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Rules Against Rulification

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Abstract: *The Supreme Court often confronts the choice between bright-line rules and open-ended standards—a point well understood by commentators and the Court itself. Far less understood is a related choice that arises once the Court has opted for a standard over a rule: May lower courts develop subsidiary rules to facilitate their own application of the Supreme Court's standard, or must they always apply that standard in its pure, un-"rulified" form? In several recent cases, spanning a range of legal contexts, the Court has endorsed the latter option, fortifying its first-order standards with second-order "rules against rulification."*

Rules against rulification are a curious breed: They promote the use of standards, but only in a categorical, rule-like manner. The existing literature on the rules-standards dilemma thus sheds only limited light on the special problems that anti-rulification rules present. This Article addresses these problems head-on, disentangling the (often unintuitive) consequences that result from the Court's adoption of anti-rulification rules, while also offering practical suggestions as to when and how these rules should be deployed. Overall, the Article's take is qualifiedly negative: Anti-rulification rules, while useful in some circumstances, carry the undesirable and often unnecessary consequence of cutting lower courts out of the lawmaking loop. And that in turn impedes the Court's own ability to refine and develop its standards over time. The Court should therefore pronounce rules against rulification only sparingly, and lower courts should identify them only begrudgingly.

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INTRODUCTION

The Supreme Court often faces a choice between bright-line rules and open-ended standards. That is, with what degree of specificity should the Court enunciate controlling principles of doctrine? The tradeoffs are familiar. With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes. With standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.[1] Every case that reaches the Court's docket presents some version of this design dilemma, and every opinion the Court issues reflects some determination as to where on the rules-standard spectrum its holding ought to lie.

The choice between rules and standards sometimes accompanies a second choice, which arises once the Court has opted for a standard over a rule. Having articulated a governing standard, should the Court permit future rule-like elaborations on the substance of the standard, or should it require that lower courts apply the standard in its pure, unadulterated form? Put differently, should the Court adopt a *permissive standard*, whose application may be assisted by the development of ancillary rules, or a *mandatory standard*, fortified by a *rule against rulification*.

Florida v. Harris illustrates this choice.[2] The case involved the Florida Supreme Court's application of the Fourth Amendment probable cause test, which, as defined by the U.S. Supreme Court in *Illinois v. Gates*, permits searches based on "a fair probability that contraband or evidence of a crime will be found in a particular place.'"[3] The Florida court in *Harris* had held that a police dog's detection of drug odors did not create probable cause to search the defendant's vehicle, reasoning that the dog lacked the requisite credentials to indicate a "fair probability" of contraband under *Gates*. In so holding, the court identified several criteria for evaluating the drug detection credentials of canine cops: Among other things, it held that the government bore the burden of adducing "the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records

[1] *See infra* note ?.
[2] 133 S. Ct. 1050.
[3] 462 U.S. 213, 238 (1983). Rather than tether probable cause to the presence of precise, outcome-determinative criteria, the Court endorsed a "totality-of-the-circumstances" inquiry, governed by a "practical, common-sense decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

(including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog."[4] Applying this highly specific minimum-showing requirement, the state court went on to hold that the search lacked probable cause, because the government never produced the required records on behalf of the dog.

The Supreme Court unanimously reversed. The lower court had erred, the Court explained, by "creat[ing] a strict evidentiary checklist, whose every item the State must tick off."[5] In this way, the state court had employed the "antithesis of a totality-of-the-circumstances analysis," not allowing evidentiary deficiencies as to a dog's training credentials to "be compensated for . . . by a strong showing as to . . . other indicia of reliability."[6] The "inflexible checklist," simply put, was not "the way to prove reliability." The state court should have asked the simpler question of whether "all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime."[7]

The Supreme Court's disapproval of the lower court's decision thus encompassed not just a *substantive* disagreement with the conclusion that the canine-initiated search lacked probable cause, but also a *methodological* objection to the manner in which the court had performed its analysis. The state court had applied a rule where a standard was required. *Gates* demanded a particularized, case-by-case inquiry of canine-based searches; it did not permit the promulgation of an across-the-board, outcome-determinative "checklist" approach for evaluating the drug detection credentials of police dogs. *Harris* may thus be construed as adopting an anti-rulification rule, making clear that the *Gates* standard was mandatory rather than permissive as applied to sniff-search probable cause review. In other words, lower courts were precluded from building out the *Gates* standard by fashioning sub-rules that would objectify its operation in particular categories of Fourth Amendment cases.

Rules against rulification are a curious breed. In one sense, they further many of the benefits associated with standards writ large. They guard against overinclusive and underinclusive doctrinal formulations and thereby promote fairness on an individualized basis. They reduce the risk of legal obsolescence over time. They encourage case-specific deliberation long associated with the common law method. And so on. At the same time, rules against rulification are themselves rules, which limit lower court involvement in the shaping of Supreme Court doctrine. When the Supreme Court promulgates a permissive standard, it invites lower courts to adorn that standard with subsidiary rules; lower courts may (or may not) choose to fill in the relevant gaps with bright-line boundaries, safe harbor presumptions, categorical exceptions, multi-factor tests, and the like.[8] In sharp contrast, mandatory standards produce methodological rigidity at the lower court level, prohibiting downstream elaboration of a standard's open-ended terms except through narrow and case-specific holdings. In other words, the Supreme Court enunciates a norm, the norm is a standard, and all that remains for lower courts to do is to apply the standard without further specification as to what the standard entails.

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[4] Harris v. State, 71 So.3d 756, 775 (Fla. 2011).
[5] *Harris*, 133 S. Ct. at 1056.
[6] *Id.* (citing *Gates*, 462 U.S. at 233).
[7] *Id.* at 1058.
[8] The mechanics of this process (sometimes termed the "rulification of standards") are further described in Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803 (2004).

The primary goal of this Article is to sketch out some criteria for evaluating the use of rules against rulification and, accordingly, the choice between mandatory and permissive standards. Having decided to offer the lower courts guidance in terms of a standard rather than a rule, when should the Court take the further step of expressly prohibiting the lower courts from rulifying the standard in future cases? At first glance, this question might seem to answer itself: If the Supreme Court itself has opted for a standard over a rule, why would it ever wish for the lower courts to translate the standard into rules? In fact, however, good reasons will often favor just such an approach. In many circumstances, as this Article will show, the Court might sensibly choose to define a norm in standard-like terms while still permitting lower courts to flesh out some specifications of the standard in the form of general, bright-line rules.

