases per year would have substantially more opportunities to engage with constitutional doctrine on a granular level.[96] And continuing that practice year after year could generate momentum in multiple areas of jurisprudence, giving lower courts and other stakeholders a better idea of the trajectory of the law. This is not to suggest that the Court could grapple with the entire universe of constitutional doctrine during a single Term.[97] The Court could, however, select more pockets of the law to develop through regular applications over a course of several years, thus increasing the number of domains in which it operates in Adjudicating mode.

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95. *Cf.* Carrington & Cramton, *supra* note 30, at 622 ("[T]he Supreme Court has in recent decades left many, many questions unresolved despite conflicts in circuit court opinions.").

96. An expansion of the Court's docket need not occur solely through the discretionary certiorari process. For example, Amanda Tyler has suggested a reinvigoration of the certification process to enhance the uniformity of federal law. *See* Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1327–28 (2010). *Cf.* Carrington & Cramton, *supra* note 30, at 630–36 (proposing a panel of federal judges with authority to grant certiorari for the Supreme Court).

97. *See* Hart, *supra* note 1, at 96 ("[W]hat matters about Supreme Court opinions is not their quantity, but their quality.").

B. IMPLICATIONS OF RULEMAKING

Rulemaking can be an effective means of providing guidance to lower courts and other stakeholders when a superior court explains its decisions in rich and comprehensive terms.[98] Even when broad rules are hazy around the edges, they can resolve numerous questions about the state of the law and the universe of plausible arguments. The effect is to enhance the clarity with which the law is understood and the firmness with which the law is established. The resulting certainty and publicity help to ensure that citizens can comprehend and react to background legal rules.[99]

Broad rulings can also promote uniformity among the lower courts.[100] To the extent a system places value upon the consistent treatment of similarly situated individuals, the reduction of disuniformity is another benefit of the Rulemaking approach.[101] Even if it intervenes regularly over the years, the Adjudicating Court must accept that disuniformity and uncertainty will persist for some period of time as the law is gradually worked out. It tolerates that cost in light of countervailing virtues of deciding cases in the context of specific, discrete disputes.[102] The

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98. *See* Schauer, *supra* note 59, at 206 ("[W]hile the [Supreme] Court is issuing significantly fewer opinions, the lower courts are being called upon to decide substantially more cases. Consequently, and in light of these changes, we might suppose that the Supreme Court would now be increasingly attuned to providing guidance to the lower courts about what the law is.").

99. *See* Paul Yowell, *Legislation, Common Law, and the Virtue of Clarity*, *in* RICHARD EKINS, MODERN CHALLENGES TO THE RULE OF LAW 121 (2011) ("Clarity is central and strategic because it both presupposes and gives vital sense to the desiderata of promulgation, prospectivity, generality, and stability."); LON L. FULLER, THE MORALITY OF LAW 46–51, 63–65 (1969) (identifying clarity, publicity, and generality among the desiderata of the rule of law).

100. Rules that are *too* broad, of course, can themselves sow uncertainty. *See* Yowell, *supra* note 99, at 101 ("Clarity . . . is a kind of Aristotelian mean between overbreadth and overspecificity."); Carrington & Cramton, *supra* note 30, at 623 (criticizing the Court's tendency "to write ever longer opinions invoking ever broader propositions of law that others may or may not read to resolve diverse future cases").

101. *See, e.g.*, Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 852 (1994) ("National uniformity of federal law ensures that courts treat similarly situated litigants equally—a result often considered a hallmark of fairness in a regime committed to the rule of law."); *cf.* Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006) (arguing that "the facts show beyond the slightest doubt that the Court is willing to allow conflicts in federal law to exist—and even worse, to persist"); *but see* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

102. *See* Tyler, *supra* note 96, at 1316–17 (arguing that "[i]t should be more than a little troubling that the myriad questions left in the wake of the *Apprendi v. New Jersey*,

Rulemaking Court, by contrast, seeks to reduce uncertainty in one fell swoop notwithstanding the risks that inhere in formulating wide-ranging rules for scenarios not presently before it.

