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Structuring Constitutional Doctrine: Principles, Proof and the Functions of Judicial Review

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STRUCTURING CONSTITUTIONAL DOCTRINE: PRINCIPLES, PROOF, AND THE FUNCTIONS OF JUDICIAL REVIEW

David Chang

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I. INTRODUCTION

The Supreme Court has decided that certain types of law, when challenged, are presumptively unconstitutional, while others are presumptively permissible. Laws containing racial classifications, for example, have been deemed to be presumptively unconstitutional, and to violate the Equal Protection Clause unless the government shows those classifications to be "necessary" to achieve a "compelling" state interest.1 The Court has applied a presumption of unconstitutionality, and a similar formulation of "strict scrutiny," not only to laws containing racial classifications, but also to laws that classify according to the content of speech;2 laws that burden the free exercise of religion;3 laws that burden the right to choose abortion;4 laws that burden the right to travel;5 indeed, laws that burden the full range of rights deemed to be "fundamental."6

1. See Grutter v. Bollinger, 539 U.S. 306, 331 (2003) (Racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."); Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (Racial "classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary... to the accomplishment' of their legitimate purpose." (citations omitted)).

2. See Simon & Schuster v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 118 (1991) (To validate a law targeting speech based on content, "the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.").

3. See Sherbert v. Verner, 374 U.S. 398, 406-07 (1963) (requiring burdens on religious exercise to be justified by a "compelling" governmental interest); Bob Jones Univ. v. United States, 461 U.S. 574, 603 ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest.").

4. See Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

5. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (A classification penalizing the right to travel is unconstitutional "unless shown to be necessary to promote a compelling governmental interest.").

6. Why does the government bear this burden under these disparate circumstances? Does "strict scrutiny" mean the same thing for enforcing the Equal Protection Clause, the speech clause, the free exercise clause, and the Due Process Clause? Should it mean the same thing? How can variations on one vague verbal formula serve to vindicate the range of disparate values that must underlie constitutional protections against racial discrimination, censorship of speech, and restrictions on the right to choose, to travel, or to worship? What, if anything, does "strict scrutiny" have to do with the particular constitutional values underlying the proscriptions in these disparate areas? Do particular constitutional values matter in those doctrinal contexts in which the Court has established "strict scrutiny" as the test of constitutionality? Should they? What, precisely, does the government have to prove under "strict scrutiny" when defending a racial classification, a content-based regulation of speech, an intrusion on the exercise of religion, an intrusion on a right of
In contrast, the Court presumes that facially neutral laws challenged as inflicting unconstitutional racial discrimination do not violate the Equal Protection Clause. Such a law will be upheld unless the challenger proves that "a racially discriminatory purpose has been a motivating factor" in the law's enactment. In another constitutional context, the Court at one time treated as presumptively unconstitutional federal statutes enacted under the Commerce Clause that regulated subjects other than interstate commerce. Today, the Court treats such statutes as presumptively permissible—at least if Congress has regulated economic activity—and treats as presumptively impermissible Commerce Clause legislation that regulates non-economic activity.

How has the Court determined which types of law should be presumed permissible, and which types presumed impermissible? How should the Court make these determinations? Beyond presumptions, in particular constitutional challenges under particular constitutional provisions, has the Court clearly identified what the challenger must prove to overcome a presumption of permissibility, or what the government must show to overcome a presumption of impermissibility? How should the Court determine, and articulate, what must be shown to overcome these presumptions?

The foregoing questions reflect two functionally discrete issues that courts must confront in deciding particular constitutional controversies. First, what is the substantive definition of governmental action that violates particular provisions of the Constitution? In other words, what substantive constitutional principles define restrictions on governmental discretion? Second, what party should bear the burden of persuasion with respect to a

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8. Id. At times, the Court characterizes the task of establishing unconstitutionality as a matter of making a "showing," at other times, as a matter of establishing "proof." Compare Justice Powell's opinion for the Court in Arlington Heights, 429 U.S. at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") with Justice Powell's opinion in California Board of Regents v. Bakke, 438 U.S. 265, 305 (1978) ("[I]n order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary... to the accomplishment" of its purpose or the safeguarding of its interest.") (citations omitted).


10. See generally United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

court's determination of whether that substantive definition of unconstitutionality has been violated; and how should that burden be discharged? In other words, through what adjudicative rules should courts determine whether a particular governmental act violates a substantive definition of unconstitutionality?

This Article will suggest that each of these two issues ought to be addressed explicitly in formulating doctrine for the adjudication of constitutional controversies. In doing so, my argument rests on a fundamental distinction that parallels that raised in Mitchell Berman's work on "constitutional decision rules." Berman argues that scholars and judges should "concentrate on developing a functional taxonomy" of constitutional doctrine, suggesting a distinction between "doctrines that represent the judiciary's understanding of the proper meaning of a constitutional power, right, duty, or other sort of provision" (which he terms "constitutional operative provisions") and "doctrines that direct courts how to decide whether a constitutional operative provision is satisfied" (which he terms "constitution decision rules").

In my view, Berman's work is on a track that could—and should—lead to a new paradigm for thinking about constitutional law. I have been working a similar track in my teaching for over twenty years, and for the past five years have been formalizing my analyses in writing this Article. Toward developing this conceptual distinction between rules that define constitutional meaning (substantive constitutional principles) and rules for determining whether a particular challenged governmental act violates a substantive constitutional principle (adjudicative rules), my route is different from Berman's. Berman develops the distinction as


14. Id. at 9.

15. Imagine my mix of reactions when I happened upon Professor Berman's article in late June of 2005, (as I was clumsily searching in Westlaw for the cite to Robert Nagel's Formulaic Constitution), just as this piece was nearing completion, after so many years of classroom percolation and four years of deliberate-speed paced writing. The proposition that constitutional doctrine should be explicitly structured in terms of substantive and adjudicative rules seemed so foundational to me, and almost obvious, but since no one had sharply made the point in the two centuries during which the Court has been crafting constitutional doctrine, I did not expect that anyone else soon would. I was wrong. But this makes all the more interesting the independent—and different—routes that we take to reach a similar conclusion. The notion first occurred to me the first time I taught McCulloch v. Maryland, in the fall of 1983. For a
"taxonomy," a framework for categorizing doctrinal rules. He teases the distinction through providing his own refining responses to positions taken by two Justices dissenting in recent cases, and to positions asserted by contemporary scholars engaged in their own meta-critiques of constitutional doctrine. I derive the distinction as intrinsic to the nature of adjudication—whether tort, contract, criminal, or constitutional adjudication—and, beyond this, as essential to achieving the special functions that constitutionalism and judicial review exist to serve.

Viewing the distinction between substantive constitutional principles and adjudicative rules as intrinsic and foundational, I go prescriptive steps beyond Berman in suggesting what ought to be done with it. Berman urges that "judges, scholars, and litigators should make greater efforts to distinguish whether a constitutional rule is an announcement of constitutional meaning (i.e., a constitutional operative proposition) or, instead, is a constitutional decision rule, and should pay attention, in the making of constitutional decision rules, to the particular considerations that discussion of McCulloch, see infra text accompanying notes 327-49. The insight's significance seemed enhanced the first time I taught Justice Powell's opinion in Bakke, the following spring. For a discussion of Powell's opinion in Bakke, see infra Parts III.C, III.D.1.a-b. It took all these years for me to fully develop the proposition that constitutional doctrine ought to be framed explicitly in terms of substantive constitutional principles and adjudicative rules (which I called "judicial proof rules" in those early years).


18. See infra Part II (discussing adjudicative and political functions of judicial review).

19. Berman also posits an intrinsic necessity for categorizing his operative propositions and decision rules. "A decision rule of some sort is unavoidable because application of the operative propositions confronts epistemic uncertainty." Berman, Constitutional Decision Rules, supra note 12, at 93. Thus, some of the differences in our rationales for suggesting that constitutional doctrine is (Berman), or ought to be (Chang), comprised at least implicitly (Berman), or preferably explicitly (Chang), of operative propositions (or substantive constitutional principles) and decision rules (or adjudicative rules), are differences of emphasis.
might justify its construction."\textsuperscript{20} Although he discusses benefits that could result from categorizing extant doctrinal rules as "operative propositions" or "decision rules,"\textsuperscript{21} Berman suggests that "[s]ome benefits of treating the distinction seriously (as well, admittedly, as some costs) are likely to be hard to envision before a judicial and scholarly practice of doing so emerges."\textsuperscript{22} He eschews recommending that "when announcing doctrine, a court should always make clear which aspects of that doctrine are operative propositions and which, if any, are decision rules,"\textsuperscript{23} urging, instead, that "courts, scholars, and litigators ... should think and speak in terms of [this 'doctrinal taxonomy'] when doing so would be productive."\textsuperscript{24} I do recommend that Justices \emph{always} should derive and define constitutional doctrine \emph{explicitly} in terms of substantive constitutional principles and adjudicative rules—or should explain why they choose to leave the matter ambiguous. Toward reaching that conclusion, I closely examine judicial opinions in a range of contexts—from Justice Marshall's early nineteenth century federalism in \textit{McCulloch v. Maryland},\textsuperscript{25} to Justice Powell's late twentieth century equal protection in \textit{California Board of Regents v. Bakke},\textsuperscript{26} and beyond. I identify the substantive constitutional principles and adjudicative rules \emph{implicit} in those opinions, discuss the significant benefits that could have been achieved had the implicit been made \emph{explicit} (and significant costs from failing to have done so), and sketch how the Justices could have framed their opinions explicitly in such terms. Furthermore, while Berman emphasizes the taxonomy of existing doctrine, I emphasize the reformulation of existing doctrine and the creation of new doctrine. Berman largely eschews "staking ourselves to any claims about the sorts of considerations upon which courts might rely in the derivation and formulation of either" kind of rule;\textsuperscript{27} I explore the discrete

\begin{itemize}
\item \textsuperscript{20} Berman, \textit{Constitutional Decision Rules}, supra note 12, at 13. In endorsing Berman's suggestion that constitutional doctrine ought to be categorized in terms of operative propositions and decision rules, Professor Kermit Roosevelt has suggested particular considerations relevant for framing decision rules. \textit{See} Kermit Roosevelt III, \textit{Constitutional Calcification: How the Law Becomes What the Court Does}, 91 Va. L. Rev. 1649 (2005). For my views on considerations relevant for framing decision rules, see infra text at notes 142-57, 478-81. For discussion of Roosevelt's views on decision rules, see infra note 142.
\item \textsuperscript{21} Berman, \textit{Constitutional Decision Rules}, supra note 12, at 83-107.
\item \textsuperscript{22} \textit{Id.} at 83.
\item \textsuperscript{23} \textit{Id.} at 108.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} 17 U.S. 316 (1819).
\item \textsuperscript{26} 438 U.S. 265 (1978).
\item \textsuperscript{27} \textit{See} Berman, \textit{Constitutional Decision Rules}, supra note 12, at 60.
\end{itemize}
considerations that are essential to the derivation, definition, and legitimacy of each kind of rule.  

Because positing the fundamental distinction between substantive constitutional principles and adjudicative rules can reorient the way that people think about constitutional law, the concept bears generative efforts that pursue alternative routes—not redundant, but mutually reinforcing—toward its explicit recognition and development. Thus, I construct a track parallel to that laid by Berman, the destination of which is the explicit distinction between substantive constitutional principles and adjudicative rules. I suggest a payoff from traveling this track that goes beyond taxonomy of extant constitutional doctrines. The payoff includes, first, a prescription as to how Justices ought to structure constitutional

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28. Berman suggests that “the more difficult it is to reach agreement on the proper characterization of extant doctrines, the greater is the worry that the basic conceptual distinction between operative and decision rules would thereby be rendered, if not illusory, then of precious little value.” Id. at 79. In my view, difficulty in classifying existing doctrine is to be expected, because courts have failed to derive and define existing constitutional doctrine explicitly in terms of the substantive rule function and the adjudicative rule function. It is important to identify those separate functions and to identify the factors relevant to the derivation and definition of each kind of rule. Berman recognizes this to an extent, in noting that:

Whether a given piece of doctrine is an operative proposition depends on ... one's theory of constitutional interpretation. Because there exist different plausible theories of proper constitutional interpretation, there exist different plausible conceptions of constitutional meaning. What one views as an operative proposition thus depends upon how one proposes to derive constitutional meaning, a matter that cannot be resolved (though it can be informed) by taxonomic explorations.

Id. at 80. This point, it seems to me, conflates two questions: First, what are the essential functions of operative propositions (or substantive constitutional principles) on the one hand, versus decision rules (or adjudicative rules) on the other? Second, what considerations are relevant for the derivation and definition of each kind of rule? Functionally, substantive constitutional principles (or decision rules) exist to identify issues of legally relevant fact, and adjudicative rules (or decision rules) exist to resolve issues of relevant fact. Methods for deriving and defining substantive constitutional principles (or operative propositions) might include originalism, conventional morality, Dworkinian principle, and so on. Considerations relevant for deriving and defining adjudicative (or decision) rules might include reducing the costs of erroneous decisions. Against these benchmarks, extant doctrine might be categorized—and more significantly, might be critiqued and reformulated—toward better serving each respective rule-function, and thereby better serving the essential functions of judicial review.

29. Indeed, struggling too much to identify what the substantive constitutional principle (or operative proposition) is, and what the adjudicative (or decision) rule is, seems a bit awkward, when the Court has not thought and written in those terms in a given doctrinal context, and has not sought explicitly to derive and define such a doctrinal structure. See infra note 308 (discussing Berman's analysis of the operative proposition and decision rule established by the "strict scrutiny" of racial classifications in contemporary cases).
doctrine; second, an analysis of the considerations relevant for the explicit derivation and definition of substantive constitutional principles and adjudicative rules (both in the reformulation of existing doctrine and the creation of new doctrine); and third, at least potentially, a resulting body of doctrine consistently better able to serve the essential functions of constitutionalism and judicial review.

My point of departure for this parallel track suggests that the ultimate issue in constitutional adjudication is structurally like the ultimate issues in other adjudicative contexts. In a criminal prosecution, that ultimate question concerns whether a particular defendant has violated some criminal statute. In a negligence action, an ultimate question concerns whether a particular defendant violated a duty of reasonable care. In constitutional adjudication, the ultimate question concerns whether a particular challenged governmental action violates some constitutional provision. Answering these ultimate questions requires a doctrinal structure comprised of substantive rules for defining the crime, or the tort, or the constitutional infraction at issue; and adjudicative rules for resolving issues of relevant fact and for applying such substantive rules to the facts found.

30. A step removed from these bottom-line adjudicative questions that apply law to facts are more "purely legal" questions: What were the legally relevant facts of some precedent which, under stare decisis, might govern a finding of negligence in a present controversy? What is the meaning of "dwelling" in a statute defining burglary in the second degree? Constitutional adjudication, or more precisely, adjudication in which constitutional issues are raised, presents legal issues concerning the permissibility of government action. Is constitutional adjudication more like civil litigation, or a criminal prosecution, in presenting a "bottom-line" question applying law to facts, or is it more like the task of statutory interpretation, presenting "pure(r)" questions of law? If it is more like the former, then, one would think, there should be a clear distinction between substantive constitutional principles and adjudicative rules. If it is more like the latter, then the absence of a clear distinction between substantive rules and adjudicative rules might be no less appropriate, but would at least be consistent with prevailing approaches to statutory interpretation and other legal decisions allocated to judges without jury (or factfinder) participation.

It would seem that constitutional adjudication is like other kinds of litigation in presenting questions of pure law, questions of pure fact, and mixed questions of law and fact. Pure questions of law are presented in deriving and defining the meaning of constitutional text. Resolving these questions of pure law generates rules—substantive constitutional principles—that identify those facts which have legal significance. Where parties contest relevant facts, they generate issues of pure fact that must be resolved. Finally, in resolving the bottom line question of constitutionality, the court must address a mixed question of law and fact, in applying the legal rule to the facts found.

31. Determining whether a criminal defendant is guilty of a crime, for example, requires substantive rules defining the crime in question, and adjudicative rules for resolving issues of fact relevant under those substantive rules, and for applying those substantive rules to the facts of the defendant's case. Determining whether a defendant has committed a tort requires substantive rules defining the tort in
Continuing the journey on this parallel track, beyond further exploring the structural similarities between the ultimate issue in constitutional adjudication and those in other adjudicative contexts, Part II explores the special functions that constitutionalism and judicial review exist to serve. As conceived by politicians, scholars, and judges through the generations, these special functions include: first, adjudicating constitutional cases (an adjudicative function); and second, shaping political debate toward inhibiting the enactment of unconstitutional laws (a political function). Part II considers whether these special functions also imply the importance of explicitly differentiating substantive constitutional principles and adjudicative rules. Part III carefully explores a range of particular contexts in which the Court has failed explicitly to differentiate the derivation and definition of substantive constitutional principles and adjudicative rules. It seeks to demonstrate how and why these failures seriously undermined both the adjudicative and political functions of judicial review. Finally, Part IV sketches a template that courts might consider toward explicitly deriving and defining substantive constitutional principles and adjudicative rules.

This Article's focus transcends critiques of particular cases as having been decided "correctly" or "incorrectly," and transcends debates about the merits of originalism versus other interpretive methodologies. It is concerned with the structure of constitutional doctrine in a generic sense. It is concerned with revealing two functionally discrete kinds of legal rule that ought to be recognized in the constitutional context, and the considerations relevant for the derivation and definition of each. The Article suggests that by explicitly differentiating the derivation and definition of substantive constitutional principles and adjudicative rules, the Court could create a far more productive body of constitutional law. The Court could create a constitutional law with a normative clarity that enhances the Justices' accountability for the values they would enforce, or refrain from enforcing; a constitutional law that could provide judges with a clearer basis for adjudicating particular constitutional cases effectively; a constitutional law that could provide the public and its representatives with a clearer sense of the question, and adjudicative rules for resolving issues of fact relevant under those substantive rules, and for applying those substantive rules to the facts of the case. Similarly, as this Article will argue, determining whether a governmental act is unconstitutional requires a substantive rule defining the constitutional infraction at issue, and adjudicative rules for resolving issues of relevant fact, and for applying that definition to the facts of the case. For a definition of "rule," see infra text accompanying note 34.

32. Of course, the political function applies to inhibiting unconstitutional executive action, and to inhibiting other forms of state action as well.
constitutional boundaries of political discretion; and, perhaps most importantly, a constitutional law that could enable political actors better to refrain from violating, while acting freely within, the Constitution's mandates.33

II. THE ADJUDICATIVE AND POLITICAL FUNCTIONS OF JUDICIAL REVIEW AND THEIR IMPLICATIONS FOR STRUCTURING CONSTITUTIONAL DOCTRINE

A. Substantive Constitutional Principles and Adjudicative Rules Defined

The ultimate issue in a criminal prosecution (or tort action) concerns whether a defendant has committed a crime (or a tort). Adjudicating this ultimate question in these and other nonconstitutional contexts requires two kinds of rule, serving fundamentally different functions. Substantive rules—whether in tort law, criminal law, or labor law—identify legally relevant facts and determine the range of factual issues that the parties will contest. Adjudicative rules—such as rules of evidence or those allocating the burden of persuasion—are designed to resolve issues of legally relevant fact.

The ultimate issue in constitutional adjudication concerns whether the government has committed a constitutional violation. This issue is structurally analogous to the ultimate issue in other adjudicative contexts, and must be resolved by the application of two functionally discrete kinds of constitutional rule. Thus, determining whether a law is unconstitutional requires substantive principles for identifying issues of relevant fact, and adjudicative rules for resolving those issues of fact, and for applying the substantive principles to those facts. To determine whether the government has abridged the freedom of speech, for example, requires a substantive definition of unconstitutional abridgement (provided by the First Amendment's speech clause and substantive judicial interpretations of that clause) for identifying issues of material fact, and adjudicative rules for resolving those factual issues and determining whether the facts found satisfy the substantive definition of such abridgement.

Developing this proposition further requires some definitions. By rule, I mean a conditional proposition, the elements of which must be satisfied as a prerequisite for triggering identified legal

33. Professor Berman touched upon this benefit as well, suggesting that "we might find our political culture enriched by being able to contemplate constitutional operative propositions alone, divorced from the constitutional decision rules which are designed solely to govern litigation. Berman, Constitutional Decision Rules, supra note 12, at 16; see also Berman, Guillen and Gullibility, supra note 12, at 1531-32.
consequences—i.e., if certain conditions are satisfied, then certain legal consequences follow. By principle, I mean a rule that is developed with particular attention to normative roots and implications, and that is evocative of those underlying norms. By substantive constitutional principle, I mean a principle that defines restrictions on governmental discretion derived from and evoking values deemed to underlie constitutional text. By adjudicative rule, I mean a rule employed by a court in the context of constitutional adjudication toward determining whether a substantive constitutional principle has been violated in relation to the facts and circumstances as developed at trial.

In nonconstitutional contexts, substantive principles and adjudicative rules serve different functions and have been framed to serve different sets of values. Substantive principles are (or should

34. The suggestion that constitutional doctrine ought to be framed explicitly through the separate derivation and definition of substantive constitutional principles and adjudicative rules does not depend on favoring “rules” over “standards” for substantive constitutional principles, or vice versa. For discussion of “rules” versus “standards,” see generally, for example, Kathleen M. Sullivan, Forward: The Justices of Rules and Standards, 106 HARV. L. REV. 22 (1992). For my purposes, a standard such as, “if a regulation places an undue burden on a woman's interest in terminating her pregnancy, then that regulation violates the Due Process Clause,” is just as much a rule as is the more “rule”-like, “if a regulation requires a woman to wait more than twenty-four hours to terminate her pregnancy, then that regulation violates the Due Process Clause.”

Indeed, in critiquing Justice Powell’s justification of “strict scrutiny” for affirmative action racial classifications in Bakke, I suggest that he ought to have separately and explicitly derived and defined three substantive constitutional principles that were implicit in his analysis: first, that a racial classification may not be adopted because of purposes rooted in racist values or stereotypes; second, that a racial classification may not excessively promote racial prejudice; and third, that a racial classification may not have excessively unfair effects on “innocents.” See infra text accompanying notes 234-41. The first putative substantive constitutional principle is more at the “rule” end of the continuum between “rules” and “standards;” the second and third putative substantive constitutional principles are more at the “standard” end. But all three, I suggest, are better framed as explicit, rather than implicit, substantive constitutional principles, rather than as parts of an undifferentiated hodgepodge of reasons for the “strict scrutiny” of racial classifications. See infra text accompanying notes 242-326.

Similarly, adjudicative rules might be framed either as standards or as rules. To require proof of constitutionally significant facts by a preponderance of the evidence, beyond a reasonable doubt, or to a moral certainty, frames the foundational adjudicative rule—the burden of persuasion—in terms of “standards” rather than “rules.” To require a legislature to make findings of fact identifying the past racial discrimination, the effects of which it seeks to redress as part of its burden to rebut the presumption that its racial classification was adopted because of purposes rooted in racism, see infra text accompanying notes 258-62, or to require Congress to make findings of fact identifying the effect on interstate commerce from regulated non-economic activity, as part of rebutting a presumption that such regulation was not adopted for purposes of promoting interstate commerce, see infra text accompanying notes 439-54, frames adjudicative rules as “rules” rather than “standards.”
be) derived from and express public values concerning the proper
public response to choices, conduct, and circumstances relevant to
the area of law in question. In the criminal context, for example,
legislatures create statutes reflecting norms that distinguish socially
acceptable conduct from that which is unacceptable, and strategic
considerations as to why particular unacceptable conduct should be
criminalized—e.g., for retribution, deterrence, or incapacitation.
When interpreting a criminal statute, courts resolve ambiguity by
referring to and reasoning from these substantive concerns. Indeed,
in many criminal codes, legislatures direct the courts to resolve
statutory ambiguity by referring to the substantive concerns
underlying the definition of the particular criminal act, and the
strategic reasons for criminalizing that bad act.35

Adjudicative rules in nonconstitutional contexts are derived from
values relevant to the imperfect judicial capacity to resolve
issues of legally significant fact and to apply governing substantive rules to
the facts and circumstances of particular cases. Because courts must
make findings of fact in particular cases founded on incomplete
evidence, or evidence tainted by the interest litigants have to hide
and mislead, they must anticipate making an erroneous decision. In
the criminal context, such errors include convicting the innocent, or
acquitting the guilty. In tort, a court might wrongly find a defendant
responsible, or wrongly fail to do so. Adjudicative rules must be
designed to promote accuracy and minimize the social harm resulting
from error in deciding the facts and determining the winner in a
particular dispute between particular parties.

In the constitutional context, substantive principles and
adjudicative rules also must be derived from differently rooted sets of
values. It cannot be controversial that the First Amendment's
freedom of speech, no less than any criminal statute, was adopted to
achieve a particular range of substantive objectives reflecting a
particular range of substantive values—though people might well
have different interpretations as to what those values are. The
definition of Congress' powers as limited to those enumerated also
was rooted in particular substantive objectives and values, as was
the Due Process Clause, the unreasonable search and seizure clause,
and, indeed, every provision in the Constitution.

35. See, e.g., N.Y. PENAL LAW § 5.00 (McKinney 2004) ("The general rule that a
penal statute is to be strictly construed does not apply to this chapter, but the
provisions herein must be construed according to the fair import of their terms to
promote justice and effect the objects of the law."); MODEL PENAL CODE § 1.02(3)
(1985) ("The provisions of the Code shall be construed according to the fair import of
their terms but when the language is susceptible of differing constructions it shall be
interpreted to further the general purposes stated in this Section and the special
purposes of the particular provision involved.").
In adjudicating whether a substantive constitutional principle has been violated under the facts and circumstances of a particular case, a court is no more omniscient, and no less error-prone, than are courts adjudicating other kinds of claim. Courts must anticipate the possible errors of either striking down a governmental act that "in fact" is not unconstitutional or upholding a governmental act that "in fact" is unconstitutional. Thus, adjudicative rules in the constitutional context, as for other kinds of law, must be framed to serve the values of accuracy in resolving issues of material fact, and of minimizing the systemic costs of adjudicative errors.36

This analysis has been rooted in the structural similarities between the ultimate issues presented in adjudicating constitutional cases and those presented in other areas of adjudication. Yet, constitutional provisions are unique—at least in their supremacy and their immunity from change by ordinary political processes. Judicial interpretation and enforcement of constitutional provisions also are unique—themselves to be treated as the supreme law of the land.37 Do these special attributes of constitutional law undermine or reinforce the proposition that I have thus far sought to establish: i.e., that like doctrine applicable in other adjudicative contexts, constitutional doctrine must be structured in a way that includes explicitly differentiated substantive principles (rooted in identified substantive values and objectives) and adjudicative rules (designed to promote adjudicative accuracy and to minimize the social harm resulting from factfinding error)?

The following will examine several classic perspectives about special attributes of constitutional law and judicial review that distinguish the constitutional context from other adjudicative contexts. I will suggest that each perspective contemplates the special adjudicative and political functions of judicial review, and thereby reinforces the proposition that the structure of constitutional doctrine must explicitly differentiate the derivation and definition of substantive constitutional principles and adjudicative rules.38

36. Berman suggests there might be adjudicative values such as reducing the costs of litigation, but acknowledges that error-cost minimization is the most clearly legitimate rationale for creating adjudicative or decisionmaking rules. See Berman, Constitutional Decision Rules, supra note 12, at 93 ("A decision rule of some sort is unavoidable because application of the operative propositions confronts epistemic uncertainty. The most obvious factor that a decision-rule-maker should consider, then, is how best to minimize adjudicatory errors—i.e., the sum of false positives and false negatives.").


38. Of course, adjudicative error also can result from erroneously declared substantive constitutional principles—as adjudicative error in a criminal case can
B. James Madison and Alexander Hamilton: The Origins of Constitutionalism and Judicial Review

In The Federalist No. 10 and The Federalist No. 78, James Madison and Alexander Hamilton (respectively) develop a rationale for a self-governing people to create a Constitution and to create judicial review as a means for enforcing that Constitution's mandates. In creating a Constitution, the People declare its provisions to be the supreme law of the land. They choose the policies underlying these supreme constitutional provisions with extraordinary deliberation and with special concern for "the permanent and aggregate interests of the community." By making the Constitution's provisions far more difficult to change than is ordinary legislation, the People protect that supreme law from their own anticipated fallibility—factional short-sightedness and selfishness—in the context of ordinary, everyday political disputes. "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually."

This is a notion of political self-constraint. It is a notion that constitutional text (and the foundational yet politically vulnerable national policy that this text signifies) should be much more difficult to create and to change than is the text of congressionally-enacted legislation (and the national policy that this text signifies). It suggests that the essential device of our constitutionalism is the distinction between the Article I political processes for creating or amending national legislation, and the Article V political processes for creating or amending the nation's supreme constitutional text. Through the principle of constitutional supremacy and the distinction between Article I for making ordinary national policy and Article V for making supreme national policy, the People's own result not only from factfinding errors, but also from errors in instructing jurors on the law they should apply to their findings of fact. The point here is that different considerations are relevant for avoiding adjudicative error from each of these two sources, and for framing explicitly differentiated substantive constitutional principles and adjudicative rules—the two kinds of rule with respect to which the two sources of adjudicative error might be committed.

40. THE FEDERALIST No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton further suggested that the People who created their supreme law in the Constitution, and who provided for federal courts to interpret and enforce that supreme law, anticipated their own political failings resulting from "the effects of those ill humors which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves . . . ." Id. at 469.
41. See Chang, Critique, supra note 37, at 293-95; David Chang, Conflict, Coherence, and Constitutional Intent, 72 IOWA L. REV. 753, 767-82 (1987) [hereinafter Chang, Constitutional Intent].
choices concerning foundational yet politically vulnerable values can be protected from their own anticipated short-sighted fallibility.

Along with insulating their supreme legal text from amendment by ordinary political processes in which this fallibility might more readily be manifested, the People chose to entrust judges with the tasks of interpreting and enforcing the meaning of that supreme law—judges appointed "during good behavior," rather than politically accountable to voters.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves...42

Because federal judges are not accountable to the political pressures that influence the behavior of the President and members of Congress, the federal courts can remain free to exercise "judgment," and thereby enforce the People's own foundational constitutional choices.43

Most significant for present purposes, Hamilton suggests that in exercising the power of judicial review, courts might address two kinds of harm. First, courts might redress the rights of individual litigants when such rights have been infringed by unconstitutional laws. Second, through judicial review, courts also might inhibit legislatures from enacting unconstitutional laws.44

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in

42. THE FEDERALIST No. 78, at 469.

43. Of course, Hamilton's justification for vesting the power to interpret and enforce the Constitution's mandates with judges appointed "during good behavior" fails to explain the mechanism by which such judges will be held accountable to the task they ought to be doing. If the lack of political accountability frees judges to exercise "judgment," does it not also free them to exercise politically unaccountable will?

44. THE FEDERALIST No. 78, at 470.
a manner compelled, by the very motives of the injustice they mediate, to qualify their attempts.45

By striking down unconstitutional laws when adjudicating particular cases, the Court "moderates the immediate mischiefs" otherwise inflicted on those subject to the reach of such laws. Beyond this, the prospect of such invalidation "operates as a check upon the legislative body," inducing legislators to "qualify" their laws according to the "obstacles . . . [that] are to be expected from the scruples of the courts."

Thus, Hamilton recognizes that judicial review should serve two functions—one is adjudicative and the second is political. The adjudicative function decides particular cases and protects the rights of individual litigants from intrusion by unconstitutional laws. The political function influences legislative decisionmaking and can inhibit legislatures from enacting unconstitutional laws—thereby averting the occasion for adjudication to enforce constitutional norms.46 Elaborating on this political function, Hamilton posits that legislators would so qualify their laws because of iniquitous intentions; but this is not inconsistent with a more optimistic expectation that when "enlightened statesmen" are, in fact, at the helm—which, as Madison suggested, was neither inevitable nor impossible47—they might, because of a sense of public duty, seek to keep whatever policies they pursue within the boundaries of anticipated judicial acquiescence.48

How politicians, and the electorate, understand the "obstacles" erected against legislative discretion by courts in the name of the

45. Id. (emphasis added).
46. Differentiating substantive constitutional principles from adjudicative rules in service of the adjudicative and political functions is unrelated to H.L.A. Hart’s distinction between primary rules and secondary rules. See generally H.L.A. HART, THE CONCEPT OF LAW (1961). Hart’s primary rules are directed against government officials; secondary rules are directed against private actors. Substantive constitutional principles and adjudicative rules are both primary rules, from Hart’s perspective. See id. at 77-96.
47. THE FEDERALIST NO. 10, at 80.
48. In Marbury v. Madison, Justice Marshall suggested a political function for a written constitution. "The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." 5 U.S. 137, 176 (1803). Recognizing that a written constitution can itself influence legislative debates and decisions contradicts one of his main bases for concluding that the people who created the Constitution must have intended to establish the power of judicial review. It is not true, as Marshall suggested, that a written constitution would be "reduce[d] to nothing" unless its provisions were judicially enforced. See id. at 178. Yet, just as a written constitution itself can affect legislative debate and decision in a way that unwritten fundamental law could not, so it would seem that judicial interpretations of the Constitution could affect legislative debate and decision, and do so differently depending on the manner in which those judicial opinions are written.
Constitution can shape political decisions. Political debate and decision might vary according to how the Court articulates the principles with respect to which the constitutionality of legislation is to be measured. If constitutional doctrine fails to articulate clearly the substantive principles derived from and evoking values deemed to underlie constitutional text—if, instead, doctrine is a confused amalgam of substantive and adjudicative considerations—the normative content of constitutional law must be obscured. Thus, creating doctrine that clearly distinguishes between substantive constitutional principles and adjudicative rules is essential if judicial review is effectively to serve not only the adjudicative function, but also the political function envisioned by Madison and Hamilton at the origins of constitutionalism and judicial review.

C. James Bradley Thayer and Legislative Responsibility

In The Origin and Scope of the American Doctrine of Constitutional Law, James Bradley Thayer suggests that judicial interpretations of constitutional text "were supplemented by a very significant rule of administration . . . 'that an Act of [Congress] is not to be declared void unless the violation of the [C]onstitution is so manifest as to leave no room for reasonable doubt.'" If [a court's] duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the

49. Congressional consideration of the Civil Rights Act of 1964 provides a vivid example. See infra text accompanying notes 454-65.

50. See infra text accompanying notes 169-91, 310-12, 323-26, 348-49, 382-83, 454-65, 475-76. Professor Roosevelt makes similar point. "When the Court treats its decision rules as operative propositions, it announces as constitutional truths rules that should neither be followed by non-judicial actors nor internalized by the general public." See Roosevelt, supra note 20, at 1713.

51. One might imagine the consequences of an analogous (hypothetical) conflation of substantive and adjudicative rules in criminal law. Consider the following (hypothetical) definition of murder:

   A person has not committed murder unless the state can present admissible evidence that proves beyond a reasonable doubt that he engaged in conduct that was not necessary to achieve a compelling objective, and that caused the death of another human being.

really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course—merely because it is concluded that upon a just and true construction that the law is unconstitutional. That is precisely the significance of the rule of administration . . . .

In Alexander Bickel's view, Thayer's deferential "rule of administration" required upholding any act of Congress that was permissible under any plausible or rational interpretation of the Constitution. Bickel characterized Thayer's position as follows:

[The Constitution is . . . a complex charter of government. . . . Most frequently, reasonable men will differ about its proper construction. The Constitution leaves open "a range of choice and judgment," so that "whatever choice is rational is constitutional." The Court, exercising the power of judicial review, is to be "the ultimate arbiter of what is rational and permissible," but is to have no further concern with policy choices.]

Thus, according to Bickel, Thayer had a single substantive definition of boundaries on Congress' discretion: Congress must act rationally in pursuit of its purposes.

In my view, Bickel misconceived Thayer's position. Thayer was not proposing deference to Congress in defining the Constitution's meaning—i.e., in deriving and defining the substantive principles with respect to which the Constitution should be deemed to circumscribe national legislative discretion. Rather, Thayer was proposing judicial deference in determining whether a particular act of Congress violates a particular judicial interpretation of the Constitution's substantive meaning.

53. Id. at 143-44 (emphasis added).
54. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 37 (1986) (suggesting Thayer's view "that the Court might nullify a statute only if it could not rationally be said to proceed from a plausible construction of the Constitution") [hereinafter BICKEL, LEAST DANGEROUS BRANCH].
55. Id. at 35-36.
56. See id. This rationality requirement is the essential concern of "rationality review," which is comprised of a substantive requirement (all things that are similarly situated with respect to a statute's purpose must be similarly treated by that statute) and an adjudicative rule (legislatures are accorded extreme deference in determining whether the rationality requirement has been violated). For a discussion of the substantive constitutional principle, see, for example, Joseph Tussman & Jacobus tenBroek, The Equal Protection of the Laws, 37 CAL. L. REV. 341 (1949); Hans Linde, The Due Process of Lawmaking, 55 NEB. L. REV. 197 (1976).
57. Professor Berman reads Thayer as did Bickel, saying that Thayer "resisted the effort to tease the states of interpretation and application apart, seeming to suggest instead that courts could and should just announce whether the challenged legislation could stand without specifying what they took to be the constitutional premise supporting such a conclusion." See Berman, Constitutional Decision Rules, supra.
Indeed, Thayer distinguished between a substantive interpretation of the Constitution's text and an adjudicative determination as to whether a particular act of Congress should be deemed to violate that substantive interpretation. On the former point, Thayer referred to the task of "ascertain[ing] the meaning" of constitutional text. In interpreting Congress' discretion under its enumerated powers, for example, Thayer articulated substantive constitutional principles much as did Justice Marshall in McCulloch: Congress could pursue any means of regulation so long as it did so for purposes—"ends" or "objects"—authorized by the Constitution.

Thayer urged his deferential "rule of administration" for determining whether Congress enacted a particular challenged statute for constitutionally authorized ends, or did so pretextually. The question of rationality was not whether Congress' challenged legislation comports with any rational or plausible substantive interpretation of the Constitution but, rather, whether Congress might rationally have believed that its legislation would serve the constitutionally authorized purposes to which it is limited under judicially derived and defined substantive interpretations of its enumerated powers.

Consider Thayer's application of these concepts. Thayer analyzed, for example, whether Congress acted unconstitutionally in issuing paper bills. He suggested that the power to issue paper currency and to make such legal tender might be ancillary (under the Necessary and Proper Clause) to the power to regulate commerce, the power to coin and regulate the value of money, or the power to borrow money. In particular, he said:

"If Congress give to its currency the quality of legal tender, wholly or mainly because it will thus be a better instrument for borrowing purposes, it will not be in the power of a court to declare the legislation for that reason unconstitutional."

12, at 103. Berman urges, nevertheless, that "Thayerians . . . [should] shift their focus from arguing for judicial deference to Congress' constitutional interpretations—i.e., to Congress' judgments about the constitutional operative propositions—to arguing for more deferential decision rules." Id. at 104. As argued in what follows, I interpret Thayer differently—as having himself made the distinction between deference to Congress' substantive interpretations (which he did not advocate) and deference to Congress on the question of whether its enactments violate judicially-declared substantive constitutional mandates (which he did advocate).

58. Thayer, Origin and Scope, supra note 52, at 144.
59. See generally McCulloch, 17 U.S. 316. For an extended discussion of McCulloch, see infra notes 327-49 and accompanying text.
60. See James B. Thayer, Legal Tender, 1 HARV. L. REV. 73, 89 (1887-1888).
61. Id. at 92-95.
62. Id. at 95 (emphasis added).
For Thayer, as for Marshall in *McCulloch*, whether a particular legislative end is constitutionally authorized is a judicial question. Whether an act of Congress is fit to achieve its constitutionally permissible ends is a political question. Whether Congress has *in fact* acted for a constitutionally authorized end or purpose is a judicial question, but one which should be answered with due deference to Congress. "[T]he fitness of the legal tender acts to accomplish their ends [is] a purely legislative question, in the absence of an obvious fraud on the Constitution."63

In justifying such a deferential "rule of administration," Thayer contemplates both the adjudicative and political functions of judicial review, and strongly suggests a need to distinguish between substantive constitutional principles and adjudicative rules toward serving each function effectively. First, Thayer suggests that in performing the adjudicative function, the court's task is not simply to determine whether and how the challenged statute is "in conflict" with the Constitution's judicially-declared meaning. To do so would risk invalidating a permissible statute—an error which, in Thayer's view, is more to be avoided than is upholding an unconstitutional law.64 Thayer views invalidating permissible statutes as undesirable because such errors deprive the legislature of its "proper range of discretion." In his view, therefore, the rule of administration should provide "an allowance . . . for the vast and not definable range of legislative power and choice."65

Thus, in relation to the adjudicative function, Thayer's rationale for a deferential "rule of administration" is normative—erroneously invalidating an act of Congress is worse than erroneously upholding such an act, because the former error deprives the legislature of its "proper range of discretion."66 I will argue below that this normative notion is vulnerable—as would be the converse normative proposition—and will suggest an alternative analysis for establishing presumptions in constitutional adjudication.67 For present purposes, however, it is enough simply to recognize that Thayer's treatment of the adjudicative function of judicial review does recognize a distinction between substantive principles expressing the meaning of

63. *Id.* at 89 (emphasis added).
64. Thayer views the erroneous invalidation as more to be avoided, despite recognizing that "it is as probable that the judiciary will declare laws unconstitutional that are not so, as it is that the legislature will exceed their constitutional authority." Thayer, *Origin and Scope,* supra note 52, at 134 (quoting Swift's "System of the Laws of Connecticut").
65. *Id.* at 135.
66. *Id.*
67. See *infra* text accompanying notes 142-51 (normative approach); 152-57 (probabilistic approach).
constitutional provisions, and adjudicative rules—"rules of administration"—for determining whether challenged legislation violates those substantive interpretations.