By introducing the concept of anti-rulification rules and offering a preliminary appraisal of their advantages and disadvantages, this Article aims to inform at least three ongoing areas of scholarly inquiry. The first involves the rules-standards problem itself. From the legal realists on down,[9] courts and commentators have scrutinized many aspects of the choice between rules and standards, focusing on their respective virtues and vices, their effects on individual conduct, their relationship to formalist and functionalist modes of judging, and so on.[10] While not intervening directly in the longstanding rules-standards debate, this Article does shine some new light on it, by suggesting how choices between rules and standards at the Supreme Court level affect the development of the law within the lower courts that the Justices oversee. In particular, the Article suggests that when standards are permissive rather than mandatory, proponents of rules should sometimes be willing to tolerate (if not endorse) the adoption of such standards at the Supreme Court level, because Supreme Court standards—unlike Supreme Court rules—leave room for lower courts to experiment with rules. Put another way, a standard adopted at the Supreme Court level need not translate into totality-of-the-circumstances review at the lower court level in every case. And articulation of a standard by the Supreme Court—if permissive rather than mandatory in nature—may facilitate the fashioning of a better set of rules.

The second area of relevant literature involves judicial minimalism. A minimalist court, as Cass Sunstein has put it, "settles the case before it, but [] leaves many things undecided," avoiding in the meantime "clear rules and final resolutions" regarding issues that might benefit from further contemplation among courts, other public officials, and private citizens.[11] For this reason, Professor Sunstein and other commentators have drawn parallels between the debate over minimalism versus maximalism and the debate over rules versus standards: Compared to standards, rules more severely constrain the resolution of future cases; consequently, minimalists champion standards over rules in enunciating controlling propositions of law.[12] This Article, however, raises an important caveat regarding this jurisprudential stance. It suggests that standards jibe with minimalism only when articulated in a way that permits the development of follow-on rules. The Court does not further minimalist values when it *foists* a legal standard on all future courts for all time, categorically prohibiting these courts from developing rules to assist in their application of the standard. Rather, the truly minimalist opinion merely *adopts* a standard for itself, leaving future courts free to decide whether the standard performs best in rulified, semi-rulified, or non-rulified form. The key point is that the minimalist virtues of

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[9] ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115-20 (1922).
[10] *See* sources cited in note ? *supra*.
[11] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999).
[12] *See* sources cited *infra* note ?.

standards dissipate when rules against rulification enter the picture. It is only with permissive standards that the Court can effectively "leaves things undecided."

Finally, in describing and examining the Court's many rules against rulification, I hope to contribute to an emerging area of scholarly interest and debate: the role of the Supreme Court in shaping and constraining the methodological choices of the courts within its purview. The academic literature on this question has thus far focused on statutory interpretation, inquiring into the possibility, reality, and desirability of according binding effect to various methods of statutory interpretation. Scholars in this line of work have asked, for instance, whether the Court does (or at least should) require future interpreters of a statute to employ textualism over purposivism, eschew legislative history, or otherwise constrain the methods by which judges find meaning in statutory text.[13] While not asking these particular questions, the Article advances ideas that may inform and enrich our answers to them, by drawing attention to a set of doctrines through which the Court has unabashedly imposed methodological restraints on its subordinates. The Court's rules against rulification, that is, may help us understand the relationship between methodology and precedent more generally. At the least, they raise the question whether the Court's willingness to impose methodological constraints on lower courts in applying doctrinal standards sanctioned by the Court itself can be reconciled with its current unwillingness to do the same when it comes to the interpretation of statutory commands.

The ensuing analysis proceeds in five Parts. Part I offers a conceptual overview of anti-rulification rules, explaining what they are and how they operate. Part II catalogues examples of anti-rulification rules within several different areas of Supreme Court doctrine. In domains ranging from the Fourth Amendment to the Takings Clause to intellectual property law to the law of remedies, the Court has established limitations on the extent to which lower courts may rulify substantive standards that the Court itself has laid down. With these examples on the table, Part III turns to the question of why the Court creates rules against rulification and why it sometimes might wish to avoid doing so. In particular, the analysis suggests that rules against rulification make sense when the Court deems the value of *fit* to be of paramount importance in applying law to fact. That is, when the overarching priority of a doctrinal formulation is to minimize overinclusiveness and underinclusiveness, rules against rulification help to prevent lower courts from undermining this priority by displacing the fuzzy penumbrae of a norm with sharp and brittle edges. As Part III notes, however, prohibiting downstream rulification of a standard presents problems of its own, which relate principally to the law's development over time. A major concern is that categorical bans on rulification foreclose valuable forms of experimentation, deliberation, dialogue, and transparency concerning the optimal formulation of a legal command. Put more simply, rules against rulification threaten to decide too much too soon, thus undercutting the minimalist virtues that substantive standards would otherwise confer.

Part IV raises and address two follow-up questions regarding anti-rulification rules. First, once the choice has been made to promulgate a rule against rulification, how should the Court go about effectuating the command? Second, how can lower courts tell whether an anti-rulification rule binds them? Here, I offer a variety of prescriptive suggestions. I posit, for instance, that the Court must take care to divorce its *methodological* justification for a rule against rulification from its *substantive* evaluation of the particular rulification that has come up for review. I also suggest that lower courts should embrace a default presumption against the existence of rules against rulification, thereby demanding a clear statement by the Justices when they seek to

[13] *See* sources cited in note ? *infra*.

propound a mandatory standard. But I also propose that when anti-rulification rules have been clearly articulated by the Supreme Court, lower courts may not dismiss them as non-binding dicta.

In Part V, I imagine variations on the theme of anti-rulification rules, speculating as to other doctrinal formulations the Supreme Court might employ in attempting to control the manner in which lower courts apply standards to individual cases. I consider, for example, the possibility of "pro-rulification rules," which expressly instruct the lower courts to rulify a standard in whatever ways they deem fit. I also consider the possibility of "anti-rulification standards," which, in contrast to true rules against rulification, would merely discourage (but not prohibit) the development of rules to assist in the application of Supreme Court standards. Finally, I imagine the possibility of "anti-publication rules," which would move even further in the direction of anti-rulification rules, by prohibiting the development of any legal precedents at all regarding a standard's application to individual cases.

The reader expecting a firm, generalized, and (dare I say) rule-like conclusion regarding rules against rulification will find no such thing in the analysis that follows. The reason why is that rules against rulification admit of few easy conclusions; sometimes they should be used, and other times they should not; and the difficult challenge thus becomes trying to identify the considerations that weigh for and against their operation. That I cannot definitively endorse or condemn such rules, however, does not mean that there remains nothing interesting to say about them. This Article considers these matters, while taking care not to oversimplify the subject under investigation. The most important point is that neither the Supreme Court nor the lower courts can deal effectively with rules against rulification unless they recognize their existence and appreciate their importance. For this reason, the Article seeks to remove these rules from the shadows and bring them into the light.

