RULES, THE RULE OF LAW, AND THE CONSTITUTION

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Traditionally, people have equated the rule of law with the rule of rules. What is good about the rule of law, so it is said, is its generality and consequent impersonality. The virtues of the rule of law reside in the way in which law avoids situational particularity, and thus in the way law tries to be comparatively acontextual. We prefer the rule of law to the rule of men [sic] because we are concerned to minimize unconstrained discretion. The rule of law is seen to express a preference for *what* you are over *who* you are, for what type of thing you did rather than what precisely you did here. The virtues of the rule of law, therefore, traditionally characterized in terms of a preference for generality and a preference for decision according to types and not particulars, are seen to resemble those virtues commonly associated with decision according to rules.

Only recently have people begun, quite justifiably, to question the conflation of the rule of law with decision according to rule.[1] Recognizing the distinction between the rule of law and the rule of rules is long overdue, for rules are simply not universal goods. They reduce sensitivity to the circumstances of individual events; they preclude, at least partially, full attention to the context in which legal decisions are made; and they block empathy with particular claimants and particular victims.[2] In attempting to disable wicked, misguided, or simply incompetent decisionmakers from doing wrong, rules also disable wise, well-intentioned, and capable decisionmakers from reaching the optimal results in individual instances.[3]

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1. *See, e.g.*, Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in JUSTIFICATION 71 (J. Pennock & J. Chapman eds. 1986); Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

2. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

3. *See* Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 YALE L.J. 561 (1977); Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

Because rules thus entail a panoply of detriments accompanying their alleged benefits, it is hardly obvious that decisionmaking according to rule need be the only decisional mode employed by the state. Moreover, it is not much more obvious that decisionmaking according to rule should be the only decisional mode employed even by those decisionmaking institutions commonly called "the legal system." Indeed, equating legal decisionmaking of legal institutions with decisionmaking according to rule may be as descriptively inaccurate as it is normatively dubious. Equity, for example, was originally conceived as precisely a method for avoiding the inevitable over- and under-inclusiveness of rule-bound decisionmaking,[4] however much our current rule-soaked practice of equity has departed from that original understanding. But even now, numerous other decisionmaking modes within the formal legal system are designed to maximize sensitivity to all of the facts of a particular case, rather than restrict a decisionmaker to some narrower class of more repeatable and easily identified facts. Thus, the advantages of rules frequently give way to other virtues, as in the focus on "the best interests of the child" in custody determinations, the range of considerations taken into account in sentencing (and especially capital sentencing) determinations, and the substantially contextual decisionmaking processes of numerous administrative agencies.[5]

"The rule of law," however, is a phrase whose positive emotive content cannot easily be jettisoned. Insofar as legal systems are perceived to have achieved some measure of success, "the rule of law" becomes synonymous with "the good things about the legal system." As we increasingly recognize that many desirable features of some legal systems avoid rule-based decisionmaking, we thus encounter a terminological problem. The traditional terminology treats "the rule of law" as entailing decision according to rule, and also as making a positive statement about that form of decisionmaking. But when we recognize that some of the good things about the legal system do not involve acontextual rule-based decisionmaking, there is, quite properly, an effort to ensure that we also attach the positive emotive associations of the phrase "the rule of law" to some number of comparatively rule-free decisional modes. Thus, "the rule of law" might legitimately be used to refer not only to rule-based decisionmaking, but also to non-rule-based decisionmaking incorporating other arguably desirable features. Among these would be public written explanation and justification of results, de-

4. Indeed, this is the conception of equity we inherit from Aristotle. ARISTOTLE, ETHICS 127 (D. Chase trans. 1937).

5. *See* Coons, *Consistency*, 75 CAL. L. REV. 59 (1987).

cisions made only after hearing both sides, decisions made by decisionmakers not directly related to the parties and their interests, and decisions made by decisionmakers comparatively removed from the ephemeral ebbs and flows of the partisan political process. This list is far from complete, and other virtues could be added, all of which would be compatible with a particularistic and contextual avoidance of the constraints of rules.