Thayer's further justifications for the deferential "rule of administration" also imply a political function for judicial review, and the need to distinguish between substantive constitutional principles and adjudicative rules to serve this function effectively. The relevant reasoning begins with the proposition that under the Constitution, Congress has initial responsibility and authority to determine whether its contemplated enactments are constitutionally permissible. Indeed, Thayer suggests that the legislature often has final authority to answer such questions, because judicial review can be exercised only in the context of a case or controversy: "It was, then, all along true...that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow."68 Thus, because the Constitution contemplated that Congress should make initial determinations of constitutionality, and because such determinations would prevail but for the exceptional occasions of constitutional adjudication, "the actual determinations" by the legislature that its enactments are constitutionally permissible "are entitled to a corresponding respect."69

Significantly, toward implying the political function of judicial review, Thayer predicates the legislature's entitlement to respect and a deferential "rule of administration" on the interesting proposition that legislators have made an "actual determination" as to the constitutionality of their enactment, and that they have done so with "virtue, sense, and competent knowledge."70

The judicial function is merely that of fixing the outside border of reasonable legislative action.... It must be studiously remembered, in judicially applying such a test as this of what a legislature may reasonably think, that virtue, sense, and competent knowledge are always to be attributed to that body.... And so in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body.... If, for example, what is presented to the court be a question as to the constitutionality of an Act alleged to be ex post facto, there can be no assumption of ignorance, however probable, as to anything involved in a learned or competent discussion of that subject. And so of the provisions of double jeopardy, or giving evidence against one's self, or attainder, or

68. Thayer, Origin and Scope, supra note 52, at 137.
69. Id. at 136 (emphasis added).
70. Id. at 149 (emphasis added).
jury trial. The reasonable doubt, then, about which our judges speak is that reasonable doubt which lingers in the mind of a competent and duly instructed person who has carefully applied his faculties to the question.\textsuperscript{71}

In presupposing legislators who are "duly instructed" about the Constitution's principles and prohibitions so that they can make competent (and, perhaps, public-spirited) decisions to remain within constitutional boundaries, Thayer's analysis implies a political function for judicial review.\textsuperscript{72} Just as a jury cannot be "duly instructed" on the law it should apply to its factfinding unless the judge provides instructions, so Congress would not be "duly instructed" on the constitutional boundaries of its discretion unless informed by the reasoning of the courts' decided cases. One cannot expect that a jury will correctly determine the legal significance of the facts of a case unless it has been soundly instructed on the law that it should apply. By analogy and by reason, one might suggest that the more soundly a legislature is instructed on the \textit{meaning} of the constitutional provisions against which its enactments are to be evaluated, the better able will legislators \textit{themselves} be to make choices that remain within constitutional bounds. Judicial review thus can serve this political function of instructing legislators as to the constitutional principles within which they should view themselves constrained—the same political function suggested by Hamilton in \textit{The Federalist No. 78}.\textsuperscript{73}

\footnotesize

\textsuperscript{71} \textit{Id.} at 148-49 (emphasis added).

\textsuperscript{72} As Thayer said, "in a court's revision of legislative acts, as in its revision of a jury's acts, it will always assume a duly instructed body" of persons who are "competent, well-instructed, sagacious, attentive, intent only on public ends, [and] fit to represent a self-governing people." \textit{Id.} at 149. To understand the implications of this "assumption," one must consider its genesis. If the assumption is merely considered to be a fictional rationalization of judicial deference in exercising the adjudicative function, then it must be justified entirely with reference to the normative notion that it would be worse to invalidate a law that is not unconstitutional, than to uphold a law that is unconstitutional. This normative judgment is at least contestable and, surely, is not self-evident. \textit{See infra} text accompanying notes 73, 142-51. If the assumption of a competent, well-instructed, and public-spirited legislature is predicated on a proposition of fact, however, another rationale for a deferential "rule of administration" emerges—a rationale predicated on the probabilities of unconstitutional government action. \textit{See infra} text accompanying notes 152-57.

\textsuperscript{73} \textit{See supra} text accompanying notes 44-51. Thayer suggests that legislative acts should be presumed permissible, "however probable" it might be that legislators were ignorant as to those constitutional boundaries. \textit{See} Thayer, \textit{Origin and Scope}, \textit{supra} note 52, at 139. This position seems clearly rooted in a normative judgment that it would be worse to invalidate a permissible act than to uphold an impermissible act—a judgment that Thayer does not adequately justify. In my view, such a normative judgment is difficult to justify, as is the converse normative judgment. \textit{See infra} text accompanying notes 142-51.
In suggesting a political function for judicial review, Thayer’s reasons for deferential “rules of administration” also imply the need to distinguish clearly between substantive constitutional principles and adjudicative rules. A public-spirited legislature that is duly instructed on the substantive principles within which it should feel constitutionally constrained is less likely to enact unconstitutional laws than is one that is ill-instructed. Indeed, to the extent that legislators are duly instructed on the substantive boundaries of their discretion, one has a rationale for judicial deference to legislative decisions that does not depend on the normative proposition that erroneously invalidating a statute is worse than erroneously upholding a statute. Rather, one has a rationale for a deferential “rule of administration” based on a probabilistic proposition that the duly instructed legislature is less likely to have acted unconstitutionally than the ill-instructed legislature. The less likely that a legislature has acted unconstitutionally, the more judicial deference is warranted when performing the adjudicative function. 74

The proposition that legislators are public-spirited as a matter of course is a bit more optimistic than were the suppositions of the Federalists who created the Constitution. In justifying the faction-thwarting structure of the national legislature, Madison warned that “enlightened statesmen will not always be at the helm.”75 In justifying judicial review, Hamilton warned that “designing men” might sway legislative choices, and that even when such legislators choose to remain within constitutional bounds, they would do so because of “iniquitous intentions.” 76

But even assuming that legislators are not all public-spirited, they still could be less likely to enact unconstitutional legislation if the Court were more clearly to articulate the substantive constitutional boundaries on legislative discretion. Even if motivated by selfish interests, opponents of a bill would have the opportunity to use constitutional arguments, predicated on the Court’s clearly articulated substantive constitutional principles, to sway legislators who might be more public-spirited, or otherwise doubtful about the merits of the policy at issue. Although Thayer’s analysis of the political function might not readily justify the degree of deference to Congress that he urged, it at least suggests that deference is more warranted to the extent that the Court’s constitutional doctrine can

74. For more on probabilistic considerations for allocating the burden of persuasion in constitutional adjudication, see infra text accompanying notes 152-57, 198-207, 446-53.
75. THE FEDERALIST No. 10, at 80.
76. THE FEDERALIST No. 78, at 469.
and does "duly instruct" legislators about the substantive boundaries of their discretion.\textsuperscript{77}

What more successful implementation of judicial review could there be than \textit{to reduce the probability that legislatures would choose to make unconstitutional choices}? Thayer's analysis implies, and I agree, that the most successful judicial review would be that which, through its political function, enhances the responsibility of legislatures, and thereby reduces the significance of courts and their adjudicative function for enforcing constitutional mandates. The means for achieving these objectives, as suggested throughout this Article, involve careful attentiveness to the structure of constitutional doctrine. Constitutional doctrine, like doctrine in virtually every other area of law, must be structured in a way that explicitly differentiates the derivation and definition of substantive principles on the one hand, and adjudicative rules on the other.

\textbf{D. Robert Bork and Legitimacy}

For Robert Bork, "[t]he intended function of the federal courts is to apply the law as it comes to them from the hands of others."\textsuperscript{78} This contemplates the adjudicative function. Yet, much of what Bork says about \textit{how} the Court should "apply the law as it comes to them from the hands of others" implies a political function for judicial review as well.

Bork's \textit{grundnorm} is "legitimacy." For Bork, to exercise judicial power legitimately is to decide cases in a manner "ensuring that the democratic authority of the people is maintained in the full scope given by the Constitution."\textsuperscript{79} Bork argues that the cardinal sin in exercising the power of judicial review is to legislate from the bench; that the judge's task is to identify policy choices made by the sovereign. Furthermore, if a court is to decide particular cases "legitimately" and thereby to avoid wrongly intruding on the sovereign's prerogatives, it must enforce the Constitution's mandates "neutrally."\textsuperscript{80} Bork insists that "[t]he Court can act as a legal rather than a political institution only if it is neutral... in the way it \textit{derives and defines} the [constitutional] principles it applies" and that "[t]he philosophy of original understanding is capable of supplying [such] neutrality... ."\textsuperscript{81}

\textsuperscript{77.} See infra text accompanying notes 159-91, 310-12, 323-26, 348-49, 382-83, 454-65, 475-76.
\textsuperscript{79.} Id.
\textsuperscript{80.} Id. at 143-53.
\textsuperscript{81.} Id. at 146 (emphasis added).
Beyond the neutral derivation and definition of principle, Bork urges that "the Court cannot . . . avoid being a naked power organ" without "the neutral application of legal principle" as well.82 Bork states:

"The neutral or nonpolitical application of principle . . . is a requirement, like the others, addressed to the judge's integrity. Having derived and defined the principle to be applied, he must apply it consistently and without regard to his sympathy or lack of sympathy with the parties before him. This does not mean that the judge will never change the principle he has derived and defined. Anybody who has dealt extensively with the law knows that a new case may seem to fall within a principle as stated and yet not fall within the rationale underlying it. As new cases present new patterns, the principle will often be restated and redefined. There is nothing wrong with that; it is, in fact, highly desirable. But the judge must be clarifying his own reasoning and verbal formulations and not trimming to arrive at results desired on grounds extraneous to the Constitution.83"

In this passage, Bork seems to suggest two notions concerning the "application" of principle. On the one hand, Bork speaks of applying identified principle to the facts of a case "consistently, and without regard to his sympathy" for one party or another.84 On the other hand, Bork speaks of purposefully changing principle in response to new circumstances not considered in previous cases.85

The first notion of applying principle neutrally, without bias for one party or another, seems concerned with "application" in the sense that I have been using the concept. A non-neutral "application" of law to facts, in effect, changes the law—albeit on an ad hoc basis. Thus, toward fulfilling the jury's functions of finding facts and applying to those facts the law about which they are to be instructed, potential jurors are screened for bias. Jury bias in performing either the factfinding function, or the law application function—jury nullification—effectively transforms the jury into an institution that makes law rather than one that applies law made by others.86

Bork's second notion of neutrally "applying" principle supposes that a judge might decide to change the definition of established

82. Id. (emphasis added).
83. Id. at 151 (emphasis added).
84. BORK, supra note 78, at 151.
85. Id.
86. This notion of "applying" substantive interpretations of constitutional text to the facts and circumstances of a particular case requires, as I have suggested, carefully constructed adjudicative rules designed to account for the possibility of factfinding error. See supra text at notes 33-38.
principle in response to facts and circumstances not previously contemplated. This essentially involves a determination that a legal principle articulated in a prior case—the reason for the decision—amounted to *dicta* (that it swept more broadly than necessary to decide a case because it encompassed facts not actually presented), or was framed too restrictively, and that the theretofore established principle should be *changed*, and *then* "applied" to the facts and circumstances found to be presented. Changing (or refining) legal principle in response to new circumstances not presented in prior cases is a paradigmatic example of *defining* legal principle.

It is this second meaning of "application" with which Bork is most concerned in developing his analysis of legitimacy through neutrality, and neutrality through originalism. Illustrating this notion, Bork examines *Shelley v. Kraemer.*87 *Shelley* considered whether the Equal Protection Clause prohibits racially restrictive covenants among private parties—or, more precisely, whether it prohibits state courts from enforcing such covenants.88 The Court decided that judicial enforcement of racially restrictive covenants in a contract among private parties was state action that violated the Equal Protection Clause.89

In Bork's view, the *Shelley* opinion is an example of failing to *apply* principle neutrally, because (he posits) the Court would never "apply" the *Shelley* principle in contexts beyond racial discrimination.90 The Court would never, for example, find state action in violation of the First Amendment if the state were to enforce its trespass laws on behalf of a property owner who sought to exclude an invitee for having expressed objectionable opinions. "The result of the neutral application of the principle of *Shelley v. Kraemer*

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87. 334 U.S. 1 (1948).
88. See id. The *Shelley* decision rested on several propositions. First, "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct ..." *Id.* at 13. Second, so long as the purposes of the restrictive covenants were achieved through voluntary compliance, there would be no need for judicial enforcement—therefore no state action and no conceivable violation of the Fourteenth Amendment. *Id.* at 12-14. Third, judicial enforcement of the covenants under circumstances where parties to the agreement do not voluntarily comply does amount to state action and, therefore, could violate the Fourteenth Amendment. *Id.* at 13-14.
89. *Id.* at 20. In particular, this state action, under the facts and circumstances of *Shelley,* *did* violate the Equal Protection Clause because "the difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing." *Shelley,* 334 U.S. at 19.
90. BORK, supra note 78, at 152-53.
[here] would be both revolutionary and preposterous. Clearly, it would not be applied neutrally . . . ."91

Of course, here Bork is using the notion of "application" not in the sense of applying a previously defined principle to the facts and circumstances of a particular case, but in the sense of choosing the level of generality at which the governing principle should be defined.92 This focus on the derivation and definition of principle—even as Bork writes of the neutral application of principle for the adjudicative function and its legitimate exercise—suggests a concern about the political function of judicial review and its legitimate exercise.93 Indeed, Bork's animating passion is:

[N]ot . . . ultimately about legal theory. It is about who we are and how we live; it is about who governs us and how, about our freedom to make our own moral choices, and about the difference that makes in our daily lives and in the lives of generations yet to come.94

More directly suggesting concern with the political function, Bork laments that the non-neutral definition of (substantive constitutional) principle—the legislating from the bench that he so abhors—is significant not only because it can wrongly deny to political majorities their right to enforce preferred policies in particular cases, but also because the judiciary's arrogation of the legislature's policymaking discretion damages the perceptions,

91. Id. at 153.

92. Furthermore, Bork's actual concern is not with defining "state action," but with defining that state action which violates the mandates of equal protection. After all, it seems undeniable that judicial decisions are state action, and it seems clear that the Court would treat a judicial decision as such in any context, subject to applicable substantive constitutional prohibitions. For example, if a litigant alleged that a state court judge engaged in a pattern of deciding against the claims of black litigants, she would have alleged conduct which, if proved, not only would qualify as state action, but also would amount to purposeful discrimination in violation of the Equal Protection Clause. In Shelley, the question was whether the Equal Protection Clause prohibits state courts from treating racially restrictive covenants as they treat other contracts. See Shelley, 334 U.S. at 4. This is a matter of defining unconstitutional racial discrimination when committed by state courts; it is not a matter of defining state action. More importantly for present purposes, it certainly is not a matter of applying previously defined substantive principle to the facts and circumstances of a particular case. The aspect of Shelley with which Bork disagrees is its (substantive constitutional) principle for identifying those facts and circumstances that trigger a finding of unconstitutional racial discrimination, not the determination of whether the facts of the case satisfy an established substantive definition of state action. For discussion of an analogous definition of unconstitutional racial discrimination when inflicted by state courts in the context of child custody decrees, see infra note 464.

93. See BORK, supra note 78, at 152-53.

94. Id. at 11.
values, and conduct of citizens in the processes of democratic self-government.\(^{95}\)

Among the stakes is the full right of self-government that the Founders bequeathed us and which they limited only as to specified topics. \textit{In the long run, however, there may be higher stakes than that}. As we move away from the historically rooted Constitution to one created by abstract, universalistic styles of constitutional reasoning, we invite a number of dangers. \textit{One is that such styles teach disrespect for the actual institutions of the American nation.} A great many academic theorists state explicitly, and some judges seem easily persuaded, that elected legislators and executives are not adequate to decide the moral issues that divide us, and that judges should therefore take their place. But, when Americans are morally divided, it is appropriate that our laws reflect that fact.\(^{96}\)

For Bork, legislating from the bench is the cardinal sin in constitutional adjudication not only because it promises to invalidate laws that should be enforced (thereby intruding through the adjudicative function on the right of self-government with respect to the particular policies wrongfully invalidated) but also because it teaches lessons that undermine respect for self-government (thereby tainting through the political function the manner in which citizens perceive and exercise their ongoing right of self-government).

It is hardly a stretch from these concerns about the harmful political consequences of illegitimately articulating and enforcing constitutional principle to posit \textit{beneficial} political consequences from \textit{properly} articulating and enforcing constitutional principle—in other words, the complete political function of judicial review as contemplated by Hamilton and Thayer. Indeed, Bork implicitly recognizes this broader political function with the following admonition:

\begin{quote}
When . . . the Supreme Court . . . pronounces in the name of the Constitution upon the meaning of racial justice, sexual morality, or any other subject, a cultural lesson is taught. Most people revere the Constitution as a basic compact that defines American civic morality. A decision does more than decide a case; it adds weight to one side of our cultural war, even when the decision is in fact not supported by the actual Constitution.\(^{97}\)
\end{quote}

Bork here suggests that judicial decisions add weight to one side or the other of political controversies—whether those decisions are “correct” or not. It should follow for Bork that “correctly” articulated

\begin{itemize}
\item \(^{95}\) See \textit{id.} at 1-11
\item \(^{96}\) \textit{Id.} at 352 (emphasis added).
\item \(^{97}\) \textit{Id.} at 137-38.
\end{itemize}
substantive constitutional principles would "duly instruct" (Thayer's words) citizens and their representatives about the extent and the limits of political discretion, and would enhance the public's ability to refrain from enacting policy that they understand transgresses constitutional bounds.

It is significant that a theorist so concerned with the legitimate exercise of judicial power and so critical of legislating from the bench could contemplate the political function as so fundamental. Because Bork's concern for legitimacy contemplates not only the adjudicative function, but also a political function for judicial review, he could embrace the proposition that constitutional doctrine should be comprised of explicitly differentiated substantive constitutional principles for legitimately deriving and defining the meaning of constitutional text, and adjudicative rules for legitimately determining whether a particular challenged governmental act violates applicable substantive constitutional prohibitions.98

E. Cooper v. Aaron and Obedience

In Cooper v. Aaron,99 the Court elaborated on its supreme authority to interpret and enforce the mandates of constitutional text. Not only are litigating parties bound to comply with judicial orders; pursuant to judicial supremacy, all those government actors who would be bound under the holding of a decided case if an action were brought against them should comply with that holding, so as to avoid the need to bring such an action.100 Cooper's judicial supremacy contemplates the political function of judicial review.

In the aftermath of Brown v. Board of Education,101 some public officials in Arkansas developed very different notions about their

98. For Bork, deriving and defining (substantive constitutional) principle is not akin to the inductive common law process of accreting specific cases toward identifying patterns and inferring general principle under the rubric of stare decisis. Rather, for Bork, the derivation and definition of principle involves a deductive process of inferring and declaring as governing principle the intentions and choices of people who joined together politically to create and ratify constitutional text. This is, perhaps, why Bork is so concerned with "application" in the sense of defining a principle's appropriate level of generality. For Bork, the legitimacy of the principles the Court defines depends on the accuracy of the Court's judgment as to the substantive values and goals of those who created the constitutional text at issue. Such an articulation of principle must be in a form that applies in general and for the future, as do the terms of a statute or of the Constitution itself. Indeed, to a significant extent, articulating principles in a way that would be dicta in the context of common law adjudication is, for Bork, an essential judicial task in the context of constitutional adjudication. On this, I tend to view Bork as correct.


100. See infra text accompanying notes 110-15.

prerogatives and responsibilities. On May 23, 1954, the Little Rock School Board declared their intent to comply with Brown's mandates, stating that "[i]t is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed." The Board then developed plans to desegregate Little Rock's public schools. Nine black students were to be admitted to the otherwise all-white Central High in September of 1957.

In contrast, the Governor of Arkansas employed the Arkansas National Guard to prevent this scheduled first step in the desegregation of Central High. The United States Attorney General and the U.S. Attorney for the District of Arkansas then brought an action against the Governor, seeking to enjoin him from further efforts to resist the desegregation plan by force. The federal district court issued the injunction. Governor Faubus complied and withdrew his troops.

The Governor's decision to resist desegregation until he was directly enjoined from continuing was the last in a series of political efforts to resist Brown's implications for segregated schools in Arkansas. The Arkansas Constitution was amended in 1956 to command the General Assembly to resist Brown. The Assembly enacted legislation in early 1957 establishing a "State Sovereignty Commission" and "relieving school children from compulsory attendance at racially mixed schools."

In the face of such political resistance, the School Board itself petitioned the District Court "seeking a postponement of their program for desegregation." The Board argued that despite its earlier good faith efforts to comply with Brown, subsequent political resistance had generated "extreme public hostility," and that unless its desegregation plan were postponed, "maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible." The District Court granted the Board's petition. The Court of Appeals reversed, and its judgment of reversal was affirmed by the Supreme Court.

All of this is background to that aspect of the Court's opinion that was concerned with reinforcing judicial supremacy, and with it,
the political function of judicial review. Even while recognizing its assertions as dicta, the Court declared, "we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case."\textsuperscript{110} It continued:

Article VI of the Constitution makes the Constitution "the supreme law of the land."... [Marbury] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States. ... Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3, "to support this Constitution." ... The principles announced in [Brown] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.\textsuperscript{111}

These propositions go well beyond the adjudicative function. The Court was asserting not only that state judges, but also legislators and governors were bound by the Court's interpretation of the Fourteenth Amendment in Brown—by the substantive constitutional principles announced in Brown—even if such officials were not parties to any of the suits actually adjudicated in Brown. When the Court said that a Governor could not, consistent with judicial supremacy, nullify a court order, its concerns were derived from the adjudicative function.\textsuperscript{112} When the Court said that state judges must abide by the "principles announced in [Brown]," its concerns also were derived from the adjudicative function, and the responsibility of courts deciding a case today to abide by authoritative precedent.\textsuperscript{113} But when the Court declared that when enacting and enforcing legislation, state legislatures and governors must abide by "the principles announced in [Brown]" because such judicially-defined principles are the supreme law of the land, its concerns were derived from the political function—counseling political actors that they have, indeed, been "duly instructed" by the Court on the constitutional boundaries of their discretion.\textsuperscript{114}

\textsuperscript{110.} \textit{Id.} at 17
\textsuperscript{111.} \textit{Id.} at 18-20.
\textsuperscript{112.} \textit{See id.}
\textsuperscript{113.} \textit{See id.}
\textsuperscript{114.} \textit{See Cooper}, 358 at 18-20.
Thus, in asserting, pursuant to judicial supremacy, that judicial opinions should command broad political obedience, Cooper added force to Hamilton’s own assertion of the political function—\textit{that judicial review:}

\textit{[O]perates as a check upon the legislative body in passing [unconstitutional acts]; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they mediate, to qualify their attempts.115}

\textbf{III. \textsc{Substantive Constitutional Principles and Adjudicative Rules (or Their Absence) in Operation: Case Studies}}

This section tests the proposition that explicitly differentiating the derivation and definition of substantive constitutional principles and adjudicative rules is necessary for effectively fulfilling the adjudicative and political functions of judicial review. It does so by closely examining several contexts in which the Court has failed to construct constitutional doctrine explicitly in terms of these two very different kinds of legal rule. Before turning to these case studies, however, I address a potential objection: that in framing constitutional doctrine, ambiguity is inevitable and, perhaps, desirable.

\textbf{A. Preliminary Observations: Some Reasons for Doctrinal Ambiguity and their Limited Relevance for this Article’s Prescriptions}

One might argue that ambiguity in framing constitutional doctrine is inevitable because achieving a majority among the Justices is an intrinsically political process that must accommodate their different views. An opinion might purposefully obfuscate a doctrinal point in order to command the support of a majority. One might further argue that this doctrinal ambiguity is desirable, as it enables the Justices to work through issues of constitutional meaning over time, rather than committing themselves, and the Court, to positions that might come to be viewed as ill-conceived. Finally, one might argue in the fashion of Bickel that obfuscatory doctrine can enable to the Court to achieve results that it could not attain through clarity and candor.

Consider each point in turn. Ambiguity is not inevitable when there is majority support for a \textit{ratio decidendi}, or when a Justice writes a concurrence or dissent for herself. In \textit{Bakke}, Justice Powell

\footnote{115. \textsc{The Federalist} No. 78, at 470.}
was beholden to no one but himself. Yet, as we will see, his opinion in
that case is a model of ambiguity and incoherence that could have
been avoided had he sought to derive and define doctrine through
explicitly differentiating substantive constitutional principles and
adjudicative rules. 116

The putative inevitability of doctrinal ambiguity does not
establish its desirability. Some might argue that creating ambiguous
doctrine can enable the Court to work through complex issues, or to
achieve results that otherwise would be resisted. One might respond
briefly to both points. If Justices create doctrinal ambiguity to avoid
resolving issues prematurely, the rationale anticipates their eventual
resolution. 117 There comes a point at which areas of constitutional

116. See infra Part III.C. Furthermore, to posit that not all Justices would follow
suit no more challenges my suggestions for structuring constitutional doctrine than
does the Court’s failure to embrace Bork’s originalism, or Dworkin’s “Herculean”
pursuit of coherent principle, or Bickel’s passive virtues, challenges the respective
merits of their proposals. Prescriptions for the manner in which judicial review ought
to be exercised are inherently idealistic. That no prescription could possibly be
achieved in reality does not vitiate its potential for casting new light on otherwise
intractable issues.

117. Richard Fallon has explored the challenges of crafting constitutional doctrine
in the face of “reasonable disagreement.” See generally Fallon, supra note 17. He
suggests that because Justices might disagree about foundational values, compromise
is necessary. Id. at 59-60. He acknowledges that compromise undermines the goal of
“fidelity” to the Constitution—that is, of correctly interpreting its meaning. See id. at
60. Thus, he argues, “[m]ore than fidelity theorists have appreciated, constitutional
law needs a theory of the second-best.” Id. at 117. Fallon views principles defining
prohibited purposes, for example, as potentially underenforcing true constitutional
meaning, but the best that Justices can do, given reasonable disagreement about
constitutional meaning. See id. at 90-102. He states that “purpose-focused . . .
doctrines—at least when they are the practically exclusive mechanisms for the judicial
implementation of constitutional norms—reflect at most a thin, minimalist conception
of the democratic processes to which courts are often asked to defer.” Id. at 105.

I would suggest that purpose-focused doctrines reflect more a minimalist conception
of constitutional mandates than a minimalist conception of democratic processes.
Beyond this, I would suggest that any substantive constitutional principle identified
by the Court must be one which the national electorate plausibly has created, or
plausibly would create, in constitutional politics, toward constraining their own
ordinary political discretion. See, e.g., Chang, Critique, supra note 37. From this
perspective, is a constitutional law comprised of “thin” substantive constitutional
principles truly second-best, or is it the most plausible understanding of the roles
accorded to the realms of constitutional and ordinary decisionmaking by those
responsible for creating the Constitution’s provisions? See infra note 309. In any event,
the value—indeed necessity—of explicitly differentiated substantive constitutional
principles and adjudicative rules, independently derived and defined to serve their
respective functions, does not depend on any particular view about the substance of
constitutional law. Indeed, recognizing the essential and functional distinctions
between substantive constitutional principles and adjudicative rules could help to
structure a search for “a theory of the second-best”—or, more precisely, one “theory of
law mature and crystallize. Even if only at that point, this Article's main proposition stands: explicitly differentiating the derivation and definition of substantive constitutional principles and adjudicative rules is necessary, even if not sufficient, for creating constitutional doctrine with a clarity most likely to fulfill the adjudicative and political functions effectively.

If Justices create doctrinal ambiguity toward making decisions that would be more politically unpalatable or resisted if reached through clearly derived and defined principles, one might seriously question the tactic's legitimacy, as Joseph Goldstein challenged Alexander Bickel's "passive virtues." One's view of such willful ambiguity depends on one's conception of judicial review, and of the Justices' responsibilities when wielding that power. Bickel sees Justices as exercising platonic judgment in ways concerned as much about preserving political peace as enforcing properly construed constitutional mandates. Goldstein far more emphasizes the latter, and would condition any pursuit of the former on a candid and explicit acknowledgement of the Court's agenda. In my view, like Goldstein's, the Court has no business making decisions that intrude (or fail to intrude) on governmental discretion in the name of the Constitution except in pursuit of its best judgment, clearly and candidly explained, as to what the Constitution prohibits, and what it permits.

For those who would advocate willful ambiguity, prescriptions for achieving doctrinal clarity might be of little use. Yet even they

the second-best" for deriving and defining substantive constitutional principles, and another "theory of the second-best" for deriving and defining adjudicative rules.


119. Cass Sunstein urges "minimalism" in adjudicating "issues on which the nation is sharply divided." Sunstein, supra note 17, at 50. By "minimalism," he means "deciding only those issues that were necessary for disposition" of the particular case. Id. at 49. He suggests that minimalism would have been appropriate for cases such as Dred Scott, Brown, and Roe. Id. at 48-51. Minimalism does not necessarily entail providing an ambiguous rationale for decision, but it does contemplate giving an incomplete explanation of the decision as the result of legitimate interpretation. Sunstein views Romer v. Evans, 517 U.S. 620 (1996), as a good, if flawed, example of minimalism. He notes that Romer must be understood as defining a new category of constitutionally impermissible purpose—a purpose "to discourage homosexuality or homosexual behavior." Sunstein, supra note 17, at 62. He acknowledges that this is not minimalist in the sense that the decision was predicated on a real and contested substantive judgment—that, indeed, the Court had taken sides in Justice Scalia's culture wars. Id. at 63. Sunstein also acknowledges that Justice Kennedy's rationale for framing the contested value judgment as a new constitutional mandate could have been "clearer" and "more coherent." Id. at 63-64. He acknowledges that the Court failed "even to do what is minimally necessary for self-defense." Id. at 64. Yet, he views the case as "a legitimate and in many ways salutary exercise in judicial minimalism," id. at 52, because the Justices could not agree on a deeper rationale, or lacked
must recognize that not all constitutional issues arise in a context that calls for willful ambiguity. For non-Bickelian contexts, inadvertent ambiguity undermines the adjudicative and political functions in ways that will be elaborated below. If the Court were to follow this Article's prescriptions toward creating more clarity, at least in non-Bickelian contexts, the contrast with those willfully obscured Bickelian contexts would be stark. Willful obfuscation could be less effective if it were transparent that there has been an attempt to muddle. Thus, those who wish to preserve space for willful ambiguity must determine whether the benefits of preserving that option are more significant than the costs incurred through a body of constitutional doctrine that is universally more ambiguous and unjustified than it otherwise could be and, therefore, that is less well suited to serve the adjudicative and political functions across the broad range of constitutional issues on which the Court pronounces its judgment.

B. The Pre-Bakke Adjudication of Claims that Racial Classifications Violate the Equal Protection Clause

1. The Implicit Substantive Constitutional Principle and Implicit Adjudicative Rule

In *Korematsu v. United States*, the Supreme Court determined that a military order excluding persons of Japanese ancestry from
presence within certain areas on the west coast did not violate principles of equal protection. Justice Black stated:

[All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.]

This statement begs several questions. Why are laws with racial classifications "immediately suspect"? What is a court to look for in closely scrutinizing laws with racial classifications? What distinguishes racial classifications that are unconstitutional from those which are not?

Significantly, Justice Black also said: "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Applying these propositions to the facts and circumstances of the case, Justice Black determined that these racial classifications should not be invalidated, saying that "[t]he judgment that exclusion of the whole group was . . . a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin." He concluded:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire. . . .

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121. Principles of equal protection have been deemed applicable to federal policies through the Fifth Amendment's Due Process Clause. This proposition was crystallized nearly a decade after Korematsu was decided. See generally Bolling, 347 U.S. 497. For a review of the Court's application of equal protection principles to the federal government before Bolling, see Justice O'Connor's opinion in Adarand v. Pena, 515 U.S. 200, 213-17 (1995). O'Connor notes that the Court left quite an ambiguous picture in Korematsu and Hirabayashi v. United States, 320 U.S. 81 (1943), of how principles of equal protection applied to the federal government through the Fifth Amendment. Adarand, 515 U.S. at 213-15. One might suggest that these ambiguities could have been mitigated significantly had the Court attended explicitly to the distinction between substantive constitutional principles and adjudicative rules, as developed in this section. On the applicable substantive constitutional principle, should the federal government have been viewed as having more discretion than the states to pursue purposes rooted in racial prejudice? If not, on the applicable adjudicative rule, should the federal government be viewed as less likely than states to have pursued purposes rooted in racial prejudice when adopting policies containing racial classifications? For analysis of these two questions, see David Chang, Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?, 91 COLUM. L. REV. 790, 825-27 (1991) [hereinafter Chang, Judicial Conservatism].

122. Korematsu, 323 U.S. at 216.

123. Id. (emphasis added).

124. Id. at 219.
There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and the time was short.125

Justice Black thus implied a substantive definition of unconstitutional racial discrimination framed in terms of prohibited purposes—that if a racial classification were enacted because of racial antagonism, then it would be unconstitutional. Having determined that the challenged racial classification in fact was not adopted because of purposes rooted in racial antagonism, but because of bona fide considerations of military necessity, he determined that this particular racial classification should be upheld.

Furthermore, Black's opinion implied an adjudicative rule for determining whether a law containing racial classifications will be upheld or invalidated.126 Laws with racial classifications are presumed unconstitutional. Such laws are viewed with suspicion.

About what is the Court suspicious when faced with a law containing racial classifications? The implicit answer: the Court is suspicious that the law was adopted because of purposes rooted in racial antagonism. What must the government demonstrate to rebut the presumption that its policy containing racial classifications discriminates unconstitutionally because of race? The implicit answer: the government must prove that the law was not adopted because of purposes rooted in racial antagonism.127 Thus, implicitly, the Court would subject a law containing racial classifications to "the most rigid scrutiny" to determine whether it was enacted because of racial antagonism.128

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125. Id. at 223-24 (emphasis added).
126. See id. at 216.
127. See id.
128. In Palmore v. Sidoti, Chief Justice Burger articulated these substantive and adjudicative propositions more clearly and explicitly than the Court ever had before, or since, stating: "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns." 466 U.S. at 432. This single, simple sentence implicitly expresses an antiracism principle as the applicable substantive constitutional principle: Racial prejudice is not a legitimate public concern. It also implies a rationale for the presumed unconstitutionality of racial classifications—they are categorically more likely to reflect racial prejudice than permissible purposes. In other words, in choosing to use racial classifications, the government probably violated the antiracism principle. Therefore, it is the government's burden to show that this statute is among the minority of laws containing racial classifications that are constitutionally permissible. Furthermore, the sentence implies something of the nature of the showing that the government must make. The government must persuade the court that the statute in question was not adopted because of racial prejudice, but instead was adopted for legitimate public concerns.
2. Failures in Explicitly Deriving and Defining Substantive Constitutional Principles and Adjudicative Rules Undermine the Adjudicative Function

   a. Substantive Constitutional Principles for Properly Identifying Issues of Relevant Fact

   **Definitional Ambiguity.** Justice Black declared that "racial antagonism" could never "justify" a racial classification. He also stated that laws "which curtail the civil rights of a single racial group" are "suspect," and "that courts must subject them to the most rigid scrutiny." As suggested above, these statements imply a substantive definition of unconstitutional racial discrimination: If the government "justifies" a law containing racial classifications with "racial antagonism," then that law violates the Equal Protection Clause.

   If one were to have considered this implicit proposition explicitly, however, one would have identified ambiguities requiring clarification. First, what does it mean for the government to "justify" a law by reference to racial antagonism? Is the concept of governmental "justification" concerned with the actual purposes for which the challenged law was enacted? Is it concerned with the purposes that the government asserts during litigation, regardless of what the actual purposes might have been? These two different definitions of "justify" would make different facts and circumstances constitutionally relevant. It surely must matter for determining whether a particular racial classification should be upheld which of these two concepts of "justification" the Court were to choose.

   Second, what, exactly, does "racial antagonism" mean? Does it mean a dislike of people of a particular race solely because of their race? Does it extend to making policy judgments about members of a certain race, apart from whether there is antagonism or dislike, because of assumed facts about that race—because, in other words, of racial stereotyping? These different definitions of "racial antagonism" each would make different facts and circumstances constitutionally relevant. It surely must matter for determining whether a particular racial classification should be upheld which of these definitions of "antagonism" the Court were to choose.

   **Derivational Ambiguity.** For the sake of further analysis, one can posit that Justice Black was concerned about the actual reasons a challenged policy was adopted, and that his notion of prohibited

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129. Korematsu, 323 U.S. at 216.
130. Id.
131. See id.
antagonism was limited to disliking people solely because of their Japanese ancestry. Again, he said that "Korematsu was not excluded from the Military Area because of hostility to him or his race." Justice Murphy, in dissent, seemed to have a broader substantive definition of unconstitutional racial discrimination than that implied by Black's opinion. Murphy said that the rationality required by equal protection:

[I]s lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage.133 

For Murphy, this unexamined, unsupported assumption that race correlates with behavioral tendencies amounted to a "legalization of racism" that violates the Equal Protection Clause.134 In other words, Murphy's (implicit) substantive constitutional principle was concerned with racial stereotyping; Black's was not.

Does the constitutional mandate of equal protection, properly interpreted, encompass substantive constitutional principles prohibiting only laws enacted because of purposes rooted in racial antagonism or, more broadly, laws enacted because of purposes rooted in racist values and racial stereotypes? This question lies at the heart of effectively performing the adjudicative function in Korematsu and in other cases challenging laws with racial classifications. How one defines an applicable substantive rule—whether a definition of manslaughter in criminal law, or a substantive constitutional principle defining impermissible racial discrimination in constitutional law—is centrally significant in identifying which questions of fact and circumstance are legally relevant and, therefore, in shaping the course and the outcome of cases in which those rules are invoked. Murphy's implicit principle made relevant some issues of fact that Black's did not. Murphy's underlay a finding of unconstitutionality; Black's did not.135 Explicitly endeavoring to derive a substantive constitutional principle as sound interpretation would require focusing on its elements. Had he done so, Justice Black more likely could have acknowledged that his definition of unconstitutional racial discrimination—establishing the irrelevance of stereotype—was

132. Id. at 223.
133. Id. at 235.
134. Id. at 242.
135. Of course, Justice Black's conclusion that the exclusion order was not unconstitutional is also explained by his failure to follow through with the adjudicative rule he purported to employ—the presumption that laws containing racial classifications are unconstitutional. See infra text accompanying notes 139-57.
substantially narrower than that of Justice Murphy. Had he done so, Justice Black would have been put to the task of justifying his narrower definition of unconstitutional racial discrimination as a better interpretation than Justice Murphy's.

**Adjudicative Legitimacy.** Whether a putative substantive constitutional principle is a *proper* interpretation of relevant constitutional text requires confronting questions of interpretive methodology. Should the substantive meaning of the Fifth Amendment's Due Process Clause be defined according to the original understanding? If so, why? If not, then what methodology should be employed, and why? Whether the interpretive method a Justice invokes is Bork's originalism, Wellington's conventional morality, Dworkin's philosophically coherent "principle," Ely's representation reinforcement, Amar's documentarianism, or something else, an explicitly identified interpretive method provides benchmarks that must be accounted for in defining the applicable principle's particular elements. Confronting these questions could be far more likely if our legal culture conceptualized constitutional doctrine *explicitly* in terms of substantive constitutional principles and adjudicative rules. Such a conceptualization would engender an expectation that rules designated as substantive constitutional principles must be justified as such—that is, as principles properly derived from and evoking values deemed to underlie constitutional text. Apart from noting their central relevance in deriving substantive constitutional principles, further exploring such questions of interpretive method is beyond the scope of this Article.

b. **Adjudicative Rules for Properly Resolving Issues of Relevant Fact**

An essential component of both criminal and civil adjudication is a clearly defined and justified burden of persuasion with respect to disputed legally significant facts. If the factfinder lacks a clear sense of which party has the burden of persuasion and why, it must be hindered, perhaps to the point of incapacity, in determining whether such facts and circumstances have been proved to the necessary degree of certainty.

**The Analysis Black Did Pursue.** In Korematsu, Justice Black suggested that the order excluding persons of Japanese ancestry from certain west coast areas would be presumed unconstitutional.

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138. See Amar, supra note 17.
All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.\(^1\)

One might explore certain definitional ambiguities in this statement. In particular, what is the nature of the "most rigid scrutiny" that Justice Black promises? For what is such scrutiny searching? What must the government do to persuade a court that what the scrutiny is looking for is (or is not) present?

Perhaps because Justice Black did not explicitly confront any of these issues essential to deriving and defining the applicable burden of persuasion, his analysis collapsed in determining whether his implicit substantive constitutional principle had, in fact, been violated. Justice Black concluded, as a matter of fact, that the order was not adopted because of racial antagonism, but to serve purposes of military necessity, simply because the government said so.\(^2\) Of course, concluding that the government wins simply because it has "answer\[ed\] the contention" of racial antagonism reveals a posture of deference.\(^3\) Resting satisfied with a government contention is inconsistent with any notion of "suspicion," let alone the focused suspicion that could have been framed if Black had explicitly sought to derive and define adjudicative rules for determining whether a particular policy containing racial classifications should be deemed impermissible.