I. THE POSSIBILITY OF ANTI-RULIFICATION RULES

A. *Rules, Standards, and Specificity*

What separates rules from standards?[14] The distinction depends in large part on the variable of *specificity*.[15] The paradigmatic "rule" falls toward the high end of the specificity spectrum; it ascribes definitive consequences to the satisfaction of precise and determinate criteria.[16] "Must be at least 5-feet tall to ride," for instance, leaves little room for interpretation: if you are at least 5-feet tall, you can go on the ride;[17] if you are shorter than five feet, there is no

[14] For a small sampling of the voluminous literature on rules and standards, see, for example, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989);Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Kathleen Sullivan, *The Supreme Court, 1991 Term–Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Cass R. Sunstein, *Problems With Rules*, 83 CAL. L. REV. 953 (1995).

[15] *See, e.g.*, James J. Park, *Rules, Principles and the Competition To Enforce the Securities Laws*, 100 CAL. L. REV. 115, 130 (2012) ("[R]ules and standards are primarily distinguished by their level of specificity. Rules are more specific about what they require while standards tend to be more general.")

[16] In the words of Professor Sullivan, "[a] legal directive is "rule"-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts." Sullivan, *supra* note ?, at 58.

[17] Logically speaking, "must be at least 5-feet-tall to ride" establishes a necessary but not sufficient condition of ride-worthiness. Literally read, that is, the rule would not necessarily preclude a ride administrator from prohibiting admission to a 6-foot-tall individual deemed otherwise unfit to ride. I am assuming here, however, that the average reader of the sign would apply to it the more commonsensical understanding that it guarantees ridership to all individuals who are at least five feet tall.

use waiting in line. The paradigmatic standard, by contrast, leaves many application-related details unresolved.[18] "Must be mature enough to ride," for instance, offers only a hazy definition of eligible riders. What does the rule mean by "mature"? Who counts as "mature enough"? Many would-be riders cannot know in advance whether they will get to ride; they must await a final decisionmaker's judgment in order to find out whether they may step aboard.

Extreme examples of rules and standards are easy to create, but what about intermediate cases? How, for instance, should we classify the command: "Must be approximately five-feet tall (or taller) to ride." That is less specific than the five-foot rule, but more specific than the "mature enough" standard. Into what category, then, should it fall? One could ponder this question at length, but doing so would not yield much of a payoff. "Rules" and "standards" are not Platonic essences; rather, they are man-made concepts that facilitate our analysis of complex, real-world phenomena. And for that reason, we need not (and probably should not) bother to delineate a fixed point on the specificity spectrum that divides the realm of rules from the realm of standards;[19] the categories simply approximate something that is very much a matter of degree.[20]

B. The Rulification Process

With common law adjudication in motion, the initial pronouncement of a legal norm marks only the beginning of its development. As cases begin to arise under the norm, courts must decide whether a particular set of facts satisfies its triggering criteria. And by rendering such decisions—which carry precedential force—courts inevitably elaborate upon the content of the norm itself. To be sure, the extent of elaboration depends on the initial specificity of the norm; for highly specific rules, such as the "at least five feet tall" requirement, repeated determinations as to whether individuals do or do not exceed the five-foot minimum are not likely to tell us a whole lot more about what the requirement itself entails. For less specific standards, by contrast, common law adjudication stands ready to convert an open-ended

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[18] Again, in Professor Sullivan's words, "[a] legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation." *Id.*

[19] *See* Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2002 U. ILL. L. REV. 1, 18 ("The 'specificity-generality continuum' may be treated, for simplification, as 'a dichotomy between 'rules' and 'standards.'" (quoting Isaach Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL. STUD. 257, 258 (1974))).

[20] In identifying the rules and standards that emerge from judge-made doctrine, we must also take care to distinguish between the "fact-specificity" of a Court's analysis and the specificity of the guidance that the analysis produces. These two variables often work at cross-purposes: fact-specific reasoning yields generalized (standard-like) guidance, whereas generalized reasoning yields specific (and hence rule-like) guidance. Suppose, for instance, that a court decides that a driver should be penalized because and only because she was exceeding a rate of 90 mph: Abstracting away all other facets of the driver's driving, that is, the court treats the single fact of the driver's 90-plus mph speed as reason enough to impose the penalty. That is an affirmatively non-fact-specific analysis, but what emerges from it is the highly specific rule for future cases—namely, that driving in excess of 90 mph is categorically illegal. If, by contrast, the Court had scrutinized multiple aspects of the particular driver's conduct—including, but not, isolating the rate of her speed—its opinion would have yielded less specific guidance for future decision-makers to follow. If no one feature of the driver's driving compelled the Court's conclusion, then all that can be said for the holding is that it seems to prohibit "unreasonable" driving, as judged by a comprehensive assessment of each driver's conduct. The relevant sense in which rules are more "specific" than standards, then, lies not in the degree to which application of a norm must engage with the specifics of each case's facts, but rather in the degree to which the norm *constrains* its future appliers.

pronouncement into a far more specific patchwork of rules. This is what I mean by the process of "rulification."[21]

Return again to the alternative "mature enough to ride" requirement. Pronounced in the abstract, the requirement offers little guidance as to whether a given individual is eligible to board the ride. To be sure, some applications of the rule can be immediately predicted: under virtually all plausible interpretations of the "mature enough" rule, a newborn baby probably cannot board the ride, whereas a mild-mannered middle-ager will pose no problem. But harder cases will arise: What about an 8-year-old? A 10-year-old? Someone who seems physically mature but not emotionally mature, or vice versa? Adjudicators will confront these sorts of "boundary" cases and, by resolving them, offer important glosses on what the norm commands. Suppose, for instance, that one application of the standard denies eligibility to a 12-year-old, while another application grants eligibility to an otherwise similar 13-year-old. With these applications in place—and exerting binding effect on future appliers of the standard—we may now render more reliable predictions regarding further applications of the standard. We will know, for instance, that being a teenager counts as a factor in favor of ride-worthiness maturity, while being twelve or younger counts as a factor against. A future case might also hold that anyone caught cutting in line in the theme park will be deemed too immature to satisfy the "mature enough" standard. With that case decided, we know that line-cutters are *per se* ineligible for a ride—even if other facts might militate the other way. As these holdings continue to accrete, the judicially developed contours of the "mature enough" standard will become more and more apparent.[22] Eventually, anyone who digs into the relevant case law

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[21] This discussion draws on the work of Professor Mark D. Rosen, who to my knowledge is the first commentator to describe the rulification process along these lines. *See, e.g.*, Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS L.J. 691, 696 (2005) (noting that as standards are applied, they "almost always become[] increasingly rule-like," and that "[t]his occurs because cases involv[e] particular facts" and "[a]s the cases are decided they become showcases of what, as a concrete matter, the Legal Standard requires"); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 495-96 (2000) ("As the Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases, by nature, are disputes that involve particular facts. As the cases are decided they become examples of what, as a concrete matter, the Standard means."). Professor Frederick Schauer has also written about the rulification phenomenon, although his focus is less on the sort of "natural" rulification process that results from the accretion of judicial precedents, and more on conscious decisions to inject rule-like language into the interstices that standards leave open. *See* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805-06 (2005) ("Whether it be by importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests, interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree . . ."); Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 105 (2012) (noting the "tendency over time for courts to replace doctrine articulated in the form of standards with doctrine articulated in the form of rules with exceptions"); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863, 1904 (2008) (noting that "courts frequently engage in what Frederick Schauer has called the 'rulification' of standards, developing sub-principles that guide their application of standards."). It is these more conscious attempts at rulification that anti-rulification rules are most likely to prevent. *See* Section I.C, *infra*.