If we include within the phrase "the rule of law," and therefore include within the very idea of law, this wide a range of techniques and institutions, the question whether constitutional law is "really law" becomes trivially true, and so does the related question whether constitutional decisionmaking *ought* to be legal in its practice. Under this approach, we discover, not surprisingly, that constitutional adjudication becomes, by definition, an exemplification of decision according to law. This attempt to encompass within "the rule of law" diverse decisional modes ought to be welcomed and not condemned. It appropriately reminds us that other forms of decisionmaking might be properly situated within the government in general and the formal legal system in particular. Moreover, expanding the ambit of "the rule of law" usefully reminds us that adjudication, even constitutional adjudication, differs from day-to-day partisan politics in important and sometimes advantageous ways even when it does not operate substantially in rule-constrained mode.

Once we have cleared away the definitional underbrush created by the quite understandable desire not to cede the emotive associations of the "rule of law" entirely to rule-based decisionmaking, we can still ask what is desirable at all about rule-based decisionmaking, and where in the legal system it should be employed. My goal here is to do this with constitutional adjudication. I want first to clarify briefly the very idea of rule-based decisionmaking, and then to think about whether that method ought to be employed for constitutional decisionmaking. Even a negative answer to that question ought not, as I have said, to delegitimate the "legal" status of constitutional law, but it might show the nature of the constitutional enterprise in a different light.

I

Our question has thus been transformed, narrowed, and clarified: To what extent does, and to what extent should, constitutional law exist as an enterprise substantially involving rule-bound decisionmaking? But in order to focus on *this* question, I must address first the general idea of rule-bound decisionmaking. What is it to

make decisions according to rules? And just what *is* a rule, anyway?

In answering this question, I do not want to rely on what might or might not be labelled a "rule" in ordinary language. Instead I want to distinguish two different forms of decision. I believe one has a more comfortable affinity with the ordinary language use of the word "rule" than does the other, but nothing turns on this linguistic intuition. I could as easily label the two forms of decision "Mutt" and "Jeff," and then ask whether constitutional decision-making should be in the Mutt mode or in the Jeff mode.

Although it is conventional to distinguish prescriptive from descriptive rules, there is an intriguing similarity between the two. Initially, of course, the distinction and not the similarity jumps out at us. "As a rule it is windy in March" is different from the Rule in Shelley's Case, just as the law of France differs from the law of gravity, and Newton's First Principle differs from the Principles of Equity. Rules that merely describe an empirical regularity are commonly and properly taken to be importantly different from rules that attempt not to describe the world but to exert pressure on it.

Despite this difference, however, descriptive and prescriptive rules share the property of *generality*. Just as one cannot descriptively generalize about only one instance, so too would it be incorrect to describe as a prescriptive rule a particular command, or a particular order. Rules, prescriptive as well as descriptive, speak to types and not to particulars.

It may turn out, however, that in the circumstances of application some item or event that is in fact within the generalization, that is an instance of the articulated type, is now seen to be inappropriate for the treatment previously prescribed for *all* members of the class. Thus, some number of events represent *recalcitrant experiences* from the perspective of the current generalization. One variety of recalcitrant experience is the over-inclusive rule. The confrontation between the "No vehicles in the park" rule and Fuller's example of the vehicle used as part of a war memorial is an apt example of precisely this variety of over-inclusiveness,[6] but

6. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958), *responding to* Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 608-12 (1958). Actually, Fuller's example is defective insofar as the possibility exists that it is definitional of a vehicle that it have current locomotive capacity. The essential point of the example is that the instance presented be within the rule's formulation but not within its purpose, and thus David Brink's example of a police car might be better. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHI. & PUB. AFFAIRS 105, 107 (1988).

other examples are all around us. The "No dogs allowed" sign in the restaurant seems to include within the generalization "dogs" seeing-eye dogs as well as the kind of dogs that ought to be excluded, and restricting the franchise to persons eighteen years and older precludes from voting some number of informed, perceptive, and intelligent seventeen-year olds.

It should come as no surprise that constitutional law is replete with examples of such over-inclusiveness. Justice Stevens's opinion for the Court in *Keystone Bituminous Coal Association v. DeBenedictis*[7] fits this mold, for in that case he made it clear that the over-inclusive generalization that is the contract clause included within its literal scope some number of instances that ideally would not be included within that clause.[8] For those who read the phrase "the freedom of speech" as synonymous with "speech," (and I am not one of them[9]), a wide range of communicative activities not even remotely related to the idea of free speech seem linguistically encompassed by the free speech clause. Similarly, the equal protection clause might be seen as touching a far wider range of inequalities than those that are, under any conception, constitutionally problematic. And although these examples are statutory rather than constitutional, the same phenomenon of over-inclusiveness has arisen recently with respect to the tension between the language and purpose of both the Civil Rights Act of 1964 and of the Pregnancy Disability Act of 1978.[10] With respect to the interpretation of each of these statutes, the simple sameness of treatment arguably literally mandated by the text of the law[11] was in some tension with what was thought to be the purpose of the statutes. Any event within the linguistic contours of a generalization but outside of the purpose of the rule illustrates the potential over-inclusiveness of any general-

7. 480 U.S. 470 (1987).