An Analysis Black Should Have Pursued. Why, then, should laws which curtail the civil rights of specified racial groups be viewed as "suspect"—not necessarily unconstitutional, but "subject to the most rigid scrutiny"? Why not apply James Bradley Thayer's deferential "rule of administration"? Why not accord such laws the same presumption of permissibility that is applied in adjudicating most claims of unconstitutionality? Then again, why are most constitutional claims adjudicated under a presumption that the challenged governmental act is not unconstitutional? What analytical

\(^1\) Korematsu, 323 U.S. at 216.
\(^2\) See id. at 222-24.
\(^3\) Id. at 219. Earlier, Black took the same posture of deference to the asserted interest in military necessity that the Court had taken in Hirabayashi.

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Id. at 218 (quoting Hirabayashi, 320 U.S. at 99) (emphasis added).
frameworks and factors are relevant for determining whether particular kinds of governmental act should be presumed permissible, or presumed impermissible?

I will now present an extended analysis of methodologies relevant for deriving and defining adjudicative rules in constitutional cases. Though the virtues and vulnerabilities of originalism and the many competing methodologies for deriving and defining substantive interpretations of constitutional text have been exhaustively considered through the generations, scant attention has been devoted to methodologies for deriving and defining adjudicative rules in the context of constitutional adjudication.142 For criminal adjudication,

142. *But see* Berman, *Guillen and Gullibility*, *supra* note 12, at 1522. Professor Roosevelt has conceptualized the creation of “decision rules”—or, in my terms, adjudicative rules—not only in terms of assigning a burden of proof, but also in terms of whether the Court should “choose decision rules that differ substantially from the operative propositions they are intended to implement.” Roosevelt, *supra* note 20, at 1658 (emphasis added). By the latter, I believe, he refers to rules identifying issues of subsidiary fact from which inferences about issues of ultimate fact (dispositive under the [operative] substantive constitutional principle) might be made. *See infra* text accompanying notes 402-11 (suggesting that doctrine concerned with whether regulated activity has a substantial economic effect on interstate commerce serves as an adjudicative rule for enforcing a substantive constitutional principle requiring congressional pursuit of economic purposes under the Commerce Clause). Roosevelt identified five factors relevant for constructing “decision rules”—including institutional competence, costs of error, frequency of unconstitutional action, legislative pathologies, enforcement costs, and guidance for other governmental actors. *See* Roosevelt, *supra* note 20, at 1658-67. In my view, Roosevelt’s five factors are reducible to the probabilistic and normative analyses presented here, *see infra* text accompanying notes 143-57.

Roosevelt acknowledges that “institutional competence could be a general answer, subsuming many of the other factors.” Roosevelt, *supra* note 20, at 1659. I would agree and, indeed, would suggest that even those facets of institutional competence on which he focuses are subsumed by other essential considerations. For example, Roosevelt suggests that:

If a constitutional operative proposition sets up a question that is within the peculiar competence of the courts, then the Court might adopt a decision rule that closely tracks the operative proposition and grants no deference to other actors. . . . Alternatively, a court confronting a question within the legislative competence might craft a deferential rule—such as the rational basis test—that will tend to uphold almost all legislative acts, even those that judges would deem unconstitutional if not deferring.

*Id.* at 1660-61. Roosevelt provides no example of a constitutional operative proposition constraining legislative discretion that poses issues peculiarly within the competence of courts. If issues were particularly within the judicial competence, one might suppose that the Constitution would allocate to courts primary authority for their resolution—and that any operative propositions would constrain judicial discretion. Principles of due process constraining adjudication, and principles governing the exercise of judicial review itself, would seem paradigmatic examples of contexts in which decisionmaking authority is vested with courts—and constrained by operative propositions applicable to courts—precisely because courts are viewed as having special competence. In
contrast, Roosevelt identifies the "rational basis test" as an example of a deferential decision rule for implementing an operative proposition that frames questions particularly within legislative competence. See id. In one sense, the operative proposition that he views rationality review as implementing—"the government may not treat some people worse than others without adequate justification"—does refer to questions of policy peculiarly with the legislative competence. Id. at 1657 (quoting Amar, supra note 17, at 45). Legislatures are viewed as having those institutional traits that justifies vesting them with authority to make policy choices within constitutional boundaries. The deference of rationality review, however, is applied only in circumstances in which legislatures are viewed as unlikely to have acted for constitutionally prohibited reasons. See id. at 1660-61. Such deference is not applied in contexts where legislatures, though still better suited than courts for choosing "adequate justifications" for statutory requirements, are viewed as more likely to have acted for constitutionally prohibited reasons—for example, when classifying by race. See id. at 1663-64. Thus, at least for the example of rationality review, it seems that the "institutional competence" factor may be subsumed within the probabilistic basis for allocating a burden of persuasion. Roosevelt, supra note 20, at 1661. Of course, it might be that a substantive constitutional principle (or an operative proposition) poses issues that courts are not well suited to answer reliably—for example, whether Congress acted for a constitutionally authorized purpose under the Commerce Clause. See infra text accompanying notes 386-411. Here, the Court might adopt a decision (or adjudicative) rule providing a best-available basis from which inferences of dispositive fact might be drawn—for example, as alluded to earlier in this footnote, a rule concerned with effects from which congressional intent might be inferred. See infra text accompanying notes 406-11. Yet this would be a function of relative judicial competence to answer different questions of fact made relevant by one substantive constitutional principle or another, toward reducing the probability of erroneously upholding or invalidating acts under the applicable substantive constitutional principle. It would not be a function of whether the substantive constitutional principle (or operative proposition) poses a question more within the judicial competence or legislative competence.

By "costs of error," see Roosevelt, supra note 20, at 1661-63. Roosevelt refers to considerations that I analyze under "the normative analysis" for allocating presumptions in constitutional adjudication. See infra text accompanying notes 143-51. By "frequency of unconstitutional action," see Roosevelt, supra note 20, at 1663-64, he refers to considerations that I analyze under "the probabilistic analysis" for allocating such presumptions. See infra text accompanying notes 152-57. By "legislative pathologies," Roosevelt refers to "justification for an anti-deferential decision rule... when there is reason to doubt the good faith of the legislature." Roosevelt, supra note 20, at 1664. As an example, he cites laws that entrench legislators, and those that benefit "locals while burdening out-of-staters." Id. In my view, this point restates concerns about the probability of unconstitutional action in relation to operative propositions (substantive constitutional principles) mandating particular definitions of legislative "good faith." Roosevelt also identifies concerns about "enforcement costs"—where "operative propositions may require courts to decide questions that they simply cannot," at least not "without burdensome... evidence gathering." Id. at 1665. Yet, such concerns seem less relevant for allocating the burden of persuasion than for devising adjudicative rules defining questions of subsidiary fact from which the questions of ultimate fact, dispositive under the applicable operative proposition, might be resolved. Finally, he suggests a "guidance for other governmental actors factor" for constructing decision rules. Id. at 1666-67. But this seems less relevant for determining what decision rules should be adopted and how they should be framed, and more relevant to rationales for explicitly differentiating
however, rules allocating the burden of persuasion regarding contested issues of material fact have been exhaustively analyzed. One might consider whether the basis for allocating the burden of persuasion in criminal prosecutions might inform analysis of the analogous issue for constitutional adjudication.

A normative approach for allocating the burden of persuasion in constitutional adjudication. Consider a prosecution for murder. A (substantive) definition of murder is “intentionally to cause the death of another human being.” This (substantive) definition of murder makes certain facts and circumstances relevant, and determines the issues of fact and circumstance that must be adjudicated when in dispute—specifically, whether the defendant intended to kill his victim; if so, whether the defendant engaged in conduct with such intent; and, if so, whether the defendant’s conduct caused such death. Accordingly, in a prosecution for murder, the state would need to make the factual argument that the defendant did intend to kill; the defendant would need to deny that he intended to kill.

Similarly, in the constitutional context, an applicable substantive constitutional principle would make certain facts or quasi-factual circumstances legally relevant. Where the parties dispute those relevant facts, rules allocating the burden of persuasion are necessary because the court might erroneously adopt the challenger’s version of the facts (and therefore erroneously invalidate the challenged governmental act); or erroneously adopt

143. The term “quasi-factual circumstances” contemplates rules such as those that require determining, first, what interest the government was pursuing in enacting a challenged policy, and second, whether such state interest qualifies as “compelling.” Whether the determinations are matters of “pure” fact, or mixed questions of law and fact, and whether the determinations are for the court, as is finding the existence of duty in a negligence action, or for the jury, as is finding the existence of breach in a negligence action, are questions that largely have been neglected in the Court’s definition of constitutional doctrine. See supra note 30. These questions far more likely could be addressed if constitutional doctrine were derived and defined in a manner explicitly distinguishing between substantive constitutional principles and adjudicative rules. Because carefully analyzing whether an issue presented by a particular element of a particular constitutional rule should be deemed one of pure fact (for the jury), mixed law and fact, or pure law (for the court) would warrant its own article-length treatment, and because such an analysis must build on first having made the case for distinguishing between substantive constitutional principles and adjudicative rules, this Article will eschew unpacking the concept of “quasi-factual” circumstance in favor of focusing on the more foundational set of issues.
the government's version of the facts (and therefore erroneously uphold the challenged governmental act).

Consider how this analysis, far from complete so far, applies to Justice Black's opinion in *Korematsu*. Recall the *implicit* substantive constitutional principle (which I have suggested should have been *explicitly* derived and defined)—if a law curtailing the rights of a specified racial group was adopted because of purposes rooted racial antagonism, *then* that law is unconstitutional. This substantive principle makes certain facts and circumstances relevant, and determines the issues of fact and circumstance that must be adjudicated when in dispute—specifically, *was* the challenged law adopted because of purposes rooted in racial antagonism? Given the substantive principle with which Justice Black implicitly was working, *Korematsu* would have had to make the factual argument that the exclusion order was adopted because of racial antagonism. The government would have had to make the factual argument that the order was not adopted because of racial antagonism.

In the criminal context, our legal culture has determined that the prosecution should bear the burden of persuasion with respect to all issues of material fact, and that the burden should be heavy. The rationale for these adjudicative rules begins with the recognition that adjudicative error is a real possibility. A court might erroneously convict a (truly) innocent defendant, or might erroneously acquit a (truly) guilty defendant. Based on a *normative* judgment that one of these errors is far worse than the other—that it would be far worse to convict the innocent than to acquit the guilty—our society has determined that the state should bear the burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged.\textsuperscript{144}

Consider how a normative analysis of adjudicative error applies to the constitutional context. In the adjudication of constitutional claims, a court might erroneously determine that a (truly) permissible law is unconstitutional, or erroneously determine that a (truly) unconstitutional law is permissible. Would invalidating a law that, in fact, is not unconstitutional be worse than upholding a law that, in fact, is unconstitutional? Might one reach the opposite conclusion? If so, how?

In my view, the normative evaluation of potential adjudicative errors can be of only questionable helpfulness in the constitutional context.\textsuperscript{145} The criminal context has made this normative judgment

\textsuperscript{144} See generally *In Re Winship*, 397 U.S. 358 (1970).

\textsuperscript{145} Cf. Berman, *Guillen and Gullability*, supra note 12, at 1522 (positing that judges "might reasonably believe that the social disutility of false positives and false
by defining, then evaluating, the social costs of each kind of adjudicative error. The social cost of an erroneous acquittal is a lost opportunity to enforce criminal prohibitions and to vindicate their underlying policies. The social cost of an erroneous conviction includes the unjust deprivation of an individual’s liberty, the risk of over-deterrence, and the dilution of the retributive condemnation of the guilty.146 Because the social costs of erroneous conviction are viewed as so much worse than the social costs of erroneous acquittal, whether the crime in question is murder or trespass, we have made the categorical determination that the prosecution must prove beyond a reasonable doubt all facts necessary to establish the crime charged.147

Can one make a categorical determination that it is worse to uphold a (truly) unconstitutional act than to invalidate a (truly) permissible act, or vice versa? Toward making this comparative judgment, one must define the relevant social costs of each adjudicative error. For constitutional adjudication, the stakes must be framed in constitutional terms. Though Korematsu involved a challenge to a military policy authorized by congressional delegation, it will be more broadly instructive, at least initially, to frame this normative analysis in terms of a typical constitutional challenge to a legislative act. Thus, what is lost of constitutional significance in an erroneous decision to invalidate a statute? What is lost of constitutional significance in an erroneous decision to uphold a statute? What are the constitutional values relevant to each kind of adjudicative error?

In the broadly categorical sense now in question, the failure to invalidate a (truly) unconstitutional statute leaves unenforced some constitutional restriction on governmental discretion, and the values from which that restriction is derived. The invalidation of a (truly) permissible statute intrudes on the legislative discretion that the Constitution, properly enforced, would require to be respected. Which category of constitutional value is more important—those constitutional values which restrict legislative discretion, or the foundational constitutional value that legislatures have the right to make policy within constitutional bounds? 148

negatives in the adjudication of any particular constitutional operative proposition are not identical”

146. See In re Winship, 397 U.S. at 363-64.

147. Justice Harlan made the point in his Winship concurrence: “I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.” Id. at 372 (Harlan, J., concurring).

148. My characterization of the relevant competing considerations in a normative analysis for allocating the adjudicative presumption in constitutional cases—weighing
Are all constitutional restrictions on legislative discretion of equal importance, and categorically more important than the norm that legislatures have the right to legislate within constitutional

the value of the particular restriction on governmental discretion against the broad norm of politically accountable governmental discretion within constitutional bounds—differs from the mode of ad hoc balancing that characterizes judicial inquiry in many constitutional contexts. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L. J. 943 (1987). This ad hoc balancing seeks to weigh the relevant constitutional norm against the particular state interest pursued through the challenged governmental act.

Indeed, it is important to recognize that the normative analysis—or balancing—about which I am concerned is functionally different from, and must be prior to, the balancing that occurs in, for example, the fundamental rights version of “strict scrutiny.” The ad hoc balancing involved in determining whether, say, a state’s interest in protecting a fetus is more important than a woman’s right to choose (and whether a particular law’s pursuit of the state interest is more significant than that law’s intrusion on the competing constitutional right) is a function of the applicable substantive constitutional principle. Such balancing cannot be undertaken without a prior determination of which party bears the burden of persuasion on the ultimate question of constitutionality—in other words, a determination of the applicable adjudicative presumption.

Thus, Justice Blackmun’s balancing in Roe was a function of an implicit substantive constitutional principle: If a law intrudes on a woman’s right to choose, and if the constitutionally significant value gained through its enforcement is not greater than the constitutionally significant value lost through its enforcement, then it is unconstitutional. Enforcing this substantive constitutional principle requires evaluating the particular state interest at stake—whether protecting a fetus, enforcing sexual morality, or protecting maternal health. But determining which party should bear the burden of persuasion for adjudicating the constitutionality of an act challenged under such a balance-oriented substantive constitutional principle cannot depend on the particular state interest asserted (and its putative weight), because the particular state interest asserted (and its putative weight) are elements of the applicable substantive constitutional principle. Determining the constitutionally significant weight of a state’s interest in maternal health, or preserving a fetus, therefore, is an issue that must be answered under the applicable substantive constitutional principle limiting state discretion—and is an issue with respect to which the burden of persuasion must be allocated. Put another way, particular state interests can be weighed against particular constitutional mandates under either a presumption of priority (permissibility) or a presumption of inferiority (impermissibility). Thus, the relevant considerations in a normative analysis for allocating the burden of persuasion would seem to be the relative importance of, on the one hand, the particular substantive constitutional principle limiting electorally accountable discretion and, on the other hand, the competing substantive constitutional principle that the people, through their representatives, have the right to create and enforce their preferred policies within constitutional bounds.

Professor Aleinikoff critiqued the ad hoc balancing required by balancing-oriented substantive constitutional principles in large part because of methodological problems involved in calibrating the balance in a constitutionally meaningful and justifiable way. See Aleinikoff, supra note 148, at 972-79. This problem is a more intense version of the problems I have suggested undermine the helpfulness of a normative approach for deriving and defining adjudicative rules that allocate burdens of persuasion in constitutional adjudication. See supra text accompanying notes 142-51.
bounds? Or, perhaps, is there some hierarchy of restrictions on legislative discretion, such that even the least important restriction on legislative discretion is more important than the norm that legislatures have the right to legislate within constitutional bounds? Unless one can answer either of these two questions in the affirmative, one cannot justify in the constitutional context the kind of sweeping categorical normative judgment and correspondingly allocated burden of persuasion that so easily determines the adjudicative presumption in the context of criminal law.

No one would argue that all constitutional restrictions on legislative discretion have equal weight. The freedom of speech, for example, would seem to be more foundational, more important, than is the requirement that "[t]he terms of the President and Vice President shall end at noon on the 20th day of January."\footnote{U.S. Const. amend. XX.} It also would be difficult to argue persuasively that the least significant restriction on legislative discretion—whether the January 20th provision, or another—is more important than the foundational principle that legislatures have the right to make law within constitutional bounds. Thus, the presumed impermissibility of Korematsu's challenged order cannot be justified on such a categorically defined normative basis.

One might evaluate whether each particular substantive constitutional principle limiting legislative discretion is more, or less, important than is the principle that legislatures have discretion to make policy within constitutional boundaries. Such a comparative evaluation begs the question of the methodology a judge should employ for making this comparative judgment. Choosing the proper methodology for identifying the relative weight of different substantive constitutional principles involves precisely the same challenges as determining the proper methodology for deriving the definition of substantive constitutional principles—whether Bork's originalism, Wellington's conventional morality, Dworkin's coherent "principle," or something else.

Beyond choosing an interpretive methodology, a court must apply it. The challenges involved in the derivation and definition of substantive constitutional principles are daunting. But defining the relative weight of substantive constitutional principles must be even more challenging. Indeed, determining the weight of a substantive constitutional principle is essentially a matter of defining the content of that principle to a greater level of precision and refinement than is required "merely" for identifying its elements. An analogy: However difficult it is to peer into a distant field, obscured by fog, to determine whether two grazing animals are cows, horses, or one of each, would
be little compared to the difficulty of trying to determine whether the animal that might be a cow weighs more, or less, than the animal that might be a horse.

Having identified these difficulties, one might question whether a normative approach could have helped Justice Black to justify a doctrinal proposition that laws with racial classifications are constitutionally suspect, and should be presumed unconstitutional. First, he would have had to identify the constitutionally relevant costs in erroneously upholding the exclusion order and erroneously invalidating the exclusion order.\footnote{150} Second, analyzing which mistake is worse would require determining whether to evaluate the competing constitutional norms in the abstract, or in the particular context presented.\footnote{151} Third, analyzing which mistake is worse would require determining whether the relative weights of the competing constitutional norms should be determined with an originalist methodology, or something else. Thus, employing a normative analysis for deriving and defining adjudicative presumptions might reveal critical questions, but would present perhaps intractable methodological challenges in justifying any answers.

A probabilistic approach for allocating the burden of persuasion in constitutional adjudication. Consider another approach for allocating the burden of persuasion that seeks to minimize the systemic costs of adjudicative error by maximizing the probability of factfinding accuracy. Recall Black's implicit substantive constitutional principle: if a law was adopted because of purposes

\footnote{150.} Erroneously upholding the exclusion order would have failed to enforce the substantive constitutional principle prohibiting laws adopted because of racial antagonism. Conversely, erroneously invalidating the exclusion order—that is, wrongly determining that it was adopted because of racial antagonism when, in fact, it was not—would have sacrificed the constitutional norm that government may exercise discretion (more precisely, military discretion established pursuant to a congressional delegation) within constitutional bounds.

\footnote{151.} Is the prohibition of racial antagonism more important when individual liberty is at stake, or exclusion from one’s home, or admission to a school, or eligibility for a driver’s license, or the choice of a marital partner, or is its significance to be determined in an abstract and broadly categorical sense? Similarly, is the principle of politically accountable government discretion within constitutional bounds more important when the policy at issue is concerned with national security, or traffic safety, or marital morality, or is its significance to be determined in an abstract and broadly categorical sense? Some might argue that the normative approach for allocating a presumption in constitutional adjudication can be dispositive when the challenged policy is justified on grounds of national security, whether created by the military or by legislative choice, to the extent that the costs of erroneously invalidating such a policy might be viewed as categorically more significant than the costs of erroneously invalidating ordinary police power legislation and, arguably, as categorically more significant than (at least certain) constitutional limits on policymaking discretion. Indeed, this point might be prominently urged especially today—and vigorously contested—as during any time of war. Cf. supra note 148.
rooted in racial antagonism, then it is unconstitutional. Laws with racial classifications are not per se unconstitutional, but laws adopted because of racial antagonism are. Implicitly, when Black proclaims "suspicions" about such laws, and declares that such laws are subject to "the most rigid judicial scrutiny," he suggests a "suspicion" that such laws were adopted because of racial antagonism. But why?

One might have reason for a meaningful suspicion if one believed, in a categorical sense, that a law curtailing the civil rights of a single racial group probably was adopted because of racial antagonism and, therefore, probably violates the applicable substantive constitutional principle. If one were to determine that most laws with racial classifications were adopted because of purposes rooted in racial antagonism, and if all one knew about a particular law is that it contains a racial classification, it would be rational to wager—based on the categorical probabilities, without additional information, and toward minimizing the systemic costs of adjudicative error—that such particular law was adopted because of racial antagonism.

Indeed, there is good reason to believe that a law targeting a single racial group for harmful treatment was adopted because of a purpose rooted in racial antagonism, animus, disdain, or some other similar negative value judgment about race. One can look, most obviously, to the historical use of laws with classifications targeting a specific racial group. The "Black Codes" enacted in southern states during the immediate aftermath of the Civil War fit the category of "laws which curtail the civil rights of a single racial group," and clearly were adopted because of racial antagonism. One could canvass and catalogue all laws targeting a racial group for harmful treatment enacted through the time Korematsu was decided. In doing so, one would find a stark pattern suggesting that nearly all, if not all, were indeed adopted because of purposes rooted in antagonism. The historical pattern would suggest a probability that any particular law within the category (i.e. laws which curtail the civil rights of a single racial group) was indeed adopted because of racial antagonism.\footnote{One might posit a similar historically-indicated probability that laws with racial classifications have been adopted because of purposes rooted in the racial stereotyping about which Justice Murphy was concerned. For the proposition that racial stereotyping tends to characterize people's thoughts when thinking explicitly in terms of race, see, for example, Gordon Allport, The Nature of Prejudice 187-99 (1958).}

Beyond this empirically-rooted rationale for positing relevant probabilities, one could canvass the range of conceivable state purposes which might rationally be pursued by enacting a law
containing a classification that specifies a racial group for harmful treatment. Few purposes that are not tainted by racism could be rationally pursued with laws that contain racial classifications. Most, if not all, purposes that are tainted by racial antagonism can rationally be pursued with laws containing racial classifications. Thus, beyond an analysis of historical usage, an analysis of the logical relationships between racial classifications and the universe of governmental objectives also suggests a probability that laws with racial classifications were adopted because of purposes rooted in racial antagonism.153

One way to reduce the systemic costs of adjudicative error—in this context, upholding an act that is unconstitutional, or invalidating an act that is not unconstitutional—is to reduce the likelihood of adjudicative error. If the majority within an identified category of governmental act are unconstitutional, a rational approach for reducing the likelihood and systemic costs of adjudicative error would place the burden on the government to prove that a particular challenged act (possessing the relevant categorical characteristic) is among the minority of permissible acts within that category.154

153. In McLaughlin v. Florida, the Court articulated this probabilistically-framed rationale for the "strict scrutiny" of racial classifications—that such classifications are "in most cases irrelevant to any constitutionally acceptable legislative purpose." 379 U.S. 184, 191 (1964) (quoting Hirabayashi, 320 U.S. at 100).

154. Lawrence Sager has suggested that some constitutional norms are "underenforced" while others are "overenforced." See Sager, supra note 17. Professor Roosevelt builds on the proposition—stating, for example, that "knowledge that certain kinds of classification have been used for illegitimate reasons, and seldom for legitimate ones, would justify overenforcement of equal protection." See Roosevelt, supra note 20, at 1663. In my view, these concepts can be clarified by reference to the normative and probabilistic rationales for allocating a burden of persuasion in constitutional adjudication, and for defining supplemental adjudicative rules (for example, those making a law's effects a basis from which to infer legislative purpose under a substantive constitutional principle concerned with such purposes). See supra note 142; infra text accompanying notes 402-11. To the extent that an adjudicative presumption is justified by probabilistic considerations, as Roosevelt contemplates above, there ought not to be "overenforcement" or "underenforcement" of the relevant substantive constitutional principle. Indeed, a probabilistically justified adjudicative rule seeks to maximize adjudicative accuracy. In contrast, adjudicative rules that are justified by normative considerations might well result in "overenforcement" or "underenforcement," at least as viewed in relation to the number of cases in which a false finding of permissibility, or a false finding of unconstitutionality, is made. This would be so in the sense that the burden of persuasion in criminal prosecutions, normatively justified, results in more false acquittals than false convictions and, therefore, in a purely numerical sense, an "underenforcement" of the criminal law. But the point of the normative basis for allocating the adjudicative burden of persuasion, and for defining supplemental adjudicative rules, is that one adjudicative error is more significant than the other and, therefore, is more to be avoided. Thus, from the perspective of social utility, as opposed to simply counting the number of false
Based on such probabilistic reasoning, had he sought explicitly to derive and define an adjudicative presumption, Justice Black might have said that all laws which curtail the civil rights of a single racial group are immediately suspect, because most laws containing such racial classifications were adopted because of racial antagonism. Any given law within that category, therefore, probably violates the governing substantive constitutional principle and, therefore, probably is unconstitutional. Thus, any particular challenged policy within the category of laws curtailing the civil rights of a single racial group is subject to the most rigid judicial scrutiny: The government bears the burden of showing that the particular challenged policy was not adopted because of racial antagonism and, therefore, is among the minority of acts within that category adopted for permissible purposes.

positives versus false negatives (an appropriate benchmark for a probabilistically-allocated burden of persuasion) the normative perspective results not in "overenforcement" or "underenforcement," but, rather, in optimal enforcement—or, at least, such is its design. Indeed, "overenforcement" or "underenforcement" could result to the extent that adjudicative rules are defined in a way that ineffectively accounts either for probabilistic or normative considerations, which is precisely why properly deriving and defining adjudicative rules are essential tasks for the adjudicative function.

155. In Palmore, the Court succinctly articulated a probabilistic rationale for the "strict scrutiny" of racial classifications. See Palmore, 466 U.S. at 432; see also supra note 128. The Court has settled on a definition of prohibited racial prejudice that includes purposes rooted in racist values (whether animus or favoritism) or racial stereotypes. See infra note 197.

156. In contrast, consider laws that do not contain racial classifications. The Court has employed an implicit substantive constitutional principle: If a facially neutral law was adopted because of purposes rooted in racial prejudice, then it violates the mandates of equal protection. See Arlington Heights, 429 U.S. at 266-71; Washington v. Davis, 426 U.S. at 229 (1976); Chang, Judicial Conservatism, supra note 121, at 791, 842 n.178, 843 n.179. Though the Court has not explicitly derived adjudicative rules for enforcing the prohibition of racist purposes in this context, it has defined applicable adjudicative presumptions more explicitly than in most doctrinal contexts. The challenger bears a burden to show than an "invidious discriminatory purpose," Davis, 426 U.S. at 248, was "a motivating factor" in the government's having adopted the challenged policy. Arlington Heights, 429 U.S. at 266. If the challenger meets that burden, the act will be invalidated unless the state meets a burden to prove "that the same decision would have been made even had the impermissible purpose not been considered." Id. at 271 n.21.

The foundational adjudicative presumption in this context—the presumption of permissibility—is readily justifiable with a probabilistic analysis. It seems obvious that, as a category, facially neutral laws probably were not adopted because of racial prejudice. Most laws are facially neutral; most laws do not contain racial classifications. Traffic regulations, principles of tort liability, employment discrimination statutes, contract law, criminal statutes, environmental regulations, tax laws, zoning laws, rules of evidence—one could go on and on—almost all such provisions fall within the category of "facially neutral" laws. Indeed, suppose one randomly pulled a statute book from the library shelves, and opened the book
Such an explicit identification of the governing substantive constitutional principle, the applicable adjudicative presumption, and the probabilistic rationale for that presumption, would have rendered painfully apparent the weaknesses of Justice Black's analysis of the facts of Korematsu's case. If Justice Black were truly focused on the proposition that a law which curtails the civil rights of a single racial group probably was adopted because of an impermissible purpose rooted in racial antagonism, then he could not have been satisfied that the government simply asserted a purpose of "military necessity." Indeed, an explicit and focused suspicion that the challenged exclusion order was adopted because of anti-Japanese antagonism would have generated a series of context-specific questions of fact—relevant to the ultimate question of impermissible purpose—that the court, or the challenger, could have posed to the government. Such specific questions thereby would have crystallized the content of the government's burden beyond any opaque formulation of "strict scrutiny." Failure to respond to these focused questions in a way that persuasively allays suspicions of racial antagonism would mean that the government fails to meet its burden and, therefore, should lose.

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The foregoing has illustrated the proposition that to serve the adjudicative function of judicial review, a court not only must randomly to find a statute. Suppose, as well, that all one knew about that statute was its facial neutrality. Suppose, based on just that information, one had to place a wager as to whether that statute was adopted because of purposes rooted in racism. It would seem rational to bet that the law was not adopted because of purposes rooted in racism, based on the fact that the policies addressed by most facially neutral laws simply have nothing to do with particular contexts and particular policies in which racism tended to be manifested in American history. Thus, if courts were to determine that most facially neutral laws were not adopted because of racial prejudice, and if all one knew about a law is that it does not contain a racial classification, it would be rational to wager—based on the categorical probabilities, without additional information, and toward reducing the systemic costs of adjudicative error—that such law was not adopted because of racial prejudice. It would be rational to place the burden of demonstrating unconstitutionality on the challenger. One might note, however, that because the Court has not explicitly derived and defined substantive constitutional principles and adjudicative rules in this context, the resulting doctrine is plagued by ambiguities that inhibit both the adjudicative and political functions in ways similar to those revealed by this Article's close examination of other doctrinal contexts.

157. Why the Japanese? What was the basis for the belief that persons of Japanese ancestry would commit acts of sabotage and espionage against the United States? Why not impose similar restrictions against persons of Italian and German ancestry on the east coast? Why were these policies framed without providing for an individualized assessment of each internee's ties to and sympathies for Japan, and likelihood of committing acts endangering the national interest?
explicitly derive and define substantive constitutional principles for identifying issues of relevant fact, but also must explicitly derive and define adjudicative rules for resolving issues of relevant fact. Because Justice Black's applicable substantive constitutional principle was only implicit, the prohibition of "racial antagonism" was poorly defined. Not a word was written toward deriving this substantive constitutional principle as sound interpretation. Furthermore, because the definition and derivational rationale for the adjudicative presumption in Korematsu was only implicit, Justice Black shifted from a presumption of impermissibility to deference, and found that the challenged policy was not adopted because of racial antagonism. In short, when the Court fails explicitly to derive and define substantive constitutional principles and adjudicative rules, the costs to the adjudicative function are poorly derived and defined propositions of law and poorly made findings of fact.158

3. Doctrinal Clarity, Correctness, and the Political Function

From Madison and Hamilton, to Thayer and Bork, and from the Supreme Court through its insistence on judicial supremacy, those who have thought seriously about judicial review have contemplated

158. Professor Berman suggests that "full appreciation of constitutional decision rules could pave the way for a more robust congressional role in the enterprise of constitutional implementation: The Court could permit Congress to substitute its judgment for the Court's on just what the applicable decision rule should be." Berman, Constitutional Decision Rules, supra note 12, at 104. I am skeptical about this. The adjudicative function of judicial review requires, as does any adjudicative context, substantive rules (for identifying issues of relevant fact) and adjudicative rules (for resolving issues of relevant fact). See supra text accompanying notes 33-38. Furthermore, the Court should derive and define adjudicative rules from either a normative perspective or a probabilistic perspective. See supra text accompanying notes 142-57. If a judicially-defined adjudicative rule has been derived from a normative analysis, see supra text accompanying notes 142-51, a congressionally enacted rule to the contrary would intrude on the Court's interpretive authority to define the Constitution's meaning. If a judicially defined adjudicative rule were predicated on a probabilistic analysis, see supra text accompanying notes 152-57, a congressionally enacted rule to the contrary would intrude on the judiciary's factfinding authority. Thus, to the extent that the Court determines that a particular adjudicative rule is necessary for the optimal enforcement of a particular substantive constitutional principle, whether from the normative or probabilistic perspective, that adjudicative rule would seem no less worthy of protection by judicial supremacy from legislative erosion than is the substantive constitutional principle itself. In short, adjudicative rules can be deemed just as much a function of constitutionally mandated meaning in court as are the substantive constitutional principles themselves. For a broad challenge to judicial supremacy, see generally Chang, Critique, supra note 37. For the proposition that some aspects of constitutional doctrine have not been framed by the Court as constitutionally mandated interpreted meaning, see generally Fallon, supra note 17; Monahan, supra note 17.
a function beyond the adjudication of particular cases. Indeed, as elucidated in Cooper, judicial supremacy is designed to inhibit the enactment and enforcement of unconstitutional policies, through mandating that political actors seek to remain within judicially-defined constitutional boundaries. Because it is a systemic part of the political process, unlike the episodically intrusive nature of the adjudicative function, this political function of judicial review can promise greater benefits as well as higher risks. The better a substantive constitutional principle is derived and defined, the better it can be enforced through the decisions of political actors who seek to remain within constitutional bounds. Conversely, poorly conceived constitutional doctrine could inhibit the enactment of laws that are not unconstitutional, as well as fail to inhibit the enactment of laws that are unconstitutional. One would suppose that Korematsu's doctrinal ambiguities undermined not only the adjudicative function, but also the political function. Rather than explore Korematsu's relationship to the political function, however, the following will so examine another foundational case that helped to shape the "suspect classification" doctrine.159

a. Substantive Constitutional Principles: Definitional and Derivational Ambiguity Preclude a "Duly Instructed" Electorate

In Bolling v. Sharpe,160 the Court invalidated a congressionally-enacted policy providing for racial segregation in the public schools of the District of Columbia. Chief Justice Warren stated that "[c]lassifications based solely upon race must be scrutinized with particular care."161 Defining the principles of equal protection that govern the federal government through the "liberty" protected by the Fifth Amendment, Warren said:

Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective."162

159. One might note, however, that the essential point concerns deviations from doctrinal clarity and correctness—which result from failures explicitly to derive and define substantive constitutional principles and adjudicative rules, and which result in barriers to fulfilling both the adjudicative and political functions. Thus, one just as well could analyze Bolling and Loving v. Virginia, 388 U.S. 1 (1967), in relation to the adjudicative function, and Korematsu in relation to the political function.


161. Id. at 499. The Court continued: "since they are contrary to our traditions and hence constitutionally suspect." For discussion of this proposition as a rationale for the close scrutiny of laws with racial classifications, see infra text accompanying notes 189-91.

162. Bolling, 347 U.S. at 499-500 (emphasis added).
Applying that principle to the facts of *Bolling*, Warren concluded:

> Segregation in public education is not reasonably related to any *proper* governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”163

In focusing on whether D.C.’s segregation was adopted because of a “proper” governmental objective, Warren implicitly applied a substantive constitutional principle similar to that applied in *Korematsu*. A similar adjudicative rule—the presumption that laws with racial classifications were adopted because of improper purposes—is implicit in the Court’s declaration that racial classifications “must be scrutinized with particular care,” and in its nondeferential, rather conclusory determination that the D.C. segregation policy was not adopted for a “proper” purpose.164

Although *Bolling*’s implicit substantive constitutional principle conceptualized invalid racial discrimination in terms of impermissible purposes, there was not a word that defined those objectives that are constitutionally “improper.” There was not a word that identified the putative “improper” objectives underlying the District of Columbia policy. Beyond this, Warren’s *Bolling* opinion did nothing to derive the substantive constitutional principle proscribing certain (undefined) “improper” purposes—nothing to justify it as a sound interpretation of equal protection.

This Article thus far has suggested in broad strokes that judicial review cannot effectively fulfill the political function unless applicable substantive constitutional principles are explicitly defined.165 Unless applicable legal rules are clearly defined, those subject to their strictures—whether lower court judges or political actors—cannot be “duly instructed.” Beyond this, prior discussion suggested that judicial review cannot effectively serve the political function unless clearly defined substantive constitutional principles are also expressly and persuasively derived as sound interpretation. The Hamiltonian justification for vesting with federal judges the power to interpret and enforce the Constitution’s mandates presupposes that judges reach their decisions through the exercise of “judgment,” not “will.”166 Derivation that is express and plausible—if not persuasive—not only can help political actors understand the

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163. *Id.* at 500 (emphasis added).

164. Unstated, but implicit, was a finding of material fact—that the District of Columbia policy of racial segregation was enacted for the same racist purposes as were similar policies of racial segregation throughout the South.


166. *See The Federalist* No. 78, at 465.
content of the principle they are bound to obey, but also might soften
the resolve of those otherwise not inclined to comply.

Definitional Clarity. Consider how greater clarity in the
definition of Bolling's (otherwise ambiguous and implicit) substantive
constitutional principle might have affected the political function.
Few personified the political resistance at which the Court targeted
its lectures in Cooper more than Senator James Eastland of
Mississippi. Senator Eastland made the southern politician's typical
assertions about segregation. “The principle of segregation of the
white and colored races in the institutions of the South is not and has
never been based upon the concept that one race should be inferior to
the other before the law.”167 He further declared:

The white people of the South do not have race prejudice. They
have race consciousness, and they are proud to possess this
awareness of the significance of race. Had they not possessed it,
the South would have been mongrelized and southern
civilization destroyed long ago. The South is historically
justified in its unflinching stand for racial integrity.168

Eastland’s formal (and fantastic) assertions about southern
segregation rest on several propositions. First, race consciousness is
not equivalent to “race prejudice.”169 Second, the prevention of
“mongrelization,” and the preservation of “racial integrity” are not
the equivalent of race prejudice.170 Third, segregation in pursuit of
“racial integrity” is not predicated on the proposition that one race
should be inferior to another before the law.171 All of these
propositions raise conceptual and legal questions for defining that
“race prejudice” (or consciousness) which is constitutionally

167. 100 CONG. REC. 7129, 7253 (1954).
168. 100 CONG. REC. 7129, 7256 (1954).
169. This proposition is valid, and had been at least implicitly recognized in Korematsu and Bolling. All racial classifications discriminate based on race and, therefore, are a product of race consciousness. Korematsu implied that only those classifications adopted because of “racial prejudice” or “antagonism” are unconstitutional. Bolling implied that only those classifications adopted because of “improper” purposes are unconstitutional. Whether “the people of the South” acted with permissible or impermissible “race consciousness” depended on the particular “significance of race” of which they proudly proclaimed awareness.
170. This proposition identifies particular southern objectives relevant to race—preventing “mongrelization” and protecting “integrity.” Like the first proposition, this second acknowledges that race prejudice underlying public policy is at least politically (and perhaps constitutionally) problematic. Furthermore, it asserts the key proposition that Bolling failed to confront—that these purposes of preventing racial “mongrelization” and protecting racial “integrity” are not manifestations of (politically and constitutionally vulnerable) racial prejudice.
171. This proposition implicitly acknowledges that a prescription of mandated legal inferiority would qualify as racial prejudice, and raises factual issues about the purposes that did underlie segregation.
problematic, and factual questions about the purposes that did underlie policies of racial segregation. Significantly, however, by these assertions, Eastland at least implicitly acknowledges that if segregation were predicated on "race prejudice," it would be politically vulnerable, if not constitutionally so.

By following Korematsu in conceptualizing unconstitutional racial discrimination in terms of prohibited purposes, Bolling presented an opportunity for the Court to address the very questions that people like Eastland were raising. Yet, Bolling's vague propositions about "proper" purposes left unchallenged Eastland's conceptual assertion that the pursuit of "racial integrity" is not race prejudice, as it left unchallenged Eastland's implicit assertion that the pursuit of "racial integrity" is not unconstitutional.

If the Court had defined "improper" purposes in Bolling, the political function could have been better served. Indeed, imagine that Bolling had defined impermissible racial discrimination as that pursued for purposes rooted in racist values or racial stereotypes—a proposition on which the Court has (at least implicitly) settled today.172 Framing such a principle explicitly in Bolling would have required defining what it means to place value on race per se, explaining why such racist value judgments are constitutionally prohibited, and demonstrating how the purposes for which public schools were segregated did, indeed, transgress such prohibitions. Such an analysis could have made clear that a purpose of preserving "racial integrity" values an individual of one race more than an individual of another race, and institutions that are mono-racial more than those that are multi-racial. Such an analysis, therefore, could have directly confronted Eastland's assertion that the purpose of preserving "racial integrity" is not racial prejudice. Thus, by failing to define "improper" purposes—by failing explicitly to define the applicable substantive constitutional principle—Bolling did less than it could have to place on political actors like Eastland a burden of defending their cherished policies, long predicated on a pervasive ideology of racism, against a clarified constitutional challenge.173

172. See infra note 197 and accompanying text. This assumes that Justice Warren intended the implications of framing the proscription in terms of "improper" purposes, and the implications of finding that the D.C. schools were segregated for no "proper" purpose at all. Of course, the Court cannot clearly frame a substantive constitutional principle until it has itself developed a clear understanding of the definition of unconstitutionality at issue.