[22] As Professor Schauer has described the process:

> Interpretations continuously change the options available to subsequent interpreters, thus occasionally making quite precise clauses more open ended in practice but more often making even the most open ended clauses substantially less so. For example, given the almost infinite number of inequalities inherent in all legislation, the range of permissible applications of the equal

should be able to translate the initially articulated standard into a rule-like formulation. And courts will have accomplished this result without ever having purported to amend or revise the standard itself. It is simply through the process of applying the norm to case after case that courts nudge the norm up the specificity spectrum and thereby increase its rule-like character. This process of "rulifying" a standard is entirely proper; indeed, it is a natural and recurring consequence of issuing opinions with precedential effect.

The same cannot be said, however, when judges attempt the opposite feat—that is, by "standard-ifying" a previously adopted rule. Suppose, for instance, that the "five-feet or taller" requirement is in effect; according to this rule, all persons who are at least five-feet tall are categorically eligible for the ride and all persons who fall below the threshold are categorically ineligible for the ride. If a judge attempts to standard-ify this rule—by say, creating an exception for "approach five feet in height and are able to handle the demands of the ride", or by clarifying that riders need only be "reasonably tall"—he or she can no longer claim fidelity to the operative law.[23] Why? Because by rendering the rule less specific than it previously was, the judge necessarily creates law that conflicts with the original rule's doctrinal commands. Rather than clear up an uncertainty that a norm leaves open, the standard-ification process *introduces* substantive outcomes that the norm had previously closed off. The five-feet-tall-to-ride rule, for example, logically implies that *no* four-foot-eleven persons may board the ride; with the new, standard-ified command in place, however, some four-foot-eleven persons can make it on board. Rulifying standards adds paint to a blank canvass; standard-ifying rules removes paint that was already there.

The upshot of all this is that unlike the rulification of standards, the standard-ification of rules may be accomplished only by someone authorized to overrule the rule itself.[24] Under our

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> protection clause, based on the text alone, is vast. As subsequent interpretations have limited the number of classifications that occasion meaningful equal protection scrutiny, however, the linguistic frame of the text alone has been substantially reduced in size, and therefore the size of the field within the frame has also been reduced.

Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 435 (1985).

[23] This is not, to be clear, to argue that the "standard-ification" of rules cannot occur. Indeed, the phenomenon occurs all the time, as several scholars have documented. *See, e.g.*, Schauer, *supra* note ?, at 804 ("From the American Legal Realists to the present, legal theorist[s] have devoted some attention to the ways in which seemin[g]ly crisp rules may have their edges rounded upon application, interpretation, or enforcement."). My point is merely that, within an operating legal hierarchy, *only the highest-ranking* court within the hierarchy may "standard-ify" the rules it has promulgated, whereas both that court and its lower-ranking subordinates may "rul-ify" its standards.

[24] Few doctrinal commands are as absolute as the ones I have posited here. Even norms that would strike most of us as "rules" sometimes contain a safety valve for cases where hard-and-fast adherence to the rule would otherwise yield absurd or unjust results. Relatedly, some might argue that even the most absolute doctrinal commands remain subordinate to a global, superseding norm that *always* permits courts to soften the edges of a categorical rule when circumstances so warrant. On this view, the standard-ification of a rule need not amount to a changing of the rule itself; rather, standard-ifying rules simply applies features of the doctrine already in place. When accused of amending or repealing a categorical rule, that is, the standard-ifying judge might simply reply: "The law always permitted me to do this, because the law has never tolerated total absoluteness in its doctrinal commands."

But even if there exists a conception of the law under which courts can standard-ify rules without overruling prior precedents, the key point for our purposes is that this move will generally require a higher justificatory burden than a move in the inverse direction. However we characterize the standard-ification of rules—whether involving the alteration of existing precedent, the utilization of implicit safety valves built into a rule, the invocation of superseding principles of equity, and so forth—the process requires a judge to acknowledge that a

system of vertical stare decisis, this point matters a great deal. It means that the doctrinal development of norms in the lower courts may move only in the direction of *more* specificity, not less. A court might, for instance, permissibly declare that the "five-foot tall" rule requires measurements that include the height of a would-be rider's shoes, it might require that the controlling measurement occur within 60 days of the ride, and so on. But these holdings render the rule more specific, not less. Any attempt, by contrast, to standard-ify the rule—by introducing, for example, the possibility of some eligible four-foot-eleven riders—can succeed only when the decisionmaker carries the further authority to *change* the rule.[25] Under a strict stare decisis regime, then, highly specific rules are intrinsically invulnerable to standard-ification by any court subordinate to the rule's promulgator, whereas not-so-specific standards can always be further rulified in these subordinate courts. As a result, if the creator of a standard wants to prevent rulification, she must do something more than simply articulate the standard itself.

C. Rules Against Rulification

What, then, might superior courts do to prevent rulification of their standards by subordinate tribunals? The answer is to fortify the standard with a supplemental command regarding the *method* with which to apply it. In the same way that a superior court demands adherence to the substantive standard it has adopted (e.g., "must be mature enough to ride"), it might also require applying that standard in a way that does not produce a body of ancillary rules. Returning to our hypothetical, for instance, the creator of the "mature enough to ride" standard might stipulate that the maturity of a given rider must be evaluated on an individualized, case-by-case basis, without reliance on generalizations, presumptions, *per se* exemptions, and the like. Higher courts could also strike down lower court precedents that have taken the doctrine too far up the specificity spectrum, identifying error in overly-broad reasoning that conveys too much information as to the content of the standard itself. Any sort of command along these lines would qualify as a "rule against rulification"; the creator of the standard not only prescribes a substantive standard for future courts to apply, but it also takes the further step of instructing future courts *not* to rulify the standard when applying it to concrete cases.