The Rulemaking Court's aspiration is to maintain uniformity while pursuing a systematic and coherent body of law. Preference for Rulemaking may also imply rejection of the Adjudicating Court's premise that, over time, a series of narrow and fact-specific interventions will yield a coherent pattern. For one who is skeptical of the promise of such coherence—perhaps because it depends on an assumption of steady progression that faces challenge from fractured courts whose membership changes over time—the Rulemaking mode is the safer path to clarity and consistency.[103]

But along with the advantages of Rulemaking come risks. Due to the significant costs that can arise from giving wide application to a constitutional rule that turns out to be unsound or unworkable, a Rulemaking Court should seek as much information and engage in as much deliberation as practicable. Its tendency should be to allow extensive consideration by the lower courts before acting, and to consult an array of specialist amicus briefs in route to understanding the full scope of implications its rulings are likely to have. The Rulemaking Court must also ensure that it selects representative cases that pose the relevant issues as cleanly and fully as possible, so as to increase the chances that its pronouncements will be properly understood by lower courts and other stakeholders. It does little good, and may do considerable harm, for a Rulemaking Court to spend its time on cases that do not present generalizable and oft-litigated issues.[104] Likewise, the

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Blakely v. Washington, and *United States v. Booker* decisions effectively have resulted in disparate sentencing schemes around the country, notwithstanding that the relevant criminal punishment is being meted out by the same sovereign") (footnotes omitted).

103. *See* Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 8, 23 (William Twining ed., 1986) (arguing that when "cohesion has begun to break down [in a common law system] and a failure to achieve consensus becomes a commoner phenomenon, interest will develop . . . in the formulation of rules as to the use of authorities—that is to say warrants or proofs that this or that is the law").

104. *See* Schauer, *supra* note 59, at 222 (arguing with respect to the Supreme Court's decision in *Morse v. Frederick*, 551 U.S. 393 (2007), that "in reality the question the Court answered was one virtually unique to the case before it. And by answering that unique question, and studiously answering no other, the Court said virtually nothing relevant to the large number of school speech cases that actually occupy the lower courts . . . ."); *id.* at 226 ("Thus, on a topic on which there is a considerable amount of disputation and

Rulemaking Court should resist tarrying on error correction. Instead, it should use divisions among the lower courts as proxies for important, well-considered questions requiring focused resolution.[105] And, in recogition of the high stakes of broad rules and the substantial resources required to craft them, the Rulemaking Court should explain itself with great care and in great depth.

It follows that a Rulemaking Court should have a relatively small docket.[106] Concerns about a court's competence to engage in rulemaking are significantly reduced when the court has adequate resources to devote to each case. Developing a rule is less fraught when time pressures are minimized and capacity for research and reflection is ample. This is particularly true for courts that enjoy a robust infrastructure for decisionmaking. The U.S. Supreme Court (when operating at full strength) consists of nine Justices who are assisted by the opinions of lower courts, the submissions of counsel and amici, and the support of some three dozen law clerks along with research librarians and additional staff. Professor Hart was right to worry that a Supreme Court that issued 115 or 120 opinions in a Term might be "trying to decide more cases than it can decide well," provided that we equate good decisionmaking with the articulation of broad rules.[107] But the calculus is much different for a Supreme Court that decides only 75 cases per year. The combination of substantial resources and a slim docket gives the Justices a suitable framework for articulating wide-ranging rules without being concerned that cases are receiving inadequate attention. The Court may still make some unsound judgments, but its miscues will not be for lack of resources.

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litigation, it appears that the Court took the wrong case, or at least a highly unrepresentative one, and, having done so, proceeded to decide that case as narrowly as possible.").

105. *Cf.* William Baude, *The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 38 (2015) ("The [Supreme] Court does not reverse every error, or even every clear error, that comes through the door.").

106. *Cf.* Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 458–59 (1959) (Frankfurter, J., dissenting) ("Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that fruitful interchange of minds which is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions. It is therefore imperative that the docket of the Court be kept down so that its volume does not preclude wise adjudication.").

107. Hart, *supra* note 1, at 100.

Finally, it is worth noting that the adoption of a Rulemaking posture at the Supreme Court does not imply a similar mindset among the lower courts. It is possible, and perhaps sensible, for the Supreme Court to act as a Rulemaker even while the lower courts operate in Adjudicating mode. Pursuant to this division of responsibilities, the Supreme Court's constitutional interventions would be limited in number but rich enough to furnish analytical principles and doctrinal factors to guide the resolution of future cases. At the same time, the lower courts—operating individually and in conversation with each other—would develop the law through the repeated application of overarching principles to specific facts. The lower courts would fill in the details of the Supreme Court's doctrinal sketches, allowing the judicial department to leverage the benefits of Rulemaking and Adjudicating alike. The more general point is that institutions at different levels of the judicial hierarchy may adopt different decisionmaking modes in their shared effort to build out the meaning of constitutional law.