173. This failure to define "improper" purposes can be contrasted with Justice Warren's opinion in Loving v. Virginia thirteen years later. In Loving, Justice Warren determined that Virginia's criminalization of interracial marriage was "designed to maintain White Supremacy" and suggested that such a purpose was not legitimate under the Equal Protection Clause. Loving, 388 U.S. at 11 & n.11. Yet even here, Justice Warren clouded the content of the applicable substantive constitutional
One might raise an objection. Even if clarity in defining substantive constitutional principles might influence the way that political actors exercise discretion in ordinary circumstances, the struggle over racial segregation involved such raging emotion that any judicial declarations, whether clear and nuanced or not, would have vaporized in the heat. Eastland perhaps revealed unreachable irrationality with statements such as those he made at a 1956 rally of the White Citizens' Council: “When in the course of human events it becomes necessary to abolish the Negro race, proper methods should be used. Among these are guns, bows and arrows, slingshots and knives. . . . All whites are created equal with certain rights, among these are life, liberty and the pursuit of dead niggers.” One who says this—and that “the white people of the South do not have race prejudice,” and that racial segregation is not predicated on a view that blacks “should be inferior [to whites] before the law”—might be entirely beyond the reach of rational discourse. What of the political function of judicial review in such circumstances?

Indeed, contemplating such sentiments, Alexander Bickel urged the “passive virtues” toward avoiding judicial decisions that would risk disobedience by parties directly subject to court order. Rather than confrontation through judicial decision, he urged judicial side-stepping through misdirection and duplicity. Along these lines, even if the Court were to make (rather than to avoid) a controversial principle in declaring, “There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.” Id. at 12 (emphasis added). This statement badly conflates the essential concern of the implicit substantive constitutional principle (the prohibition of discrimination because of racist purposes) and the implicit adjudicative rule (the probabilistically-rooted presumption that laws with racial classifications were adopted because of racist purposes). Apart from the fact that it is difficult to fathom what discrimination “solely because of racial classifications” might mean, this statement at best muddies the message to citizens and their representatives as to the normative proposition—the repudiation of purposes rooted in racism—which the Court (implicitly) deemed mandated by the Equal Protection Clause. Like jurors who would be ill-instructed in a murder prosecution if the court did not clearly distinguish between the substantive criminal statute (with all its elements) and the adjudicative rule requiring the prosecution to prove facts establishing each element beyond a reasonable doubt, so citizens and their representatives were ill-instructed by this Loving opinion as to the substantive constitutional principle that they should endeavor to respect in their policymaking. Again, were the Court explicitly to define constitutional doctrine in terms of substantive constitutional principles and adjudicative rules, it would be less likely to conflate elements from the two types of rule. Recall the discussion, above, of a hypothetical murder statute that conflates substantive and adjudicative considerations. See supra note 51.

175. 100 CONG. REC. 7129, 7253 (1954).
176. See BICKEL, LEAST DANGEROUS BRANCH, supra note 54, at 244-72.
decision, as it did in *Bolling*, might it not be better to obscure the grounds of decision, toward avoiding direct ideological confrontation? Might resistance be less likely if political actors could maintain a pretense of continuing commitment to their constitutionally problematic ideology?

Perhaps so, but the point seems vulnerable. Bickelian obfuscation would have the Court choose a strategic path toward maximizing compliance with judicially-declared mandates by issuing opinions designed to hide the content of those constitutional mandates. It would have the Court refrain from communicating clearly with those inclined to obey by anticipating the resentment of those inclined to rebel. It is an approach that seems akin to blurring the definition of murder for fear of inflaming the emotions of the criminally insane.

Beyond this, it hardly makes sense to measure the success of rules aimed at deterrence by focusing on the undeterred and the undeterrable. Simply because some people continue to commit murder does not establish that the death penalty does not deter others. Even if some would disobey clearly defined substantive constitutional principles, it does not follow that clearly defining such principles would not maximally deter the enactment (or promote the repeal) of unconstitutional laws through influencing the decisions of those inclined to obey. Constructing vague doctrine might have anticipated the feared rebel, but it ensured that those political actors who could have felt constrained by judicial supremacy were left guessing about the limits on their discretion—here, the definition of "improper" purposes applied in *Bolling*.

All of this assumes that Eastland and his ilk were the political equivalents of the criminally insane. If they were not, but merely duplicitous and stubborn, would not engagement, rather than avoidance, have been the best weapon for maximizing the political function? Indeed, one imagines that if the *Bolling* Court had explicitly defined a substantive constitutional principle withdrawing discretion to pursue purposes rooted in racist values or stereotypes, Eastland would have responded not only with his factual assertion that segregation is not predicated on notions of racial inferiority, but also with the legal assertion that equal protection, as originally understood, permitted racial segregation. This brings us to another critical proposition for this Article—that the political function can be enhanced not only by clearly defining substantive constitutional principles, but through their explicit derivation, as well.

*Derivational Clarity.* Indeed, perhaps because *Bolling*’s *ratio decidendi* was ill-defined, the ire of the white southern establishment was focused not on *Bolling*, but on *Brown*. It is important to recognize that *Bolling* and *Brown* were decided with respect to
fundamentally different (implicit) substantive constitutional principles. Bolling rested on an implicit prohibition of purposes rooted in racial prejudice. This implicit principle cast aside Plessy v. Ferguson's177 "separate but equal" as no longer applicable as a matter of law. In Brown, Warren declared that "in the field of public education the doctrine of 'separate but equal' has no place."178 Critically important is Warren's reason for displacing Plessy's doctrine in Brown. His point was not that "separate but equal" was inapplicable as a matter of law, but rather that the principle was not satisfied as a matter of fact. "Separate educational facilities are inherently unequal," he declared, as a matter of fact, because even assuming equal tangible facilities, black students derive less benefit from such schools than do white students.179

Eastland closely examined Warren's reasoning in Brown, to the point of quoting, and endeavoring to rebut, extended portions of the opinion.180 Eastland focused particularly on Warren's suggestion that "we cannot turn the clock back to 1868 when the Amendment was adopted."181 He responded that "the 14th amendment ... did not prevent segregation, and it was so understood at the time. ... [T]he meaning of the Constitution or an amendment is fixed when it is adopted. It cannot conceivably have one meaning at one time, and another meaning in later years."182

It could have been profoundly important for the political function if the Court had asserted explicitly that it was turning back the clock to 1868—at least in defining the substantive constitutional principle under which Brown was decided. What warranted the invalidation of racially segregated schools was not so much a change of legal principle—i.e., that segregated facilities are permissible so long as a mandate of equal facilities is satisfied—but the evolution of societal

177. 163 U.S. 527 (1896).
180. Eastland also criticized Brown on other grounds, including allegations that some members of the Court were corrupt, see, for example, 100 CONG. REC. 11319, 11526 (1954), and some were subject to Communist influence, see, for example, 100 CONG. REC. 7129, 7255 (1954).
facts relevant to that principle's mandate of equality.183 It is (arguably) a very different matter—more responsive to Eastland's Bork-like insistence on interpretive legitimacy—to apply an originalist principle to the changed facts of the modern world, than to create a nonoriginalist principle, and apply that nonoriginalist principle to its relevant facts.184 Making this distinction clearly could have been facilitated by explicitly distinguishing between substantive constitutional principles and adjudicative rules—between those constitutional principles that identify issues of relevant fact, and those constitutional rules devised for resolving issues of relevant fact.

These arguments would not have persuaded Senator Eastland. He ridiculed the Court's determination that "segregated schools are inherently unequal," and its reliance on the findings of psychologists about the effects of segregated schools on black children.185 Indeed, recognizing the distinction between deriving and defining substantive constitutional principles and adjudicative rules would have placed a burden on the Court to explain how it determined that segregated educational facilities are inherently unequal—to address who should bear the burden of persuasion on that issue of fact, and why. Addressing this question would not have eliminated resistance and resentment, but it could at least have helped to crystallize the points in dispute. It would have "duly instructed" (or, at least, better instructed) political actors. And that is precisely what the political function is about.

One should turn now from Brown and focus again on Bolling—something the public never did. I have suggested that Bolling was, by far, more doctrinally radical and significant.186 Brown applied Plessy's originalist "separate but equal" principle. Bolling repudiated it. Bolling rested on an implicit substantive constitutional principle—a prohibition of "improper" purposes—that was to confront the ideology of racism. Had the Bolling Court made this clearer, by having explicitly defined a substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, it surely

183. It is, of course, arguable that Brown changed the content of the "separate but equal" principle by redefining what had to be equal—from equality of tangible facilities to equality of experiential benefits from those facilities. See Chang, Equal Educational Opportunity, supra note 179, at 8-9.

184. For the former, the derivational task must explain why the originalist principle should continue to govern (a point that Eastland and his ilk would not contest) and why the Court should recognize the relevant implications of modern facts (a point that might be difficult to contest). For the latter, the derivational task must explain why the originalist principle should be modified, and to what. This is, of course, the essential point contested by those who proclaim allegiance to originalism.

185. 100 CONG. REC. 7129, 7252 (1954).

186. See generally Chang, Equal Educational Opportunity, supra note 179.
would have drawn more of Eastland's ire. It would have needed to anticipate that ire with an explanation as to why such a nonoriginalist interpretation of equal protection—one that fully repudiated racist values in law—was appropriate in 1954.\textsuperscript{187} Yet, not only did Warren's \textit{Bolling} opinion fail effectively to define the substantive constitutional principle proscribing certain "improper" purposes; it did nothing to derive the principle—to justify it as a sound interpretation of equal protection. Thus, Eastland and his comrades not only lacked "due instruction" on the content of their constitutional boundaries; beyond this, had they noticed \textit{Bolling}'s doctrinal implications, they would have been left with less reason to follow the Court's instructions—to abide by their responsibilities under judicial supremacy—as they resentfully pondered the Court's failure to meet its own responsibilities of justification.\textsuperscript{188}

b. Adjudicative Rules: Definitional and Derivational Ambiguity Preclude a "Duly Instructed" Electorate

Warren's \textit{Bolling} opinion briefly sought to justify the adjudicative proposition that laws with racial classifications are

\begin{itemize}
\item \textsuperscript{187} \textit{Bolling} has been so overshadowed by \textit{Brown} that Professor McConnell did not mention the case when reexamining the original understanding and the Supreme Court's desegregation decisions. \textit{See} McConnell, \textit{ supra} note 182, at 1117-39. This is all the more significant because in McConnell's view, the original position on segregation, at least that of Senator Charles Sumner, did not depend on sociological judgments about the effect of segregation on educational performance. Rather, that original condemnation of segregation was rooted in repudiation of any "formal expression of subordination" because of racism. \textit{Id.} at 1138-39. This is precisely the notion implied by \textit{Bolling}. \textit{See supra} text accompanying notes 160-76. For an effort to derive the \textit{Bolling} principle (prohibiting racist purposes even in the originally protected context of segregation) as sound interpretation, see Chang, \textit{Constitutional Intent}, \textit{supra} note 41, at 828-55.
\item \textsuperscript{188} In \textit{Loving}, Chief Justice Warren endeavored explicitly to derive the proposition that the Equal Protection Clause prohibits Virginia's criminalization of interracial marriage. Virginia argued that the original understanding of the Equal Protection Clause contemplated that anti-miscegenation statutes would remain permissible. Justice Warren's response was initially tentative, ultimately adamant, and internally inconsistent. On the one hand, Warren followed \textit{Brown} in acknowledging that "although these historical sources 'cast some light,' they are not sufficient to resolve the problem; 'at best, they are inconclusive.'" \textit{Loving}, 388 U.S. at 9 (citation omitted). On the other hand, Warren declared that "the clear and central purpose of the 14\textsuperscript{th} Amendment was to eliminate all official state sources of invidious racial discrimination . . . ." \textit{Id.} at 10. Yet, to refer to the purpose of the Fourteenth Amendment in the past tense seems to be a statement about its original intent—one that views that original purpose as clear, not inconclusive. Thus, in Warren's \textit{Loving} opinion, the derivation of the (implicit) substantive constitutional principle was incoherent. One might question which derivational failure—the complete absence of interpretive justification or the presentation of incoherent justification—engenders more political resentment and confusion, and more undermines the political function.
\end{itemize}
presumed unconstitutional. "Classifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect."189 The proposition that racial classifications are "contrary to our traditions" is, at best, contestable, and at worst, laughable. There has been a tradition in the United States of laws with racial classifications. That tradition has been pervasive and at least regionally deep. To say that such laws are "contrary to our traditions" must have rung hollow not only to those citizens and their representatives who favored segregation, but also to others who might have been more agnostic about such policies. Whatever one's response to the Court's bottom-line decision, reasoning that depended on such an odd statement about "our traditions" could not inspire confidence. It could only further undermine Bolling's potential to instruct political actors as to the substantive constitutional significance of the purposes they pursue, and the probabilistically-justifiable adjudicative presumption attaching to racial classifications.190

The Court could have sent a message more capable of "duly instructing" political actors had it explicitly differentiated the derivation and definition of applicable substantive constitutional principles and adjudicative rules—had it clearly stated in Bolling that racial classifications are constitutionally significant because they indicate a probability that a substantive constitutional principle prohibiting racist purposes has been violated. Indeed, had it explicitly pursued the probabilistic rationale, the Court could have said that racial classifications serve this adjudicative function precisely because there has been a tradition of their use in such a manner.191 Thus, Bolling's substantive message concerning "improper purposes"—obscured first by the failure explicitly to derive and define the applicable substantive constitutional principle—was obscured further by the failure explicitly to derive and define the


190. To the contrary, because the use of racial classifications is a part of the American tradition, and forms a pattern so clearly rooted in racism, the probabilistic rationale for the presumed impermissibility of racial classifications is well-warranted. See supra text accompanying notes 152-57.

191. The pursuit of purposes rooted in racism is contrary to our better traditions. But as suggested above, because many such purposes were permitted by the original understanding, the Court had a responsibility to explain a substantive constitutional principle broadly repudiating such purposes as sound interpretation. Beyond this, the Court might have sent a clearer but entirely different normative message by suggesting that racial classifications have some normative significance independent of this evidentiary and adjudicative function—a normative significance that implicates some substantive constitutional principle other than the prohibition of purposes rooted in racial antagonism. See infra text accompanying notes 234-40 (discussing Powell's concerns about "justice" in Bakke).
applicable adjudicative presumption. Also obscured was an important concomitant message: Legislatures may use racial classifications so long as they do not act because of "improper" purposes.

C. Powell in Bakke: Adjudicating Challenges to "Affirmative Action" Racial Classifications

In Regents of University of California v. Bakke,192 the Supreme Court considered whether a state university medical school's "special" admissions program violated the Equal Protection Clause. The school reserved sixteen of one hundred seats for blacks, Chicanos, Asians, and American Indians. It argued that these racial classifications should not be subjected to "strict scrutiny," because they were unlike those challenged in previous cases.193 The exclusion of Japanese-Americans in Korematsu, the prohibition of interracial marriage in Loving, and the racial segregation in Bolling, aimed legal harms at traditional targets of racism. The U.C. Davis racial classifications aimed legal benefits at traditional targets of racism.

Addressing the school's doctrinal argument, Justices Powell and Brennan vigorously debated the proper "standard of review." Justice Powell rejected the school's position, as he determined that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."194 For Powell, the U.C. Davis racial classifications, like all racial classifications, should be subject to "strict scrutiny"—that is, struck down unless the state meets a burden of showing that its racial classifications are "necessary" to serve "a compelling governmental interest."195 For Brennan, U.C. Davis' special admissions program should be presumed unconstitutional, but to a lesser degree. The U.C. Davis racial classifications, like other classifications "designed to further remedial purposes," must be struck down unless the state demonstrates that they "serve important governmental objectives" and are "substantially related to achievement of those objectives."196

The intense dialogue between Powell and Brennan on the appropriate "standard of review" suggests that there is a meaningful distinction between a state interest that is "compelling" and one that is merely "important," and between a racial classification being "necessary" to achieve the state's objective, and one that is merely "substantially related" to achieve that objective. The following will

193. See Bakke, 438 U.S. at 287-88 (arguing that "strict scrutiny" "should be reserved for classifications that disadvantage 'discrete and insular minorities'").
194. Id. at 291.
195. Id. at 299.
196. Id. at 359.
suggest that in considering whether something other than "strict scrutiny" should be applied to U.C. Davis' racial classifications, Powell failed to distinguish between substantive constitutional principles and adjudicative rules. He failed to build upon the implicit structure of constitutional doctrine developed by the Court in Korematsu, Bolling, and Loving. He failed to focus clearly on the implicit substantive constitutional principle (defining unconstitutional racial discrimination in terms of prohibited purposes rooted in racist values—whether animus or favoritism—or racial stereotypes)\(^{197}\) and the implicit adjudicative rule (designating laws with racial classifications as presumptively unconstitutional because, more likely than not, they were enacted because of impermissible purposes rooted in racist values or racial stereotypes).

Indeed, the following discussion will suggest that rather than pursue an analysis about the adjudicative presumption appropriate for enforcing the substantive prohibition of purposes rooted in racism, Powell's analysis implicitly created new substantive constitutional principles, without any effort to define such principles with precision, or to derive such principles as sound interpretations of constitutional text and legitimate bases for judicial intrusion on legislative discretion. The resulting doctrinal confusion had profound consequences both for the new substantive constitutional principles that Powell implicitly created, and for the established substantive constitutional principle (prohibiting purposes rooted in racism) from which he departed.

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\(^{197}\) This assumes an explicit definition of prohibited purposes broader than that suggested by Black's *Korematsu* opinion, but implied in subsequent Supreme Court decisions—purposes rooted in racist value judgments, whether animus or favoritism, and purposes rooted in racial stereotypes, violate the Equal Protection Clause. Justice Powell's opinion in *Bakke* implied this fuller notion of prohibited racial prejudice. For Powell's view that racial favoritism is prohibited, see, for example, *Bakke*, 438 U.S. at 307 ("Preferring members of any one group for no reason other than race . . . is discrimination for its own sake. This the Constitution forbids."). For Powell's view that purposes rooted in racial stereotyping are prohibited, see infra note 243. After *Bakke*, the Court has made rather clear that state action disfavoring people solely because of race is constitutionally prohibited (racial animus), as is state action preferring people solely because of race (racial favoritism), as is state action predicated on racial stereotypes. For example, Justice O'Conner, writing for the Court in *Grutter v. Bollinger*, indicated that the Equal Protection Clause prohibits racial classifications "motivated by illegitimate notions of racial inferiority," and motivated by "simple racial politics," or "illegitimate racial prejudice or stereotype." 539 U.S. at 326.
1. Building on a Structurally Ambiguous Doctrinal Foundation: Exacerbating Doctrinal Distortion

a. Explicitly Deriving and Defining Adjudicative Rules for the U.C. Davis “Type” of Racial Classification: The Analysis Powell Should Have Pursued

Immediately preceding his first pronouncement that U.C. Davis’ racial classifications, like all other racial classifications, should be subject to “strict scrutiny,” Powell cited statements from Hirabayashi and Korematsu that implicitly conveyed the substantive constitutional principle prohibiting purposes rooted in racial prejudice, and the adjudicative rule, justifiable from a probabilistic perspective, presuming that laws with racial classifications were adopted because of impermissible purposes rooted in racism. Powell said:

Racial and ethnic classifications... are subject to stringent examination.... “[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”\(^{198}\)

If Powell had considered Bakke’s “standard of review” issue with an explicit focus on the substantive principles and adjudicative rules that theretofore had implicitly comprised “strict scrutiny,” how might his analysis have proceeded?

Assuming this probabilistic rationale for “strict scrutiny,” why insist that the state validate Bakke’s racial classifications by proving them “necessary” (rather than substantially related) to achieve a “compelling” (rather than important) interest? What is the difference between a “compelling” interest and an “important” interest? Indeed, what is the proper definition of a “compelling interest”? What distinguishes a “necessary” relationship (between a classification and the state’s asserted purpose) from a “substantial” relationship? Indeed, what is the proper definition of the required relationship of “necessity” between the challenged racial classifications and the asserted state purpose? For whatever reason, neither Justice Powell, nor Brennan, nor anyone on the Court before or since, has engaged these definitional issues.

Basic legal method resolves ambiguities in legal rules by reference to the functions and policies that those rules are created to serve. If the rationale for the “strict scrutiny” of racial classifications is a probabilistic suspicion that they were adopted because of purposes rooted in racist values or stereotypes, then all facets of the

\(^{198}\) Bakke, 438 U.S. at 290-91 (quoting Korematsu, 323 U.S. at 216).
government’s burden should be framed toward allaying that suspicion, and persuading the court that the particular racial classification in question is exceptional in not having been adopted because of racism. A “compelling” interest, therefore, might be defined as one satisfying two elements: first, an interest that, on its face, does not manifest racist values or stereotypes—in other words, a purpose that is, on its face, constitutionally legitimate; and, second, an interest that, in relation to other facts and circumstances presented in the case at hand, persuasively allays suspicions that the classifications would not have been adopted but for purposes rooted in racist animus, favoritism, or stereotypes.199

How might one conceptualize the requirement that the racial classifications in question be “necessary” to achieve the asserted “compelling” interest?200 A necessary or close relationship between the racial classification as a means of regulation, and the asserted “compelling” (or suspicion-allaying) non-racist purpose, would be one that persuasively helps to rebut the suspicion that the classifications were, in fact, employed because of purposes tainted by racist values or stereotypes. Use of racial classifications in a way that sweeps overinclusively in relation to the asserted legitimate purpose, or cherry-picks underinclusively, would reinforce the initial suspicion of racism.

Indeed, analyzing particular aspects of a classification’s overinclusiveness or underinclusiveness in relation to the state’s asserted legitimate purposes would crystallize suspicions about actual impermissible purposes,201 and could generate questions about specific racist values or stereotypes that might have tainted the challenged policy.202 Answering these specific questions persuasively

199. Consider how this definition of “compelling” would apply to the interest asserted by Virginia in Loving. Virginia claimed that it criminalized interracial marriage involving white persons because it sought to “preserve racial integrity.” See Loving, 388 U.S. at 7, 11 & n.11. Such an asserted purpose would not get past the first element suggested above for defining “compelling,” because the purpose itself reflects a racist value judgment: that persons of one racial background—“pure white”—are to be preferred over persons of mixed racial background. Indeed, in Loving, Justice Warren determined that either a purpose of “maintaining White supremacy” or one of “preserving the integrity of all races” would be deemed invalid on its face. Id.; see also supra note 173.

200. It is not self-evident why either of the phrases discussed by Powell and Brennan (“necessary to achieve a compelling state interest” or “substantially related to an important state interest”) are effectively framed as adjudicative rules for determining whether a particular racial classification was not adopted because of purposes rooted in racist values or stereotypes. There will be more to say about this point as we delve deeper into Justice Powell’s opinion. See infra Part III.C.1.b.

201. See supra note 157 and accompanying text.

202. For discussion of particular questions that might have been raised about the special admissions program, see infra text accompanying notes 248-55, 278-80.
would become part of the burden the state would be required to overcome, and would be a far more focused and meaningful burden than that framed by the otherwise abstract terms of "strict scrutiny."  

Given this understanding of the "strict scrutiny" applicable to racial classifications like those challenged in *Korematsu*, *Bolling*, and *Loving*, how might one analyze the doctrinal issue about which Powell and Brennan so vehemently disagreed? Is there a basis for believing, as a categorical matter, that the *Bakke*-type of classification is less (or, indeed, more) likely to have been adopted in violation of the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes than was the type of classification challenged in *Korematsu*, *Bolling*, and *Loving*?

Brennan suggested that the U.C. Davis classifications should be subject to "intermediate scrutiny" because they were adopted for "benign" purposes. But whether a racial classification was adopted for impermissible purposes is precisely the question that close judicial scrutiny is supposed to answer. Thus, to posit a "benign" purpose is to assume the dispositive matter at issue. Yet, one might reformulate Brennan's characterization. The *Bakke* classification *seems to benefit traditional targets of racism*. This is quite unlike the classifications in *Korematsu*, *Bolling*, or *Loving*, which fit the historic pattern of racial classifications that seemed to harm unpopular groups for purposes rooted in racist animus.  

Thus, one might view the *Bakke* classifications as *less likely* to have been adopted because of racist *animus* than is a classification that seems to harm traditional targets of racism.

203. See supra text accompanying notes 155-58.

204. Indeed, on this point, Powell himself said, "Justice Brennan . . . offer[s] no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since [he is] willing in this case to accept mere post hoc declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose." *Bakke*, 438 U.S. at 295 n.34.

205. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Powell himself suggested another way to reformulate Brennan's characterization of the *Bakke*-type of classification—a reformulation that would not assume the ultimate conclusion about the purpose underlying the challenged classification. He viewed *Wygant's* challenged classification as "operat[ing] against a group that historically has not been subject to governmental discrimination." *Id.* at 282. With a category of racial classifications so characterized, one might then explore whether there is reason to subject racial classifications that operate against groups not historically the targets of racial discrimination to a lesser (or different) presumption of unconstitutionality than is applicable to racial classifications that operate against groups that historically have been the targets of racial discrimination.

206. See *Bakke*, 438 U.S. 265.
Yet, this analysis is presupposing an explicit substantive constitutional principle prohibiting purposes rooted in not only racial animus, but also favoritism and stereotypes.207 If (and only if) there is also reason to be less suspicious that a law seeming to benefit traditional targets of racism was adopted because of racial favoritism and stereotypes than was a law containing the Korematsu, Bolling, or Loving type of classification, then a fully relaxed burden of persuasion could be warranted. If, however, there is reason to believe that most racial classifications seeming to benefit traditional targets of racism were probably adopted because of purposes rooted in racial favoritism or purposes rooted in racial stereotypes, then judicial scrutiny of these classifications should still focus closely on the government's burden to allay these particular suspicions—despite a lessened suspicion that the policy was adopted because of prohibited animus.

It is not necessary to posit answers to these questions to make the point at hand: Given the implicit substantive constitutional principles and adjudicative rules inherited from Korematsu, Bolling, and Loving—and making those implicit rules explicit—the issue, properly framed, concerns the probability that the substantive prohibition of purposes rooted in racism was violated, and whether there is some categorical basis for distinguishing (on such probabilistic grounds) between Bakke's classifications, which seem to benefit traditional targets of racism, and the Korematsu-Bolling-Loving classifications, which seemed to harm traditional targets of racism. Debating adjectives and adverbs as Powell and Brennan did—"compelling" versus "important," and "necessary" versus "substantially related"—is fussing about form without content, and cannot begin to derive or define adjudicative rules for effectively avoiding both the failure to invalidate the unconstitutional law that was adopted because of impermissible racist purposes, and the invalidation of the permissible law that was not.

b. Confusing the Nature and Role of Substantive Constitutional Principles and Adjudicative Rules: The Analysis Powell Did Pursue

Powell's rationale for the "strict scrutiny" of Bakke's racial classifications is complex, and warrants extended quotation and examination. The early part of his analysis was marred by the failure to distinguish explicitly between the nature and functions of substantive constitutional principles and adjudicative rules. The latter part of his analysis was further marred by affirmatively confusing of the nature and functions of substantive constitutional

207. See supra note 197 and accompanying text.
principles and adjudicative rules, and the factors relevant to the derivation and definition of each. In what follows, omitting only his citations, I present Justice Powell’s discussion, interrupted by analysis and commentary. Powell began:

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons “the protection of equal laws,” . . . in a Nation confronting a legacy of slavery and racial discrimination. . . . Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the “majority” white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that “[o]ver the years, this Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”208

In these sentences, Powell articulates part of the substantive constitutional principle implicitly invoked by the Court in Korematsu, Bolling, and Loving: Discrimination “solely because of” race is impermissible. In other words, discrimination in pursuit of racist value judgments—placing value on race, per se—is impermissible. Powell suggests that this principle is universally applicable to value judgments about any race, not simply animus against African-Americans, and to racist value judgments underlying discrimination in any policy context, not just those contexts to which the reach of the Equal Protection Clause was originally limited.209

Powell continues:

Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause and hold that discrimination against members of the white “majority” cannot be suspect if its purpose can be characterized as “benign.” [Powell’s footnote 34] The clock of our liberties, however, cannot be turned back to 1868. . . . It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [Powell’s footnote 35]210

208. Bakke, 438 U.S. at 293-94 (citations omitted).
209. As did the Court in Korematsu, Bolling, and Loving, Powell fails to address whether this is a nonoriginalist interpretation of the Equal Protection Clause and, if so, why this expansion beyond its original meaning is appropriate, thus generating questions about the legitimacy of the Court’s decisions in enforcing the putative mandates of the Equal Protection Clause.
Powell confronts U.C. Davis' argument—embraced by Brennan—that racial classifications adopted for benign purposes are not suspect. In his footnote 34, Powell correctly recognizes that positing a permissible, remedial purpose is to assume the matter at issue.\footnote{Id. at 294-95 n.34.} U.C. Davis (and Brennan) "offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere post hoc declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose."\footnote{Id. (emphasis added).} So far, the discussion is consistent with implicit recognition of the substantive prohibition of purposes rooted in racist values, whether animus or favoritism, and of the adjudicative task to determine whether a particular challenged racial classification was, in fact, adopted because of such an impermissible purpose.

Significantly, however, when he declares that "it is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others,"\footnote{Id. at 295 (emphasis added).} Powell veers from the substantive prohibition of purposes rooted in racism. To decide that laws apparently benefiting traditional targets of racism warrant less suspicion than do laws apparently harming traditional targets of racism would not necessarily accord "less protection" to whites harmed by U.C. Davis' special admissions program than was accorded to blacks harmed, say, by the District of Columbia's racially segregated schools in \textit{Bolling}. Rather, all people could be equally protected by a single substantive constitutional principle in both contexts—the prohibition of purposes rooted in racism. \textit{If} different kinds of statute categorically warrant different degrees of suspicion that they were enacted because of racism—\textit{if} they suggest different probabilities of unconstitutionality—then a different adjudicative presumption would be warranted for the sake of adjudicative accuracy.\footnote{Indeed, black applicants to the D.C. police force in \textit{Davis} were not accorded "less protection" against unconstitutional racial discrimination than were black school children in \textit{Bolling}, nor indeed less protection than Bakke himself, simply because in \textit{Davis}, an adjudicative rule presuming permissibility was employed, while in \textit{Bolling} and \textit{Bakke} adjudicative rules presuming impermissibility were employed. \textit{See generally Davis}, 426 U.S. 229. Though \textit{the same substantive constitutional principle} was at stake in all cases—the prohibition of purposes rooted in racist values or stereotypes—different kinds of statute (facially neutral versus facially discriminatory) categorically suggest different probabilities of unconstitutionality and, therefore, warrant different adjudicative presumptions. \textit{See supra} note 156 and accompanying.
In his footnote 35, Powell quotes Alexander Bickel's views on the remedial use of racial classifications:

The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution.215

Of course, the Court has never said that discrimination on the basis of race is illegal. If it had, there would be no "strict scrutiny" of racial classifications, because all racial classifications, by definition, discriminate on the basis of race, and all racial classifications would, therefore, be impermissible. Bickel was suggesting a substantive constitutional principle beyond that applied in Korematsu, Bolling, and Loving. Powell's reference to Bickel confuses analysis of the question at hand—whether a different adjudicative rule should be applied to determine the permissibility of the U.C. Davis classification in relation to the established substantive constitutional principle prohibiting purposes rooted in racial prejudice.

Moving beyond Bickel, Powell continues:

The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and "Negro." Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial text. The same "degree of protection" is provided by a single, consistent, substantive constitutional principle. The adjudicative presumption appropriate for enforcing that substantive constitutional principle has varied in the doctrine that the Court has created for racial classifications and facially neutral laws and, from a probabilistic perspective, appropriately so. Thus, the proposition that people of all races are entitled to the same "degree of protection" does not advance Powell's analysis; it is simply beside the matter at issue. Professor Roosevelt makes this point as well in critiquing Justice O'Connor's requirement of "consistency" in Adarand—the requirement that all racial classifications be subject to the same scrutiny, regardless of the races benefited or burdened. See Roosevelt, supra note 20, at 1701-05. "The argument that consistency demands strict scrutiny for affirmative action... is mistaken. The operative proposition of equal protection is indeed symmetrical, protecting no person more than any other. But decision rules will have special favorites, as long as, and to the extent that, state actors have special victims." Id. at 1703.

review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable.216

Here, Powell frames the question as varying the level of judicial review "according to a perceived 'preferred' status of a particular racial or ethnic minority." It is not quite clear at this point what Powell means by this. Yet, a program's distribution of benefits based on race undeniably reflects the policymaker's preference based on race. As suggested above,217 the fact that a policymaker—say, a legislature—has chosen to "prefer" racial groups that traditionally have been targets of racism frames the issue relevant for determining the appropriate adjudicative presumption: Is there a categorical basis for distinguishing the probability that the "preferential" racial classifications at issue were adopted because of purposes rooted in racism, from the probability that a Korematsu-Bolling-Loving type of classification was adopted because of racism?

A court's determination that some categories of racial classification are less likely to have been adopted because of racial prejudice and, therefore, warrant a lesser presumption of unconstitutionality, would not depend on whether a particular legislature, in enacting a particular statute, has or has not chosen to enact such preferences. Furthermore, for a court to apply different adjudicative presumptions to different kinds of classification would not necessarily suggest that the court itself prefers some racial groups over others. Rather, determining whether legislative choices to benefit particular racial groups should be subject to a different adjudicative presumption—different from that applicable to traditional racial classifications—would require the Court to make a social, political, and historical judgment about the nature and prevalence of racism with respect to the particular groups in question. Whether making this kind of categorical probabilistic judgment involves "intractable" problems is a question Powell simply did not address.218

Powell continues:

The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only

216. Id. at 295 (citation omitted).
217. See supra text accompanying notes 198-207.
218. See Bakke, 438 U.S. at 295.
“majority” left would be a new minority of white Anglo-Saxon Protestants.\(^{219}\)

This passage is ineffective in addressing the “standard of review” issue in two ways. First, Powell clearly now is confusing the judgments that policymakers might make in adopting preferences based on race, and the judgments that a reviewing court must make in determining whether the chosen policy based on race was adopted because of race. He says that not all racial groups can receive preferential treatment, presumably by policymakers creating affirmative action programs. This seems self-evident, and one could hardly imagine a sensible policy that was designed to give all racial groups a preference based on race.

Beyond this, turning to issues relevant to the judicial review of legislative choices, Powell suggests that not all racial classifications that distribute benefits could receive a corresponding judicial tolerance.\(^{220}\) This might be true, or might not, but it misstates the matter at issue. As suggested above, the issue is whether the Bakke-type of racial classification is categorically distinguishable from the Korematsu-Bolling-Loving type of racial classification in terms of the probabilities of having violated the substantive constitutional principle prohibiting purposes rooted in racial prejudice.

Having asserted that racial classifications distributing benefits should not be accorded more “judicial tolerance” than are those imposing burdens, Powell considers whether there might be a basis for identifying other categories of racial classification that would warrant greater judicial tolerance, and concludes that none exists.\(^{221}\)

There is no principled basis for deciding which groups would merit “heightened judicial solicitude” and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.\(^{222}\)

\(^{219\text{.}}\) Id. at 295-96.

\(^{220\text{.}}\) See id.

\(^{221\text{.}}\) Id. at 296-97.

\(^{222\text{.}}\) Id. (emphasis added).
In this passage, by referring to “the extent of prejudice... suffered by various minority groups,” Powell comes as close as he ever does to “the analysis that Powell (and Brennan) should have pursued,” sketched above.223 Yet, the analysis remains deeply confused—still conflating the judgments that a policymaker might make with those that the reviewing court must make; and still failing to analyze questions about appropriate adjudicative presumptions by reference to the probabilities that the racial classifications at issue were, indeed, adopted in violation of the substantive constitutional principle prohibiting laws adopted because of purposes rooted in racial prejudice. Consider each sentence, in turn.

“There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.”224 The question, of course, is not which groups warrant greater “judicial solicitude,” but which legislatively chosen classifications warrant less, or different, judicial suspicion. Legislative solicitude for certain groups would underlie legislative choices to use racial classifications that seem to benefit traditional targets of racism. And, as suggested above, there could be a principled basis for determining whether such legislative choices might warrant less suspicion of impermissible underlying purposes, or a different presumption of unconstitutionality, than is applicable to classifications that seem to harm traditional targets of racism.225

“Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups.”226 Here, Powell seems to have in mind a legislature’s choice to use racial classifications for remedial purposes—to redress the effects of past racial discrimination. He seems to be suggesting that a court must second-guess the policymaker’s judgment about the extent to which designated groups were targets of past racism, and the extent to which they bear the continuing effects of past racism. True or not, this point is simply irrelevant to the burden of proof question. Regardless of whether “strict scrutiny” or something less is applied—whatever adjudicative presumption is employed—a reviewing court would have to make some kind of judgment about the legislature’s basis for believing that the groups were targets of past racial discrimination, and about the legislature’s basis for believing that any present and relevant underrepresentation of the group is the result of that past discrimination.

223. See supra text accompanying notes 198-207.
224. Bakke, 438 U.S. at 296 (emphasis added).
225. See supra text accompanying notes 198-207.
"Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny." 227 Powell continues to confuse the question of policy that the legislature might address and the question of constitutional law that the court must address. Whether a group is deemed entitled to preferential treatment is a question of policy for legislatures. Whether a legislatively-chosen classification warrants other than "strict scrutiny" is a question of law for the Court—the adjudicative rule with respect to which the policy's constitutionality is determined. This question of law properly can be resolved based on the likelihood in relevant categorical circumstances that legislatures act because of racist values or stereotypes. 228

"As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary." 229 Still, Powell confuses the question of policy that the legislature addresses from the question of constitutional doctrine that the court must address. As the continuing effects of past racial discrimination become mitigated, legislatures would need to consider whether, in their view, the race-based preferences remain necessary to redress the effects of past racial discrimination. Such legislative judgments would be subject to judicial review, but the question for courts is not the policy determination about whether the effects of past racial discrimination should be deemed redressed, but a factual question as to whether a legislative assertion of, or belief about, the continued need for such policies has been tainted by racist values or stereotypes.

This issue of fact, relevant under the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, might be answered with a more demanding adjudicative presumption, or one less demanding. Determining the appropriate adjudicative presumption, based on the categorical likelihood that prejudice tainted a legislative judgment about historical facts, is analytically distinct from determining those historical facts themselves, just as determining whether a murder defendant acted in the heat of passion is distinct from the question of who should bear the burden of proving such material facts, and why. 230 Indeed, it is through the chosen adjudicative rule that a court determines the extent to which it views with deference, or suspicion, the legislature's

227. Id. at 297 (emphasis added).
228. See supra text accompanying notes 198-207.
229. Bakke, 438 U.S. at 297 (emphasis added).
230. See supra text accompanying notes 144-47.
assertions about the facts with respect to which its policy was framed.

"The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable." 231 The point should be that making a policy determination as to whether particular groups should be accorded preferential treatment for remedial purposes would involve the exercise of will, would amount to "legislating from the bench," would be beyond the judicial role—and therefore would be beyond the judicial competence. Determining whether a legislature's choice to do so was tainted by racist values or stereotypes, however, is within the judicial role and competence. Indeed, such is a question that courts must answer, given a substantive constitutional principle prohibiting purposes rooted in racism. And this question of fact must be answered, whether through an adjudicative rule of "strict scrutiny" for racial classifications, or the Arlington Heights presumption of permissibility for facially neutral governmental policies, 232 or an adjudicative rule tailored to laws with racial classifications that seem to benefit traditional targets of racism.

The foregoing misdirection in Powell's "standard of review" analysis resulted from a failure to focus clearly, and explicitly, on the conceptual distinction between substantive constitutional principles and adjudicative rules. Justice Powell failed to recognize that deriving and defining an appropriate adjudicative rule—which was the issue that he was debating with Brennan—requires a probabilistic (or normative) analysis tailored to the particular substantive constitutional principle at stake. Powell should have framed the issue as whether racial classifications that seem to benefit traditional targets of racism are categorically less likely to have been adopted because of racist values or stereotypes than were the more familiar kinds of classifications that seem to harm traditional targets of racism. Instead, he framed the issue as whether different racial groups should be accorded preferential treatment—clearly an issue of policy for legislatures, rather than one of law for courts, at least in the context of the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes.

But there was more confusion to come, with even more significant consequences. As he continued justifying the formalities of "strict scrutiny" in Bakke, Powell turned to "problems of justice connected with the idea of preference." 233 In discussing these

231. Bakke, 438 U.S. at 297 (emphasis added).
232. See supra note 156.
problems of justice," Powell not only failed to explore the probabilistic rationale for "strict scrutiny" as an adjudicative rule for enforcing the well-established substantive constitutional principle prohibiting purposes rooted in racial prejudice. Beyond this, Powell implicitly created two new substantive constitutional principles.

He continued:

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is in fact benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. . . . Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. . . . Third, there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.234

The first "problem of justice"—that members of the preferred racial groups might suffer "otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups"—seems to contemplate that the community might simply assume that most members of the covered group would not have been admitted but for the special admissions program. This is, essentially, a concern that such programs might encourage racial stereotypes. Indeed, his second "problem of justice" refers explicitly to the possibility that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth." Thus, one might view both of these "problems of justice" as concerns that "preferential" racial classifications might promote racial prejudice, with harmful consequences for members of the preferred racial groups, as well as for the broader society.