8. "Unlike other provisions in [article I, section 10], it is well-settled that the prohibition against impairing the obligation of contracts is not to be read literally." *Id.* at 502.

9. Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979). I am hardly unique in holding this view. *See, e.g.*, A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19 (1948); M. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT sec. 2.01 (1984); Van Alystyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107 (1982).

10. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-89 (1987); United Steelworkers v. Weber, 443 U.S. 193, 201 (1979).

11. The issue seems presented more clearly in *CalFed* than in *Weber*, for a literal reading of "the same" in the Pregnancy Disability Act seems less reconcilable with an affirmative action program than does the "discriminate against" language in Title VII of the Civil Rights Act of 1964.

ization, and shows one way in which recalcitrant experiences may arise.

Alternatively, a recalcitrant experience may be presented when the extant generalization turns out to be *under*-inclusive. Are bears, for example, excluded by a sign prohibiting "cats and dogs" from the elevator?[12] May I ride my bicycle across a lawn on which is posted a "Do not walk on the grass" sign? Again, we can see embodiments of the same phenomenon of under-inclusiveness in constitutional law. It may turn out, for example, that there now appear to be good reasons for including within the scope of the eleventh amendment suits by citizens against their own states, but the existing generalization seems not to reach that far, precluding federal jurisdiction only in cases in which a citizen of one state seeks to sue *another* state.[13] Under the same literal ("speech" means speech) reading of the free speech clause I referred to in the previous paragraph, arm bands, picket signs, flags, and oil paintings seem not to be included within the scope of the protection of freedom of speech.

The most common form of under-inclusion, as in the "cats and dogs" example, is the incomplete list. A recalcitrant experience is presented whenever a certain power appears to be one that Congress ought to have in light of the deeper justifications for congressional power, yet is not found in article I, section 8, or any other parts of the Constitution giving power to Congress. The incomplete list also arises with respect to limitations on governmental powers. Insofar as the particular rights listed in the Bill of Rights, for example, represent the instantiation of some deeper principle or principles, some other right can be seen to emanate from the deeper principle yet not be contained on the textually enumerated list. The right to privacy is the most currently prominent example of this phenomenon, but there are others as well. Consider the Court's determination in *In re Winship*[14] that the right to put the prosecution to proof beyond a reasonable doubt, while not textually enumerated, would nevertheless be taken to be as constitutionally mandated as are the specifically enumerated protections.

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12. I owe the example to my colleague Doug Kahn.

13. *See* Monaco v. Mississippi, 292 U.S. 313, 329-30 (1934); Hans v. Louisiana, 134 U.S. 1, 9-10 (1890).

14. 397 U.S. 358 (1970). It is true, of course, that the due process clauses of the fifth and fourteenth amendments provide a textually respectable grounding for the authority to add to an enumerated list, especially a list of procedural protections available to a criminal defendant. The ninth amendment can be said to serve parallel purposes. But that those provisions *can* be so interpreted does not mean that they *must* be interpreted as effectively adding "*E.g.*," at the commencement of the Bill of Rights. Given the due process clauses and the ninth amendment, such a course seems textually permissible. Whether it is desirable is another question, one that goes to the very questions I seek to address here.

These and numerous other examples demonstrate the way in which a rule necessarily applies its normative pressure to a *category*, a category that is the instantiation of some deeper justification.[15] Sometimes, the category selected to instantiate the justification may appear to be maximally precise at the time of selection. Yet with the unfolding of reality subsequent events may challenge the previously assumed congruence between instantiated category and justification.[16] The rights listed in 1791 in the Bill of Rights may have been at the time the only ones thought necessary to further the deeper purposes behind the Bill of Rights. Only with the passage of time and changes in the world do the assumptions made at the time of crafting the rule become questionable. Only when a different world makes government data banks more of a problem than the quartering of troops in private homes do we need to ask whether the Constitution is strongly rule-bound.