At this point, an important question should emerge: Won't anti-rulification efforts always prove futile in the end? After all, as originally described, rulification occurs as a natural byproduct of courts deciding cases; the more cases the courts decide, the more data we acquire regarding the standard's scope and substance. The inevitable consequence of this process is an increasingly specific set of guidelines regarding when the standard will come out in one's favor,

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doctrinal framework has become *too* constrictive and thus requires a reduction in constrictiveness. Such express methodological tinkering need not (and often does not) occur when courts rulify standards; rulification, unlike standard-ification, arises as a mere byproduct of a court's substantive reasoning—in general, adding a precedent regarding the application of law to fact provides more information (and hence increased specificity) regarding the law's application in future cases. The "natural" direction of doctrinal development, in other words, is in the direction of more and more specificity regarding the content of a legal norm. The rulifier of standards comfortably drifts along with this current, whereas the standard-ifier of rules has to figure out a way to swim upstream.

[25] One further clarification: nothing in the foregoing analysis should be read to suggest that lower courts cannot *reduce the specificity* of rules that they themselves have rendered. Only its own internal rules of stare decisis stand in the way of subsequent lower court attempts to undo *their own attempts* at rulification. Thus, for instance, if a lower court thinks better of its "measure with shoes" gloss on the "five feet tall" requirement, and decides instead to evaluate the propriety of measuring on a purely case-by-case basis, it would be free to overrule its prior precedent and reduce the overall specificity of its doctrinal commands. What the lower court cannot do, however, is to displace a higher court rule with a standard of its own—it could not, for instance, install a "reasonably tall" requirement in the stead of the "five feet tall" requirement that vertical stare decisis commands it to accept.

and that information should eventually come to light regardless of whether courts articulate their holdings in terms of generalizations, presumptions, and other rule-like norms. Insofar as the rulification process works this way, the only available mechanism to prevent rulification of a standard would be to prohibit courts from creating any precedents at all. Absent this extreme solution,[26] however, some amount of rulification will always occur. The specificity of the norm will inevitably rise as the number of on-point judicial precedents increases. And given that fact, it seems that in the long run, no rule against rulification will ever manage to achieve its underlying objective.

One may accept the premise of this objection without accepting the conclusion. The key is to recognize that, even though the rulification of standards might inevitably occur as a result of common law adjudication, the pace at which it occurs can in fact be controlled. Suppose that Suzie Q, a 13-year-old veteran of the fairground, wishes to experience the ride subject to our open-ended "mature enough" requirement. The case comes before a judge, who decides that Suzie Q is in fact mature enough to ride the ride. What does the decision of *In re Suzie Q* tell us about the "mature-enough" standard? At a minimum, it tells us that children identical to Suzie Q will satisfy the "mature enough" standard going forward. But precisely how, and to what extent, must those children resemble Suzie Q? The answer to that question depends on the reasoning of the *Suzie Q* decision itself. If the judge issues an opinion declaring that Suzie Q was mature enough to ride the ride *because and only because* she was a teenager, that opinion will fill a huge swath of previously unoccupied doctrinal space: Going forward, we would know that the "mature enough" requirement incorporates a strong presumption of ride-worthiness applicable to all children older than twelve. If, by contrast, the judge issues an opinion declaring that Suzie Q's maturity is evident from a holistic combination of her individual attributes—her age, her size, her demeanor, her past experience at theme parks, etc.—then the opinion will provide far less specification as to how future cases should be resolved. We would know that children similar to Suzie Q have a good chance at satisfying the "mature enough" standard, but we could still only hazard guesses as to how similar to Suzie Q the kids must be. These two contrasting decisions in the *Suzie Q* case—although they yield the same disposition—carry substantially different consequences for the rulification process; one moves the process along quite a bit, the other merely inches it forward.

In this respect, judges can indeed control the extent to which they rulify a standard in any given case, even if they cannot control the inevitable fact that, as they decide more cases, the substance of the standard will become increasingly rule-like. And that in turn means that rules against rulification, while perhaps not capable of stopping the process outright, can at least decelerate it. Bound by a rule against rulification, our lower court judge would be less inhibited from resolving *In re Suzie Q* according to categorical reasoning (i.e., Suzie Q gets to go on the ride because and only because she is a teenager) and more inclined to employ a mushier and more holistic analysis (i.e., Suzie Q gets to go on the ride because, all things considered, she seems like a pretty mature kid). The rule against rulification would therefore tend to reduce the extent of future substantive guidance provided by the decision, thus producing a much slower rate of rulification over time. Lower court precedents would still accumulate, and along with them, information regarding the standard's applicability to a variety of cases. But each decision's contribution to the rulification process would be less substantial, meaning that complete specification of the standard would occur over a significantly longer time horizon. For

[26] For an extended discussion of this possibility, see Section VI.C *infra*.

this reason, anti-rulification rules have profound practical effects. At the very least, they ensure that standards remain static over the short-run, even if they are inevitably fated to evolve into rules in the long-run.

D. Subtleties, Nuances, Etc.

Lurking beneath the seemingly simple terms of "rules," "standards," "rulification," and "anti-rulification rules" are layers upon layers of complexity. The discussion thus far has steered clear of complicating details, relying on artificial examples to help elucidate the core features of the concepts being introduced. But before moving from tidy theory to messy reality, we should expose some of these simplifying assumptions, so as to reveal some difficulties that arise when attempting to classify and evaluate anti-rulification rules in the real world.

First, as we have already seen, the distinction between rules and standards is anything but clean. The concepts merely approximate a property that is very much a matter of degree. What is more, even when we replace the binary rules/standard frame with scalar comparisons of specificity, determining the extent to which one norm is more or less specific is not always a straightforward exercise either.[27] But even though boundary cases will prove difficult, their existence does not a useless concept make, and there remain many scenarios in which the labels of "rule," "standard," "more specific," and "less specific" can advance the analysis in a useful and understandable way.

Second, and related to the first point, I have sometimes spoken as if the "rulification" process involves the straightforward conversion of standards into rules. But this too is an oversimplification; "rulification," as I understand it, occurs *any time* a judicial decision materially increases the specificity of a controlling legal norm. This can happen when paradigmatic standards become paradigmatic rules. But it can also happen, for instance, when courts make specific rules even more specific, (E.g., "In applying the requirement that would-be riders' must be at least five-feet tall, we will henceforth *always* measure the rider's height without reference to the shoes she is wearing."), or when making highly amorphous standards somewhat less so. (E.g., "In applying the requirement that riders must be 'mature enough' to board the ride, we will henceforth measure maturity by reference to physical, rather than emotional, characteristics."). For simplicity's sake, it may be helpful to view standards as the input of a rulification process and rules as the output, but nothing of significance turns on this particular point. What matters most for our purposes is (a) that courts put "meat on the bone" of a legal directive when they apply that directive to future fact patterns; and (b) the Supreme Court sometimes seeks to discourage them from doing just that.