How does this concern help to justify the "strict scrutiny" of the U.C. Davis racial classifications? Is this concern at all relevant for the traditional (though implicit) rationale for the "strict scrutiny" of racial classifications, which is comprised of a substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, and an adjudicative rule presuming unconstitutionality based on the categorical proposition that a law

234. Id.
containing racial classifications probably was adopted in pursuit of purposes rooted in racism?

It is not self-evident why the fact that a policy might promote racism prospectively is relevant for determining whether that policy was itself adopted because of purposes rooted in racial prejudice. Indeed, one can think of laws that promoted racism, despite having been intended to curb racism and its effects. The Fourteenth Amendment, and other Reconstruction policies designed to protect the freedmen and women, promoted southern racism. Powell did nothing to connect a law's possible promotion of racism to the probabilistic rationale for strictly scrutinizing racial classifications. To this extent, the concern about promoting racism was entirely out of place in analyzing whether the U.C. Davis program should be examined under a different adjudicative rule than were the classifications challenged in Korematsu, Bolling, and Loving—at least toward determining whether the substantive constitutional principle prohibiting racist purposes had been violated.

More significant than having tainted analysis of the proper adjudicative presumption for enforcing the established substantive prohibition of purposes rooted in racist values or stereotypes, Powell's discussion can be understood as implicitly creating an entirely new substantive constitutional principle. Powell's discussion implies that if a racial classification excessively promotes racial prejudice, then it violates the Equal Protection Clause. But why should the Court measure legislation against this norm? Is this an originalist interpretation of the Equal Protection Clause? If so, its provenance should have been identified. If not, whatever methodology was employed for its derivation and definition should have been identified, and justified.

Beyond identifying the interpretive methodology with respect to which this new, implicit substantive constitutional principle was derived, Powell needed to define the principle's elements in some meaningful way. What does it mean to determine that a racial classification excessively promotes racial prejudice? Does the concept require balancing the significance of the prejudice fomented against the significance of the public objectives served by the program at issue? If so, what factors are relevant in determining the significance of the public benefits served by the challenged program? How is a court to determine whether a challenged policy will indeed foment racial prejudice, in what contexts, to what extent, and with what effects? And what factors are relevant in determining the significance

of the prejudice fomented, to be measured against the significance of the public benefits obtained?236

Beyond the responsibility *explicitly* to derive and define this new substantive constitutional principle—if, indeed, creating a new boundary on legislative discretion was his objective—Powell also needed *explicitly* to derive and define the adjudicative rules with respect to which that new substantive principle would be enforced. If laws are to be invalidated when they excessively promote racial prejudice, should laws with racial classifications be presumed to violate this substantive constitutional principle, or presumed not to? Do laws with racial classifications more likely than not *excessively* promote racial prejudice—under a necessary definition of “excessively” as discussed above? Would it be worse wrongly to uphold a classification that does have excessively unfair effects, than to strike down a law that does not? If the “excessively unfair effects” principle does warrant enforcement, it warrants enforcement through adjudicative rules tailored to enforcing that principle—optimally tailored to avoid both striking down a law that does not violate that principle, and upholding a law that does violate that principle.

Consider, now, Powell's third “problem of justice.”237 As part of his rationale for the “strict scrutiny” of racial classifications that seem to benefit traditional targets of racism, Powell said that “there is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”238 Does this concern with “inequity” have anything to do with the traditional rationale for closely scrutinizing racial classifications? Powell made no such point, and drew no connection between an “unfairness” concern and a suspicion that racial classifications were adopted because of impermissible purposes rooted in racial prejudice.239 Indeed, the concern about excessively unfair effects was entirely out of place in analyzing whether the U.C. Davis program should be examined under a different *adjudicative

236. *See* Chang, *Judicial Conservatism, supra* note 121, at 808.
238. *Id.* (emphasis added).
239. It is not self-evident why the proposition that a policy might have excessively unfair effects on “innocents” bears any relevance to whether that policy was adopted because of purposes rooted in racist values or stereotypes. Indeed, without defining this concept of “excessively unfair effects on innocents,” it is simply impossible to determine whether making such a finding of “unfairness” in any way suggests a probability that the substantive constitutional principle prohibiting purposes rooted in racism has been violated. Powell neither demonstrated, nor made demonstrable, a connection between a racial classification’s putatively unfair effects on innocents and the question of whether “strict scrutiny” should be applied to the classifications at issue in *Bakke*. 
rule than were the classifications challenged in *Korematsu, Bolling* and *Loving*, toward determining whether the established *substantive constitutional principle* prohibiting racist purposes had been violated.

As with the concern about excessively promoting racism, Powell's concern that racial classifications might have excessively unfair effects on "innocent" persons implicitly created a new *substantive constitutional principle*. Powell implied that if a racial classification has excessively unfair effects on "innocent" parties, *then* it violates the Equal Protection Clause. Observations made above about the nascent "excessively promoting prejudice" principle apply to this nascent substantive constitutional principle as well. Why should the Court measure legislation against *this* putative constitutional norm? Is this an originalist interpretation of the Equal Protection Clause? If so, its provenance should have been identified. If not, whatever methodology was employed for its derivation and definition should have been identified, and justified.

Beyond identifying the interpretive methodology with respect to which the principle was derived, Powell needed to define its elements in some meaningful way. An ill-defined substantive constitutional principle can be neither effectively justified as sound interpretation, nor effectively applied to adjudicate particular cases or controversies. An ill-defined substantive constitutional principle cannot effectively identify issues of material fact. What does it mean to determine that a racial classification has an *excessively* unfair effect on innocents? Does the concept requiring balancing the significance of the harms suffered by innocents against the significance of the public objectives served by the program at issue? If so, what factors are relevant in determining the significance of individual harms? What factors are relevant in determining the significance of the public benefits served by the challenged program?

Powell needed not only explicitly to derive and define this new substantive constitutional principle, but also explicitly to derive and define the adjudicative rules with respect to which it would be enforced. The *traditional* rationale for the "strict scrutiny" of laws with racial classifications had nothing to do with whether such laws should be presumed to impose excessively unfair effects. If laws with racial classifications are to be invalidated when they have excessively unfair effects on innocents, should they be presumed to violate this substantive constitutional principle, or presumed not to? Should the burden be allocated by reference to a probabilistic analysis? If so, do laws with racial classifications more likely than not impose excessively unfair effects on innocents—under a necessary definition of "excessively" as discussed above? Should the burden be allocated by reference to a normative analysis? If so, would it be worse wrongly to uphold a classification that does have excessively unfair effects,
than to strike down a law that does not? If the "excessively unfair effects" principle does warrant enforcement, it warrants enforcement through adjudicative rules tailored to optimally avoiding both the invalidation of laws that do not violate that principle, and the failure to invalidate laws that do.240

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To summarize: Powell's analysis of the "standard of review" to apply to U.C. Davis' racial classifications was deeply flawed because it failed, even implicitly, to recognize the essential distinction between substantive constitutional principles and adjudicative rules, and the very different analyses appropriate for their respective derivation and definition. Before he turned to the "problems of justice," Powell's analysis obscured the fact that "strict scrutiny" at least implicitly had been comprised of two standards—a substantive standard and an adjudicative standard. Thus, Powell failed properly to frame the "standard of review" issue: whether there was a categorical basis for distinguishing the U.C. Davis classifications from the Korematsu, Bolling, and Loving classifications with respect to the probability of having been adopted in violation of the substantive constitutional principle prohibiting purposes rooted in racism.

Beyond failing to frame and address this essential issue, Powell's justification of "strict scrutiny" relied on, and implicitly created, two new substantive constitutional principles—a prohibition of racial classifications that excessively promote racism; and a prohibition of racial classifications that have excessively unfair effects on "innocents." Invoking these new substantive constitutional principles distorted the inherited, established meaning of "strict scrutiny." If they were to be enforced legitimately against legislative discretion, these new substantive constitutional principles needed to be derived and defined on their own terms as interpretations of the Equal Protection Clause. Furthermore, if these two new substantive constitutional principles were to be enforced effectively, Powell ought to have derived and defined adjudicative rules tailored to enforcing each.

The following will examine some consequences of Powell's failure to recognize the distinct nature and functions of substantive

240. This new implicit substantive constitutional principle was confirmed by Justice Powell's opinion in Wygant, and provided the rationale for invalidating a policy containing racial classifications. All the foregoing issues concerning the substantive constitutional principle's derivation and definition, and the issues concerning the adjudicative presumption through which the principle ought to be enforced, remained just as unaddressed in Wygant as they were in Bakke. See infra text accompanying notes 313-22.
constitutional principles and adjudicative rules. In determining the legal significance of Bakke's facts, Powell undermined the adjudicative function in two significant ways. First, he failed effectively to determine whether the U.C. Davis program violated the established substantive constitutional principle prohibiting purposes rooted in racism. Second, he measured the Davis program against the prohibition of excessively unfair effects, without having analyzed whether this new (implicit) substantive constitutional principle should be enforced, and how. Beyond this, Powell's opinion undermined the political function. It failed to instruct political actors effectively as to the principles against which their policy choices would be measured. It failed to articulate clearly derived and defined substantive constitutional principles capable of inhibiting the enactment of unconstitutional law, while leaving legislators free to choose policy within constitutional bounds.241

2. Consequences of Doctrinal Distortion

a. Failing Explicitly to Derive and Define New Substantive Constitutional Principles Undermines the Adjudicative Function in Enforcing Previously Established Substantive Constitutional Principles

U.C. Davis asserted four purposes that it sought to serve with the special admissions program:

(i) "reducing the historic deficit of traditionally disfavored minorities in the medical schools and the medical profession;"
(ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.242

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241. Professor Roosevelt also considers the potentially pernicious consequences of failing to distinguish carefully between substantive constitutional (operative) principles and adjudicative (decision) rules. "Sometimes, when a stable jurisprudential regime has persisted for a period of time, decision rules can start to be mistaken for constitutional operative propositions. When this happens, a number of undesirable consequences follow. These consequences include ill-advised doctrinal reform, attempts to bind non-judicial actors to decision rules rather than operative propositions, and an undoing of the benefits of decision rules." See Roosevelt, supra note 20, at 1693. I would suggest that these pernicious consequences can result not only in the context of stable doctrine, but also with respect to new and evolving doctrine. Powell's opinion in Bakke provides a stark example, as do the affirmative action decisions that grew out of that opinion. For a discussion of one such case, see infra text accompanying notes 313-26.

Justice Powell considered each purpose, and determined that with respect to none of them was U.C. Davis able to overcome the demands of "strict scrutiny."

Powell's consideration of two of U.C. Davis' asserted purposes—"reducing the historic deficit of minorities in the medical schools and the medical professions," and "increasing the number of physicians who will practice in communities currently underserved," was largely consistent with the inherited (implicit) meaning of "strict scrutiny." Because a close examination of Powell's disposition of these two state objectives would not contribute significant additional insight into the adjudicative perils of failing explicitly to distinguish between substantive constitutional principles and adjudicative rules, we

243. The deficiencies in these parts of Powell's opinion are much like those in Korematsu, Bolling, and Loving—deficiencies caused by failing explicitly to derive and define the substantive constitutional prohibition of purposes rooted in racism, and the adjudicative presumption that laws with racial classifications were adopted because of racial prejudice. Powell determined that the third asserted purpose—"increasing the number of physicians who will practice in communities currently underserved"—could not help to validate the program because there was "virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal... Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem." Id. at 310-11.

Why, exactly, is the lack of evidence demonstrating that minority doctors will choose to practice in underserved communities a reason to find that the burdens of "strict scrutiny" have not been met? One might frame an answer simply in terms of the formal elements of "strict scrutiny:" with no evidence that persons admitted through the special admissions program would practice in underserved communities, U.C. Davis had failed to show that its racial classifications were necessary to achieve its asserted interest, "compelling" or not. Yet, this answer elevates the terms of "strict scrutiny" to the level of substance, rather than maintaining clear the formulation's role as an adjudicative rule in service of the prohibition of purposes rooted in racist values or stereotypes. A better explanation would focus on the connection between that lack of evidence and the relevant substantive constitutional principle. Lacking evidence demonstrating in fact that blacks, Chicanos, Asians, and American Indians admitted through the special program would practice in underserved communities, all Davis had was an assumption that they would do so—an unexamined, unsupported assumption that race correlates with fact (behavior and career choices). This assumption is the very definition of prohibited racial stereotyping. The state's justification for the program as a means to educate doctors who would serve in underserved communities confirmed, rather than rebutted, the presumption of unconstitutionality.

Powell rejected the first purpose—"reducing the historic deficit of traditionally disfavored minorities in the medical schools and the medical profession"—as impermissible, per se. Id. at 306. He said: "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race is discrimination for its own sake. This the Constitution forbids." Id. This point essentially states that aspect of the traditional substantive constitutional principle that prohibits purposes rooted in racist value judgments. If U.C. Davis acted based on
turn immediately to his consideration of the remaining two purposes on which U.C. Davis relied—"obtaining the educational benefits that flow from an ethnically diverse student body" and "countering the effects of societal discrimination."

In this section, I will examine how Powell's importation of new substantive constitutional principles—in particular, the concern with "unfair effects"—distorted the meaning of "strict scrutiny" as adjudicative rule, and rendered it ineffective for enforcing the established and (by then) uncontroversial substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes. Indeed, when applying his normatively contaminated conception(s) of "strict scrutiny" to Bakke's facts, Powell's opinion identified as constitutionally significant a range of factual issues that should have been deemed irrelevant—at least with respect to the established prohibition of purposes rooted in racism. Powell's focus on these unwarranted issues of fact generated an analysis inclined to strike down policies that should be deemed permissible under the substantive constitutional principle prohibiting purposes rooted in racism, and—perhaps paradoxically—to uphold policies that should be deemed impermissible under that established substantive constitutional principle.244

i. Invalidating Policies That Do Not Violate an Established Substantive Constitutional Principle

U.C. Davis claimed that it sought to enroll a student body in which fifteen percent of students were black, Chicano, Asian, or American Indian for a purpose of countering the effects of societal discrimination.245 When considering whether this asserted purpose

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244. It should be emphasized that this analysis does not assert that a substantive constitutional principle prohibiting racial classifications having an excessively unfair effect on "innocents" is necessarily erroneous and should not be enforced. Rather, it suggests that if such a substantive constitutional principle is to be enforced, it should be derived and defined on its own terms, and should be enforced independently of any other substantive constitutional principle, through adjudicative rules specifically derived and defined for its enforcement.

245. See Bakke, 438 U.S. at 362.
could validate the challenged racial classifications, Powell revealed no clear vision as to what "strict scrutiny" should entail. Apparently elaborating on the meaning of "compelling" and "necessary," he developed three requirements that must be met if a state is to validate racial classifications by asserting a remedial purpose. But a close examination reveals that two of these three requirements undermined "strict scrutiny" as an adjudicative rule for enforcing the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, and were the product of Powell's concern with the "unfair" effects principle.

The analysis Powell should have pursued. The traditional notion of "strict scrutiny" was comprised of an implicit substantive constitutional principle prohibiting of purposes rooted in racism; and an implicit adjudicative rule, justifiable from a probabilistic perspective, presuming that laws with racial classifications were adopted in violation of that substantive prohibition. Analyzing the facts and circumstances of Bakke's case, the judge (and the challenger's attorney) could have generated a series of pointed questions about the special admissions program to give specific content to otherwise vague suspicions of purposes rooted in racial prejudice.

First, is the asserted purpose facially legitimate, or is it per se impermissible? Here, the asserted purpose of countering the effects of societal discrimination is not inherently rooted in racist values or stereotypes. Determining that members of a racial group bear the continuing effects of past discrimination does not necessarily reflect stereotype. Furthermore, determining that the continuing effects of past racial discrimination ought to be mitigated no more necessarily reflects improper favoritism than does providing a statutory remedy for individual instances of racial discrimination or, indeed, federal assistance for a region devastated by a hurricane.

Second, does the asserted purpose qualify as "compelling"? As previously suggested, if one conceptualizes "strict scrutiny" as a probabilistically derived adjudicative rule for enforcing a substantive constitutional principle prohibiting purposes rooted in racism, one

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246. See infra text accompanying notes 256-75.
247. See supra text accompanying notes 120-38, 197.
248. See supra text accompanying notes 152-57.
249. Recall that in Loving, Virginia failed to meet the burdens of "strict scrutiny" because it asserted a purpose that revealed racist values on its face—maintaining the "integrity" of the race. See supra notes 173, 199.
250. Why should the scrutiny of racial classifications with respect to the substantive prohibition of purposes rooted in racism be concerned with qualifying an asserted purpose as "compelling" rather than "legitimate"? See supra notes 199-200 and accompanying text.
would define “compelling” as meaning not only legitimate, but also persuasive toward rebutting suspicions of racism.\textsuperscript{251} One might view the asserted remedial purpose of countering the effects of societal discrimination as helpful in rebutting a suspicion of traditional racist animus.

Yet, the state’s assertion that it sought to achieve this purpose through the special admissions program should raise specific suspicions of racial favoritism or stereotype—suspicions focused on ways in which the program’s details may seem an overinclusive or underinclusive means for achieving that purpose.\textsuperscript{252} These specific suspicions should generate specific questions. In particular, why did U.C. Davis include each group? Since Asians were well represented in the population of students admitted in the regular admissions program, why were they included in the special program?\textsuperscript{253} What societal discrimination against Asians did U.C. Davis identify that, in its view, had continuing effects in medical education?\textsuperscript{254} Is the inclusion of Asians in its program predicated on stereotype—the unexamined, unsupported assumption that race (Asian) correlates with fact (suffering the present effects of past racial discrimination)?\textsuperscript{255}

The state might be able to answer these specific questions persuasively; it might not. In the absence of persuasive answers, it

\begin{itemize}
\item \textsuperscript{251} See supra text accompanying note 199.
\item \textsuperscript{252} Indeed, to ask whether a “legitimate” purpose is also “compelling” obscures the point that any asserted purpose might allay some suspicions about impermissible purposes rooted in racism, and exacerbate other suspicions. Rather than ask whether an asserted purpose qualifies as “compelling,” the “strict scrutiny” of racial classifications, focusing on the probabilistically-rooted suspicion that laws with racial classifications were adopted in violation of the substantive prohibition of purposes rooted in racism, would require the reviewing court to identify the specific suspicions that the asserted facially legitimate purpose allays, if any, and the specific suspicions that it reinforces.
\item \textsuperscript{253} From 1971 through 1974, thirty-seven Asian students were enrolled through the regular admissions program, and twelve Asians were enrolled through the special admissions program. See Bakke, 438 U.S. at 275-76.
\item \textsuperscript{254} See id.
\item \textsuperscript{255} In relation to the formalities of “strict scrutiny,” one might conceptualize these questions as relevant to determining whether the racial classifications are “necessary” to achieve the asserted purpose. Conceptualizing the questions in terms of “necessity,” however, may obscure, rather than sharpen, their significance. Indeed, consider an alternative conceptualization of these questions that connect them to the governing substantive constitutional principle: Posing such specific questions to the government crystallizes the suspicions of racial prejudice that it must overcome, and gives specific content to the burden it must meet—that is, to rebut a presumption that its racial classifications were adopted because of purposes rooted in racial prejudice. Such specific questions frame the government’s burden far better than does the generic formulation requiring proof that the classification is “necessary to achieve a compelling state interest.”
\end{itemize}
would fail to rebut the presumption that it adopted the special admissions program because of purposes rooted in racist values or stereotypes, and the policy should be invalidated. The adjudicative function thus could be fulfilled, through an explicit and focused distinction between substantive constitutional principles and adjudicative rules.

The analysis Powell did pursue. Toward determining that U.C. Davis' asserted purpose of redressing the effects of past racial discrimination did not validate its use of racial classifications, Powell said:

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.... Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm. Petitioner does not purport to have made, and is in no position to make, such findings.... [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.256

These observations about the U.C. Davis program suggest three conditions that must be satisfied if a remedial purpose is to validate the use of racial classifications. First, the entity that uses racial classifications for remedial purposes must make contemporaneous findings of fact identifying the past discrimination, the effects of which it seeks to redress. Second, that past discrimination must have been illegal—a violation of constitutional or statutory mandates. Third, the entity must be competent to make such findings and to adopt the policy at issue.

The following analysis will consider how Powell justifies each of these requirements. It also will consider how each of these requirements, and Powell's justifications for them, relate to the traditional (implicit) rationale for the "strict scrutiny" of racial classifications—that a law with racial classifications is presumed unconstitutional because it probably violates the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes.257 Finally, it will suggest that two of these three requirements place restrictions on governmental discretion unwarranted by the prohibition of purposes rooted in racist values or

257. See supra text accompanying notes 152-57, 198-207.
stereotypes, and flow instead from Powell's new (implicit) substantive constitutional principle prohibiting excessively unfair effects on "innocents."

First, before adopting racial classifications for remedial purposes, a policymaker must make "findings of constitutional or statutory violations." 258 Although Powell seems to treat this as one requirement, 259 I would like to consider separately the requirement of contemporaneous factfinding to identify the relevant past racial discrimination, and the requirement that such identified past racial discrimination must have amounted to a constitutional or statutory violation. How do each of these two factfinding requirements relate to the traditional (implicit) rationale for the "strict scrutiny" of racial classifications?

To require factfinding can be understood as directly tailored to the probabilistically-rooted presumption that racial classifications were adopted because of racial stereotyping. 260 Indeed, if U.C. Davis had made findings of fact identifying the historic discrimination against blacks, Chicanos, Asians, and American Indians that explained their putative underrepresentation, it less likely would have used racial classifications in a way that was tainted by the _unexamined, unsupported assumption_ that all such groups were targets of past racial discrimination, and that such past discrimination has continuing effects in medical school admissions. 261 Because relevant factfinding can reduce the probability that government will have acted unconstitutionally in this way, imposing such a requirement seems supportable as an adjudicative rule for enforcing the relevant substantive constitutional principle prohibiting purposes rooted in racial prejudice. 262

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258. _Bakke_, 438 U.S. at 308.
259. _Id._ at 308-09.
260. _See supra_ note 152.
261. Formal factfinding could have induced U.C. Davis to reconsider, for example, its inclusion of Asians in the special admissions program—as a significant number of Asians were admitted each year through the regular admissions program. _See supra_ note 253 and accompanying text.
262. Viewing Powell's factfinding requirement as a device to reduce the probability of constitutional violations does not make it vulnerable in the way that Mitchell Berman views _Miranda_'s exclusionary rule as vulnerable. _See Berman, Constitutional Decision Rules, supra_ note 12, at 21. Scholars have grappled with the implications of _Miranda_'s original characterization of the exclusionary rule as not mandated by the Fifth Amendment, but as "prophylactic" in relation to the amendment's prohibition of compelled self-incrimination. _See id._ For Berman, and others, the injunction that "[n]o person . . . be compelled in any criminal case to be a witness against himself" is "directed to trial courts, not to the police." _See id._ at 116-17 (citing U.S. CONST. amend. V). Professor Berman goes to great lengths to characterize _Miranda_'s exclusionary rule as a "decision rule," (that is, in my terms, an adjudicative rule) designed to promote adjudicative accuracy in enforcing an "operative proposition directed to judges (do not
Second, how does the requirement that the past identified discrimination must have been illegal—a constitutional or statutory violation—relate to enforcing the substantive prohibition of purposes rooted in racist values or stereotypes? Consider the implications of the illegality requirement. If a policymaker may not seek to redress the effects of identified past discrimination that was not illegal, then the effects of slavery, of Jim Crow, of racial segregation through 1954, all would be off-limits, because all such discrimination was legal. Resting on a bedrock of historic legal discrimination, the many and vast sedimentary layers of racially disproportionate disadvantage could not be addressed by policies employing racial classifications—if Powell's requirement of "constitutional or statutory violations" were taken seriously.

Yet, one surely can conceive of a policymaker who determines—without having been animated by any racist value judgment or stereotype—that slavery, Jim Crow, and racial segregation were gravely wrong, even when legal, and that their continuing consequences should be mitigated. Thus, while the factfinding

admit a statement against a criminal defendant that has been compelled) . . . ." See id. at 136-38. Recognizing that Miranda's doctrine of mandated warnings also "is intended to affect police behavior," he nevertheless suggests that this purpose is not an independent end, but a means to the end of promoting adjudicative accuracy on the question of whether a confession was compelled. See id. at 129-32. Berman does so for two reasons. First, to constrain the behavior of police is of questionable legitimacy as a device to enforce an operative proposition (substantive constitutional principle) directed to trial judges. See id. Second, he suggests more broadly that "a decision rule's legitimacy is likely to be most secure insofar as it is designed to reduce adjudicatory error." See Berman, Constitutional Decision Rules, supra note 12, at 129.

Berman suggests that deterring police conduct compelling confessions serves adjudicative accuracy because trial courts are otherwise unable effectively to sift the compelled from the voluntary confessions on a case-by-case basis. See id. at 131. Whatever the supportability of this view, such analytical maneuvers are not necessary for viewing Powell's factfinding requirement as a legitimate and prophylactic adjudicative rule—at least in the sense that, unlike for Berman's view of Miranda's doctrine, both the substantive constitutional principle (prohibiting purposes rooted in racism) and the adjudicative rule (the factfinding requirement) are directed at the same governmental actors. Under such circumstances, I suggest that the legitimacy of a decision rule (or adjudicative rule) can, and should, be measured beyond the parameter of adjudicative accuracy. In framing adjudicative rules applicable to the same government actor constrained by the governing substantive constitutional principle, the Court can and should seek to serve the political function, at least to the extent that doing so does not undermine the goal of minimizing adjudicative error. Under such circumstances, preventing the breach of substantive constitutional principles by inhibiting the creation of unconstitutional policies has to be understood as a legitimate basis for framing adjudicative rules—especially if the foundational adjudicative rule makes the challenged act presumptively unconstitutional based on a probabilistic rationale. For a similar analysis of a factfinding requirement in the context of Commerce Clause challenges to congressional acts, see infra Part III.E.3.

263. See Chang, Judicial Conservatism, supra note 121, at 821-23.
requirement directly confronts—and reduces—the probability of purposes rooted in racial stereotyping, the “illegality” requirement bears no relationship to enforcing the prohibition of purposes rooted in racist values or stereotypes.

Instead, Powell’s “illegality” requirement was derived from his concern with the “unjust” effects of affirmative action programs on “innocent” white victims who otherwise would receive the program’s benefits. He introduced the “illegality” requirement by characterizing the U.C. Davis program as one aiding “persons perceived as members of relatively victimized groups at the expense of other innocent individuals . . .” Pointing even more clearly to his concern with “unfair” effects, Powell declared that “[w]ithout such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.”

As discussed above, a concern that laws with racial classifications should not have an excessively unfair effect on “innocents” is distinct from a norm prohibiting purposes rooted in racism. If this concern warrants enforcement, it should be justified as a properly derived and defined substantive constitutional principle, and enforced through its own explicitly derived and defined adjudicative rules. But to rely on this “fairness” norm in generating an “illegality” requirement, and to apply that “illegality” requirement in identifying constitutionally significant issues of fact, contaminates the adjudication of whether a given racial classification violates the prohibition of purposes rooted in racist values or stereotypes—and promises to invalidate policies that are permissible in relation to that substantive constitutional principle.

Third, a policymaking institution that chooses to use racial classifications for remedial purposes, and that makes the requisite

264. See Bakke, 438 U.S. at 290.
265. Id. at 307 (emphasis added).
266. Id. at 308-09. Similarly, Powell declared that a purpose to help “victims of societal discrimination”—as opposed to victims of identified illegal discrimination—"does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." Id. at 310.
267. See id.
268. See supra Part III.B.2.b.
269. Indeed, Powell framed the requirement of factfinding to identify past illegal discrimination as a precondition for finding the state's remedial purpose to be “compelling.” He said: “Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm." Bakke, 438 U.S. at 308-09 (emphasis added).
findings of fact, must be “competent” to do so.\textsuperscript{270} In Powell’s view, neither the California Board of Regents nor U.C. Davis qualified as “competent.”\textsuperscript{271} He said:

For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Before relying on these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.\textsuperscript{272}

By disparaging “isolated segments of our vast governmental structures,” and by seeming to require “legislative mandates and legislatively determined criteria,” Powell suggests that electoral accountability is an essential element of institutional “competence.” How does disabling electorally insulated governmental institutions from using racial classifications for remedial purposes relate to enforcing the prohibition of purposes rooted in racist values or stereotypes?

Unless one posits that electorally accountable decisionmakers are categorically less likely to pursue purposes rooted in racism when using racial classifications, Powell’s requirement of institutional “competence” seems irrelevant to the traditional probabilistic rationale for the “strict scrutiny” of racial classifications. Yet, this categorical proposition is problematic. A political community might well make the judgment that biases of various sorts—including racism and beyond—are less likely pursued by institutions less politically accountable, rather than more. That is a theory underlying the formation of independent commissions and agencies. Federal courts are not electorally accountable, and this design has been justified, at least in part, to inhibit decisionmaking tainted by bias.\textsuperscript{273} Indeed, our system relies on electorally insulated federal courts to police legislative decisions for purposes rooted in racism.

\textsuperscript{270} Id. at 309.
\textsuperscript{271} See id. at 309-10.
\textsuperscript{272} See id. Part III of Powell’s opinion focused on justifying the “strict scrutiny” of all racial classifications, including those challenged by \textit{Bakke}, and was discussed extensively above. See supra Part III.C.1.b. It is difficult to fathom what Powell meant in suggesting that his reasons for the “strict scrutiny” of all racial classifications also explain why “isolated” governmental segments are not “competent” to make findings as to which groups suffer what effects of past racial discrimination.

\textsuperscript{273} See, \textit{e.g.}, Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 347 (1816) (positing that federal courts were accorded jurisdiction over certain categories of case to avoid impediments to “the regular administration of justice” resulting from the influence on state courts of “state attachments, state prejudices, state jealousies, and state interests”).
What, then, explains this "competence" requirement?\textsuperscript{274} Perhaps it is a view that legislatures are less likely than are politically "isolated" decisionmakers to adopt race-specific remedial programs and less likely, therefore, "unfairly" to trammel the interests of innocent victims. Perhaps Powell believed that the potentially "unfair" intrusion on the interests of innocent whites is legitimate only if adopted by politically accountable decisionmakers. Both of these rationales emanate from the concern with "excessively unfair effects."\textsuperscript{275} Neither of these rationales, however, is related to enforcing the substantive constitutional principle prohibiting purposes rooted in racism. Indeed, like the requirement that government may use racial classifications only to redress the effects of illegal past discrimination, the requirement of "competence" promises to undermine the adjudicative function by invalidating policies that were not adopted because of purposes rooted in racism.

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It bears repeating: To say that the concern with "unfair effects" undermined enforcing the prohibition of racist purposes is not to suggest that one principle is correct, and the other interpretive error. It is to suggest, however, that each substantive constitutional principle should be understood and treated as if it were a separate cause of action, or a separate "constitutional crime." A racial classification might be impermissible if enacted because of purposes rooted in racism.\textsuperscript{276} A racial classification also might be impermissible if it has excessively unfair effects on innocents.\textsuperscript{277} To address both bases of potential impermissibility through analytical garble and confusion—rather than determining whether each basis of impermissibility was violated through separate and specifically tailored analyses—is akin to determining whether a defendant should be civilly liable by asking whether there was negligent consideration (mixing elements of tort and contract); or whether a criminal defendant should be convicted by asking whether the victim consented to be killed (mixing elements of rape and murder). Quite obviously, a civil defendant might be liable in tort, or contract, or both, or neither. A criminal defendant might be guilty of murder, or

\textsuperscript{274} In his dissent, Justice Brennan challenged Powell's requirement of "competence," stating that "the manner in which a State chooses to delegate governmental functions is for it to decide," and that the California constitution's delegation of legislative authority over the University to the Board of Regents "is certainly a permissible choice." \textit{Bakke}, 438 U.S. at 366 n.42 (Brennan, J., concurring in part and dissenting in part).


\textsuperscript{276} \textit{See supra} text accompanying notes 198-207.

\textsuperscript{277} \textit{See supra} text accompanying notes 237-40.
rape, or both, or neither. But it enforces no legal principle effectively—it undermines adjudicative efficacy—to fail to enforce each substantive legal rule separately, on its own terms.

ii. Failing To Invalidate Policies That Do Violate an Established Substantive Constitutional Principle

U.C. Davis' fourth claimed purpose was to attain the educational benefits flowing from a racially diverse student body. Powell's application of "strict scrutiny" to this purpose was an odd combination. His analysis not only imposed restrictions unwarranted by the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, but also licensed policies that clearly would violate that principle. Both problems were created by a meandering analysis that was contaminated by his new substantive concern with "unfair" effects on "innocents," and by his failure explicitly to differentiate the derivation and definition of substantive constitutional principles and adjudicative rules.

The Analysis Powell Should Have Pursued. Based on a probabilistically-rooted presumption that a racial classification was adopted in violation of a substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, the judge and the challenger's attorney could generate a series of questions about the special admissions program's details in relation to the purpose it is purported to serve. First, is the asserted purpose of attaining the educational benefits of a racially diverse student body inherently rooted in racist values or stereotypes, or is it possible for such a purpose to be permissible? Second, if the asserted purpose is conceivably permissible, was U.C. Davis' particular version of that purpose rooted in racist values or stereotypes?

Digging deeper, the judge (or challenger's attorney) might ask, for example: What educational benefits do you seek to gain? What is your basis for believing that such benefits can flow better from a student body that is racially diverse than from one that is not? What is your basis for believing that such benefits can flow by forging a student body in which at least fifteen percent are black, Chicano, Asian, or American Indian? What specific educational benefits do you believe members of each group can bring? What is your basis for believing that having a particular racial background enables a particular student to bring such educational benefits to the classroom?

U.C. Davis, or schools in other cases defending their own race-specific programs on similar grounds, might provide persuasive

278. See Bakke, 438 U.S. at 311.
279. See id. at 307.
answers to these questions, and thereby rebut the probabilistic suspicion that the challenged program was adopted because the school placed value on race per se, or because the school acted because of unexamined, unsupported assumptions that race correlates with fact. Failure to provide persuasive responses, however, would leave the adjudicative presumption of unconstitutionality unrebutted, and would render the program properly subject to invalidation.280

The Analysis Powell Did Pursue. Consider Powell's analysis of whether the asserted purpose of "obtaining the educational benefits that flow from an ethnically diverse student body"281 is "legitimate," whether it qualifies as "compelling," and whether the use of racial classifications is "necessary" to achieve a "compelling" state purpose.282 He begins:

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.283

Powell easily concludes that a purpose to attain a diverse student body is constitutionally permissible because academic

280. This analysis does not mechanically apply the formal elements of "strict scrutiny." It did not ask whether the asserted purpose qualifies as "compelling." Indeed, previous analysis has suggested that the "compelling" requirement obfuscates the scrutiny that racial classifications should bear toward determining whether they violate the proscription of racist purposes. See supra note 252. Nor does it ask whether the racial classification is "necessary" to achieve the asserted legitimate purpose, though many of the specific questions, derived from a focus on the presumption of racism, can be conceptualized as consistent with a requirement of "necessity." See supra note 255. Once again, I suggest that properly framed adjudicative rules, tailored to determining whether a particular challenged policy violates a particular substantive constitutional principle, can effectively serve the adjudicative function of judicial review—avoiding the invalidation of permissible policies, and the failure to invalidate impermissible policies—far better than can an all purpose, abstract formalism such as the elements of "strict scrutiny." Indeed, the elements of "strict scrutiny" must be defined, and their definition must be a function of the reasons for applying "strict scrutiny." It is those reasons for close scrutiny that generate the nature of the scrutiny that is appropriate, rather than the otherwise abstract terms of "strict scrutiny," as will be further illustrated in the discussion that follows immediately below. Recall the discussion, above, deriving definitions of "compelling" and "necessary" for enforcing the substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes. See supra text accompanying notes 198-207.

282. See *id.* at 306-15.
283. *Id.* at 311-12.
freedom is rooted in the First Amendment.\textsuperscript{284} One might ask, however, what academic freedom has to do with whether a university has made choices rooted in racist values or stereotypes—purposes \textit{illegitimate} under the Equal Protection Clause. \textit{Brown} and \textit{Bolling} make clear that academic freedom does not trump the prohibitions of equal protection. One readily can imagine certain notions about the educational benefits of racial diversity that would reflect purposes rooted in racist values—for example, that a student body of one race or another is \textit{intrinsically} better than one of many races; or that a student body that is racially balanced in a particular way is \textit{intrinsically} better than one that is not. Similarly, certain notions about the educational benefits that flow from a racially diverse student body also could be rooted in racial stereotypes—for example, an unexamined, unsupported assumption that members of particular racial groups have particular views to contribute to classroom discussion. Thus, diverted by the First Amendment, unfocused on the applicable substantive constitutional principle, and unmindful of the adjudicative presumption of unconstitutionality based on the probabilistic suspicion of racist purposes, Powell squandered the occasion to crystallize the ways in which the U.C. Davis policy might indeed have violated the equal protection proscription of purposes rooted in racial prejudice.

Powell then turned, mechanically, to the “strict scrutiny” requirement of a “compelling” interest.\textsuperscript{285} He concluded, without analysis, that a goal of student body diversity is (or can be) not only “legitimate,” but also “compelling.”\textsuperscript{286} Immediately thereafter, however, when purporting to turn (again mechanically) to the element of “strict scrutiny” requiring that the classification be “necessary” to achieve the state’s “compelling” interest, Powell makes clear not only that mere racial or ethnic diversity is not “genuine diversity,” but also that a purpose of attaining the educational benefits of mere racial diversity cannot qualify as “compelling.”\textsuperscript{287}

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But . . . the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic

\begin{thebibliography}{9}
\bibitem{284} See id. at 312.
\bibitem{285} See id. at 315.
\bibitem{286} Id. at 314-15.
\bibitem{287} See Bakke, 438 U.S. at 314-15.
\end{thebibliography}
origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity.\(^{288}\)

Consider the failings of this analysis—both its internal contradictions and its irrelevance for determining whether U.C. Davis' asserted purpose can help rebut a presumption that the special admissions program actually was adopted because of prohibited purposes rooted in racist values or stereotypes. Recall that Powell relied on the First Amendment value of academic freedom in determining that a purpose of fostering educational diversity is not only "legitimate," but also "of paramount importance."\(^{289}\) Yet, Powell's conclusion that the purpose of attaining a racially diverse student body does not qualify as "compelling"—because narrower than his own concept of "genuine" diversity\(^ {290}\)—reflects an odd (more to the point, incoherent) notion of academic freedom.\(^ {291}\)

Furthermore, a purpose of attaining educational benefits from "mere" racial diversity is not necessarily rooted in racist values or stereotypes. Perhaps a university believes (as a matter of value) that enrolling students having perspectives shaped by racism against blacks in America is the only specific element of diversity that warrants compromising the usual highest test score approach for choosing among applicants. Perhaps the university believes (as a matter of fact) that one must experience life and discrimination as an African-American truly to understand the experiences of blacks with racism in America. Perhaps the university has evidence that supports this view, beyond unsupported, unexamined assumptions. Perhaps the university asks applicants to write an essay discussing their experiences with racism. A university claiming an interest in securing educational benefits from racial diversity might well rebut a presumption that it acted because of racist values or stereotypes. If a university were to rebut this presumption, neither the notion of academic freedom, nor the more fundamental norm of legislative discretion within constitutional boundaries, could even begin to support disqualifying its purpose as not "compelling."\(^ {292}\) Justice Powell's analysis, however, foreclosed a route to validate the U.C. Davis program—and other schools' programs in subsequent cases—in

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288. Id. at 315 (emphasis in original).
289. See id at 311-13; see also supra text accompanying notes 281-84.
290. See Bakke, 438 U.S. at 315.
291. Beyond this, as previously suggested, tethering the conclusion of "legitimacy" to academic freedom was irrelevant to the issue of whether the state had exercised that "freedom" in pursuit of purposes prohibited under the Equal Protection Clause. See supra text accompanying notes 284-85.
292. See Bakke, 438 U.S. at 315.
relation to the substantive constitutional principle prohibiting purposes rooted in racial prejudice, as enforced through the traditional notion of "strict scrutiny" developed in Korematsu, Bolling, and Loving.293

What, then, explains the line Powell drew designating as "compelling" the pursuit of his broader concept of diversity, but rejecting as inadequate the pursuit of a more focused view of diversity?294 Once again, Powell seems to have in mind his concerns about excessively unfair effects on "innocents."295 He cautions that "although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded."296

Though it is conceivable that Powell is talking about the individual right to be free from regulation that violates the prohibition of purposes rooted in racism, it seems more likely that Powell is reverting to his new substantive concern that racial classifications must not have excessively unfair effects on "innocents."297

Indeed, Powell lauds certain characteristics of Harvard's approach to attaining educational diversity in ways that not only suggest the unfair effects concern, but also demonstrate how the focus on fairness distorts analysis necessary for effectively enforcing the prohibition of purposes rooted in racist values or stereotypes.298 The Harvard program awarded points to applicants based on their having characteristics on which Harvard placed special value.299 Those diversity-enhancing characteristics included racial or ethnic background—some races necessarily receiving more points than others—but also included geography, and special talents, among others.300 On the Harvard approach, Powell said:

In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats . . . . This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had

293. See supra text accompanying notes 120-58.
295. See id. at 298; see supra text accompanying notes 237-40.
297. See id. at 298; see supra text accompanying notes 237-40.
298. See Bakke, 438 U.S. at 317-19.
299. See id. at 317-18, 323-24.
300. See id.
the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. *His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.*

Note that Powell's approval of the Harvard approach is predicated not on a determination that Harvard was pursuing purposes untainted by racism, but on a determination that Harvard treated white applicants "fairly." Consider, now, two points that clearly illustrate how Powell's concern with "fair" effects undermined enforcing the prohibition of purposes rooted in racist values or stereotypes. First, the fact that Harvard considers factors other than race in constructing a "diverse" student body does not explain why Harvard does consider race at all. Indeed, Harvard could consider race in a way that violates the prohibition of purposes rooted in racist values or stereotypes. Powell cited a statement in Harvard's description of its program:

A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.