More commonly, rules are not created with the expectation that every member of the instantiated category will fit the justification. We know in advance that not every person over eighteen is qualified to drive, to drink, or to vote, and we know that not everyone over seventy is unqualified to work. We know that not everyone who owns more than ten percent of the shares of a corporation is privy to inside information, and we know in advance that not every act of price fixing is economically disadvantageous. Still, the identified category is statistically relevant to the deeper goal or danger, and thus the rule does not seem arbitrary. But although the rule is not arbitrary, some cases will still exist in which the generalization is inapt. What is true for most cases may not be true for this one.

Thus, rules incorporate and apply their prescriptive pressure to a category bearing at least a probabilistic relationship to the justification undergirding the rule. Rules get interesting, however, when some member of the category is within the category as stated but not within the background justification. What is to happen in such cases? Under one approach, the instantiated category operates merely as a rule of thumb. It has no intrinsic normative weight, so

15. This deeper justification, or purpose, need not be based either on history or on the actual intentions of those who wrote the text. I distinguish the purpose of a rule from the psychological states of those who drafted it.

16. It might have been thought at the time of creating the category of "vehicles" in the "no vehicles in the park" rule that *all* (and only) vehicles would fit with the purposes of the justification (say, elimination of noise, or danger, or fumes) that inspired the rule in the first instance. But then we are presented with the possibility that some vehicles, for example police cars or vehicles serving as statues, are still within the instantiated category while not serving the justifications that inspired that category. Then and only then do the central tensions of ruleness appear.

an event being a member of the instantiated category supplies no decisional weight beyond that supplied by the event falling within the scope of the background justification. Under the rule of thumb approach, therefore, the rules themselves add nothing, and become continuously defeasible in the service of their generating justifications.

By contrast, we can imagine a decisional process in which these instantiated categories are *entrenched*. That is, their existence *qua* category provides a reason for decision (although not necessarily a conclusive one) even in those cases in which the item falling within the instantiated category does not fall within the background justification. This decisional process gives intrinsic weight to the very fact of instantiation, or crystallization. It is this mode of decisionmaking that I want to refer to as rule-based decisionmaking.

Thus, a rule as I conceive it is a characterization of a relationship between an instantiation (at whatever level) and its background justification. Rules exist when, and insofar as, the crystallized instantiation is itself capable of providing a reason for action. To put it differently, when the crystallization offers at least some resistance to applying the background justification directly to the case at hand, then and only then can we say that the crystallization is a rule. When the fact that the rule excludes vehicles provides a reason to exclude vehicles even when the justification behind the rule is not served, the rule operates in the strong sense I am now describing. When the fact that the Pregnancy Disability Act of 1978 prescribes that pregnant and non-pregnant people shall be treated "the same" is taken at least to constitute an impediment to a program favoring pregnant women, we again see the operation of a rule in this sense. Similarly, when the facts that the Bill of Rights refers to speech but not privacy, that the fourteenth amendment applies its strictures only to "states," and that the Constitution provides a right to counsel but not to proof beyond a reasonable doubt are taken to be *problems*, rules can be said to exist in substance as well as in form.

II

We have now seen what rule-governed decisionmaking looks like, and we have seen earlier that not everything entitled to the appellation "law" need necessarily take place in rule-governed mode. We can now turn to the central question. When, if at all, should constitutional law operate in rule-governed mode?

The answer to this question is likely to vary depending on which facet of constitutional law is before us for inspection. If we are asking questions about the appropriate style of constitutional

decisionmaking, we must know what a constitutional decision is. Let us look at some examples. Consider the following constitutional decisions: a police officer deciding whether to obtain a warrant before searching a suspect; a police officer deciding whether to warn a suspect prior to interrogation; a clerk at the park department or the highway department deciding whether to withhold a parade or picnic permit because the applicant is the Communist Party of the United States; a governor of a state considering whether to introduce legislation banning the sale of wine produced in other states; a school official deciding whether to assign a black child to a school that she thinks already has too many blacks; a president deciding whether to consult with Congress prior to taking hostile action against another nation; and so on.[17]

In all these cases, a governmental official is faced with several courses of action, some of which might be constitutionally created, others of which might be constitutionally required, and still others of which might be constitutionally prohibited. Let us call this the category of government decisions with constitutional implications.