C. A NOTE ON TEXT AND STRUCTURE

Before closing this Part, we hasten to add that the text and structure of the Constitution have potential implications for a court's decisionmaking mode. Some commentators contend that Article III's case-or-controversy requirement demands a case-specific, incremental approach that forecloses attempts at broad rulemaking.[108] Others argue that the hierarchical structure of the federal judiciary creates a need for uniformity,[109] which is best achieved through the issuance of broad rulings by the Supreme

108. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1259 (2006) ("The constitutional function of the courts is to adjudicate—to decide cases. The Constitution does not explicitly grant to courts the power to make law."); *id.* at 1260 ("Courts make law only as a consequence of the performance of their constitutional duty to decide cases. They have no constitutional authority to establish the law otherwise."); *cf.* United States v. Windsor, 133 S. Ct. 2675, 2699 (2013) (Scalia, J., dissenting) ("Our authority begins and ends with the need to adjudge the rights of an injured party who stands before us seeking redress.").

109. *See, e.g.*, JAMES E. PFANDER, ONE SUPREME COURT 38–39 (2009) ("[C]onsiderations of uniformity and convenience brooked large in the Framers' thinking about the structure of the federal judiciary (as James Wilson's pyramidal conception of the federal judiciary nicely confirms)."); *id.* at 41 (emphasizing the Supreme Court's "responsibility to administer a uniform body of law and resolve the differences among lower courts," a responsibility that is implied by "the Framers' very conception of a unitary and hierarchical, rather than a plural and horizontal, judiciary").

Court.[110] Though these issues are exceedingly important, we have put them aside for present purposes. Our aim is simply to explore what a court's docket management and mode of decisionmaking reveal about the nature of its institutional role.

III. AGAINST GUIDANCE

Thus far we have explored two modes of common law decisionmaking in the constitutional domain. Rulemaking Courts frame their decisions in broad terms; Adjudicating Courts focus on the narrow application of law to specific facts. We have argued that the choice between these approaches carries implications for the way in which a court shapes constitutional discourse. An Adjudicating Court may present its individual decisions narrowly, but it must issue a relatively high number of those decisions in order to furnish adequate guidance to the legal community. As applied to the U.S. Supreme Court, it makes little difference whether such decisions are part of the Court's merits docket (which entails full briefing and argument) or whether they emerge in the form of summary reversals.[111] Either way, the Supreme Court must provide a sustained dialogue with the lower courts and other stakeholders. By comparison, a Rulemaking Court decides a smaller number of cases but compensates with wide-ranging opinions. Freed from the pressures of an onerous docket, the Rulemaking Court enjoys the capacity to treat every case as an occasion for extensive exposition.

These divergent approaches to common law judging embody a shared commitment to the Supreme Court's role in furnishing guidance about the meaning of constitutional norms. In this Part, we examine two decisionmaking modes that reflect a different conception of the Supreme Court's role—a conception, we shall argue, that resides outside the common law paradigms.

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110. *See, e.g.*, Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2009) ("[I]n our current judiciary, the Court can review only a fraction of the lower federal and state court cases raising federal questions. The Court must therefore make the most of the cases it does hear by issuing broad (maximal) decisions that guide the lower courts in the many cases that it lacks the capacity to review.").

111. *See* Baude, *supra* note 105, at 31 (observing that "[m]any of the Court's summary reversals appear to be designed to ensure that lower courts follow Supreme Court precedents").

A. RELUCTANCE

A court may decide a small number of cases *and* frame its decisions narrowly. This is the approach of a Reluctant Court.

The Reluctant mindset is evident in the Supreme Court's recent episodes of granting certiorari on, and then assiduously avoiding, significant constitutional questions. In *Bond v. United States*, for example, the Court had an opportunity to determine whether a ratified treaty can grant Congress lawmaking power not otherwise conferred via the Constitution's enumerated powers.[112] Although three Justices were willing to say the implementing statute exceeded Congress's authority, a majority of the Court avoided the question by reading the statute narrowly.[113] Similarly, in *FCC v. Fox Television Stations*, the Court stepped into a dispute over the First Amendment rights of the broadcast media.[114] Rather than addressing the (fully briefed) First Amendment question, the Court rested on the narrower ground that the FCC's failure to provide fair notice of the bounds of legality violated due process.[115] Situations like these illustrate the Court speaking sparsely as well as softly. Such is the predilection of the Reluctant Court.[116]

Such reluctance, we submit, falls short of discharging the primary obligations of a constitutional court operating in the

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112. 134 S. Ct. 2077 (2014).