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301. *Id.* at 317-19 (citation omitted) (emphasis added). Apart perhaps from special bills, all legislation classifies, and all classifications treat people as members of groups. Selecting applicants on the basis of grade point averages and MCAT or LSAT scores treats them as members of groups defined in terms of grades and test scores. Given a substantive constitutional principle prohibiting purposes rooted in racist values or stereotypes, the issue really is not whether a selection policy treats applicants as individuals or as members of groups. Rather, the issue, properly framed, is whether the policy uses race in a way that places value on race per se, or that engages in racial stereotyping by making unexamined and unsupported assumptions that race correlates with fact.

302. *Id.* at 323. In *Grutter*, Justice O'Connor implicitly connected the concept of "individualized consideration" to the prohibition of racial stereotyping:

That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration. When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.... Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse environment.

*Grutter*, 539 U.S. 336-37. Although O'Connor characterizes her notion of "individualized consideration" as an application of Justice Powell's, it is altogether different. Because he referred approvingly to Harvard's statement vaguely differentiating black and white students, one can conclude that Powell was not concerned with *how and why* race was considered, but only with whether race was considered along with other sources of diversity. The Michigan law school policy, as
What, exactly, is the "something" that a black student can usually bring that a white person cannot? Is Harvard acting based on a racial stereotype? Had he taken seriously the presumption that racial classifications were adopted because of purposes rooted in racist values or stereotypes, Powell should have presumed that Harvard's use of racial classifications were rooted in stereotype, and should have cited Harvard's admissions policy not as a paradigm to be copied by public universities, but as beset with pitfalls to be avoided.303

Why, then, does Powell laud the Harvard program as a model for public institutions? Why would Powell not require a public school to make findings of fact, identifying the traits that it believes correlate with race, traits that it wishes to bring to its student body, toward gaining the educational benefits of "genuine" (including racial) diversity, as he requires findings of fact identifying past illegal discrimination when the state relies on a remedial purpose?304 Why was Powell so insistent on the formalities of "strict scrutiny" in his great debate with Brennan, yet so lax in its application to the facts and circumstances of the Harvard plan?

There is a second indication that Powell, beguiled by his "fairness" concerns, was distracted from the established concept of "strict scrutiny." Powell suggested (quite shockingly) that the Harvard program (if adopted by a public university) should be presumed permissible:

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated, but no less effective, means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element, to be weighed fairly against other elements, in the selection process.... And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a

characterized by O'Connor, does not use race in a way that assumes a correlation between race and unspecified fact. Rather, it seems to consider the particular role that the applicant's race has played in her life, and in forming her perceptions and values. Unlike Powell's notion of "individualized consideration," this part of O'Connor's Grutter opinion is tailored to overcoming a presumption that race was considered in violation of a prohibition of purposes rooted in racist values or stereotypes.

303. The point is not that Harvard would necessarily have been unable to respond persuasively to these suspicion-crystallizing questions, but that under "strict scrutiny" tailored to enforcing the substantive prohibition of purposes rooted in racism, Harvard (if a public institution) would have had the burden to do so.

304. See supra text accompanying notes 256-73.
cover for the functional equivalent of a quota system. In short, *good faith would be presumed* in the absence of a showing to the contrary in the manner permitted by our cases.\(^{305}\)

Somehow, Powell views the Harvard program as not facially discriminatory—as not employing racial classifications—and, therefore, as not warranting "strict scrutiny."\(^{306}\) But, of course, the Harvard program *does* use racial classifications in determining which races get what kind of "pluses." The fact that Harvard might give pluses based on factors other than race does not negate the fact that it *does* give pluses *based on* race, just as a private club's exclusion of members based on gender and religion would not negate the fact that the club discriminates based on race as well. How striking it is, after being so insistent that the *formalities* of "strict scrutiny" should be applied to all racial classifications, that Powell would suggest that a program like Harvard's ought to be insulated by a presumption of good faith.\(^{307}\) Apparently distracted by a visceral sense of its "fairness," he fails to see the racial classifications that the program does contain, and fails to be suspicious of the racist values or stereotypes on which those classifications probably were predicated.\(^{308}\)

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308. This analysis of Powell's opinion suggests that an effort to "taxon" or categorize extant doctrine in terms of substantive constitutional principles and adjudicative rules might yield only limited benefits. Consider Professor Berman's consideration of whether "strict scrutiny" should be understood, in his terms, as an operative proposition or a decision rule. *See Berman, Constitutional Decision Rules, supra* note 12, at 80 n.253. After laying out propositions from recent cases (which built upon and perpetuated the failings of Powell's *Bakke* opinion), and after recognizing that impermissible motivation can be a basis for invalidating a racial classification, Berman concludes:

[S]trict scrutiny seems to rest on both evidentiary and justificatory rationales. Some demand for heightened justification is part of the operative proposition; narrow tailoring is supplied by the decision rule. Perhaps, then, the doctrine is best understood as follows. The operative proposition of equal protection prohibits states from treating people differently unless the public good pursued outweighs the *harm to disadvantaged persons*. The decision rule directs that, because racial classifications generally *produce substantial harm*, and because fully ad hoc balancing is cumbersome and unpredictable, courts should presume that the good does not outweigh the harm unless the good is "compelling." Furthermore, because our unfortunate history shows that states are especially likely to be pursuing illegitimate ends when employing racial classifications, the decision rule also directs courts to presume that the (putatively compelling) interest claimed by the state is not the real interest pursued unless the classification is narrowly tailored to advance that (putatively compelling) interest.
To summarize Powell's application of "strict scrutiny" to the facts of Bakke's case: Concerns about the effects on "innocents" generated restrictions on the discretion of a policymaker unwarranted for enforcing the prohibition of purposes rooted in racist values or stereotypes. Concerns about the effects on "innocents" also distracted Powell's attention from aspects of the "model" Harvard program that, if adopted by a public university, could well have violated the firmly established substantive constitutional principle prohibiting purposes rooted in racism. Thus, Powell's failure to distinguish explicitly between substantive constitutional principles and adjudicative rules, to attend to the enforcement of each substantive constitutional principle separately, and to do so through adjudicative rules specifically tailored to each, tainted the manner in which he examined the facts of Bakke's case. As a result, he presented an analysis that promised not only to invalidate policies that were not adopted for prohibited purposes rooted in racial prejudice, but also to uphold policies that were adopted for prohibited purposes—and thereby to undermine the adjudicative function.309

Id. (emphasis added). In my view, this characterization of "strict scrutiny" tries too much to account for extant doctrine, and too little to critique current doctrine, in relation to the distinction between substantive constitutional principles (or operative propositions) and adjudicative (or decision) rules. This account of "strict scrutiny" fails to reveal that the Court (beginning with Justice Powell) has been concerned with substantive concerns going beyond impermissible purpose—including the "fairness" of harming "innocents," and concerns about promoting racism. Instead, Berman identifies a normatively vague operative proposition: states may not "treat[ ] people differently unless the public good pursued outweighs the harm to disadvantaged persons." Id. Having failed to tease out the distinct normative bases for distinct "operative propositions"—e.g., the prohibited purposes principle and the "unfair" effects principle—Berman's account of extant doctrine cobbles together a single "decision rule" that actually makes reference to two these two disparate substantive concerns—"pursuing illegitimate ends" and producing (an unspecified type of) "substantial harm." In my view, Berman's particular taxonomic account of extant "strict scrutiny" is capable neither of effectively adjudicating whether any of the disparate substantive concerns have been violated, nor "duly instructing" political actors about the boundaries of their discretion. The insight that constitutional doctrine, like doctrine in other areas of law, must be structured in terms of substantive constitutional principles and adjudicative rules, has a power that is more productively directed toward the critique of existing doctrine (that has not been framed with careful attention to the distinction), and the creation of new doctrine. To focus too much on the taxonomy of existing doctrine places too much credence on judicial thought processes that, at best, have been inchoate and implicit, and limits the clarifying potential of the underlying premise of the taxonomic agenda: analytical clarity comes from making explicit that which has been only implicit.

309. Cass Sunstein characterizes Powell's opinion as "narrow," in leaving many questions open, Sunstein, supra note 17, at 46-47, but not "shallow, because it offered a number of relatively abstract judgments about the legitimate grounds for affirmative
action programs.” Id. at 47 n.209. For Sunstein, whether a decision is “narrow” or “wide” depends on the extent to which it purports to reach facts beyond those of the case decided. Id. at 15-17. Whether a decision is “shallow” or “deep” depends on the extent to which it purports to be deduced from foundational first principles. Id. at 20-21. It is difficult to understand how Powell’s decision can be understood as “narrow,” as he sweepingly deems a purpose of achieving racial diversity as not “compelling;” a purpose of remedying the effects of past legal discrimination as not “compelling;” a racial classification adopted for remedial purposes unsupported by contemporaneous findings of fact identifying past illegal racial discrimination as impermissible; and so on. Indeed, Powell’s opinion was the foundation for Adarand, and Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Furthermore, Powell’s opinion can be understood as “deep” rather than “shallow” not simply because it suggested abstract judgments about legitimate grounds for affirmative action programs, but also because it suggested abstract principles with respect to which such programs would be deemed invalid—for having excessively unfair effects, and for excessively promoting racial prejudice. See Bakke, 438 U.S. at 318-19.

Toward minimalism, Sunstein urges case-by-case analysis rather than rules. See Sunstein, supra note 17, at 90-92. He conceives of a rule-based disposition of affirmative action policies in terms of a “court opinion outlawing affirmative action.” Id. at 91. But one might question whether case-by-case disposition is necessarily, or even more probably, minimalist than would be rules-based disposition. It all depends on the rule. The inherited meaning of “strict scrutiny” applied a substantive constitutional principle prohibiting purposes rooted in racism. This rule is concerned only with legislative purpose, not the effects of the policy, its “fairness,” its duration, or any other matter that a court might identify as relevant in the less disciplined common law manner for evaluating the facts of each case. See supra note 98. Furthermore, the rule prohibiting racist purposes does require a careful examination of each case’s facts—but only so far as those facts are relevant for rebutting a presumption of impermissible purpose. Perhaps Sunstein has a notion of constitutional mandates that is denser than mine—that “correctly” interpreting constitutional text involves intricately evaluating and balancing a broad range of facts and policies. My notion of constitutionality is skeletal. See supra note 117. Constitutional provisions establish relatively discrete boundaries on governmental discretion, leaving most values and factual judgments permissible bases for the exercise of governmental discretion. Constitutional policy—as made by the People when acting as framers and ratifiers, and as properly interpreted by judges—does not replicate the full range of considerations relevant for making ordinary policies in legislative politics. Rather, it defines boundaries within which ordinary policy ought to be made. This is a minimalist concept of constitutional meaning, and implies a minimalist approach to judicial review. But it is minimalist in the sense of identifying minimalist substantive constitutional principles. In my view, disposing of affirmative action cases as all racial classifications had been evaluated before Bakke, i.e., according to a rule prohibiting racist purposes, is far more “minimalist” than was Powell’s opinion, and far more minimalist than “case-by-case” dispositions building on the Powell opinion have been. See generally Chang, Judicial Conservatism, supra note 121.
b. Failing Explicitly to Derive and Define New
Substantive Constitutional Principles Undermines
the Political Function for Enforcing Previously
Established Substantive Constitutional Principles

Justice Powell's three requirements for governmental entities seeking to use racial classifications for remedial purposes sent problematic messages that begged to be heeded by conscientious policymakers.\(^{310}\) Policymakers were not told that they may use racial classifications if their purposes are not rooted in racist values or stereotypes. Rather, they were told that if they seek to use racial classifications for remedial purposes, they must be politically accountable, and they may only seek to redress the effects of past discrimination that was illegal. Policymakers who conscientiously heeded these constraints were discouraged from enacting policies that would have been perfectly permissible—that they should have felt constitutionally free to enact—under the well-established substantive constitutional principle prohibiting laws with racial classifications adopted because of purposes rooted in racism. President Clinton sought to "mend it, not end it," but the definition of "mending" was obscured by the failings of Powell's analysis and by subsequent decisions that built on Powell's foundation.\(^{311}\)

This point does not presuppose that the only legitimate definition of unconstitutional racial discrimination is that which violates the prohibition of purposes rooted in racism. It does not presuppose that Powell's additional, implicit substantive constitutional principles—the prohibition of racial classifications having excessively "unfair" effects on "innocents," and the prohibition of classifications that excessively promote racism—are necessarily erroneous.\(^{312}\) It does suppose, however, that each substantive constitutional principle should be derived and defined on its own terms—that one or another putative substantive constitutional principle might be erroneous. It also supposes that a doctrinal hash of disparate substantive concerns and functionally distinct adjudicative considerations cannot begin to provide policymakers

\(^{310}\) For discussion of those three requirements, see supra text accompanying notes 256-77.

\(^{311}\) In 1995, President Clinton sought to defend affirmative action against political and legal attacks. "Despite the strong sentiments in Clinton's speech, the 96-page review it introduced concludes that a number of minority set-asides will have to be revised or eliminated to comply with [a] recent Supreme Court ruling.... [S]ays a top Clinton aide, alluding to the impact of the Supreme Court decision, 'there's a day of reckoning coming.'" See James Carney, Mend It, Don't End It, TIME, July 31, 1995, at 35.

\(^{312}\) See Bakke, 438 U.S. at 298-300; see also supra text accompanying notes 233-41.
with "due instruction" as to the constitutional norms by which they should feel their discretion constrained.

c. Failing Explicitly to Derive and Define New Substantive Constitutional Principles (and Correlative Adjudicative Rules) Undermines the Adjudicative Function for Enforcing Those New Principles

In *Wygant v. Jackson Board of Education*, Justice Powell authored a plurality opinion in which the reason for a finding of unconstitutionality was *Bakke's* implicit substantive constitutional principle prohibiting racial classifications that inflict excessively unfair effects on "innocents." *Wygant* involved a challenge to a local school board policy, established through a collective bargaining agreement with the teachers' union, that displaced a pure seniority principle of "last hired, first fired" with one providing for racially proportionate layoffs.

After noting that the Court would apply "strict scrutiny" even though "the challenged [racial] classification operates against a group that historically has not been subject to governmental discrimination," Powell determined that because of the "burden that [the] preferential layoffs scheme imposes on innocent parties," "the layoff provision was not a legally appropriate means of achieving even a compelling purpose." He continued:

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available. For these reasons, the Board's selection of layoffs as the means to

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314. Id. at 280-84.
315. Id. at 270. The provision stated, "In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff." Id.
316. Id. at 273.
317. Id. at 278 (emphasis added).
accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.\textsuperscript{318}

Note the import of this passage: Even if the Court were to determine that racial classifications had not been employed in pursuit of purposes rooted in racist values or stereotypes—even if the state were to meet its burden of establishing that it employed racial classifications for constitutionally legitimate purposes—the classification could be struck down based on a judicial determination that it inflicted excessively unfair effects on “innocents.” Powell’s \textit{Wygant} opinion makes undeniable that which was implicit in \textit{Bakke}: the creation of a new substantive constitutional principle, beyond the proscription of purposes rooted in racism, prohibiting racial classifications deemed to have excessively unfair effects.\textsuperscript{319}

Powell failed to address the full range of issues relevant for deriving and defining this putative substantive constitutional principle. First, he did nothing to \textit{derive} the constitutional pedigree of this principle—nothing to indicate whether, in his view, a concern with the “fairness” of racially disproportionate effects was an originalist interpretation of the Equal Protection Clause, whether he was employing a particular methodology other than originalism, why his chosen methodology was appropriate, or why his chosen methodology generates the concern with unfair effects. With all of these questions unaddressed and unanswered, the legitimacy of enforcing a judicial definition of “unfairness” is seriously questionable as “legislating from the bench.”\textsuperscript{320}

Second, Powell failed to \textit{define} the concept of “fairness” that he purported to enforce. Why is the injury from losing a job more significant than that from having one’s job application rejected? More significantly, why is it unconstitutionally unfair for a white job holder to lose a job because of race-specific layoff policies that were adopted because of permissible purposes (untainted by racist values or stereotypes), but not unconstitutionally unfair for a black job

\begin{footnotesize}
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\item[318.] \textit{Wygant}, 476 U.S. at 283-84 (emphasis added).
\item[319.] \textit{See} \textit{Chang, Judicial Conservatism}, supra note 121, at 821-23.
\item[320.] \textit{See Bork, supra} note 78 at 15-16 (noting that self-proclaimed judicial conservatives profess abhorrence for “legislating from the bench”); \textit{see also} United States \textit{v. Morrison}, 529 U.S. 598, 627 (2000) (Thomas, J., concurring); \textit{Lopez}, 514 U.S. at 601 (Thomas, J., concurring); Griswold \textit{v. Connecticut}, 381 U.S. 479, 522-27 (1965) (Black, J., dissenting). The aversion to “legislating from the bench” is, however selective. Compare Justice Thomas’ concern with enforcing the original understanding of the Commerce Clause in \textit{Lopez} and \textit{Morrison} with his concern for enforcing his personal beliefs about racial discrimination. \textit{See Adarand}, 515 U.S. at 240 (Thomas, J., concurring) (“I believe that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”) (citation omitted); \textit{see also} \textit{Chang, Judicial Conservatism}, supra note 121, at 800-17; \textit{infra} note 466.
\end{enumerate}
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holder to suffer the same loss—the loss of a job—because of a (permissibly motivated) last hired, first fired principle? Although it is true, as Powell suggests, that “layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives,”321 seniority-based layoffs of more recently hired black employees must seriously disrupt their lives as well.322

A legislature that chooses to displace traditional seniority policies toward mitigating the effects of past racial discrimination has made its own judgment about fairness. What is the judicially-determined, constitutionally mandated concept of “fairness”? Why should that definition of “fairness” supersede the legislature’s different view? Without clear answers to these questions, and apart from issues of legitimacy, a judge seeking to enforce the “excessively unfair effects” principle will haphazardly identify issues of constitutionally significant fact and, therefore, haphazardly fulfill the adjudicative function of judicial review.

Furthermore, if laws containing racial classifications are to be measured against a separate substantive constitutional principle prohibiting excessively unfair effects on “innocents,” the Court must derive and define adjudicative rules tailored to enforcing this new norm. Should laws with racial classifications be presumed to violate this principle? Do remedial racial classifications probably have excessively unfair effects on whites? Is it worse wrongly to uphold a classification that is excessively unfair than wrongly to invalidate one that is not excessively unfair? Powell posed none of these questions. He addressed and answered none of these questions—and none could have been answered because the substantive definition of unconstitutional unfairness was neither explicitly defined, nor derived.

Thus, with the substantive constitutional principle prohibiting “unfair” effects ill-defined, Justice Powell’s Wygant opinion risked erroneously identifying issues of constitutionally significant fact. With the appropriate adjudicative rule unaddressed, his opinion risked erroneously resolving issues of constitutionally significant fact. The foregoing discussion focused on one of Powell’s new substantive constitutional principles, but is applicable to any circumstance in which a Justice measures the permissibility of challenged policies against putative substantive constitutional principles that are neither explicitly derived nor defined, nor tethered to adjudicative rules explicitly tailored for their enforcement.

321. Wygant, 476 U.S. at 283.
322. See Chang, Judicial Conservatism, supra note 121, at 794-99.
d. Failing Explicitly to Derive and Define New Substantive Constitutional Principles Undermines the Political Function for Enforcing Those New Principles

The creation of constitutional doctrine that fails explicitly to derive and define substantive constitutional principles undermines the political function of judicial review by precluding the "due instruction" of political representatives as to the norms by which they should feel their discretion constrained. All of the previously discussed ways in which the political function could be undermined are applicable to Justice Powell's opinions in Bakke and Wygant and their newly-established implicit substantive constitutional principle prohibiting (permissibly motivated) racial classifications having excessively unfair effects on "innocents." First, failing to define the elements of "unfairness" fails to instruct political actors about the boundaries by which discretion is circumscribed. Second, failing to derive the excessively unfair effects principle through an identified interpretive methodology is a lost opportunity to reveal it as interpretive error, and increases the likelihood that conscientious legislators will be wrongly inhibited from enacting remedial uses of racial classifications. Third, and alternatively, failing to derive the excessively unfair effects principle through an identified interpretive methodology is a lost opportunity to reveal it as proper interpretation, and thereby to reduce the likelihood that less than conscientious legislators would feel constrained to limit their policy pursuits within such boundaries — judicial supremacy notwithstanding.


Explicitly differentiating the derivation and definition of substantive constitutional principles and adjudicative rules can

323. See supra text accompanying notes 183-84.
324. Policymakers were left unguided about a range of issues. What constitutionally-mandated notion of "fairness" underlies the proposition that it is worse to lose a job than never to receive it? What constitutionally-mandated notion of "fairness" supports the view that it is worse for a white worker with more seniority to lose a job than for a black worker with less seniority (because of the effects of past racial discrimination) to lose a job? See Chang, Judicial Conservatism, supra note 121, at 794-99.
325. Cf. supra text accompanying note 311 for an example of a politician who conscientiously sought to limit policy choices within judicially-declared constitutional mandates.
326. Cf. supra text accompanying notes 167-87 for an example of a politician less than conscientious about responsibilities in relation to judicial supremacy.
enhance the enforcement of constitutional provisions well beyond the Equal Protection Clause. Consider the enumerated powers of Congress. Consider, in particular, Justice Marshall's foundational efforts to interpret the meaning of the Necessary and Proper Clause in *McCulloch v. Maryland*, and the Commerce Clause in *Gibbons v. Ogden*.327

1. *McCulloch* and Foundational Ambiguity

   a. Failing Explicitly to Derive and Define Substantive Constitutional Principles Undermines the Adjudicative Function

   Definitional Ambiguity and Identifying Issues of Constitutionally Significant Fact. In *McCulloch v. Maryland*,328 Marshall resolved arguments concerning the definition of Congress' legislative discretion under the Necessary and Proper Clause. Challenging the permissibility of legislation creating a national bank, Maryland argued, first, that the power to create a bank was not expressly enumerated and, second, that any implied powers provided by the Necessary and Proper Clause should be interpreted narrowly.329 Indeed, Maryland argued that "necessary" should be construed to mean "absolutely necessary,"330 defined "as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory."331 The federal government conceded that the power to create a bank was not expressly enumerated, but contended that the implied powers delegated through the Necessary and Proper Clause should be interpreted broadly enough to include the discretion to create a bank.332

   Marshall presented his own, much broader interpretation. In Marshall's view, Congress could choose any means of regulation it wished, so long as the ends it sought to pursue were authorized under some enumerated power other than the Necessary and Proper Clause.333 He said:

   [W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into

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327. 22 U.S. 1 (1824).
328. 17 U.S. 316 (1819).
329. See id. at 412.
330. Id. at 414-15.
331. Id. at 413.
332. Id. at 413-15.
333. Id. at 418-19.
execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. *Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.*

Later in his opinion, Marshall articulated much the same idea:

[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

These statements express three essential concepts. First, a law might be affirmatively prohibited—unconstitutional not on federalism grounds, but for transgressing affirmative prohibitions, such as those established in the Bill of Rights. Second, the Necessary and Proper Clause itself imposes no limits on Congress’ discretion. The choice of means—and any determination about the degree of a law’s necessity—are political questions, not subject to judicial oversight. Third, and very significant, these statements imply that the boundaries on congressional discretion under the expressly enumerated powers (other than the Necessary and Proper Clause) are to be defined in terms of “ends” or “objects”—purposes—that Congress is constitutionally authorized to pursue. Thus, implicitly, Congress’ discretion under the Commerce Clause is properly defined in terms of the limited purposes Congress may pursue. So with the power to tax, to pay the debts, and all of the other enumerated powers. “Let the end be legitimate,” where a law is “really calculated to effect any of the objects entrusted to the government,” then Congress’ choice of means—so long as not affirmatively prohibited—is a matter of political discretion.

There are ambiguities in at least the first iteration of principles defining Congress’ discretion under the Necessary and Proper Clause


335. *Id.* at 423. Elsewhere, Marshall articulated the same idea but in negative terms:

Should congress, in the execution of its powers, adopt measures prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

*Id.* (emphasis added).

336. *Id.* at 421, 423 (emphasis added).
with potentially significant consequences for identifying issues of relevant fact and fulfilling the adjudicative function. \(^{337}\) Yet, Marshall's analysis became more fundamentally problematic as he moved toward his ultimate conclusion that the statute creating the national bank was not unconstitutional. Having declared that an act would be impermissible if Congress "under the pretext of executing its powers, pass[ed] laws for the accomplishment of objects not entrusted to the government,"\(^ {338}\) Marshall's ensuing analysis was definitionally deficient in two ways.

First, though he suggested that the bank is helpful "in the prosecution of [the government's] fiscal operations," and "the administration of our finances," he did not identify the particular enumerated power(s) under which, in his view, Congress acted to create the national bank.\(^ {339}\) Second, he did not define the purposes for which Congress may legislate under those particular (unspecified) enumerated powers.\(^ {340}\) Given these unaddressed issues, it was simply

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337. Marshall suggests that the means chosen must in some way be "appropriate." Does he intend this as a judicially-defined element that must be satisfied, apart from whether Congress acted for a legitimate end? In other words, must the Court make its own determination of whether the means selected are "appropriate," or is the question simply whether Congress selected the means in pursuit of a legitimate end? His other two statements would seem to eschew an independent judicial determination of "appropriateness," but the ambiguity created by his reference to a requirement of "appropriate" means in the first statement creates a risk of wrongly identifying issues of fact in adjudicating federalism challenges to congressional acts. In that first iteration, Marshall also suggests that the means chosen must be "plainly adapted" to a legitimate end. See id. at 421. Does he mean to establish judicial standards as to the efficacy of a chosen means to achieve a legitimate end—and, therefore, to establish requirements in addition to the legislature's good faith? If so, Marshall is contemplating a requirement that goes well beyond determining the content and legitimacy of Congress' purpose. He may be contemplating the possibility that an act of Congress could be deemed impermissible even if adopted for a legitimate end if, in the Court's view, the act is not a sufficiently effective means for achieving that end. For evaluation of such a substantive proposition, see infra note 429. Alternatively, is requiring that the challenged statute be "plainly adapted" to a legitimate end meant to establish an adjudicative rule for ascertaining legislative purpose—i.e., a presumption that Congress acted for a constitutionally unauthorized purpose? Such a notion, if that is what Marshall had in mind, would have been very different from Thayer's deferential "rule of administration." See supra text accompanying notes 52-77. If so, as discussed below, there was no analysis of any kind deriving an (implicit) adjudicative rule presuming that acts of Congress are unconstitutional for not having been adopted in pursuit of legitimate ends.


339. Id. at 422.

340. In other words, now assuming that Congress claims to have acted under the commerce power to create the bank, what ends, objects, or purposes is Congress authorized to pursue under the Commerce Clause? Marshall might have defined a substantive constitutional principle that Congress' discretion under the Commerce Clause is limited to purposes of promoting interstate commerce—i.e., *if (and only if)*
impossible to determine whether Congress acted for permissible purposes in having created the national bank. By thus failing to define the applicable substantive constitutional principle for identifying issues of constitutionally significant fact, Marshall hamstringed his analysis of the bank’s permissibility, and thereby undermined the adjudicative function.

Derivational Ambiguity and Adjudicative Legitimacy. Marshall spent considerable effort discussing his interpretive goal for defining “necessary,” and the interpretive methodology to be employed in reaching that goal. He said, “[t]his word, then, like others, is used in various senses; and, in its construction, the subject, the context, [and] the intention of the person using them, are all to be taken into view.” Thus, he endeavored to identify the intent of the sovereign—the People who chose the word “necessary.” “The government proceeds directly from the people; is ‘ordained and established’ in the name of the people.”

Turning to interpretive methods, Marshall suggested various approaches for identifying the intent of the sovereign People. He compared the text of the Constitution with that of the Articles of Confederation as a basis from which to infer the intent of those who framed and ratified the Necessary and Proper Clause. He further Congress enacted legislation with the purpose of promoting interstate commerce, then its means of regulation are permissible. Alternatively, he might have determined that the framers and ratifiers had a more limited view of congressional discretion under the Commerce Clause, authorizing only legislation adopted for purposes of eliminating protectionist trade barriers. These different substantive definitions of congressional power under the Commerce Clause identify different issues of relevant fact that would have to be resolved in determining the permissibility of the national bank. Judicial scrutiny of the circumstances under which the bank was rechartered should look very different, depending on which (if either) of these two ways of defining authorized purposes under the Commerce Clause Marshall might have adopted. For further discussion of these purpose-centered definitions of congressional authority under the Commerce Clause, see infra note 433 and accompanying text.


342. Id. at 403. This interpretive goal also was implicit in Marbury v. Madison, where Marshall declared: “That the people have an original right to establish . . . such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.” 5 U.S. at 176. From this foundational norm, Marshall’s interpretive approach was comprised of a goal—identifying the intent of the framers and ratifiers—and of methodological propositions as to how that goal is to be fulfilled. One should note that Marshall’s rationale for originalism is not quite applicable for guiding Justices once “the People” who created the Constitution have passed from the scene. See infra text accompanying notes 468-72.

343. See McCulloch, 17 U.S. at 406. In particular, Marshall noted that the Articles of Confederation declared that the national government possessed only such powers as were “expressly” delegated, while the Constitution’s Tenth Amendment omitted the word “expressly” in declaring that those powers not delegated to the national
asserted that the People could not have intended to create a national government without providing "ample means" for the execution of its enumerated substantive powers. "The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution, by withholding the most appropriate means."344

However supportable these propositions about the People's intent might have been, Marshall's analysis thus far was relevant only for rejecting Maryland's very narrow interpretation of "necessary." Beyond this, however, he gave no attention to deriving—justifying—the critical proposition that the People intended to define Congress' expressly enumerated powers in terms of limited, authorized purposes.345 This is significant because there were other ways in which the framers and ratifiers might have chosen to define the national government's legislative powers. Rather than define Congress' powers in terms of authorized purposes, they might have preferred to define such powers in terms of requisite effects. Alternatively they might have chosen to define such powers in terms of permitted subjects of regulation—thus rendering Marshall's interpretation of the Necessary and Proper Clause incorrect.346

Failure to derive—to justify—the proposition that Congress' expressly enumerated powers are defined in terms of authorized purposes undermined Marshall's conclusion that the national bank was not unconstitutional. A substantive constitutional principle defining Congress' powers in terms of authorized purposes requires finding very different facts relevant to a challenged statute than would a principle defining Congress' discretion in terms of requisite effects, or authorized subjects. Furthermore, correctly finding facts under an identified principle promises incorrect results if the principle applied was itself unwarranted. Failing to derive—to justify—the conceptualization of congressional power in terms of authorized purposes threatened the legitimacy of any conclusions reached about the national bank, and about any other congressional

government are reserved to the states. See id. Of course, omitting the word "expressly" in the Constitution merely confirms that the framers and ratifiers of the Constitution intended to vest the national government with some measure of implied powers—a point that Maryland did not contest. The interpretive disagreement between Maryland and the federal government concerned not whether Congress was vested with implied powers, but the scope of those implied powers.

344. Id. at 408.
345. Id. at 421-23 (emphasis added). Indeed, he gave little attention to deriving his own interpretation of the necessary and proper clause as imposing no limits on Congress' choice of regulatory means. Id.
statute subsequently challenged, and thereby undermined the adjudicative function.

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All of these failings in defining the principles for identifying issues of constitutionally significant fact about the national bank—failing to specify the enumerated power under which Congress acted, to define the purposes Congress may pursue under that power, to derive the proposition that Congress' powers were created in terms of authorized purposes, and to derive the particular purposes Congress was authorized to pursue—would have been less likely had Marshall endeavored to define constitutional doctrine explicitly in terms of substantive constitutional principles and adjudicative rules. Substantive constitutional principles are rules stating limits on governmental discretion derived from and evoking values deemed to underlie constitutional text. Their function is to identify issues of constitutionally significant fact. They must, therefore, be defined with careful attention to the elements identified, and to the kinds of fact addressed by each element. Furthermore, to frame a substantive constitutional principle requires its derivation—by identifying the values deemed to underlie relevant text, explaining how and why those values were so deemed, and explaining how the substantive constitutional principle, as particularly defined, is indeed derived from and expresses those identified underlying constitutional norms.

b. Failing Explicitly to Derive and Define Adjudicative Rules Undermines the Adjudicative Function

Beyond the foregoing shortcomings in deriving and defining the substantive constitutional principles relevant for adjudicating the bank's permissibility, Marshall failed to derive and define adjudicative rules with respect to which issues of constitutionally significant fact were to be resolved. Now assuming that McCulloch's (inadequately derived and defined) implicit substantive constitutional principles provide the yardstick for identifying the issues of constitutionally significant fact, should congressional acts, when challenged, be presumed to have been enacted for constitutionally authorized purposes (and, therefore, presumed permissible) or be presumed to have been enacted for constitutionally unauthorized purposes (and, therefore, presumed impermissible)? What evidence should be relevant from which to infer Congress' legislative objectives? What inferences from what evidence should be permissible? What, if any, inferences from what evidence should be mandatory? Because Marshall did not begin to address these issues, reliably determining whether the national bank was adopted because
of authorized purposes under some enumerated power was gravely undermined.\textsuperscript{347}

c. Failing Explicitly to Derive and Define Substantive Constitutional Principles and Adjudicative Rules Undermines the Political Function

It should be evident that \textit{McCulloch}'s ambiguities in defining substantive constitutional principles would impede not only the Court's performance of the adjudicative function, but also the "due instruction" of political actors. The \textit{McCulloch} opinion informed Congress that its statutes were to be judged by the purposes for which they were enacted,\textsuperscript{348} but gave no indication of the purposes for which Congress was authorized to act under any enumerated power. Further discussion of the political function will be deferred until analysis of \textit{Gibbons} and its progeny,\textsuperscript{349} for the doctrines developed in these cases involved worse than the ambiguity that results from doctrine that is unclear. These cases undermined both the adjudicative and the political functions with implicit substantive constitutional principles that were at war with each other.

\textsuperscript{347} Indeed, it was impossible to determine whether the Bank should be presumed permissible or impermissible without having first identified the power(s) under which Congress acted, and without having defined (and derived) the particular purposes (ends or objects) that Congress was authorized to pursue under such power(s). As previously suggested, one cannot effectively analyze the burden of persuasion—whether pursuant to a probabilistic analysis or a normative analysis—without a clearly defined substantive constitutional principle. \textit{See supra} text accompanying notes 142-57, 237-40, 313-23. If one were to pursue a probabilistic rationale for allocating the adjudicative presumption, determining whether a given category of statute probably does, or does not, violate the applicable substantive constitutional principle requires focusing with particularity on the elements of the substantive constitutional principle at issue. Thus, for example, determining whether Congress probably enacted the Bank legislation for a constitutionally authorized purpose requires defining those purposes that are authorized. If one were to pursue a normative rationale for allocating the adjudicative presumption, one also would have to identify the content of the constitutional norms limiting (and authorizing) congressional discretion in order to determine whether an erroneous invalidation would be worse than an erroneous failure to invalidate the challenged Bank legislation. Thus, the failure to derive and define substantive constitutional principles undermined the adjudicative function not only through the absence of clear rules for effectively identifying issues of relevant fact, but also by having precluded the derivation and definition of adjudicative rules for effectively resolving issues of relevant fact.

\textsuperscript{348} \textit{McCulloch}, 17 U.S. at 421-24.

\textsuperscript{349} \textit{See infra} text accompanying notes at 350-82.
2. Building on *McCulloch*'s Substantive Ambiguity: *Gibbons*' Schizophrenia and its Bipolar Progeny

*Gibbons v. Ogden* involved a dispute over the operation of steam vessels in the Hudson River from the shores of New Jersey to those of New York. New York had granted a monopoly to Ogden to operate vessels in its waters. Congress had granted a license to Gibbons to operate vessels between New Jersey and New York, including within New York's waters. If Gibbons' license was a valid exercise of federal power, it would preempt Ogden's monopoly based on New York law. Ogden argued that Congress lacked discretion under the Commerce Clause to grant a license to operate a vessel within New York's territorial waters, because navigation within a state's territorial waters does not qualify as "commerce among the several states."

Referring to the Commerce Clause, Marshall asked, "What is this power?"

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Note that these elements defining the extent, and the limits, of Congress' delegated powers are much the same as those Marshall developed in *McCulloch*. First, he suggests that the Constitution

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350. 22 U.S. 1 (1824).
351. *Id.* at 7.
352. *See id.*
353. *Id.* at 186-87.
354. *Id.* at 196-97.
355. *See supra* text accompanying notes 334-40. Toward defining Congress' discretion under the Commerce Clause in *Gibbons*, Marshall addressed interpretive
imposes affirmative limits on Congress' discretion, apart from the boundaries of delegated powers. As in *McCulloch*, these affirmative limits, such as those imposed by the first eight amendments, did "not affect the questions" presented in *Gibbons*. Second, he suggests that Congress' legislative powers are "limited to specified objects"—that Congress is authorized to legislate in the pursuit of particular *ends, objects, or purposes*. Third, as he did in *McCulloch*, he suggests that Congress' regulatory discretion is plenary, so long as it acts in pursuit of authorized purposes.

Yet, the ambiguities left in *McCulloch* were repeated in *Gibbons*. Most significantly, what purpose(s) may Congress pursue under the Commerce Clause? Marshall never touched this issue.356 Compounding these ambiguities, earlier portions of Marshall's *Gibbons* opinion implied an entirely different framework for defining the scope of the commerce power. Indeed, Marshall began his analysis of Congress' discretion under the Commerce Clause by considering whether ship navigation falls within the *subject* of commerce.

The *subject* to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. . . . *If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.*357

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356. Secondary ambiguities include the following questions: To determine whether Congress acted for legitimate ends, does it matter if one member voted for illegitimate ends; or if most members did not vote for legitimate ends; or if the act would not have been enacted but for the consideration of legitimate ends? These are ambiguities about identifying those issues of relevant fact that should be resolved in the adjudicative process. For a discussion of willful ambiguity, see *supra* text accompanying notes 116-19.

Marshall pursues a similar subject-centered inquiry into whether the navigation of vessels within a state's waters is encompassed by "commerce among the several states."

The subject to which the power is next applied, is to commerce "among the several States"... It is not intended to say that these words comprehend that commerce, which is completely internal... and which does not extend to or affect other States.358

There is a fundamental inconsistency between this part of Marshall's opinion, concerned with defining "commerce" and "among the several states" as subjects of regulation,359 and the later part of his opinion, discussed above, concerned with defining the power "to regulate."360 Each of these two different approaches would require identifying very different issues of fact in determining whether particular acts of Congress are permissible. The latter approach is concerned with facts indicative of legislative purpose; the former is concerned with facts indicative of the nature of the things regulated. Both approaches cannot be correct. If, indeed, as Marshall had suggested in McCulloch, and in the latter part of Gibbons defining the power "to regulate," Congress may choose any means of regulation in pursuit of an authorized end,361 the inquiry into whether "navigation" qualifies as commerce would be irrelevant. Marshall's assertion, above, that "[if] commerce does not include navigation, the government of the Union has no direct power over that subject" would be wrong.362

This schizophrenia in Marshall's substantive conceptualization of federal legislative power in Gibbons—which emanated at least in part from his failure to attend to the explicit derivation and

358. Id. at 194 (emphasis added).
359. Id.
360. Id. at 196-97.
362. Gibbons, 22 U.S. at 190 (emphasis added). It is somewhat unclear what Marshall means by "direct" power over navigation. One might interpret the statement as distinguishing between power derived from the Commerce Clause itself as "direct" power, in contrast with power derived from the necessary and proper clause in conjunction with the Commerce Clause as other than "direct." Yet, such an interpretation of Marshall's meaning is not plausible, because Marshall follows this point about "direct" power with the unqualified assertion that if "commerce" does not include navigation, Congress could "make no law" regulating vessels or seamen. Id. This unqualified proposition that Congress could make no such law had to have accounted for whatever discretion Congress has under the necessary and proper clause. This confirms that in this portion of Gibbons, Marshall's view of Congress' discretion under the Commerce Clause is the product of an approach very different from that developed in McCulloch and in the later, purpose-centered portion of Gibbons.
definition of both substantive constitutional principles and adjudicative rules in McCulloch—had significant consequences in the decades to come. Consider Champion v. Ames (The Lottery Case) and Hammer v. Dagenhart (The Child Labor Case).

Champion involved a challenge to a congressional act that criminalized the interstate shipment of lottery tickets. Champion argued that the act was unconstitutional because "the carrying of lottery tickets from one state to another ... does not constitute ... commerce among the states." The government argued "that the carrying of lottery tickets from one state to another is commerce which Congress may regulate." Note that both parties made arguments that eschewed the McCulloch and latter-Gibbons concept of federal legislative power defined in terms of authorized purposes. Instead, both parties made arguments that employed the earlier Gibbons conceptualization of congressional power in terms of whether Congress regulated an authorized subject.

Justice Fuller, in dissent, did rely on the McCulloch and the latter Gibbons perspective.

[An act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the states and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the [Tenth] Amendment ... .]

Fuller seems concerned about Congress' objects or purposes, and seems to suppose that the commerce power does not vest Congress with a "general police power" to pursue moralistic purposes.

In response for the majority, Justice Harlan suggested that so long as Congress regulated the subject of interstate commerce, it could pursue any purpose.