Now let us turn to a second category of constitutional decisions—those likely to confront courts other than the Supreme Court. Consider, then, the following putative constitutional decisions: whether a trial judge in instructing the jury in a criminal case should observe that the defendant's refusal to testify in her own defense is probative of her guilt; whether a trial judge, prior to the decision of the Supreme Court in *Palmore v. Sidoti*,[18] should have considered the effects of an interracial remarriage in determining which custodial arrangement is in the best interests of the child; whether a trial judge *subsequent* to *Palmore* should have considered that factor; whether a trial judge should dismiss an indictment for disturbing the peace by virtue of the defendant having claimed that numerous scientists had demonstrated conclusively that blacks were genetically less intelligent; whether a federal district court judge sitting in the Fifth Circuit should in 1988 uphold against constitutional attack an anti-pornography ordinance worded identically to that struck down in *American Booksellers Association v. Hudnut*;[19]

17. Obviously many refinements could be added. We could distinguish elected from appointed officials, state from federal, Congress from the president, and so on. We could also distinguish cases in which the constitutional implications come directly from the text (President Reagan's decision whether to run for a third term) from those in which the constitutional implication, while having a textual provenance, comes more immediately from a court decision (the police officer's decision whether to warn a suspect prior to interrogation that anything he says may be used against him). But for the present these refinements are unnecessary.

18. 466 U.S. 429 (1984).

19. 771 F.2d 323 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986).

and whether a federal district court judge sitting in the Seventh Circuit should reach the same conclusion.

Again, various refinements of this picture of lower courts are plausible, but the refinements need not detain us here. The important point is that there are some number of cases that might be presented to a lower court in which higher court constitutional decisions might seem to require an otherwise undesirable result from the perspective of the then-deciding court, or seem to prohibit what would appear to the deciding judge to be an otherwise desirable result, or, much more commonly, establish the framework in which the issues are to be perceived. Even though the process of judging may require a great deal of judgment, a lower court constitutional decision in a defamation case will still lie within the framework for analysis created by *New York Times Co. v. Sullivan*[20] (Is it open to the trial judge, for example, to place great weight on the fact that the plaintiff, although a public official, had performed a number of good deeds in the past? Can the judge also take as relevant the fact that the same public official would not have accepted the job had she known the kinds of things that might be said about her?). Similarly, what is relevant and what is irrelevant in a search-and-seizure case will have been determined by some number of Supreme Court cases. What can be taken into account in response to a claim that a piece of federal legislation intrudes on the prerogatives of the states will be different after *Garcia v. San Antonio Metropolitan Transit Authority*[21] than before. With respect to constitutional decisionmaking in the domains just described, it appears that the prevailing view (and practice) is that such decisions should take place within an environment that is moderately to severely rule-bound. Rarely, of course, do decisionmakers situated as are these have to confront uninterpreted constitutional text, or uninterpreted constitutional "raw material" of any kind. Instead, the most common source of constitutional mandate for these officials comes from Supreme Court decisions, and, for officials and trial judges, from decisions of appellate courts other than the Supreme Court. When a rule laid down by the Supreme Court or a higher court seems confronted with a recalcitrant experience from the perspective of the governmental official or the trial judge, we seem often to expect the decisionmaker to be constrained by the rule, rather than to take the rule as a defeasible marker for what that decisionmaker perceives to be that rule's underlying justifications or purposes. Thus the issue is the attitude that various government officers—the cop on the beat,

20. 376 U.S. 254 (1964).
21. 469 U.S. 528 (1985).

the assistant district attorney, the Attorney General of the United States, the Chairman of the Joint Chiefs of Staff, the Director of the Central Intelligence Agency, the Marine Corps colonel on national security assignment, and the judge of the municipal court in Livonia, Michigan—should have to what appear to them to be constitutional rules emanating usually from higher courts, but occasionally from the constitutional raw material itself.

When the question is posed in this way (especially with this array of deliberately tendentious examples), the virtues of constitutional decisionmaking in a strongly rule-bound way become somewhat more palatable. There are obviously cases in which the purposes behind *Miranda v. Arizona*[22] would not be served (and might even be frustrated) by giving a *Miranda* warning, but we are wary of having the cop on the beat make this determination. Instead, something in us wants to say "Just *do* it" to the police officer, for we fear that the authority to determine whether *Miranda*'s justifications are applicable in a particular case will in practice result not in a furtherance but in a frustration of that purpose.