113. *See id.* at 2088–93 (refusing to infer congressional intent to alter the federal/state balance in responsibility for criminal law); *id.* at 2098–2102 (Scalia, J., concurring) (addressing the underlying constitutional question).

114. 132 S. Ct. 2307 (2012).

115. *Id.* at 2320 ("[B]ecause the Court resolves these cases on fair notice grounds under the Due Process Clause, it need not address the First Amendment implications of the Commission's indecency policy."). This cautious tendency also seems to have migrated to the Court's resolution of major questions of statutory interpretation. In Bond, for example, the majority sought to cabin the reach of its non-textualist approach to the relevant statute, explaining that "[t]his case is unusual, and our analysis is appropriately limited" and justified by an "exceptional convergence of factors." Bond, 134 S. Ct. at 2093. *See also* Kiobel v. Royal Dutch Shell Petroleum Co., 133 S. Ct. 1659 (2013) (stretching the canon against extraterritorial application of statutes to avoid resolving whether the Alien Tort Statute applies to corporations).

116. Reluctance also marked the Court's decisionmaking in major cases during October Term 2015. Consider the birth-control-mandate cases, where the Court requested supplemental briefing in route to vacating and remanding on narrow grounds. *See* Zubik v. Burwell, 136 S. Ct. 1557, 2016 WL 2842449 (2016). Or consider the Court's similar decision to avoid a challenging standing question in Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 2016 WL 2842447 (2016). Even if these instances of reluctance owe to the absence of a ninth Justice who could settle 4-4 splits, they resemble similar examples in recent years during which the Court was operating at full strength.

common law tradition. A court that speaks both rarely and guardedly fails to provide the requisite clarity and certainty regarding the content of constitutional norms.[117] Of course, it does not necessarily follow that Reluctance is unjustifiable. For starters, a Reluctant Jurist might believe that the Adjudicating mode is not as effective as its champions claim. One need not go so far as to accept Jeremy Bentham's argument that the common law is "dog law"[118] in order to conclude that requiring people to predict the arc of precedent is a precarious method of securing rights and facilitating coordination and cooperation.[119] Not every lawyer, let alone every citizen, can intuit the direction of a common law that changes even as its rules are applied.

Anxieties about the effectiveness of judicial guidance might also trace to the Supreme Court's nature as a multi-member tribunal. The issuance of practical guidance via frequent, incremental interventions is most effective when judges operate with a shared sense of reasonableness about the content and contours of constitutional doctrine—in other words, when there is a "convergence of judgment on common solutions."[120] As we noted in Part I, the Adjudicating model depends on the assumption that a line of narrow decisions eventually will produce a coherent legal rule. That prospect may be put in jeopardy by a sharply divided court whose changing composition often generates sharp deviations in litigated outcomes. Rather than

117. *Cf.* Schauer, *supra* note 59, at 227 (arguing that "[i]n recent years the Court has appeared especially unconcerned with the guidance aspect of its work, and has perhaps taken to heart a bit too much the importunings of those who would have it act minimally and decide merely 'one case at a time'").

118. Jeremy Bentham, *Truth Versus Ashhurst*, *in* 5 THE WORKS OF JEREMY BENTHAM 235 (John Bowring ed., 1843) ("When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me."). Bentham's analogy is ghastly, but it underscores his disdain of the retroactivity he saw in the common law. (Incidentally, as pet owners, we would suggest that the positive reinforcement of good behaviors makes for a far more humane and effective jurisprudence of dog law.)

119. *Cf.* RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 125 (2012) ("Public promulgation and canonical formulation [in legislation] make the legal change easier to locate and grasp than that found in unwritten custom or in the best understanding of a line of cases."); Yowell, *supra* note 99, at 121 (arguing that "clarity is best achieved by making law through legislation" in "codes and statute books" and that the common law is an "inferior mode of lawmaking that deviates from rule of law values in important respects").