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution ... . If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that

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363. See supra text accompanying notes 329-47.
364. 188 U.S. 321 (1903).
365. 247 U.S. 251 (1918).
366. See generally Champion, 188 U.S. 321.
367. Id. at 344.
368. Id. at 345.
369. See supra text accompanying notes 350-56.
370. Champion, 188 U.S. at 365 (Fuller, J., dissenting) (emphasis added).
mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution.\textsuperscript{371}

Note that in the last sentence above, Harlan paraphrases the portion of Marshall’s \textit{Gibbons} opinion that defined Congress’ powers in terms of unlimited discretion to choose means in pursuit of limited, authorized ends. Highly significant, however, was Harlan’s omission of \textit{Gibbons’} limiting principle: Congress’ discretion, “though limited to specified objects, is plenary as to those objects.”\textsuperscript{372}

In \textit{Hammer}, the Court considered a challenge to a congressional act that prohibited the interstate shipment of goods produced by children of less than a minimum age who worked for less than a minimum wage or for more than maximum hours.\textsuperscript{373} In a formal sense, the subject of regulation in \textit{Hammer} was just as much interstate commerce per se as was the regulated subject in \textit{Champion}—interstate shipment was prohibited by the law challenged in each case. In \textit{Hammer}, however, the subject of regulation was not dispositive.

The thing \textit{intended} to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but \textit{aims to} standardize the ages at which children may be employed in mining and manufacturing within the States . . . . There is no power vested in Congress to require the States to exercise their police power \textit{so as to prevent} possible unfair competition . . . . The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it

\textsuperscript{371}. \textit{Id.} at 355-56 (majority opinion).

\textsuperscript{372}. \textit{Gibbons}, 22 U.S. at 197 (emphasis added). There is, of course, a certain ambiguity in this statement from \textit{Gibbons}. “Objects,” in the sense of the purposes Congress is authorized to pursue under its enumerated powers, are not \textit{specified} in the Constitution, but would have to be identified through some interpretive inference. Yet, it also is true that the \textit{subjects} Congress may regulate are not specified in the sense suggested in the earlier part of \textit{Gibbons}—that because, in Marshall’s view, “commerce” includes the unspecified category of “navigation,” Congress may regulate the licensing of steam vessels. Furthermore, the \textit{subjects} Congress may regulate also are not \textit{specified} in the sense suggested by Marshall’s definition of Congress’ discretion in \textit{McCulloch} and in the latter part of \textit{Gibbons}. Rather, from that perspective, Congress could regulate \textit{any} subject, so long as it pursued authorized \textit{objects}.

\textsuperscript{373}. \textit{See} \textit{Hammer}, 247 U.S. at 268 n.1.
authority to control the States in their exercise of the police power over local trade and manufacture.\textsuperscript{374}

Though reference to the effect of the act makes Justice Day's conceptualization of Commerce Clause discretion ambiguous, the broader thrust of these passages suggests a concern with the impermissibility of Congress' purpose—that Congress "aim[ed] to standardize" the age at which children could be employed; that Congress sought "to require the States to exercise their police power so as to prevent possible unfair competition;" that Congress sought "to control the states in their exercise of the police power . . . ."\textsuperscript{375} In \textit{Hammer}, it did not matter that the subject regulated was interstate shipment—what mattered was Congress' purpose. In \textit{Champion}, it did not matter that Congress was aiming at the moral evils of selling and buying lottery tickets—what mattered was that the subject regulated was interstate shipment. Thus, \textit{Hammer} and \textit{Champion} enforced diametrically opposed (implicit) substantive constitutional principles defining congressional discretion under the Commerce Clause.\textsuperscript{376}

\textsuperscript{374.} \textit{Id.} at 271-74 (emphasis added).

\textsuperscript{375.} \textit{Id.} at 272-74. Although the \textit{Hammer} Court determined that Congress "aim[ed] to standardize" child labor policy through the Child Labor Act, it failed to define the substantive standard against which that purpose was measured—it failed to define the substantive constitutional principles identifying those particular purposes that Congress may pursue under the Commerce Clause. More than this, the \textit{Hammer} Court gave no indication of the adjudicative rules with respect to which it made the factual determination that the Child Labor Act was enacted for illegitimate purposes. Did the government bear the burden to show that Congress acted for constitutionally authorized purposes, or did the challenger bear the burden to show the opposite? Why? What evidence of legislative intent was relevant? What inferences from what evidence were permissible, or mandatory, and why?

\textsuperscript{376.} Justice Day feebly tried to distinguish the facts of \textit{Hammer} from those of \textit{Champion}, and thereby denied the fundamental inconsistency of the implicit substantive constitutional principles applied in each case. Day suggested, first, that unlike lottery tickets, the goods produced by children are intrinsically harmless. \textit{Hammer}, 247 U.S.at 272. Yet, a lottery ticket is simply a piece of paper which, one would suppose, is no more intrinsically harmful than is a shirt stitched together by a child. It is, of course, the use of a lottery ticket—its sale or purchase—that arguably is harmful, as it is the manufacture of the shirt by children that involves social harm. In both circumstances, it is human activity in relation to intrinsically harmless products that provides the focus of legislative concern.

Day's second basis for purportedly distinguishing the statute upheld in \textit{Champion} from that invalidated in \textit{Hammer} somewhat contradicts the first, and is no more tenable. Day suggested that for lottery tickets, "the use of interstate transportation was necessary to the accomplishment of harmful results . . . . [A]lthough the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. This element is wanting [in regulating the interstate shipment of goods produced by children]." \textit{Id.} at 271. Of course, if the interstate shipment of lottery tickets was necessary to effect the evil posed by lottery tickets, it follows that it is their sale or
Causes of Doctrinal Incoherence. McCulloch's ambiguity begat Gibbons' internal inconsistency; Gibbons' internal inconsistency begat the contradictory (implicit) substantive constitutional principles applied in Champion and Hammer. To have expressly derived and defined substantive constitutional principles in McCulloch would have required Marshall to designate as substantive constitutional principles the propositions that legislation enacted "for the accomplishment of objects not entrusted to the government" is unconstitutional; and that legislation is permissible if "really calculated to effect any of the objects entrusted to the government," regardless of the means of regulation.\textsuperscript{377}

To have justified the purpose-centered approach as a substantive constitutional principle would have required addressing a range of questions. Why did the sovereign People choose to define the power "to regulate Commerce . . . among the several states," or "to establish an uniform Rule of naturalization,"\textsuperscript{378} in terms of authorized purposes? What values, what competing values, underlay the People's creation of these limited powers and their definition of these powers in terms of authorized purposes? What other ways for defining the boundaries of these expressly enumerated powers might they have chosen?\textsuperscript{379} What values could underlie these alternative modes of defining national legislative power, and why are such values not plausibly those from which the sovereign People created Congress' legislative powers? And if, indeed, the sovereign People did choose to define the enumerated powers in terms of authorized purposes, what particular purposes did they authorize Congress to pursue when using the power under which the Bank was created, and why?

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\textsuperscript{377} McCulloch, 17 U.S. at 423.

\textsuperscript{378} U.S. CONST. art. I, § 8.

\textsuperscript{379} Why not have chosen to define the powers in terms of required regulatory effects, rather than legislative purposes? Why not have chosen to define the power in terms of authorized subjects, rather than authorized objects? \textit{See supra} text accompanying notes 356-72.
To have addressed the normative roots and implications of a putative substantive constitutional principle would have required acknowledging definitional ambiguity, and either clarifying what was ambiguous, or explaining why the ambiguity is retained as a matter of judicial choice. Furthermore, to have explicitly derived and defined adjudicative rules in McCulloch would have required closer attention to defining the substantive conception of federal legislative power that Marshall had constructed. Determining whether a challenged statute should be presumed permissible or impermissible, from either a probabilistic or a normative perspective, requires identifying with particularity the elements of the substantive constitutional principle with respect to which probabilities or normative hierarchies are to be determined.380

Had there been in Gibbons an explicit focus on the discrete functions of substantive constitutional principles and adjudicative rules, and the explicit derivation and definition of each, Marshall would have been more likely to recognize, and ultimately to avoid articulating, the two inconsistent substantive conceptualizations of Congress’ discretion. He more likely could have considered whether it makes more sense to conclude that the sovereign People chose to frame congressional discretion in terms of subjects it may regulate, or in terms of objects it may pursue, or in some other terms entirely. Thus, he would have been more likely to acknowledge (or to avoid framing) doctrine suggesting simultaneously that Congress’ discretion is limited in terms of the subjects it may regulate and that Congress has unbounded discretion to choose the means of regulation—the subjects of regulation—so long as it has pursued an authorized end. How could it be that Congress lacks power to regulate a subject that does not qualify as “commerce” (as Marshall suggested that navigation could not be regulated unless it qualifies as “commerce”) if, indeed, Congress has plenary discretion to choose the means of regulation when acting in pursuit of authorized ends?

Had this all occurred in Gibbons, the divergent approaches of Champion and Hammer would not each have had a plausible precedential pedigree. Justice Harlan less likely could have so selectively used Marshall’s Gibbons language in Champion, because Marshall more likely would have clearly derived and defined doctrine in Gibbons that was concerned either with authorized subjects of regulation, or authorized objects of regulation, but not both.381

380. One cannot conduct an effective analysis about how to allocate the burden of persuasion—whether with respect to a probabilistic analysis or a normative analysis—without a clearly defined substantive constitutional principle. See supra text accompanying notes 142-57, 237-40, 313-23, 347.

381. Not only did Harlan fail to acknowledge that his definition of congressional power was inconsistent with McCulloch, and with at least that portion of Gibbons
Champion might well have been decided very differently, based on the principle (on which Fuller relied in dissent) that Congress acts impermissibly when it pursues purposes not constitutionally authorized.

Consequences of Doctrinal Incoherence for the Adjudicative and Political Functions. A court might happen to reach the same result in a case whether by flipping a coin or by the careful derivation, definition, and application of legal principle to relevant facts. Though the result in Gibbons might not have been different had Marshall fully pursued the implications of McCulloch's proposition that Congress may regulate any subject so long as it acts for authorized objects,382 the incoherence of the Gibbons opinion undermined the adjudicative function in Champion and Hammer. Champion's doctrine applied to Hammer's facts should have upheld the challenged regulation, as the dissent argued. Hammer's principle, if applied by the majority in Champion, should have invalidated that regulation. The availability of contradictory doctrine, both of which cannot be correct, must undermine the adjudicative function, much in the way that deciding constitutional cases by flipping a coin would.

Furthermore, just as ambiguous—or worse, contradictory—constitutional doctrine must undermine the adjudicative function by failing to guide courts effectively, such flawed doctrine must undermine the political function of judicial review in failing to guide legislators effectively. Legislators only could have been confused by judicial opinions suggesting in one case (Champion) that Congress may pursue any purpose, so long as the subject regulated is interstate commerce, and suggesting in another case (Hammer) that Congress may not regulate under the Commerce Clause if its purpose is not authorized, even if the subject regulated is interstate commerce. Such incoherent doctrine cannot "duly instruct" legislators as to the boundaries of their discretion. Embracing the proposition that constitutional doctrine must be structured as is legal doctrine in other areas—explicitly comprised of substantive rules and adjudicative rules, explicitly recognizing the nature and functions of each kind of rule, and explicitly deriving and defining each kind of rule—can reduce the risks of ambiguous, inconsistent, and misleading legal doctrine, unfit to perform the adjudicative and political functions that judicial review exists to serve.
E. The New Deal Revolution in Commerce Clause Doctrine and the Modern Reaction: Explicitly Deriving and Defining Substantive Constitutional Principles and Adjudicative Rules Could Enhance Doctrinal Clarity and Legitimacy

Champion and Hammer adjudicated challenges to congressional acts that regulated the interstate shipment of goods and, therefore, that could be seen as regulating interstate commerce itself. In the late nineteenth and early twentieth centuries, the Court developed complex and contradictory doctrines for determining the permissibility of federal statutes regulating subjects that did not qualify as interstate commerce per se—either because not commerce or not interstate. The Court determined that if the subject regulated is not itself interstate commerce, then Congress could regulate only if the thing regulated “directly” affects interstate commerce. By the time of challenges to early New Deal legislation, the Court defined “direct effects” as those caused “proximately” by the thing regulated, without “an efficient intervening agency or condition.” It emphasized that the magnitude of the effect on interstate commerce caused by the subject Congress regulates was irrelevant to the issue of whether that subject “directly” affects interstate commerce.

So much could be said about this pre-New Deal line of cases, informed by the distinction between substantive constitutional principles and adjudicative rules. Rather than spend more time with these cases, however, it would be equally revealing, and more relevant to evaluating contemporary constitutional doctrine, to look closely at the case in which the Court departed from the doctrinal focus on “direct” versus “indirect” effects, and to examine how the Court’s failure in that case to distinguish between substantive constitutional principles and adjudicative rules undermined the adjudicative and political functions of judicial review.

383. See, e.g., Carter, 298 U.S. at 304. Noting that the regulation of wages and hours “primarily falls upon production and not upon commerce,” and that “the production of every commodity intended for interstate sale and transportation has some effect on interstate commerce,” the Court turned to “the final and decisive inquiry,” i.e., “whether here that effect is direct.” Id. at 307.

384. Id. This was an apparent importation into constitutional law from prevailing tort notions of proximate cause. See, e.g., In re Polemis, [1921] 3 L.J.K.B. 560 (Eng. EWCA (Crim)) (finding defendant in negligence action liable only for those harms “directly” caused by his negligence, where “direct” entails the absence of causal events intervening between defendant’s negligence and plaintiff’s injury).

385. Carter, 298 U.S. at 308 (“T[he] extent of the effect bears no logical relation to its character. The distinction between a direct and indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.”).
1. *NLRB v. Jones & Laughlin Steel* as Counterpoint

In *NLRB v. Jones & Laughlin Steel*, the Court considered a challenge to the National Labor Relations Act of 1935. The Act prohibited employers from retaliating against employees for engaging in union organizing activities. Pursuant to the Act, the National Labor Relations Board found that the Jones & Laughlin Steel Corporation had impermissibly fired employees. The Board ordered the company to reinstate the employees, and to pay their back wages. In challenging this order, the company relied on arguments that were irrefutable under the most recently decided cases—that the subject regulated was not interstate commerce per se; that firing employees could have only an indirect effect on interstate commerce; and that the exercise of federal power was, therefore, unconstitutional. The government attempted to rely on the less recently decided "stream of commerce" line of cases.

The Analysis the Court did Pursue. The Court determined that neither line of precedent was controlling, and moved—more implicitly than explicitly—toward a new definition of congressional power under the Commerce Clause.

We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases... The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce.... The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for its "protection or advancement;" to adopt measures "to promote its growth and insure its safety;" "to foster, protect, control, and restrain." That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their

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386. 301 U.S. 1 (1937).
387. Id. at 22.
389. See *Jones*, 301 U.S. at 34. Firing employees for union organizing activity could affect interstate commerce only through a chain of causation involving several intervening agencies—including the decision to strike by fellow employees; the resulting cessation of producing goods; the resulting cessation of shipping goods; and the resulting reduction of goods purchased in other states. Thus, firing employees for engaging in union activities could affect interstate commerce only indirectly under *Carter*. See *supra* text accompanying notes 383-85.
390. See *Jones*, 301 U.S. at 34-36.
control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control . . . . The question is necessarily one of degree.391

Here, the Court suggests that under the Commerce Clause, Congress has the power "to protect interstate commerce from burdens and obstructions."392 Justice Hughes elaborates by declaring "the fundamental principle" defining Congress' power, and articulates that "fundamental principle" in terms that imply a reversion to the purpose-centered definition of congressional power born in McCulloch, distracted in Gibbons, and implicitly—if temporarily—recaptured in Hammer.393 Congress has the power to enact all appropriate legislation regarding interstate commerce "for its protection or advancement."394 Thereafter, Hughes describes the power in terms of infinitive verbs: Congress may adopt measures "to promote its growth and ensure its safety . . . ."395 Further implying an approach consistent with that in McCulloch, the Court declared that the power it had just sketched—the power to legislate for the protection or advancement of interstate commerce—is plenary, and may be exercised regardless of the source of the dangers that Congress seeks to address. In other words, but still only implicitly, Congress may pursue any means of regulation—may regulate any subject—so long as its purpose is to protect or to promote interstate commerce.

Yet, this "fundamental principle" is not the only principle implied by Justice Hughes' opinion. In addition, Hughes seems to view as significant the effects of the regulated activities on interstate commerce, but to examine such effects in a way that departed from Carter's focus on causal chains. Hughes declared that "it is the effect upon commerce, not the source of the injury, which is the criterion."396 Though this statement leaves ambiguities as to what aspects of "the effect" the Court deemed significant, the ambiguities were mitigated when the Court examined the facts of the case—the "effects of the unfair labor practices."397 "In view of respondent's far-flung activities, it is idle to say that the effect upon interstate commerce would be indirect or remote. It is obvious that it would be

391. Id. at 36-37 (emphasis added) (citations omitted).
392. Id. at 36.
393. Id.
394. Id. at 37 (quoting The Daniel Ball, 10 Wall. 557, 564 (1870)).
395. Id. (quoting County of Mobil v. Kimball, 102 U.S. 691, 696-97 (1880)).
396. Jones, 301 U.S. at 37 (quoting Second Employers' Liability Cases, 223 U.S. 1, 51 (1912)).
397. Id. at 41.
immediate and might be catastrophic."398 Here is implied, at least, a concern with the magnitude of effects on interstate commerce—implying a principle that if the subject regulated could have a substantial (or catastrophic) effect on interstate commerce, then Congress may regulate that subject under Commerce Clause.399

It should be obvious that Jones' two principles each make very different issues of fact constitutionally dispositive. Under the first—the "fundamental principle" concerned with the purposes for enacting the challenged legislation—the Court would need to make determinations as to Congress' beliefs about the facts of the world, and Congress' purposes in responding to those beliefs. Under the second, concerned with the effects of the subject regulated on interstate commerce, the Court would need to make determinations as to its beliefs about the facts of the world—the Court's judgments about the effects of the regulated activity on interstate commerce. Thus, these two different principles in Jones would provide very different bases for adjudicating challenges to congressional legislation.

Which is a more plausibly "correct" interpretation of the Commerce Clause? Hughes made even less effort to derive as "correct" either the purpose-centered fundamental principle, or the new magnitude-oriented effects principle, than he did to define either principle with precision.400 Thus, the Jones opinion left nearly as much ambiguity as to the substantive constitutional principles defining Congress' Commerce Clause discretion as did Marshall's opinion in Gibbons.401

Elements of an Analysis the Court Should Have Pursued. A substantive constitutional principle states limits on governmental discretion derived from and evoking values deemed to underlie

398. Id.
399. The foregoing explication of Hughes' two principles glosses over the kinds of ambiguity, explored above in other doctrinal contexts, resulting from failing to structure constitutional doctrine explicitly in terms of substantive constitutional principles and adjudicative rules. Though "the fundamental principle" was framed implicitly as concerned with legislative purpose, it might have been understood to be concerned with the effect of legislation. These two different meanings would hinge on the difference between defining Congress' power as that of enacting legislation to promote interstate commerce, versus enacting legislation that promotes interstate commerce. So understood, the fundamental principle would have an interesting relationship to the second principle—which was concerned with the degree of the effect of the regulated activity on interstate commerce. For an examination of how the purpose-oriented "fundamental principle" relates to this second principle, see infra text accompanying notes 409-11.
400. Rather, the principles were asserted simply as if they were ordained by past decisions. See Jones, 301 U.S. at 36-37.
401. See supra text accompanying notes 350-62.
constitutional text. Had he explicitly sought to define Congress’ discretion in such terms, Hughes would have been more likely to consider whether a purpose-centered definition of congressional authority is, indeed, rooted in values underlying the Commerce Clause. When form is explicitly connected to content and context, doctrinal meaning must be more carefully defined. Further development of an analysis the Court might have pursued toward deriving—legitimizing—the substantive constitutional principles from which twentieth century Commerce Clause doctrine is comprised will be deferred until the discussion of United States v. Darby, in the next section.

Beyond this, Hughes neglected entirely the derivation and definition of the foundational adjudicative rule allocating the burden of persuasion. Should laws like the NLRA have been presumed impermissible, or presumed permissible? Why? Let us briefly consider how the analysis ought to have proceeded.

As previously suggested, one might allocate the burden of persuasion from a probabilistic perspective or a normative perspective. Whichever perspective one chooses, deriving and defining the adjudicative presumption requires clearly identifying the applicable substantive constitutional principle with respect to which probabilities or normative hierarchies are to be determined. Assume, for the sake of discussion, a substantive constitutional principle declaring that if (and only if) Congress pursues a purpose of protecting or promoting interstate commerce, then it has plenary discretion to choose the means of regulation, and has acted

402. See supra text accompanying notes 34-35.
403. Does the specific proposition that Congress may pursue any regulatory means (not otherwise prohibited) so long as its purpose is to promote or protect interstate commerce emanate from and evoke values underlying the Commerce Clause? How and why? If Congress does regulate a subject that qualifies as interstate commerce per se, is its discretion still restricted to pursue only the authorized purpose of promoting interstate commerce? Why? Alternatively, does defining Congress’ discretion in terms of the effects of the regulated activity on interstate commerce emanate from and evoke values underlying the Commerce Clause? If so, should a court second-guess a legislative determination that disparate bargaining power between employers and employees depresses the price of labor, which undermines demand, which undermines production, which undermines interstate commerce? Should Congress have the right to pursue its view of social and economic facts relevant to the creation of economic policy, or should courts have priority to substitute their views of the facts of the world? Does judicial review only of Congress’ bona fides, or of the correctness of Congress’ judgment as well, better reflect the constitutional allocation of institutional responsibilities between Court and Congress?
404. 312 U.S. 100 (1941).
405. See infra text accompanying notes 426-35.
406. See supra text accompanying notes 142-57.
permissibly. How could Justice Hughes have framed an analysis of whether Congress should be presumed to have enacted the National Labor Relations Act for such permissible purposes?

From a probabilistic perspective, deriving and defining the adjudicative presumption depends on identifying categorical circumstances about the statute in question that suggest a probability of constitutionality, or unconstitutionality. For example, if one can identify a category of statute that includes the National Labor Relations Act, within which a majority would seem to have been enacted to protect or promote interstate commerce, then there is a basis to presume that the Act is permissible, and to place the burden on the challenger to prove that it is among the impermissible minority within that category.408

From a normative perspective, deriving and defining an appropriate adjudicative presumption would depend first, on identifying what (of constitutional magnitude) would be lost if the Court were to uphold an unconstitutional act, or invalidate a permissible act; and second, on determining which constitutional loss is more significant, and more to be avoided.409 In Jones, the erroneous invalidation of the NLRA would undermine the constitutional norm that the national electorate's representatives have the right to make policy within the boundaries of their constitutionally delegated authority—in particular, the right to make policy to protect and promote interstate commerce. The erroneous failure to invalidate the NLRA would intrude on the constitutional norm that the national government is a limited government of enumerated powers, and is limited toward protecting the states' discretion to govern themselves without unauthorized federal interference.

Finally, constructing doctrine that explicitly differentiates the derivation and definition of substantive constitutional principles and adjudicative rules could have facilitated additional clarifying refinements in Jones. Recognizing the two kinds of rule would have supported exploring whether there was some relationship between the "fundamental principle," apparently concerned with whether Congress acted with a purpose "to protect or to promote" interstate commerce, and that other principle, apparently concerned with the

408. Conversely, if one can identify a category of statute that includes the National Labor Relations Act, within which most would seem not to have been enacted to protect or promote interstate commerce, then there is a basis to presume that the Act is impermissible and to place the burden on the government to prove that it is among the permissible minority within that category. For foundational discussion on the probabilistic approach for allocating the burden of persuasion in constitutional adjudication, see supra text accompanying notes 152-57.

409. See supra text accompanying notes 142-51.
magnitude of the effect of the regulated activity on interstate commerce. Is the effect principle inconsistent with the purpose principle? If so, which is the "correct" substantive constitutional principle, and which should be abandoned?

Alternatively, the two principles might have been understood as synergistically related. The effects principle could have been understood as an adjudicative rule developed to help enforce the substantive constitutional principle authorizing Congress to act with a purpose of protecting or promoting interstate commerce. The stronger the basis from which Congress could have concluded that the regulated activity—that is, the discriminatory firing of employees for engaging in union activities—substantially (and negatively) affects interstate commerce, the stronger the basis from which a court could infer that Congress' purpose for enacting the NLRA was indeed to protect or to promote interstate commerce. Depending on whether the foundational adjudicative rule were to establish that laws like the NLRA are presumptively permissible, or presumptively unconstitutional, the supplementary adjudicative rule establishing the relevance of plausible effects could provide the basis for a permissible inference, or perhaps a mandatory inference, that Congress acted for a constitutionally authorized purpose.

Framing issues for deriving and defining adjudicative rules is necessary, but obviously not sufficient, for framing the rules themselves. Complex questions, difficult to resolve, are presented whether one pursues a probabilistic or normative framework for deriving and defining an adjudicative presumption. There will be much more to say about allocating adjudicative presumptions for legislation challenged under the Commerce Clause, when discussion turns to United States v. Lopez. For now, it is sufficient to reiterate the basic proposition: Structuring constitutional doctrine by explicitly differentiating substantive constitutional principles (and the considerations relevant to their derivation and definition) and adjudicative rules (and the considerations relevant to their derivation and definition) can enhance doctrinal clarity. Though Justices might seek to create doctrinal ambiguity for a range of reasons, candor and clarity may well be chosen objectives, and for good reasons—for example, better fulfilling both the adjudicative and political functions.

Of course, the Jones Court did not explicitly differentiate substantive constitutional principles and adjudicative rules. Perhaps it sought ambiguity by design. Perhaps it created ambiguity through

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411. See supra text accompanying notes 39-115. On reasons for doctrinal ambiguity, see supra Part III.A.
inadvertence. Whatever the case, ambiguity there was, and the ink on the pages was barely dry when in Darby, the Court moved, implicitly but unmistakably, to a new substantive conception of congressional discretion under the Commerce Clause.

2. United States v. Darby as Counterpoint

United States v. Darby involved a challenge to two provisions of the Fair Labor Standards Act of 1938—§15(a)(1), which prohibited the interstate shipment of goods, if those goods had been produced by workers employed for more than maximum hours or for less than a minimum wage; and §15(a)(2), which prohibited the employment of workers for more than maximum hours or for less than a minimum wage, if those workers produced goods to be shipped in interstate commerce. Note that §15(a)(1) was structurally identical to the child labor provisions invalidated in Hammer.

The Analysis Justice Stone Did Pursue. Recall the implicit substantive constitutional principle from Jones: Congress' discretion under the Commerce Clause is defined in terms of authorized purposes, and that if Congress acted for the purpose of promoting interstate commerce, then the means of regulation are constitutionally irrelevant. In Darby's consideration of §15(a)(1), this principle was turned on its head, when Justice Stone declared:

The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. "The judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged power." Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In this passage, Justice Stone and the Court reverted to the principle embraced in Champion: Congress may act for any purpose, so long as the subject regulated is interstate commerce per se.

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413. See Darby, 312 U.S. at 108-10.
414. See supra text accompanying notes 373-76.
415. See Jones, 301 U.S. at 33-34.
416. Darby, 312 U.S. at 115 (citations omitted).
417. See Champion, 188 U.S. at 355-56.
Indeed, rather than positing a congressional purpose to promote interstate commerce through §15(a)(1), the Court supposed Congress to have been concerned with the "fairness" of labor conditions and the "fairness" of competition between producers in states that mandated "fair" employment conditions, and producers in states that did not.418 Given these concerns, Congress might well have believed that its enactment actually would harm the efficiency of production, lessen the availability of inexpensive goods, hinder the growth of the national economy, and limit the flow of interstate commerce—yet despite such beliefs, might well have chosen to sacrifice economic productivity toward enhancing social "fairness." If so, §15(a)(1) would not have been permissible under Jones' implicit substantive constitutional principle limiting Congress' Commerce Clause discretion to the pursuit of authorized purposes—in particular, the purpose of promoting the flow of interstate commerce.

In upholding §15(a)(2), Justice Stone said:

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.419

This statement implies two principles with respect to which regulations of subjects other than interstate commerce per se may be validated: First, Congress may regulate those intrastate activities that so affect interstate commerce as to validate their regulation in pursuit of "a legitimate end;" second, Congress may regulate those intrastate activities that so affect Congress' regulation of interstate commerce as to validate their regulation in pursuit of "a legitimate end."

At first glance, these rules seem to connect one principle concerned with the legitimacy of legislative purpose and another principle concerned with the effects of the regulated activity—a connection that begged to be identified in Jones. Upon closer examination, however, one concludes that Justice Stone's approach, unlike the approach implicit in McCulloch, Hammer, and Jones, does not contemplate a limited set of permissible purposes rooted in the Commerce Clause itself.

418. Justice Stone posited that "the evils aimed at by the Act are the spread of substandard labor conditions through the... facilities of interstate commerce... The Act is thus directed at the suppression of... competition in interstate commerce which it has in effect condemned as 'unfair'..." Darby, 312 U.S. at 122 (emphasis added).
419. Id. at 118.
Recall that under Stone’s analysis of §15(a)(1), Congress may regulate interstate commerce per se for any motive or purpose. In analyzing §15(a)(2), Stone declares that Congress may regulate intrastate activities “which so affect ... the exercise of the power of Congress over [interstate commerce] as to make regulation of them appropriate means to the attainment of a legitimate end . . . .” The ongoing production of goods under substandard labor conditions affects Congress’ prohibition of shipping such goods in interstate commerce—that is, such production affects the exercise of Congress’ power over interstate commerce. Furthermore, when Congress prohibits the interstate shipment of goods produced under substandard labor conditions, Congress may act for any purpose (including for non-economic moral purposes)—any end is legitimate. Thus, ancillary to prohibiting the interstate shipment of goods produced under substandard labor conditions (the exercise of Congress’ power over interstate commerce), Congress is constitutionally unconstrained in the purposes for which it may regulate the intrastate conditions of production themselves. This is quite unlike the fair implications of Jones, which seemed to define Congress’ discretion as restricted with respect to the purposes it may pursue, but unrestricted as to the means it may choose for pursuing those constitutionally authorized purposes.

The proposition that under the Commerce Clause, Congress may pursue any purpose in regulating activity that is not itself interstate commerce was confirmed by Stone’s analysis of why §15(a)(2) was permissible even unconnected to §15(a)(1). Stone said:

We think also that §15(a)(2), now under consideration, is sustainable independently of §15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has in effect condemned as “unfair” . . . .

420. Id. at 115.
421. Id. at 118.
422. Such goods cannot be shipped interstate if they are not produced in the first place.
423. Darby, 312 U.S. at 122.
According to Stone, the effect on interstate commerce contemplated by Congress involved the spread of "substandard" labor conditions.\[424\] As discussed above, this effect was conceptualized in moral terms, not in the economic terms of reduced productivity, reduced demand, or a reduced flow of interstate commerce.\[425\] Stone does not posit a congressional concern that the regulated activities would cause harmful economic effects on interstate commerce; rather, he posits a congressional concern that interstate commerce would cause harmful effects on local morality—that the dynamics of interstate competition would pressure local businesses to employ workers under "substandard" conditions. Thus, in upholding §15(a)(2) on a basis independent of §15(a)(1), Stone implies that Congress may regulate activity that is not itself interstate commerce if that activity has a substantial effect "on" interstate commerce, even when Congress has conceptualized, evaluated, and targeted that effect in terms not of interstate economic curtailment, but of local moral debasement through the mechanisms of interstate commerce.

Elements of an Analysis Justice Stone Should Have Pursued. A substantive constitutional principle states limits on governmental discretion derived from and evoking values deemed to underlie constitutional text.\[426\] If Justice Stone had framed Darby's analysis explicitly in terms of substantive constitutional principles, he would have had to confront the following questions: What values could explain the particular benefits to be gained by empowering Congress to legislate for any purpose, so long as the subject regulated is interstate commerce, or in some way substantially affects interstate commerce? How do such benefits justify the concomitant sacrifice of otherwise retained state legislative autonomy? More fundamentally, whose values count—those of the framers and ratifiers, or those of some sovereign People otherwise defined? Recognizing, now, that the Darby (Champion) approach is very different from that of Jones (McCulloch), which better expresses values underlying the commerce power for defining the extent—and the limits—of Congress' discretion?\[427\]

Consider the relative merits of the substantive constitutional principle implicit in Jones and that implicit in Darby. Jones implied

\[424\] Id. at 123.

\[425\] See supra note 418 and accompanying text.

\[426\] See supra text accompanying notes 34-35.

\[427\] Without delving too far into what it might entail, Professor Berman refers to considerations for evaluating a putative substantive constitutional (operative) principle as the "test of fidelity." See Berman, Guillen and Gullibility, supra note 12, at 1528-29. For a summary of my views about the criteria with respect to which substantive constitutional principles ought to be derived and defined, see infra text accompanying notes 467-78.
that under the Commerce Clause, Congress may regulate any subject for the purpose of promoting interstate commerce. Empowering Congress in this way promises certain unambiguous benefits to the people of all the states, at least over the long term. We live in a material world—money and possessions are good; more money and possessions are better. If Congress enacts legislation—e.g., mandating minimum wages, or prohibiting the discriminatory firing of employees—with a purpose of promoting interstate commerce, promoting productivity, and creating wealth, the anticipated material benefits could compensate for any intrusions on state discretion to pursue competing policies.

All of this helps to explain why people—the sovereign People of the states in 1787—might have chosen to define congressional power in terms of authorized purposes, and in particular to define the commerce power in terms of the authorized purpose to promote interstate commerce. All of this could have been said, and should have been, in Jones—indeed, in Gibbons—toward explicitly deriving, defining, and legitimizing their implicit substantive constitutional principles. What could be said, however, to explain why the sovereign People of the states might have chosen to define the commerce power in Darby's terms, authorizing Congress to pursue any purpose, so long as the subject regulated is interstate commerce, or has some kind of substantial effect on interstate commerce?

Justice Stone's view of the purposes underlying the Fair Labor Standards Act, discussed above, imply perhaps the strongest rationale for Darby's Commerce Clause doctrines.

The evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate

429. Of course, Congress might not be correct in predicting the economic consequences of its policies. This possibility of predictive error raises the question of whether the substantive constitutional principles defining Congress' discretion under the Commerce Clause might better be defined in terms of required effects—for example, under the Commerce Clause, Congress might be deemed permitted to regulate only if its enactment actually will have the effect of promoting interstate commerce. But such an approach for defining the substantive boundaries of congressional discretion would require a judicial determination as to the effects to be anticipated from the regulation in question. It contemplates the priority of a court's prediction, superseding the legislature's, about the way the world works—about matters of societal fact relevant to policymaking. This seems deeply at odds with conventional notions about legislative prerogatives in a democracy. In part because a court might err as well, it is ordinarily a matter for legislative judgment to predict and to evaluate the effects of laws contemplated or enacted—for example, whether a policy of mutually assured destruction would deter a Soviet first strike; or whether lowering marginal tax rates would increase tax revenues; or whether reforming welfare would encourage its beneficiaries to seek employment; or even whether imposing the death penalty deters crime.
commerce for competition by the goods so produced with those produced under the prescribed or better conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition which it has in effect condemned as “unfair”...

Thus, according to Justice Stone, Congress determined that without national standards governing minimum wages and maximum hours, interstate market forces would spread pressures to pay “unfair” wages. Indeed, without national mandates governing decent employment conditions, firms in states that favored such standards would face “unfair competition” from firms in states that rejected such standards. Stone anticipates two possible effects of leaving low-paying firms and states unconstrained by national standards: Either states otherwise inclined to impose minimum wage requirements would forgo such policies toward enabling their firms to remain competitive in the relevant market; or such states will persist in imposing minimum wage policies, rendering their firms less competitive and vulnerable to being forced out of business. Thus, as he apparently viewed Congress’ intent in enacting Darby’s minimum wage requirements, Stone contemplates that national standards enacted under the Commerce Clause can be designed to prevent “higher morality” states from facing “unfair” economic pressure from “lower morality” states to lower their moral standards and forgo their preferred policies.

Might the sovereign People have sought to empower Congress to prevent what it views as creeping interstate moral debasement through such effects of “unfair” interstate economic competition? Perhaps. Yet, the consequences of this “unfair” economic competition—the “dislocation” of less efficient firms by more productive firms—was among those economic benefits that the framers and ratifiers apparently anticipated from freely flowing commerce among the states, as fostered by laws enacted by Congress. If a product could be produced better and cheaper by a firm in Georgia than one in Mississippi, the Georgia firm should have

430. Darby, 312 U.S. at 122 (emphasis added).
431. Id.
432. One should emphasize that Congress could, of course, favor wage and hour legislation because of a belief that such a policy would stimulate demand, and thereby promote interstate commerce, as was the view of congressional policy in Carter and Schechter. Where minimum wage legislation is justified on “fairness” grounds, however, one might seek minimally decent standards of employment even while believing that such standards could retard interstate commerce, or without considering the effects of such standards on the volume and vigor of interstate commerce.
free access to the Mississippi market. The Mississippi firm might fail, but its economic energies could be channeled toward the production of goods for which it is better suited.433

Indeed, as suggested by the rationale for Jones' "fundamental principle," one can understand why people would sacrifice state discretion to pursue their own moral objectives if they anticipate gaining wealth, at least in the long-run. Far less plausible is the view implicit in Darby—that the people of the states chose to sacrifice state discretion to pursue local moral judgments for the sake of establishing national moral judgments with no anticipated corresponding gain in wealth. What the Darby principle promises, at best, would be the opportunity for states to trade occasions when, as part of a congressional majority, they can impose their morality (say, about minimum wage laws) on states that disagree, for occasions when, as part of a congressional minority, they have moral precepts imposed on them (say, about child labor). Voters might view trading opportunities for national governance on moral questions as desirable, but they hardly would anticipate an unambiguous benefit—such as the long term wealth production promised by conceptualizing the commerce power as does the McCulloch-Jones approach.

Yet, even if it were more plausible that Jones, rather than Darby, expresses the original intent for the Commerce Clause, it would not necessarily follow that Jones, rather than Darby, is "correct." Should substantive constitutional principles defining Congress' discretion under the Commerce Clause be defined in terms of the original understanding? If so, why? If not, why not? And if not, then through what alternative interpretive methodology? How does

433. In the Federalist No. 11, Alexander Hamilton declared: "Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth." THE FEDERALIST No. 11, at 87. Although he was discussing the benefits of union in relation to Europe—both competition among states for European markets, and competition between domestic and European industry—Hamilton here contemplates a Commerce Clause authorizing vigorous national policy directed toward economic growth. See id. Elsewhere in this Federalist Paper, Hamilton extols the virtues of union in relation to establishing a navy, as different ingredients in building a navy are best provided by different states and regions. Id. at 89. The point is related to the benefits to be derived from a national market of producers and consumers, where production proceeds by those firms and in those areas where the highest quality can be achieved with least cost. This is a perspective that hardly supports the Darby notion that Congress was to be empowered to impose national moral standards on conditions of production, even at the cost of economic productivity. Again, of course, Congress could well choose to enact the kinds of policy challenged in Darby for purposes of promoting economic development and the flow of interstate commerce. See supra note 432.
that alternative interpretive methodology lead to *Darby*'s principles?

To have framed constitutional doctrine explicitly in terms of deriving and defining substantive constitutional principles and adjudicative rules could have made addressing these questions far more likely. *Explicitly* framing constitutional doctrine in terms of substantive constitutional principles and adjudicative rules inherently requires not only *defining* each kind of rule for adjudicating a constitutional controversy, but also *deriving*—justifying—a rule *as* a substantive constitutional principle or *as* an adjudicative rule. To have done so might have inhibited Justice Stone's reversion to, and expansion of, *Champion*'s license for Congress to pursue any purpose under the Commerce Clause. And even apart from whether Justice Stone still would have moved from *Jones*' purpose-centered definition of congressional power, he could have enhanced the definitional clarity and interpretive legitimacy of whatever rules he ultimately chose to apply in *Darby*, had he endeavored explicitly to derive and define them as substantive constitutional principles for identifying issues of significant fact, and concomitant adjudicative rules for resolving those issues of fact.

3. *United States v. Lopez* as Counterpoint

In *United States v. Lopez*, defendant was convicted of violating the Gun-Free School Zones Act of 1990, which defined as a crime "knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Lopez argued that Congress had acted beyond its discretion under the Commerce Clause in having criminalized such gun possession. This is regarded as a case in which a majority of the Court sought to reinvigorate federalism-based limits on national legislative power. *Lopez* reveals the limitations of a judicial effort to "fix" inherited doctrine, without structuring the fix explicitly in terms of substantive constitutional principles and adjudicative rules.

*The Analysis Rehnquist Did Pursue.* Justice Rehnquist, for the majority, began by canvassing established Commerce Clause doctrine, stating that Congress may regulate, first, use of the channels of interstate commerce; second, the instrumentalities of interstate commerce, or persons or things in interstate commerce;

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434. *See infra* text accompanying notes 467-78.
437. *See, e.g.,* NORMAN REDLICH, JOHN ATTANASIO, & JOEL K. GOLDFSTEIN, UNDERSTANDING CONSTITUTIONAL LAW 143 (2005) (characterizing *Lopez* as "another turning point" in the Court's Commerce Clause doctrine).
and third, activities that substantially affect interstate commerce.  

Analyzing the Act under the third doctrinal category, Rehnquist implicitly addressed issues relevant to the foundational adjudicative rule—that is, whether Congress or the challenger bore the burden of persuasion with respect to the “affecting commerce” principle. He noted the undisputed fact that Congress had failed to make formal findings identifying the effects on interstate commerce caused by gun possession in a school zone. Rehnquist said:

Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

This passage suggests that the Court was subjecting this Act to a burden of validation that was not applicable to other putative exercises of the commerce power. Unlike for other challenged legislation, Congress' failure to make such formal findings in the Guns-Free School Zones Act counted against its permissibility. Indeed, in dissent, Justice Breyer charged that this facet of Rehnquist's opinion departed from precedent.

Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway . . . . Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity

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438. *Lopez*, 514 U.S. at 558-59. Rehnquist cited *Darby* for the “use of channels” principle, though he referred to the situation addressed by *Darby* in the second category’s concern with “things in interstate commerce.” *Id.* He recognized that under established doctrine, Congress may regulate use of the channels of interstate commerce even to address perceived moral problems, as *Darby* made clear. *Id.* It is notable that Rehnquist did not mention *Jones* “fundamental principle,” which seemed to harken back to the *McCulloch* framework for defining Congress’ Commerce Clause power as involving unlimited discretion to choose the means of regulation, so long as the ends are constitutionally authorized. *See supra* text accompanying notes 329-47. Rehnquist thus implicitly confirmed that *Darby* and its progeny superseded *Jones*, even as his *Lopez* opinion might be interpreted as an implicit and tentative effort to reinvigorate the notion that Congress may act only for economic purposes, at least when regulating matter that is not itself interstate commerce. *See infra* text accompanying notes 447-54.


440. *Id.* at 562-63 (citations omitted).
sufficiently affected interstate commerce,” but, rather, whether Congress could have had “a rational basis” for so concluding.441

Rehnquist gave two reasons for rejecting this “rational basis” deference in enforcing the “substantial effects” principle against the Lopez statute—reasons that putatively distinguished that statute from all those to which the Court had accorded deference since Jones. First, the regulated activity—gun possession in a school zone—is not “economic activity.”442 Second, deferring to Congress’ assertions of “inference after inference” about the effects on interstate commerce of this “non-economic activity” would “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”443 How do these two propositions support adjudicative rules less deferential to congressional discretion in Lopez than in Jones or Darby?

As Rehnquist presented his analysis, this retreat from deference seems little more than the late twentieth century equivalent to earlier crudely articulated fears of congressional aggrandizement—whether Maryland’s position in McCulloch, Calhoun’s path to nullification, or the Knight-Schechter-Carter era refrain that if Congress can do “this,” then little would be left for state regulation.444 Such outcome-reactive paths to nondeferential adjudicative rules hardly provide the focused analysis that can enhance the adjudicative and political functions of judicial review.

441. Id. at 616-17.
442. Id. at 567.
443. Id. Rehnquist also noted that the Lopez statute “contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” Id. at 561. However, the absence of a statutory requirement that a particular litigant’s regulated activity must be determined to have a substantial effect on (or some other connection with) interstate commerce does not distinguish the Lopez statute from, say, the quota on a farmer’s winter wheat production upheld in Wickard v. Filburn, and, therefore, does not explain why the Court applied a presumption of impermissibility in Lopez and a presumption of permissibility in Wickard. Wickard, 317 U.S. at 128-29 (upholding regulation because “Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices”).
444. In 1895, the Court said: “[I]f the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for the state control.” United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895). In 1935, the Court said: “If the commerce clause were construed to reach all enterprises and transactions which . . . have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.” Schechter, 295 U.S. at 546.
Why should it matter whether Congress regulates economic activity or non-economic activity? How would lesser deference to regulations of non-economic activity prevent transforming the commerce power into a general police power? If the subject regulated should matter, why not draw a distinction, as the Court once did, between regulating interstate commerce itself, and regulating intrastate economic activities—whether commerce, manufacturing, or mining? Why, and how, is the nature of the regulated subject significant for deference, or not, in determining whether that regulated subject substantially affects interstate commerce?

An Analysis Rehnquist Should Have Pursued. To develop a rationale for such lesser deference to regulations of non-economic activity in enforcing the “substantial effects” rule, one must consider the rationale for the “substantial effects” rule itself. As suggested in the discussion of Jones, one might understand a requirement that a regulated activity must substantially affect interstate commerce as an adjudicative rule for enforcing a substantive constitutional principle authorizing congressional action under the Commerce Clause if (and only if) Congress’ purpose was to promote the flow of interstate commerce. The adjudicative rule would permit an inference of such a permissible purpose if there was a basis for Congress to believe that the regulated activity had a substantial, adverse effect on the flow of interstate commerce. Assuming such functions for the purpose principle (substantive), and the effects principle (adjudicative), how might one frame the basic adjudicative rule—that is, the adjudicative presumption? Should the government bear the burden of proving a permissible purpose—and of proving a basis on which Congress could have concluded that the regulated activity adversely affected the volume or flow of interstate commerce—or should the challenger have the burden of persuasion on these issues?

445. Such is a question posed by Justice Thomas. See Lopez, 514 U.S. at 587 (Thomas, J., concurring).

446. Recall our earlier consideration of the “effects” principle in Jones. See supra text accompanying notes 409-11. We questioned whether this rule was, and should be, viewed (implicitly) as a substantive definition of Congress’ Commerce Clause discretion, or as an adjudicative rule defining permissible inferences about dispositive congressional intent from ancillary facts. Under the former view, the Court would be called upon to make its own independent judgment as to whether the regulated activity substantially affects interstate commerce. Under the latter view, the Court would be called upon to determine whether there was a basis for Congress to believe that the regulated activity substantially affected interstate commerce, thereby providing a plausible basis for concluding that Congress’ purpose was to promote or protect interstate commerce. See supra note 429.
As previously suggested, one might pursue a normative or a probabilistic analysis for allocating the burden of persuasion.\textsuperscript{447} Yet, we have seen little promise from the normative approach.\textsuperscript{448} Would it be worse wrongly to determine that Congress did pursue the legitimate purpose of protecting or promoting the flow of interstate commerce, or wrongly to determine that Congress did not pursue such a constitutionally permissible purpose? Does the constitutional significance of either error depend on whether Congress regulated economic activity or non-economic activity? It is difficult to posit how.\textsuperscript{449}

In determining whether Congress pursued a purpose of promoting interstate commerce, might one develop a probabilistic rationale for according less deference to regulations of non-economic activity than to regulations of economic activity? Is there a basis for distinguishing the likelihood that Congress enacted legislation in pursuit of such an authorized purpose? Does the distinction between regulating economic activity and regulating non-economic activity provide such a categorical basis for allocating different probabilistically-rooted adjudicative presumptions?

Perhaps. Economic activities—such as gathering raw materials, manufacturing products for marketing, transporting products for marketing, advertising products in pursuit of sales, buying and selling products in the market, hiring or firing employees, paying wages to employees—may be more likely to have potential effects on the volume and flow of interstate commerce than would non-economic activities such as static possession. If this is so, then it seems more likely that Congress could be concerned about a substantial effect on interstate commerce if such economic activities

\textsuperscript{447}. See supra text accompanying notes 142-57.

\textsuperscript{448}. See supra text accompanying notes 145-51.

\textsuperscript{449}. Either error would intrude on a fundamental constitutional value. Erroneously invalidating a congressional act would intrude on the constitutional value of politically accountable lawmaking—that Congress is vested with discretion to legislate within constitutional bounds. Erroneously upholding a congressional act would intrude upon the constitutional value of federalism—that states retain discretion to legislate according to the preferences of their people in those areas where Congress has not permissibly enacted preemptive uniform national policy. Determining which value is of greater constitutional significance—essential for determining which mistake is more to be avoided from the normative perspective—is more demanding than "merely" deriving and defining those substantive constitutional principles. See supra text accompanying notes 142-51. Identifying substantive constitutional principles and determining their relative weight require choosing the interpretive methodology a Justice will employ (whether originalism or something else); justifying that methodology as the appropriate basis with respect to which to define substantive constitutional principles; and applying that interpretive methodology toward identifying the content and comparative weight of relevant competing substantive constitutional principles. See infra text accompanying notes 467-78.
were left unregulated than if non-economic activities were left unregulated and, therefore, more likely that Congress would choose to regulate economic activities for the purpose of promoting interstate commerce than to pursue such a purpose in regulating non-economic activities.\textsuperscript{450} In other words, congressional regulation of economic activity suggests a probability that Congress acted for purposes of promoting interstate commerce\textsuperscript{451} that is not suggested by the regulation of non-economic activity. Thus, regulations of non-economic activities may indeed warrant less judicial deference on the issue of whether they were enacted for the permissible purpose of promoting interstate commerce—and less deference on the issue of whether Congress believed that such activities have a substantial economic effect on interstate commerce.\textsuperscript{452} Whether or not these propositions are correct, one could not have begun to analyze the matter at issue—i.e., whether, and why, regulations of non-economic activity should be accorded less judicial deference than regulations of economic activity—without having explicitly distinguished between substantive constitutional principles and adjudicative rules, their respective functions, and the different considerations relevant for their respective derivation and definition.\textsuperscript{453}

\begin{itemize}
  \item \textsuperscript{450} In \textit{Carter, Schechter, Jones, Wickard, Darby, and Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241 (1964), Congress had regulated economic activities. Though Congress might not have enacted each of those regulations for purposes of promoting interstate commerce, one reasonably might suppose that it acted for such purposes in enacting most of those regulations.
  \item \textsuperscript{451} Even if the “substantial effects” principle is viewed not as an adjudicative rule for enforcing a substantive principle defined in terms of authorized purposes, but as a substantive principle itself, a similar probabilistic rationale also could justify drawing a categorical distinction between regulating economic activity versus non-economic activity. If one posited that economic activity more likely has a (relevant) substantial effect on interstate commerce than does non-economic activity, there would be a probabilistically-rooted basis for according more deference to a statute regulating the former than to one regulating the latter.
  \item \textsuperscript{452} Justice Rehnquist has indicated not that findings of fact are required for upholding a regulation of non-economic activity under the Commerce Clause, but that such findings would be helpful to support a judicial determination of permissibility. \textit{See Lopez}, 514 U.S. at 562-63 (citations omitted). If the Court were to make the factfinding requirement a condition of permissibility, it would present the kinds of issue regarding conclusive presumptions addressed above in relation to Justice Powell’s opinion in \textit{Bakke}, and Professor Berman’s analysis of \textit{Miranda}’s exclusionary rule. \textit{See supra} note 262.
  \item \textsuperscript{453} For a similar analysis of \textit{Lopez} in relation to a putative substantive constitutional principle defining Congress’ Commerce Clause discretion as limited to the pursuit of commercial purposes, see Berman, \textit{Guillen and Gullibility}, \textit{supra} note 12, at 1523-27. It bears repeating that even when analysts do explicitly differentiate substantive constitutional principles and adjudicative rules, they may well disagree about the content and definition of each kind of rule in particular constitutional contexts. Professor Roosevelt, for example, characterizes the substantive constitutional principle established in \textit{McCulloch} as authorizing Congress to regulate “if the
4. Enhancing Doctrinal Clarity and Legitimacy Can Promote the Adjudicative Function

From McCulloch and Gibbons, to Champion and Hammer, to Jones and Darby, to Lopez today, the Court has struggled to craft a paradigm with respect to which Congress' discretion under its enumerated powers is to be defined, and has consistently failed to derive—to justify—one paradigm or another as a proper interpretation of our constitutional law. Through this struggle, it created incompatible conceptions. If the part of Gibbons defining "to regulate" was correct, than the part defining "commerce among the several states" was wrong. If Hammer was correctly decided, then Champion was wrong. If Jones' doctrine was correct, then Darby's was wrong.

It matters whether Congress' discretion is defined as limited to the pursuit of constitutionally authorized purposes, or as unlimited with respect to purposes so long as the subject regulated either is itself interstate commerce, or has some substantial effect on interstate commerce. Whatever substantive definition is chosen, it matters whether that principle is applied with deference, or with an intrusive adjudicative rule. Reliably framing constitutional rules tailored to fulfilling the two essential and discrete adjudicative functions of identifying issues of relevant fact, and resolving those factual issues, requires structuring constitutional doctrine explicitly in terms of substantive constitutional principles and adjudicative rules.

"legislative intent is in fact to regulate interstate commerce." Roosevelt, supra note 20, at 1674. Though apparently viewing McCulloch as concerned with legislative purpose, this characterization of congressional power begs the question of whether Congress must intend to regulate interstate commerce only for particular purposes—e.g., only to promote trade and economic productivity. See supra text accompanying notes 419-35. The statutes challenged in Champion and Hammer each involved a congressional intent to regulate interstate commerce, but as a means of achieving ends other than promoting interstate commerce—and the Court had a very different view in each case of whether such motives were constitutionally significant. See supra text accompanying notes 364-76. Better specifying the content of substantive constitutional principles (or operative propositions) must depend on better exploring the implications of how such substantive principles ought to be derived and defined—in my view, as a function of explicitly identified values deemed to underlie constitutional text. Whether one embraces my characterization of the applicable substantive constitutional principle, or Roosevelt's, or something else altogether, the basic point remains as to the analytical virtues of explicitly differentiating the derivation and definition of substantive constitutional principles and adjudicative rules. As Professor Roosevelt stated in critiquing the Lopez Court's posture of nondeference as not adequately justified: "The failure to distinguish between decision rules and operative propositions has . . . led the Court to reject its Commerce Clause decision rules for patently inadequate reasons." Roosevelt, supra note 20, at 1699.
5. Enhancing Doctrinal Clarity and Legitimacy Can Promote the Political Function

The Civil Rights Act of 1964\textsuperscript{454} prohibits racial discrimination in places such as restaurants, theaters, hotels, and amusement parks. Two Supreme Court decisions influenced congressional deliberations about whether the legislation should be enacted under Section 5 of the Fourteenth Amendment or the Commerce Clause. In the consolidated case \textit{United States v. Stanley}\textsuperscript{455} (Civil Rights Cases), the Court invalidated the Civil Rights Act of 1875, which criminalized racial discrimination by private individuals in providing "the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement . . ."\textsuperscript{456} Congress enacted this landmark legislation under Section 5 of the Fourteenth Amendment. Justice Bradley, for the Court, determined that Section 5 does not empower Congress to regulate private conduct, but only to constrain state action that subverts "the fundamental rights specified in the amendment."\textsuperscript{457}

Proponents of the Civil Rights Act of 1964 were concerned that if Congress proceeded under the Fourteenth Amendment, their bill would suffer the same fate as did the 1875 Act. Yet, because \textit{Darby} had determined that Congress may legislate for moral ends so long as the subject regulated had some substantial effect on interstate commerce, the bill's proponents had reason to expect that it would be deemed permissible if enacted under the Commerce Clause. Some still favored relying on Section 5, however, arguing that combating racial discrimination is a moral matter, that connecting the issue to commerce obfuscates those moral issues, and that Congress' objectives far better fit the values underlying the Fourteenth Amendment than those underlying the commerce power. Typical were the positions of Senator Pastore of Rhode Island, and Senator Cooper of Kentucky. Pastore said:

\begin{quote}
I believe in this bill, because I believe in the dignity of man, not because it impedes our commerce. I don't think any man has the right to say to another man, "You can't eat in my restaurant because you have a dark skin." . . . And that is the reason I want to vote for this law.\textsuperscript{458}
\end{quote}

\begin{itemize}
\item \textsuperscript{454} 42 U.S.C. § 2000(a) (2000).
\item \textsuperscript{455} 109 U.S. 3 (1883).
\item \textsuperscript{456} \textit{Id.} at 9 (quoting Civil Rights Act of 1875, 18 Stat. 335, § 2).
\item \textsuperscript{457} \textit{Id.} at 11.
\item \textsuperscript{458} See GERALD GUNTHER, CONSTITUTIONAL LAW—CASES AND MATERIALS 202 (10th ed. 1980).
\end{itemize}
Cooper went a bit further, suggesting that relying on the Commerce Clause requires limiting the reach of the bill's prohibitions in ways that are unwarranted and that otherwise might not be necessary.

I do not suppose that anyone would seriously contend that . . . Congress . . . suddenly determined, after all these years, that segregation is a burden on interstate commerce. We are considering the legislation because we believe . . . that all citizens have an equal right to . . . the equal use of accommodations held out to the public . . . . [I]t is a right of citizenship and a constitutional right under the 14th amendment. It has nothing to do with whether . . . discrimination against individuals places a burden on commerce. It does not depend upon the commerce clause, and cannot be limited by that clause . . . . 459

Those who favored relying on the commerce power argued that Darby provided a safe foundation for the bill, while the Civil Rights Cases rendered Section 5 shaky at best. Robert Kennedy, the Attorney General, pressed the point in his congressional testimony:

We base this on the commerce clause which I think makes it clearly constitutional. . . . I think there is argument about the 14th amendment basis—going back to the 1883 Supreme Court decision, and the fact that this is not state action—therefore Congress would not have the right under the 14th amendment to pass any legislation dealing with it . . . . [W]e are not going beyond any principle of the use of the commerce clause that has not already been clearly . . . ruled on by the courts. We are not stretching the commerce clause. 460

These statements illustrate the political function of judicial review. Political actors accounted for not only the Court's decisions, but also its reasoning. Yet, while congressional debate was influenced by Darby and the Civil Rights Cases, the doctrine of neither case had been effectively legitimized as "correct." The Civil Rights Cases did derive interpretation of Section 5 power on textual and originalist grounds, but so much had changed since 1883 that the Court's interpretive rationale warranted at least reexamination, if not rejection. In Darby, as suggested above, the Court had made no effort toward justifying its implicit substantive constitutional principles as "originalist," or as a correct expression of any other

459. Id. at 201.
460. Id. at 199. Burke Marshall, Assistant Attorney General of the Civil Rights Division, echoed Kennedy. "I think it would be a mistake to rely solely on the 14th amendment. This bill . . . relies on the 14th amendment, and also on the Commerce Clause. I think it is plainly constitutional. I think if it relied solely on the 14th amendment, it might not be held constitutional. I think it would be a disservice to pass a bill that was later thrown out by the Supreme Court." Id. at 202.
identified and justified interpretive methodology. But Darby's then-recent vintage offered a path of less resistance, even for members of Congress who sensed a discontinuity in pursuing primarily moral objectives through a power that seemed concerned primarily with economic development.

Consider how different congressional deliberation about the Civil Rights Act of 1964 might have been had the Court clarified Jones' "fundamental principle" through explicitly differentiating substantive constitutional principles and adjudicative rules, rather than abandoning that "fundamental principle" in Darby. Suppose, for example, the Court had defined a substantive constitutional principle declaring that Congress may act under the Commerce Clause whenever (but only if) its purpose is to promote or protect the development of interstate commerce. Suppose, as well, that the Court had defined adjudicative rules declaring that when Congress regulates economic activities, it will be presumed to have acted for those authorized purposes; and, further, that when there is a basis from which Congress plausibly could have determined that the regulated activity substantially affects interstate commerce, there is a basis for concluding that Congress acted to promote interstate commerce.

In a context of such judicial declarations, it would not have been plausible to argue that pursuing moral purposes under the Commerce Clause is permissible. The positions of Senators Cooper and Monroney would have had constitutional force beyond persuasiveness on grounds of mere policy. Despite that, proponents such as the Attorney General could have emphasized the deferential adjudicative rules (implicit in Jones but which we have hypothetically posited were made explicit). They could have pretextsually emphasized economic objectives, while deemphasizing moral motives. Members of Congress would have more understood that they could choose to respect a clearly derived and defined substantive constitutional principle limiting Congress to purposes of promoting interstate commerce; or choose to violate that principle by acting pretextually, anticipating that the bill could have been upheld pursuant to deferential adjudicative rules. "Duly instructed," members of Congress could have chosen policy more responsibly.

461. See supra text accompanying notes 426-27.
462. See supra text accompanying notes 428-35.
463. Even with Darby's departure from Jones' "fundamental principle" that implicitly defined Congress' Commerce Clause power in terms of limited permitted purposes—purposes of promoting or protecting interstate commerce—members of Congress were uncomfortable about using the commerce power for moral purposes. See supra text accompanying notes 459-60.
Furthermore, had the Court clarified and legitimized Jones, rather than departing from it in Darby, the Civil Rights Cases, eight decades old by 1964, might have seemed the less daunting obstacle. Legislative creativity could have been devoted to developing new arguments about the nature and definition of state action. For example, private discrimination in the provision of services could have been connected to state action by recognizing that such private discrimination depended significantly on state enforcement of trespass laws. Building on McCulloch’s definition of congressional power in terms of unlimited discretion to choose the means of regulation toward achieving a constitutionally authorized end, prohibiting private discrimination could have been viewed as a chosen means toward the constitutionally authorized end of preventing state law enforcement from discriminating because of the racism of the private service providers.\(^{464}\) Alternatively, as suggested by Akhil Amar, prohibiting private racial discrimination could have been viewed as a means of securing equal citizenship to blacks, mandated pursuant to Section 1 of the Fourteenth Amendment.\(^{465}\) Or, building on Bolling, Brown, and Loving, proponents could have developed arguments that the definition of congressional power

\(^{464}\) Cf. Shelley, 334 U.S. 1. In Palmore v. Sidoti, a father challenged his former wife’s custody of their daughter because the mother, a white woman, had married a black man. The state court determined that “the best interests of the child” would be threatened by the taunts the child would face about her black step-father. 466 U.S. at 431. Justice Burger, for the Court, invalidated the custody decision because the custody decree accommodated the anticipated racist response of private actors. Id. at 433-34.

There is a risk that a child living with a stepparent of a different race may be subject to a variety of ... stresses not present if the child were living with parents of the same racial ... origin. The question, however, is whether the reality of private biases ... are permissible considerations for removal of an infant child from the custody of its natural mother.... The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. (emphasis added). Burger’s opinion is significant in suggesting that even if the purpose of a government official is not itself rooted in racist values or stereotypes—as the family court judge seemed to be concerned with sparing the child from taunts she would bear from one custody arrangement but not from the other—a governmental purpose to accommodate private racism is impermissible. This notion would be readily applicable to a state’s even-handed enforcement of trespass laws, where the owner of private commercial property discriminated because of race in determining which customers to permit where. If state action accommodating anticipated private racism can be viewed as a violation of equal protection in Palmore, then state action accommodating actual private racism (a race-motivated call to enforce trespass laws) could be so understood as well. See supra note 92.

465. See Amar, supra note 17, at 105-07.
under Section 5 should be derived by interpretive methodologies other than originalism.

Even had the Court decided *Darby* as it did, but in a way that explicitly sought to derive its substantive constitutional principle as ”correct” interpretation, the political function of judicial review also could have been enhanced. Members of Congress might have felt less concerned about enacting the Civil Rights Act of 1964 for moral purposes had the Court persuasively explained the permissibility of pursuing such purposes as derived from and expressing values deemed to underlie the Commerce Clause. Alternatively, if the Court’s explicit derivation of *Darby*’s substantive principles had been unpersuasive, conscientious members of Congress could have better understood why using the Commerce Clause for moral purposes should indeed be viewed as constitutionally problematic—and should be avoided—despite having been deemed permissible by the Court.

In short, the better instructed political actors are about the derivation and definition of the substantive constitutional principles by which they should view their discretion constrained, the better able they will be to make informed decisions about what policies should be understood as constitutionally problematic and why, what precedents should be viewed as binding and how, and what areas of substantive constitutional doctrine appropriately might be questioned. Judicial opinions that frame substantive constitutional principles by explicitly identifying the values deemed to underlie constitutional text, and the interpretive methodology with respect to which such values were identified, would better enable legislators and other political actors to account for such values when deciding which policies to pursue, and which to eschew.

IV. TOWARD FULFILLING THE ADJUDICATIVE AND POLITICAL FUNCTIONS: A TEMPLATE FOR STRUCTURING CONSTITUTIONAL DOCTRINE

The foregoing has suggested that constitutional doctrine should be structured in a way that explicitly differentiates substantive constitutional principles and adjudicative rules. This section suggests a template of issues that judges should address in deriving and defining each kind of rule.

Explicitly Deriving and Defining Substantive Constitutional Principles. First, a judge must identify the interpretive methodology with respect to which she will endeavor to derive and define relevant values and to frame applicable substantive constitutional principles.

Second, whether the judge identifies originalism, conventional morality, Dworkian principle, representation-reinforcement, republican aspiration, or something else, she must justify her choice of methodology. Justification is all the more important when the...
judge employs one interpretive method for resolving some issues of constitutional meaning, and another interpretive method for resolving other issues of constitutional meaning. Identifying interpretive method, and justifying such a choice, is essential for addressing every question of substantive constitutional meaning, to prevent Justices from claiming to pursue a consistent approach, even as they cherry-pick contexts in which to abide by their protestations, and those in which freely to depart.  

Though well beyond the scope of this Article, it might be helpful briefly to address some ways in which a judge might endeavor to justify her choice of interpretive methodology. Justice Marshall's opinion in Marbury v. Madison is foundationally instructive. In interpreting and enforcing the Constitution's mandates, Marshall recognized the need to identify the sovereign—the authority whose values ought to have been enforced. Marshall identified "the people" who created the Constitution as the sovereign. He declared:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.

466. Justice Thomas insists on originalism for interpreting the Commerce Clause. See, e.g., Morrison, 529 U.S. at 627 ("Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."). Yet, he also insists on a decidedly nonoriginalist interpretation of the Equal Protection Clause—that all laws containing racial classifications are prohibited. See supra note 320. Consider, as well, Justice Blackmun's different methodologies for interpreting the words "liberty" and "person" in the Fourteenth Amendment's Due Process Clause. See Roe, 410 U.S. at 129-68. Blackmun employed a methodology akin to a Dworkinian pursuit of coherent principle for interpreting the word "liberty" as including the right to choose to terminate pregnancy. See id. at 153 ("This right of privacy ... founded in the Fourteenth Amendment's concept of personal liberty ... is broad enough to encompass a woman's decision whether ... to terminate her pregnancy."). Blackmun employed originalism for interpreting the word "person" in that very same clause as not including a human fetus. Id. at 157-58 ("The Constitution does not define 'person' in so many words .... 'Person' is used in other places in the Constitution .... [I]n nearly all these instances, the use of the word is such that it has application only post-natally .... All this, together with our observation .... that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn.").

467. 5 U.S. 137 (1803). What follows in the text above anticipates analysis to be presented in my work-in-progress, tentatively entitled "Reconceptualizing Originalism."

468. Id. at 176. As previously discussed, Marshall predicated his opinion in McCulloch on this foundational norm of sovereignty as well. See supra note 342 and accompanying text.
Having identified the governing sovereign, everything else fell into place for evaluating and choosing interpretive methodologies. If, indeed, the People who created the Constitution in 1787 are the sovereign, if they have the right to their preferred constitutional values, then Marshall is their servant, and his interpretive goal should be to identify the constitutional choices they made. For Marshall, fulfilling this interpretive goal warranted an interpretive methodology known today as "originalism," and involved analyzing all reliably relevant evidence indicating the intent of the framers and ratifiers—from constitutional language, to records of debates, to other aspects of the political context in which the text was framed and ratified.

Of course, for judges deciding cases a century or two after the ratification of constitutional text, the justification of interpretive method could not be as direct as was Marshall's. In 2006, who is the sovereign whose values ought to be vindicated? Is it the People, long since dead, who created the text in question, or the People today, who not only are governed by the Court's interpretations, but who have the uncontested right to create their own constitutional provisions and to select Supreme Court Justices? How one answers these foundational questions must have far reaching implications for articulating an interpretive goal, and justifying an interpretive methodology for achieving that goal.

Third, having identified and justified an interpretive methodology, the judge should, through applying that methodology, identify values that underlie the relevant constitutional text. Toward this end, it is critical to recognize that there are inevitably competing values underlying the meaning of all constitutional provisions—as the original understanding of unconstitutional racial discrimination accommodated an aspiration for racial equality with continuing racist notions; and the original understanding of liberties specially protected against state intrusion by the Due Process Clause accommodated an aspiration for individual liberty with ordinary

469. This, or some variation on the idea, would be the implicit interpretive goal. One variation would seek to identify not only the constitutional choices actually made by the sovereign People, but also the choices they would have made, had they thought about an issue not actually contemplated. Justice Jackson suggested such a notion when he said, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

470. See BORK, supra note 78, at 165 (discussing "abundant sources" for inferring the original understanding of particular constitutional provisions).

471. For more on possible interpretive methodologies, see supra text accompanying notes 136-38.

472. See Chang, Constitutional Intent, supra note 41, at 833-38.
concerns for social order through law; and the original understanding of Congress' limited enumerated powers accommodated the pursuit of benefits anticipated through authorizing the creation of national policy with a continuing desire for state autonomy.

Identifying such competing values underlying constitutional text is necessary for providing a foundation from which applicable substantive constitutional principles can be meticulously derived and defined, and for identifying the normative framework within which judges and political actors should understand the meaning of such principles.Identifying the normative framework within which substantive constitutional principles ought to be understood is essential for transforming otherwise abstract and formulaic doctrine into normatively evocative declarations. Framing substantive constitutional principles as normatively evocative declarations is critical toward fulfilling Madison's and Hamilton's vision of a value-based constitutionalism capable of securing "the permanent and aggregate interests of the community" against the short-sighted impulses of majority faction.

Fourth, having identified the competing values underlying constitutional text, the judge should carefully frame the elements of a substantive constitutional principle in a way that is derived from, expresses, and serves the implications of those values. Of course, the crystallization of mature doctrine will take time. But once doctrine has matured, the Court should explain the connection between each element of the substantive constitutional principle and the identified competing underlying values. The Court should endeavor to address

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473. Id. at 811-14.

474. Unless a policy is constructed from competing public values, there is no need for a constitutional mandate to force a greater commitment to one side of those competing values than Congress can be trusted to respect. It is the competition of values, and an anticipated congressional inclination to favor one side of that competition, that provides a rationale for constitutional mandates forcing a greater commitment (than Congress can be trusted to respect) to the other side of that competition. See Chang, Critique, supra note 37, at 293-95; see also supra text accompanying notes 39-51.

475. Having defined "faction" as "a number of citizens, whether amounting to a majority or minority of the whole, who are united by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community," THE FEDERALIST No. 10, at 78, Madison defines "the great object to which our inquiries are directed" as "securing the public good and private rights against the danger of . . . a [majority] faction." Id. at 80.

476. See supra text accompanying notes 117-18.
any ambiguities in each element's meaning, and either resolve those ambiguities, or explain why they remain.477

Explicitly Deriving and Defining Adjudicative Rules. As suggested throughout this Article, different considerations must underlie the derivation and definition of substantive constitutional principles and adjudicative rules. Framing adjudicative rules must be guided by the goal of best avoiding error in resolving those issues of fact made relevant by the elements of the applicable substantive constitutional principle, and in applying those elements to the facts found.

First, toward deriving and defining an adjudicative rule for enforcing the applicable substantive constitutional principle, that substantive principle must be clearly identified.478 This, of course, will have been achieved if the foregoing parts of this "template" have been followed.

Second, the judge must identify (and justify) the analytical method through which she will derive and define the foundational adjudicative rule—the presumption of permissibility or impermissibility. Is the adjudicative presumption to be determined through a normative analysis, identifying the constitutional costs that would be incurred through an erroneous invalidation of the challenged act (and the erroneous intrusion on the foundational norm

477. Close attention to substantive constitutional principles as derived from and evoking values deemed to underlie relevant text is necessary not only for framing new doctrine, but also for an effective critical taxonomy of existing doctrine. One might quibble, for example, which Professor Roosevelt's analysis of the Court's doctrine for adjudicating equal protection challenges to laws that discriminate because of gender. Roosevelt focuses on the shift from Bradwell v. State, 83 U.S. 130 (1872) (in which the Court upholds a state bar against the practice of law by women), to Frontiero v. Richardson, 411 U.S. 677 (1973) (in which the Court's plurality applies "strict scrutiny" to gender classifications), as a shift in "decision rules" that had "lost their fit with the underlying operative proposition—discrimination against women had shifted from natural to invidious." See Roosevelt, supra note 20, at 1688. Roosevelt is correct, in my view, in suggesting that there had been a shift in the implicit substantive constitutional principle. But what warrants emphasis in this context is less that Frontiero was part of a reform of adjudicative (decision) rules to fit changed substantive constitutional (operative) principles but, rather, the change in substantive constitutional principle itself. What was the new substantive definition of unconstitutional gender discrimination? I would suggest that the Court was moving toward a substantive constitutional principle prohibiting purposes rooted in gender role-typing or stereotyping—a destination rather clearly reached in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). If this is, indeed, the definition of the applicable substantive constitutional principle, through what interpretive methodology is it derived? These questions concerning the derivation and definition of substantive constitutional principles must be raised and addressed as prior to, and more fundamental than, the derivation, definition, and "fit" of adjudicative (decision) rules for their enforcement.

478. See supra text accompanying notes 234-40.
of electorally accountable discretion within constitutional boundaries), or an erroneous failure to invalidate (and the erroneous intrusion on the particular substantive constitutional values at issue)? Or is the adjudicative presumption to be determined through a probabilistic analysis, identifying a category of governmental act, including the one in question, suggesting a probability of permissibility, or impermissibility, with respect to the substantive constitutional principle at issue? Or is the presumption to be determined through some combination of the normative and probabilistic approaches?

Third, whatever analytical method is identified (and justified) for deriving and defining the adjudicative presumption, the judge must apply that method to the particular doctrinal context presented and, of course, actually frame the adjudicative presumption.

Fourth, the judge might frame supplemental adjudicative rules tailored to resolving the issues of fact made relevant by the applicable substantive constitutional principle. Such supplemental adjudicative rules could be derived from the relationships among the substantive constitutional principle, the foundational adjudicative presumption, and the rationale for that adjudicative presumption. They could include rules identifying categories of evidence relevant to establishing essential elements of the substantive constitutional principle, or rules identifying ancillary facts from which permissible or mandatory inferences of dispositive fact ought to be drawn.

479. See supra text accompanying notes 142-51.
480. See supra text accompanying notes 152-57, 198-207, 446-53.
481. In Arlington Heights, for example, Justice Powell identified several categories of evidence that a challenger could employ to meet its burden to show that a facially neutral law was motivated at least in part by an impermissible racially discriminatory purpose. Arlington Heights, 429 U.S. at 266-67.
482. One might understand the substantial (economic) effects principle from Jones, for example, as an adjudicative rule establishing a basis from which a court may, or must, draw an inference of congressional purpose to promote the volume or flow of interstate commerce. See supra text accompanying notes 409-11. One might understand the requirement of factfinding in Powell's Bakke opinion as an adjudicative rule establishing a basis from which a court must draw an inference of purposes rooted in racial stereotypes. See supra text accompanying notes 258-62. One might understand Justice Rehnquist's preference for congressional findings of fact in Lopez as an adjudicative rule establishing a basis from which a court must draw an inference of purposes other than one to promote the volume or flow of interstate commerce. See supra text accompanying notes 447-54.
V. CONCLUSION: TOWARD CONSTITUTIONAL DOCTRINE CLEARLY ROOTED IN, AND EXPRESSIVE OF, LEGITIMIZED PUBLIC VALUES

Like doctrine in other areas of law, constitutional doctrine should be comprised of two explicitly differentiated kinds of legal rule. Substantive constitutional principles should be framed for determining which facts have what legal significance—for identifying issues of legally relevant fact. Adjudicative rules, most fundamentally rules allocating the burden of persuasion, should be framed for resolving those issues of fact, and for applying the substantive law to the facts found. Substantive constitutional principles should be derived from and evoke values deemed to underlie particular provisions of constitutional text. Adjudicative rules should be derived from concerns for minimizing the costs of making erroneous findings of fact, and of reaching erroneous conclusions about a challenged policy’s constitutionality, under applicable substantive standards.

Unlike doctrine in other areas of law, constitutional doctrine has not been framed in a structure that explicitly differentiates the derivation and definition of substantive principles and adjudicative rules. Rather, the Supreme Court has created formulaic doctrine, in context after constitutional context, that fails to serve relevant underlying values, fails to identify and define necessary elements, and conflates considerations relevant to defining what must be proved and those relevant to defining how that proof is to be made.

Failing explicitly to differentiate the derivation and definition of substantive constitutional principles and adjudicative rules results in ambiguities that undermine the adjudicative function of judicial review. Ambiguity in defining substantive constitutional principles risks adjudicating issues of fact that ought to be irrelevant, and neglecting issues of fact that ought to be dispositive. Failing explicitly to derive and define adjudicative rules risks erroneously allocating the burden of persuasion. Ill-framed substantive rules for identifying issues of significant fact, and ill-framed adjudicative rules for resolving those issues of fact, can only increase the risks of both upholding government action that “in fact” is unconstitutional and striking down government action that “in fact” is not unconstitutional.

483. See, e.g., Robert F. Nagel, The Formulaic Constitution, 84 MICH. L. REV. 165, 202-03 (1985); Amar, supra note 17, at 27 (suggesting that to focus on synthesizing constitutional doctrine rather than on ascertaining the Constitution’s meaning is “to miss the point of many constitutional rights and structures—to spend too much time pondering arid formulas and not enough time recalling the world the Constitution rejected and imagining the world it promised”).
Furthermore, failing explicitly to differentiate the derivation and definition of substantive constitutional principles and adjudicative rules results in ambiguities that undermine the political function of judicial review. When political actors are not effectively informed about the elements of their conduct that render government action unconstitutional, they could be both undeterred from enacting an impermissible law and deterred from enacting a permissible law. Either way, an essential objective of constitutionalism—the exercise of political will within constitutional boundaries—is thwarted.

In our democracy, legal rules are created and enforced to serve public values—values that ought to be publicly identified, contested, and selected. No less than for contract law, or tort law, or criminal law—and perhaps more so—constitutional law foundationally ought to be about preferred public values. There is no other reason for a body of superior law that governs inferior law, or for a practice in which judges appointed "during good behavior" exercise a power that is designed to supersede the decisions of officials accountable to the People.

Our processes of constitutional democracy establish the framework within which disagreements about governing public values are to be resolved. The familiar counter-majoritarian difficulty of judicial review underscores the importance of ensuring, to the extent possible, that constitutional cases are properly decided, and that public officials are duly instructed about the boundaries of political discretion, according to rightly framed substantive constitutional commandments. Hamilton's rationale for judicial review was predicated on the faith that federal judges have the capacity and inclination to exercise judgment, not will, and thereby effectively to identify the Constitution's meaning and enforce its mandates.484

Eternal debates about whether Dred Scott was "correctly" decided—or Plessy, Brown, Loving, or Roe—are premised on the notion that there is such a thing as deciding a constitutional controversy "correctly," that there is such a thing as Hamiltonian interpretive "judgment," and—a critical point—that criteria for decisional correctness are different from questions of political desirability. The political function of judicial review contemplates that political actors will abide by the fair implications of decided cases—e.g., feeling constitutionally free, if so inclined, to create separate but equal facilities for blacks and whites after Plessy, and feeling constitutionally constrained from maintaining racially segregated public schools after Brown; feeling constitutionally free, if so inclined, to criminalize sexual conduct between people of the same

484. See supra text accompanying notes 42-44.
gender after Bowers v. Hardwick,\textsuperscript{485} and feeling constrained from doing so after Lawrence v. Texas.\textsuperscript{486}

Thus, it matters greatly that the Court’s voice, as oracle of constitutional meaning, explicitly defines substantive principles, explicitly predicated on identified values, explicitly derived through an identified and plausibly legitimate interpretive methodology. If not, the justification for a judicial opinion intervening in politically accountable decisionmaking, or refraining from intervening, is no more compelling than would be intervention decided through the flip of a coin. Doctrine that does not explicitly differentiate the derivation and definition of substantive constitutional principles and adjudicative rules intertwines discrete functions, risks the unreliable adjudication of constitutional controversies, and leaves unfulfilled the promise of a judicial participation in our democratic constitutionalism that legitimately clarifies foundational values and appropriately enriches public debate.

Through constitutionalism, the American people pursue a better version of our laws and our politics—one that seeks “the permanent and aggregate interests of the community” more than we otherwise would.\textsuperscript{487} Through constitutionalism, the American people attend to certain values—constitutionally selected values—more than we otherwise would.\textsuperscript{488} If judicial review is to serve its adjudicative and political functions, if judicial review is to help the People and our representatives toward better self-governance, then judges must pursue a better version of constitutional doctrine.\textsuperscript{489} Practical or merely ideal, embraced or debated, the proposition that constitutional doctrine—like doctrine in other areas of law—ought to be framed in terms that explicitly differentiate the derivation and definition of substantive principles and adjudicative rules, could reform the ways in which the legally-trained and lay alike think about constitutional law. Less formalistic, less formulaic, less technically foreign, and more derived from and expressive of clear and legitimized public values, doctrine comprised of explicitly derived and defined substantive constitutional principles and adjudicative

\textsuperscript{485} 478 U.S. 186 (1986).
\textsuperscript{486} 539 U.S. 558 (2003).
\textsuperscript{487} THE FEDERALIST NO. 10, at 83.
\textsuperscript{488} See Chang, \textit{Constitutional Intent, supra} note 37, at 774-84; Chang, \textit{Critique, supra} note 37, at 293-95.
\textsuperscript{489} Richard Fallon, who Amar views as more concerned with the doctrine than with the document, Amar, \textit{supra} note 17, at 27, and who urges a “theory of the second-best” when Justices cannot agree as to what constitutes “fidelity” to the Constitution, Fallon, \textit{supra} note 17, at 117, nevertheless recognizes that the foundational reason for judicial review is the “successful specification and implementation of constitutional values . . . .” \textit{Id.} at 142.
rules could be the basis for better judicial decisions in adjudicating cases, and better political debate about the constitutional implications of legislative options. If this does not describe the best that judicial review can do, it at least may describe a step in the right direction.