The same perceptions seem to apply to various other governmental officials. When Colonel North claims, in effect, that the purposes behind the constitutional separation of powers with respect to war and national defense are best served, in an age of modern warfare and modern communications, by the actions he took, much of society responds quite properly that making those determinations is simply not his job. If the constitutional allocation of functions is obsolete in light of modern conditions, Colonel North is not the one, many of us say, to compensate for that obsolescence.

Similarly, various Supreme Court tests might be worded in such a way that they appear to generate in particular cases results at odds with the purpose behind those tests, or with a better conception of constitutional law in general. Life is richer than any three-part test, and thus some of those tests (rules by any other name) may appear sometimes to generate the wrong result, as when literal application of *Brandenburg v. Ohio*[23] to the disclosure of plans for a nuclear weapon seems to be excessively protective to a lower court judge.[24] Again, however, part of the understanding of many Americans about constitutionalism includes within that understanding the expectation that lower court judges, when the mandates of a Supreme Court case are linguistically clear, will quite simply "Just *do* it."

22. 384 U.S. 436 (1966).
23. 395 U.S. 444 (1969) (per curiam).
24. *See* United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

Now these perspectives on the constitutional responsibilities of cops, constables, and colonels are far from self-evident. Rules do not determine their own application, or even their own force. Thus the issue is *whether* the rule-formulations appearing in the constitutional text and in Supreme Court opinions will be treated as rules in the strong sense I have outlined above, or will instead be treated as rules of thumb, useful in guiding the preliminary thought of the officials we are discussing, but without the power to provide substantial normative pressure against the determinations of those officials as to what a deeper set of justifications and norms in fact requires in the individual case. This latter view is by no means implausible, although it is one I find ultimately unpersuasive for most of the officials I have been discussing. But my point here is only to identify the plausibility of the rule-bound position. Even if in the end it is found unpersuasive with respect to the understanding of rules a society expects its law-enforcement and other officials to have, it is hardly an unreasonable position. Indeed, I would expect that, especially when we are thinking about the cop on the beat, the municipal court judge, the Attorney General of the United States, or Colonel North, it is a congenial position for most academic American constitutionalists. And if that is right, then it cannot be denied that a strongly rule-bound, acontextual, and non-particularistic perspective on constitutional norms has its place within the large universe of constitutional decisionmaking.

III

What, then, of the constitutional decisions of the Supreme Court? Should they too be rule-based in the strong sense of rule I have been relying on here?[25] To answer this question, we might want to expand our understanding of the source of the constitutional rules that could putatively bind a court not subservient to any higher court.

One source of such rules might be the constitutional text. Should it *make a difference*, for the Supreme Court, that privacy is not enumerated in the Bill of Rights although other specific rights

25. I admit that my "strong" sense of a rule is a "narrow" sense to others. Just as there is a positive emotive component to the word "law," so too is there often the same for "rule." To repeat, I disclaim pretensions to definitional imperialism. Those who would describe as rule-bound the common-law process, where rules can be and are remade at the instant of application, are not misusing the language. *See* Burton, *Law as Practical Reason: The Rhetorical Hypothesis*, 63 S. CAL. L. REV. (forthcoming 1989); Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987). Still, there is a crucial difference between that decisional mode and one in which rules are not subject to revision at the moment of application, and it is that difference that I want to mark with the rule/non-rule distinction, however stipulative my terminology may appear.

are? Should it make a difference that the eleventh amendment speaks of "another" state rather than simply of "states"? Should it make a difference that some powers that Congress seeks to exercise might only with difficulty be squeezed into the enumerated list in article I, section 8? Should it make a difference that neither article II nor any other part of the Constitution speaks of executive privilege, or of inherent emergency powers of the president, or of inherent foreign policy powers of the president? Should it make a difference that the power to declare war against foreign nations is textually reserved to Congress? Should it make a difference that the Constitution restricts the Presidency to the native-born, and membership in the Senate to those thirty years old or over?

This is not to say that in any or all of the decisions to which I have alluded the text need be taken as dispositive under a rule bound approach. But if the text is to be taken to constitute some sort of strong rule (and I have yet to say that it should), then these textual provisions applicable to the questions I have just raised would at the very least create argumentative burdens that would not otherwise exist.