Third, as we will soon see, the Supreme Court does not always speak with clarity regarding the existence of a rule against rulification. Sometimes, for instance, the Court may offer a lengthy justification for its own decision to favor a standard over a rule without indicating whether the same reasoning extends to lower court rulifications of the standard. Sometimes, the Court may reject a *particular* rulification of a standard, without further indicating whether its rejection of that rulification would extend to alternative rulifications as well. In these and other

[27] Try ranking the following three norms in terms of their specificity: (a) a categorical command with an amorphous exception built into it ("No one less than five-feet-tall may board the ride, except where justice demands"); (b) a non-categorical presumption with no exceptions attached ("We should in all cases disfavor letting people on rides who are less than five feet tall."); or (c) an open-ended norm that categorically excludes consideration of certain criteria ("Only riders who are sufficiently mature may board the ride, provided that maturity is adjudged solely by reference to physical characteristics."). Different readers, I suspect, will come up with different answers.

cases, Supreme Court precedents leave anti-rulification rules debatably and not definitively present in the doctrine. This is a problem that Part III considers in detail; for now, it suffices to note that observers will not always agree whether the Court has injected anti-rulification rules into its case law.

Finally, I have thus far spoken as if doctrine can be reliably trusted to constrain future decisionmaking. But this too is an oversimplification. Courts cannot always be trusted to follow the precedents to which they are bound. Sometimes they forget about a controlling case; sometimes they misread an opinion; sometimes they willfully ignore the law; and so forth. Doctrine does not constrain as much as it purports to constrain; whatever influences it brings to bear must compete with a host of countervailing forces: human error, political pressure, policy preferences, and so forth. Even if controlling Supreme Court precedent dictates that a lower court *must* apply a standard on a case-by-case basis, that command itself provides no guarantee that lower courts will always do so.

This same point, however, applies to all doctrinal scholarship: If outside forces motivate and explain judicial decisionmaking, the academic study of doctrine amounts to a colossal waste of time. And, indeed, to the extent one truly and honestly believes that doctrine has no role to play in affecting the decisions judges render, the claim is unassailable. But I don't buy the premise: I think doctrine has some role to play in motivating judicial outcomes, and so I regard it as well worth studying as *a* force—though not the only force—underlying the resolution of cases.[28] Thus, even though we cannot always trust in anti-rulification rules' ability to bind where they purport to bind, we should not leap to the other extreme of insisting that they will never carry real-world effect.

II. THE REALITY OF ANTI-RULIFICATION RULES

Having established the conceptual possibility of rules against rulification, I now turn to the question of their real-world existence. The aim of this Part is twofold. The first is to demonstrate that the Supreme Court does in fact issue rules against rulification. The second is to show that the Court's anti-rulification commands do not amount to meaningless blather. That is, lower courts pay attention to anti-rulification rules when applying the substantive standards to which these rules attach. That is not to say that lower courts *always* abide by rules against rulification; like any of the Supreme Court's doctrinal commands, anti-rulification rules will sometimes find themselves subject to creative manipulation or benign neglect in the courts below. But they are not paper tigers either, as lower courts have often pointed to these rules as a reason *not* to accept a rulification that litigants and/or trial court have invited them to adopt.

A. The Supreme Court's Commands

Florida v. Harris provides a nice introductory example of an anti-rulification rule: There, the Court insisted that judges applying the probable cause test should reject "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things considered approach."[29] Similar pronouncements have arisen in other areas of Fourth Amendment law. For

[28] That is especially so, moreover, in the sorts of cases on which this article focuses: mine-run lower-court cases that often lack politically salient dimensions. *Cf.* Michael Klarman, Windsor *and* Brown: *Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 138-39 n.95 (2013) (suggesting that "legal doctrine matters little in *landmark* constitutional decisions," and that "the more passionately judges care about the underlying policy issue, the less constraint they are likely to feel from the traditional legal sources" (emphasis added)).

[29] Florida v. Harris, 133 S. Ct. 1050, 1055 (2013). *Harris*'s anti-rulification commands accord with other Supreme Court descriptions of the probable cause standard. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 232, 235 (1983) (rejecting previous formulations of the probable-cause standard as a "complex superstructure of evidentiary and

instance, in evaluating the voluntariness of a defendant's consent to a search, the Court has "eschewed bright-line rules" and "disavowed litmus-paper test[s]," favoring instead a "traditional contextual approach" that accommodates the "endless variations in the facts and circumstances" that individual cases present.[30] It has done the same in defining circumstances under which citizens' encounters with the police count as a Fourth Amendment "seizure."[31] And, in asking whether exigent circumstances justify a warrantless search, the Court has recently called for a "finely tuned approach" that evaluates "each case of alleged exigency based on its own facts and circumstances."[32]

Other areas of criminal procedure law reveal anti-rulification rules at work. For example, the Court's suggestive identification jurisprudence—which asks whether police identification procedures violate a defendant's right to due process—"requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification."[33] Similarly, when asking whether "extraordinary circumstances" justify the equitable tolling of postconviction filing deadlines, courts must apply the test "on a case-by-case basis," so as to avoid creating "hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules."[34] In describing the "objective standard of reasonableness" that defines the Sixth Amendment right to effective assistance of counsel, the Court has emphasized that "[s]pecific guidelines are not appropriate" and that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions" that counsel might make."[35] And in articulating the boundaries of so-called "plain error" doctrine (governing

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analytical rules," and instead urging lower courts to treat probable cause as a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules"); Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances").

[30] Ohio v. Robinette, 519 U.S. 33, 39 (1996) (quoting Florida v. Royer, 460 U.S. 491, 506 (1983)); Michigan v. Chesternut, 486 U.S. 567, 572-73 (1988) ("Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not necessarily a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.").

[31] Florida v. Bostick, 501 U.S. 429, 439-40 (1991) (noting that the lower court "erred in adopting a *per se* rule" to determine whether a police encounter constituted a Fourth Amendment seizure, as the lower court should have "consider[ed] all the circumstances surrounding the encounter" in applying the applicable test).

[32] Missouri v. McNeely, 133 S. Ct. 1552, 1559 n.3 (2013) (internal quotations omitted).

[33] Perry v. New Hampshire, 132 S. Ct. 716, 724 (2012) (internal citations omitted); *see also* Simmons v. United States, 390 U.S. 377, 384 (1968) (holding that "each case must be considered on its own facts").

[34] Holland v. Florida, 560 U.S. 631, 649-50 (2010) (quoting Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)); *see also id.* at 669 (Scalia, J., dissenting) (attributing to the majority the view that "all general rules are *ipso facto* incompatible with equity).