120. Postema, *supra* note 30, at 10; *see also* Simpson, *supra* note 103, at 21–22 (emphasizing the importance of normative cohesion and consensus in the classical common law tradition).

facilitating the gradual crystallization of legal principles, a series of interventions by a vacillating or sharply divided Supreme Court may lead to cloudiness and confusion.[121]

But the wide-ranging, forward-looking, and canonical statements that characterize the Rulemaking Court create their own concerns. Perhaps the cases that come before the Court, even if they have been carefully vetted, provide an unrepresentative view of the relevant field. The equities of particular cases might also skew efforts at broad rulemaking in ways that subsequent revisions cannot cure.[122] Furthermore, one might conclude that the Supreme Court's mandate to act only in reaction to particularized cases and controversies limits its effectiveness in controlling its rulemaking agenda. And there is the additional worry that, as compared to legislators or expert administrative agencies, generalist judges simply lack the competence to craft broad decisions, no matter how many law clerks, amicus briefs, and spare hours they have.[123] In the most extreme case, a Supreme Court Justice who harbors these concerns might favor retracing the steps of Bentham, who began by seeking to improve the common law through the use of forwarding-looking rules only to abandon that project in favor of a comprehensive code that minimizes judicial discretion.[124]

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121. This phenomenon can be seen in vexing areas of jurisprudence such as the application of the Establishment Clause. *See* Steven G. Gey, Vestiges of the Establishment Clause, 5 FIRST AMEND. L. REV. 1, 4 (2006) ("One of the few things constitutional scholars of every stripe seem to agree about is the proposition that the Court's Establishment Clause jurisprudence is an incoherent mess.").

122. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883 (2006). *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (identifying the limits of adjudication in resolving complex, polycentric social problems).

123. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279, 319 (1987) (explaining, in considering the constitutionality of capital punishment, that legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts") (quotation omitted); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 242–43 (2006) (doubting the Court's "competence to evaluate moral arguments [presented in materials like the "Philosopher's Brief" on a constitutional right to assisted suicide] and also to ask about facts and incentives" relevant to policy choices); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 755–58 (2008) (arguing that as compared to agencies' ability to undertake "wide-ranging investigations," a lay judge's understanding will "be fragmentary and quite likely outdated"); *cf.* Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 DUKE L.J. 1013, 1019 (1998) ("[A]gencies have become modern America's common law courts, and properly so.").

124. *See* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 191–217 (1986) (tracing this evolution of Bentham's thought).

Given the drawbacks of both Adjudicating and Rulemaking, the argument goes, the Supreme Court should free itself of the idea that its interventions are invariably positive from the standpoint of legal guidance. Instead, it should adopt a posture of reluctance: It should inject itself into constitutional debates only on rare occasions, and it should say as little as possible even then. Put differently, the Reluctant Jurist concludes that the common law ideal, whatever its merits in other times and contexts, should not be the animating vision of constitutional law in our large, complex polity.

This position, though, is unpersuasive. Even a Reluctant Court will need to explain its reasons for its comparatively rare interventions, if only to ensure that parties avoid hitting a particular constitutional tripwire again and again. Unless the Court is to reject judicial review entirely or limit itself to summary affirmations and reversals without opinion, the creation of constitutional doctrine is inevitable. A Reluctant Court accordingly must consider how best to offer authoritative guidance through what small dollops of doctrine it develops. In doing so, it has little choice but to try to overcome the challenges that led it to doubt the common law ideal in the first place.

The challenges of developing clear constitutional doctrine are not the only possible explanations for judicial reluctance. Perhaps a court is reluctant because it believes that, within a democracy, much of the content of constitutional law should be developed through mechanisms outside the judiciary.[125] For example, Keith Whittington has argued that matters of constitutional construction—by which he means judgments made "in the interstices of discoverable, interpretive meaning"—are the provinces of democratic politics.[126] He argues that "where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules,"[127] any "efforts by the courts to fill remaining gaps in the law represent political choices."[128] While the courts may legitimately engage in

125. *Cf.* Schauer, *supra* note 23, at 458 ("A judge who makes law is simultaneously deciding not to defer to some other lawmaking institution.").

126. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 5 (2001); *see also* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

127. WHITTINGTON, *supra* note 126, at 5.

128. Keith E. Whittington, Constitutional Interpretation 157 (1999).

construction by "provisionally maintaining constitutional understandings widely shared by other political actors," they may not go any further. Acting as "innovators on behalf of constitutional understandings that are not widely shared by other political actors" would strain the legitimacy of their behavior.[129]

Building from this type of analysis, one might defend the Reluctant Court as properly cognizant of the limits of its authority to resolve political debates without the anchor of determinate positive law (such as constitutional text) or widely shared constitutional understandings. On this account, the Reluctant Court is principally concerned with issues other than the judicial development of constitutional rules and principles.