Rule-based constraint might also come from the original intentions of the framers. The various theoretical and epistemological problems involved in such constraint have been well rehearsed in the last decade,[26] but again we should be careful not to let our newly-found sophistication provide too easy an escape from some hard questions.[27] Should it be a problem that the framers of the fourteenth amendment might not have intended to guarantee integrated schools, or freedom from discrimination on the basis of gender, alienage, handicap, or sexual preference? Should it be a problem that the first amendment was not intended to interfere with laws against blasphemy, defamation, and perhaps even seditious libel? Had the Equal Rights Amendment been ratified, should it have made a difference that the framers did not intend it to apply to lavatory facilities?

Finally, and perhaps most important, the question of ruleness might be presented by previous decisions of the Supreme Court itself. Should the existence of *Plessy v. Ferguson*[28] have made a difference in *Brown v. Board of Education*?[29] Should the existence of

26. *See* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

27. *See* Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773.

28. 163 U.S. 537 (1896).

29. 347 U.S. 483 (1954).

United States v. Darby[30] have made a difference to the majority in *National League of Cities v. Usery*?[31] Should the existence of *Usery* have made a difference to the majority in *Garcia v. San Antonio Municipal Transit Authority*?[32] Should the existence of *Garcia* make a difference to the hypothetical future majority referred to in Justice Rehnquist's dissent in that case? Although the question of determining what is a precedent for what is complex,[33] previous decisions of the Court could operate, under a strong system of stare decisis, in much the same way that rules operate.

I do not deny that distinctions can be drawn among text, original intent, and stare decisis, and that one could plausibly embrace, for example, textual and precedential constraint while rejecting the relevance of original intent.[34] But distinguishing among the three is not central to my task here, for their similarities are at least as important as their differences. The three sources of constraint all share in common just that—they are sources of constraint, in the strong rule-based sense that I have been talking about. Each of the three is susceptible to a strong rule interpretation, to a frankly formalistic approach. The combination of the three therefore presents the central question of Supreme Court constitutional decisionmaking. Should that process be substantially rule-free, using the raw material of constitutional text, history, and case law for education and guidance, but not as intrinsically weighty rules, capable of interfering with what appears at the time of decision to be the best reading of all the relevant sources of constitutional decision? Or should some or all of these materials be treated as rules, in a strong sense, capable of formalistically interfering with the ability of sensitive justices to make the best constitutional decisions?

As a society thinks about how it answers these questions, about what it expects its Supreme Court to do, about whether it expects its Supreme Court to be rule-bound in my sense, it is important to begin with the premise that neither answer is necessary and neither answer is illegitimate. There is a choice, and there is nothing essential about law or even about constitutionalism that dictates one choice rather than the other. The decision whether to take a series of written norms as rules in a strong sense, on the one hand, or defeasible indicators of a deeper reality, on the other, is not dictated

30. 312 U.S. 100 (1941).
31. 426 U.S. 833 (1976).
32. 469 U.S. 528 (1985).
33. *See* Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).
34. *See* Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41 (1987); Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Schauer, *An Essay on Constitutional Language*, 29 UCLA L. REV. 797 (1982). .

by those norms themselves. Whether the Constitution will be read in rule-based form is based on the norms of the environment in which the document is read, and these norms are determined socially, and not by the document itself.

If *I* were to be asked whether the Supreme Court should make constitutional decisions according to a strong sense of rule, I would be tempted to respond with "Who wants to know?" Every one of the rule-furthering devices I mentioned disables decisionmakers, and a disabled decisionmaker is disabled from doing good as well as from doing ill. Although traditional arguments for ruleness have emphasized predictability, certainty, and reliability, such arguments seem to miss the point of rules, and seem especially wide of the mark with respect to constitutional law. Instead, we must understand the ways in which rules operate as instruments for the allocation of power. Their effectiveness resides in the way in which they disable some decisionmakers from considering certain factors, and thereby from making certain kinds of determinations. Thus, just as cases like *Palmore* prevent a wise and sensitive decisionmaker from taking into account factors that might be relevant to making the best decision, so too does treating the Constitution in rule-like fashion also limit the potential of even the best decisionmakers. Whether the issue is text, or original intent, or precedent, a great deal of constitutional theory has operated, broadly, under the anti-*Lochner* paradigm,[35] under which the dangers of a comparatively unencumbered Supreme Court are taken to be greater than the countervailing benefits that might come from the same lack of encumbrance. The anti-*Lochner* paradigm may well be correct, either as a statement of political theory incorporating a preference for majoritarian decisionmaking, or as a statement of pragmatic politics incorporating an assessment of which institutions will do the greatest good and which the greatest evil.[36] But the anti-*Lochner* paradigm remains a choice, and its merits must be evaluated against its alternative, a decisional mode in which *Lochner* itself is more likely to be repeated, but in which more desirable manifestations of that same authority are less likely to be foreclosed.