[35] Cullen v. Pinholster, 131 S. Ct. 1388, 1406 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688-89 (1984)); *see also id.* at 1407 n.17 ("[T]he *Strickland* test of necessity requires a case-by-case examination of the evidence." (quoting Williams v. Taylor, 529 U.S. 362, 382 (2000))). A related example comes from *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which concerned an attorney's failure to file a timely notice of appeal. Two lower courts had held that an attorney's failure to file such a notice qualified as *per se* deficient under *Strickland* ,absent an explicit request from the defendant *not to do so*. *Id.* at 478. The Court rejected this formulation of test, concluding that it "failed to engage in the circumstance-specific reasonableness inquiry" that *Strickland* required. *Id.*; *see also* Chaidez v. United States, 133 S. Ct. 1103, 1119-20 (2013) (Sotomayor, J., dissenting) (holding that "the distinction between misrepresentations and omissions, on which the majority relies in classifying lower court precedent, implies

forfeiture of claims not raised at trial), the Court has warned of the dangers associated with "a per se approach to plain error review"—an approach that is flatly inconsistent with the "case-specific and fact-intensive basis" on which plain error analysis is supposed to proceed.[36]

The Court has also invoked anti-rulification rules in the civil context. When it first set forth the three-part balancing test of *Mathews v. Eldridge*,[37] for instance, the Court made clear that the open-ended nature of the test reflected "the truism that due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[38] Following up on this point some 20 years later, the Court would invalidate a lower court attempt to embed an "absolute rule" within the *Mathews* framework, reasoning that the precedential support for such an approach was "far outweighed by the clarity of our precedents which emphasize the flexibility of due process as contrasted with the sweeping and categorical rule" the lower court had adopted.[39] Or, as the Court has more recently put the point, "[b]ecause the requirements of due process are flexible and call for such procedural protections as the particular situation demands, we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures."[40]

Consider also the Court's recent description of the standard for issuing permanent injunctions in civil cases. In *eBay v. MercExchange*, the Court defined the relevant "principles of equity" in terms of a "traditional four-factor test," and then went on to fault both lower court decisions in the case for applying this test in an unduly rulified way. The district court, that is, had erred by "appear[ing] to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases."[41] The court of appeals had erred, meanwhile, by adopting a "general rule" that was too accepting of injunctive relief. Though each court had reached a different result, both had committed the same methodological mistake: "[J]ust as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief."[42] Both lower courts, in other words, had ignored the fact that the relevant doctrinal analysis depended on "traditional equitable principles," which "do not permit such broad classifications."[43] Going forward, as Justice Kennedy's concurring opinion

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a categorical rule that is inconsistent with *Strickland*'s requirement of a case-by-case assessment of an attorney's performance.").

[36] Puckett v. United States, 556 U.S. 129, 142, 145-46 (2009). More particularly, the anti-rulification rule here concerns the *fourth prong* of the plain-error test, which asks whether failure to address a forfeited error on appeal would result in a "miscarriage of justice." United States v. Olano, 507 U.S. 725, 736 (1993) (internal quotations and alterations omitted). It is this component of the plain error inquiry, the Court has made clear, that "is meant to be applied on a case-specific and fact-intensive basis." *Puckett*, 556 U.S. at 142..

[37] Under the Mathews test, Courts must weigh "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." 424 U.S. 319, 335 (1976).

[38] *Id.* at 334 (internal quotations and alterations omitted) (citing Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)); *see also* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985) ("The flexibility of our approach in due process cases is intended in part to allow room for other forms of dispute resolution; with respect to the individual interests at stake here, legislatures are to be allowed considerable leeway to formulate such processes without being forced to conform to a rigid constitutional code of procedural necessities.").

[39] Gilbert v. Homar, 520 U.S. 924, 931 (1997).

[40] Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (internal quotations and citations omitted).

[41] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393 (2006).

[42] *Id.* at 394.

[43] *Id.* at 393.

put the point, courts were to apply the "well-established[] four-factor test—without resort to categorical rules."[44]

Or, take the law of intellectual property. In articulating the standard for determining whether a claimed invention is too "obvious" to qualify as patentable, the Court once faulted the Federal Circuit for "analyz[ing] the issue in a narrow, rigid manner inconsistent with [the Patent Act] and our precedents."[45] These precedents, the Court emphasized, "set forth an expansive and flexible approach" to obviousness determinations, which should not be "transform[ed] . . . into a rigid rule that limits the obviousness inquiry."[46] And the Court has sung a similar tune in defining the "fair use" defense to copyright infringement: Simply put, the analysis of fair-use claims is "not to be simplified with bright-line rules."[47] Congress, in short, had "eschewed a rigid, bright-line approach to fair use" when it codified the defense,[48] meaning that any fair use claim "has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law."[49]

Finally, consider the Court's Takings Clause doctrine. While the Court has characterized some types of government conduct as "per se takings,"[50] it has emphasized that most areas of takings analysis must proceed in a manner that accounts for the "particular circumstances of each case."[51] In *Arkansas Game & Fish Commission v. United States*, for instance, a lower court attempted to hold that recurrent, though temporary, floodings of land could *never* constitute a taking of property.[52] But the Court rejected this "categorical bar" as inconsistent with the principle that "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."[53] Much to the contrary, the Court held, "[f]looding cases, like other takings cases, should be assessed with reference to the particular circumstances of each case and not by resorting to blanket exclusionary rules."[54] The proper approach, in other words, called for "situation-specific factual inquiries."[55]

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[44] *Id.* at 395 (Kennedy, J., concurring); *see also* Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1044 (9th Cir. 2012) (noting that in *eBay*, the Court "disapproved of the use of 'categorical' rules regarding irreparable harm in patent infringement cases"); *Copyright Injunctions and Fair Use: Enter* eBay *– Four Factor Fatigue or Four-Factor Freedom?*, 55 J. COPYRIGHT SOC'Y 449, 457 (2008) (attributing to *eBay* the proposition that "[t]here can be no categorical rules, no categorical denial of injunctive relief or categorical grant of such relief").

[45] KSR Intern. Co. v. Teleflex Inc., 550 U.S. 398, 427-28 (2007).

[46] *Id.* at 419.

[47] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

[48] *Id.* at 584.

[49] *Id.* at 581.

[50] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (physical takings); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (regulatory measures that eliminate all economically beneficial uses of land).

[51] United States v. Central Eureka Mining Company, 357 U.S. 155, 168 (1958); *see also see also* United States v. Caltex, 344 U.S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses."). Also within the takings context, the Court has arguably adopted an anti-rulification rule in connection with the Takings Clause's public use requirement. *See* Kelo v. City of New London, 545 U.S. 469, 483 (2005) ("[O]ur public use jurisprudence has wisely eschewed rigid formulas . . . ."); United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 402, (1949) ("Perhaps no warning has been more repeated than that the determination of value [for just-compensation purposes] cannot be reduced to inexorable rules.").

[52] Arkansas Game & Fish Comm'n v. United States, 637 F.3d 1366, 1374 (Fed. Cir. 2011).

[53] Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012).

[54] *Id.* at 521 (internal quotations omitted).

[55] *Id.* at 518.