Yet that depiction is difficult to square with the modern Supreme Court's insistence on preserving and exercising its *Marbury*-given right to announce the content of the law. It is conceivable that the Court might someday move systematically in the direction of political deference to avoid trespassing into constitutional spaces that belong to the people and their politics. At present, such deference is sporadic at best. If the Court wishes to establish for itself a principled reluctance, it has the burden of explaining the reasons behind that approach, the attendant conceptualization of the judiciary's role in constitutional discourse, and the manner in which it will bring its judgment to bear consistently across cases.

B. EXPERIMENTING

Standing in opposition to the Reluctant Court is the Experimental Court. Like the Adjudicating Court, the Experimental Court seeks to resolve many cases. But in crafting its opinions, the Experimental Court pursues the broad guidance and deep reasoning associated with the Rulemaking mode of decisionmaking.

The Experimental Court brings our project full-circle to the concerns expressed by Professor Hart. Deep and broad rulemaking in case after case would test the Supreme Court's institutional capacity. The likely result would be the proliferation of unsound and short-sighted decisions. The Experimental Court might respond by using its large docket for frequent course

129. Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 129 (2010).

corrections over time. But the inevitable switchbacks, blind alleys, dead-ends, and U-turns on the road to equilibrium would levy a heavy toll on the legal system. In the worst-case scenario, the Experimental Court might even become a Flailing Court, driving the polity down roads to nowhere, or at least nowhere worthwhile. That type of Court is most vulnerable to the kind of criticism that Professor Hart levied: sacrificing quality to quantity and deliberation to haste.

CONCLUSION

This Essay has considered the relationship between the Supreme Court's management of its docket, its mode of decisionmaking, and its institutional role. Along the way, we have drawn distinctions between the nature of a Rulemaking Court, an Adjudicating Court, a Reluctant Court, and an Experimental Court. In reality, of course, the modern Supreme Court is all these things, and more. Sometimes it acts as an eager Rulemaker, reaching out to settle an area of law and to direct the law's path forward. At other times it is an Adjudicator, becoming interested in a particular issue and developing it—narrowly, methodically, incrementally—over the course of years. In still other contexts, the Court is Reluctant, limiting its own role even when constitutional disputes are squarely presented for resolution. Finally, the Court may be Experimental, aggressively expanding its docket and sweeping broadly as it goes. These competing approaches are all the more salient because debates over the Court's institutional role often arise within the context of hot-button controversies. Depending on one's perspective, the same case might implicate the judicial "province and duty" to "say what the law is" or the constitutional imperative for judges to limit themselves to the "particular cases" in front of them—with both precepts tracing their lineage to no lesser authority than *Marbury*.[130]

An eclectic or undulating vision of the Supreme Court's role is not necessarily untenable. But there must be some reason why the Court is willing to intervene repeatedly in certain areas—thus opening up the possibility of operating as an Adjudicating

130. *Compare* U.S. v. Windsor, 133 S. Ct. 2675, 2688 (2013) (invoking "say what the law is" language), *with id.* at 2703 (Scalia, J., dissenting) (invoking "particular case" language).

Court—even as it engages with other issues in sporadic fashion.[131] Is the Court more comfortable with the Adjudicating or Rulemaking mode? Does its choice owe to considerations of constitutional structure, political philosophy, pragmatic calculus, or otherwise?[132] Alternatively, is ours an era in which the Court's self-imposed mandate is not to lead, but to follow? If so, is the Court's rationale for this understanding related to institutional competence, or capacity, or a resetting of the constitutional separation of powers? Is it simply a tactical ceasefire between Justices who cannot agree on a methodology of constitutional interpretation?[133] And in all events, what vision of the Court's institutional role do the Justices employ to guide their actions (and inactions)? Only upon answering these questions can we determine what kind of court we have.

Ultimately, the Supreme Court's discretionary docket isn't so discretionary after all. To be sure, the Court remains in charge of choosing its own cases. But its approach to case selection creates obligations for its crafting of opinions. We sometimes talk of the Court's certiorari decisions as distinct from its "merits docket." That distinction should not obscure the relationship between case selection and opinion writing. It is the interplay between docket management and decisionmaking style that defines the role of the Court.

131. *Cf.* Carrington & Cramton, *supra* note 30, at 606 (arguing that the Court's certiorari practice is unprincipled and lacks transparency).

132. *Cf.* Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 YALE L.J. 949, 950–51 (1992) (distinguishing a depiction of the Supreme Court as a "paradigmatic common law adjudicator" from a depiction of the Court as a "Council of Revision" empowered to "veto[] legislation on grounds of morality or prudence, not just irreconcilability with constitutional commands").

133. *See* Owens & Simon, *supra* note 7, at 1224.