As I have indicated, however, if the question is what would *I* tell a Supreme Court Justice to do, the answer I would give might vary with the identity of the addressees of my instructions,[37] depending on whether the inquiry is from: 1) a Supreme Court Justice

35. Lochner v. New York, 198 U.S. 45 (1905).

36. *See* J. ELY, DEMOCRACY AND DISTRUST (1980); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Van Alstyne, *Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court*, 72 IOWA L. REV. 1281 (1987).

37. Consider in this connection the story of the Four Sons in the Passover Haggadah,

who shares my general political outlook and whom I trust to consider sensitively and intelligently the widest range of possible factors; 2) a Supreme Court Justice from whom I differ both politically and jurisprudentially but whom I consider open-minded and thoughtful; 3) a Supreme Court Justice whom I consider intelligent, but also devious and fundamentally at odds with me on important political and jurisprudential questions; 4) a Supreme Court Justice whom I consider to have basically good political instincts, but who is largely unconcerned with abstract issues of constitutional theory; 5) a Supreme Court Justice whom I consider to have basically bad political instincts, but who is again largely unconcerned with abstract issues of constitutional theory; 6) the nine people currently serving as Justices of the Supreme Court; 7) the nine people serving as Justices of the Supreme Court in 1968; 8) the nine people I expect to be serving as Justices of the Supreme Court in the year 2000; 9) the assembled collection of people I expect to be serving as Justices of the Supreme Court from 1988 through the year 2050; 10) a society asking what norms it should establish for the behavior of its Supreme Court Justices, a process that takes place continuously, although it was most recently obvious during the Bork confirmation hearings.

To these various perspectives might be added one more, one that perhaps explains much, and perhaps too much, of contemporary American constitutional scholarship. That perspective treats the central question of constitutional law as "How would *I* decide Supreme Court cases if *I* were a Justice of the Supreme Court of the United States, and if I knew that four other Justices were sure to agree with me?" Now this is not an irrelevant question, but it is a question that necessarily treats questions of institutional design as being peripheral or wholly immaterial to normative constitutional theory. When, by contrast, questions about institutional design are asked, a focus on any one decisionmaker, whether real or hypothetical, is too narrow. Focusing on a larger array of actual and potential constitutional decisionmakers does not itself answer the question of constitutional ruleness, nor do I want to answer that question here. I do want to suggest, however, that evaluating the appeal of ruleness cannot take place without confronting the question of *who* is making the constitutional decision.[38] If that question

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where the story of the Passover varies depending on the intelligence and sympathy of the questioner.

38. Note, of course, that this also includes questions of *who* is to determine the general virtues of constitutional ruleness, or the comparative weight of those virtues in a particular case. If the virtues of ruleness are seen to reside substantially in predictability, reliance, and certainty, it may be consistent both to recognize those virtues and to have the weight of those

is removed from the agenda by thinking only of the best constitutional decisionmaker, or by positing some ideal constitutional decisionmaker, then there is little if anything to be said for constitutional ruleness. But if we focus on the current and future array of actual constitutional decisionmakers, on the power that a society wishes to give them and on the use of rules as devices for granting or withholding power, then the selective attractiveness of rules increases. This is not to say that rule-bound decisionmaking, in the Supreme Court or elsewhere, is always or frequently desirable. It is to say, however, that the question cannot be abstracted from a somewhat more concrete context. Thus, perhaps paradoxically, evaluating ruleness entails evaluating the selective virtues of acontextuality, but evaluating the selective virtues of acontextuality is itself a contextual decision.

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virtues in a particular case be evaluated by the rule-applier. *See* G. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986). But if the virtues of ruleness are seen instead largely in terms of allocation of power, and in terms of selectively disabling certain decisionmakers from making certain kinds of decisions, then it is far from clear that *those* decisionmakers should be determining the weight of those disabling virtues on a case-by-case basis.