In sum, several different areas of Supreme Court doctrine, spanning both constitutional and nonconstitutional cases, reveal attempts by the Court to dictate not just the *substance* of a doctrinal standard, but also the *method* by which lower courts should apply the standard in future cases. With that in mind, let's now investigate whether the lower courts pay any attention to these commands.

B. The Lower Courts' Responses

This Section highlights lower court cases that cite anti-rulification rules as *reasons not to* rulify a standard. That is, in entertaining a potential rule-like application of a standard, the courts in these cases point back to the Supreme Court's methodological commands as precluding such an approach. These examples cannot definitely prove that anti-rulification rules carry real-world force; sometimes, for instance, lower courts might invoke the Court's anti-rulification rules as post-hoc rationalizations for holdings that they are already inclined to issue.[56] Nevertheless, the examples below at least help to indicate that anti-rulification rules place some weight on the methodological scale, rendering judges less inclined than otherwise to flesh out Supreme Court holdings in rule-like terms.

Consider first the lower courts' application of the Fourth Amendment probable cause standard. In *United States v. Brundidge*,[57] for instance, the Eleventh Circuit declined to invalidate a search based on an affidavit that lacked independent police corroboration. The problem, in short, was that such a holding would effectively "requir[e] independent police corroboration as a per se rule in each and every case."[58] Such a rule was inappropriate, the court reasoned, not only because it lacked direct support in prior cases,[59] but also, and more fundamentally, because the Supreme Court has "criticiz[ed] per se rules for the determination of probable cause."[60] Other lower courts have employed analogous reasoning to reject related rulifications of both the probable cause standard and other Supreme Court standards within Fourth Amendment law.[61]

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[56] And sometimes, indeed, lower court dissenters have accused their colleagues of outright ignoring the Court's anti-rulification rules. *See, e.g.*, United States v. Ameline, 409 F.3d 1073, 1106 (9th Cir. 2005) (en banc) (Gould, J., dissenting) (accusing the majority of "adopting a bright-line, 'one size fits all'" plain error rule, in contravention of the Supreme Court's anti-rulification commands).

[57] 170 F.3d 1350 (11th Cir. 1999).

[58] *Id.* at 1353.

[59] *Id.* (noting that "independent police corroboration has never been treated as a requirement in each and every case").

[60] *Id.*

[61] Such claims involve, for instance, the *voluntariness of a defendant's consent to search*, *see, e.g.*, United States v. Gonzalez-Garcia, 708 F.3d 682, 688 (5th Cir. 2013) ("Gonzalez appears to argue that consent is coerced *whenever* police use an unwarned statement to obtain consent. But a categorical rule is inconsistent with the multi-factor, holistic approach to assessing voluntariness that this Court and the Supreme Court have endorsed"); United States v. Montgomery, 621 F.3d 568, 572 (6th Cir. 2010) (rejecting "a per se rule that medication (or intoxication) necessarily defeats an individual's capacity to consent," on the ground that "per se rules are anathema to the Fourth Amendment"); United States v. Guimond, 116 F.3d 166, 170-171 (6th Cir. 1997) (highlighting "the Supreme Court's fourth attempt to point out that per se or bright-line rules are inconsistent with that court's Fourth Amendment jurisprudence" before rejecting a proposed bright-line rule that would have automatically linked the presence of an illegal detention to a finding of involuntary consent), the *presence of Fourth Amendment seizures*, *see, e.g.*, United States v. Broomfied, 201 F.3d 1270, 1275 (10th Cir. 2000) (refusing to follow the Eleventh Circuit's "per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent to search luggage," and holding instead that "such notification is a relevant fact to consider, [but] cannot be dispositive of the reasonableness inquiry"); United States v. Stephens, 232 F.3d 746, 747-48 (9th Cir.

Similar results appear in ineffective-assistance-of-counsel doctrine, where the Court has warned against the use of "specific guidelines" to assess the reasonableness of an attorney's conduct.[62] In *Harrington v. Gillis*, for example, the Third Circuit reviewed a habeas petitioner's ineffective-assistance claim, based on his defense attorney's failure to appeal from a criminal conviction in Pennsylvania court.[63] The state court had rejected this claim, invoking the rule that "before a court will find ineffectiveness of trial counsel for failing to file a direct appeal, Appellant must prove that he requested an appeal and that counsel disregarded this request."[64] But the Third Circuit rejected the state court's reasoning, holding that it contravened clearly established federal law. The problem, again, was one of method: The Supreme Court had "definitively rejected any per se rules for adjudicating claims of ineffective assistance of counsel,"[65] and the state court had attempted to apply a per se rule. Put another way, the state court had treated one and only feature of the counsel's conduct "as dispositive," when it should have "consider[ed] all the circumstances" presented by the claim, thus "engag[ing] in the circumstance-specific reasonableness inquiry required by *Strickland*."[66]

Procedural due process doctrine also reveals lower courts taking seriously the Supreme Court's anti-rulification commands. In *McClure v. Biesenbach*, for instance, the Fifth Circuit made short shrift of a claim that due process required predeprivation proceedings before a municipality abated a noise nuisance; such a "per se" claim wouldn't work, the court explained, because "the mandates of due process are inherently flexible, and the courts must balance public

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2000) (O'Scannlain, J., dissenting to denial of rehearing en banc) (admonishing the majority for adopting a per se rule contrary to controlling Supreme Court precedent), and the *presence of exigent circumstances justifying a warrantless search*, *see, e.g.*, United States v. Bradley, 488 Fed. Appx. 99, 103 (6th Cir. 2012) ("we have . . . established that the appropriate inquiry when evaluating exigent circumstances is to consider the totality of the circumstances"). Relatedly, lower courts have also invoked the Court's anti-rulification rules when evaluating due process claims arising from suggestive identification procedures. *See, e.g.*, Robinson v. Cook, 706 F.3d 25, 33–34 (1st Cir. 2013) (endorsing a "totality of the circumstances" approach to determine the likelihood of misidentification (citing Perry v. New Hampshire, 132 S.Ct. 716, 724-25 (2012)),

[62] *Pinholster*, 131 S. Ct. at 1407.

[63] 456 F.3d 118 (3d Cir. 2006).

[64] Commonwealth v. Harmon, 738 A.2d 1023, 1024 (Pa. Super. 1999).

[65] *Harrington*, 456 F.3d at 126. *But see* United States v. Bergman, 599 F.3d 1142, 1148 (10th Cir. 2010) (endorsing "a *narrow* per se rule of ineffectiveness where a defendant is, unbeknownst to him, represented by someone who has not been admitted to any bar based on his "failure to ever meet the substantive requirements for the practice of law." (quoting Solina v. United States, 709 F.2d 160, 167 (2d Cir. 1983)).

[66] *Harrington*, 456 F.3d at 126 (quoting Strickland v. Washington, 466 U.S. at 687-88; *Flores-Ortega*, 528 U.S. at 478-79). For additional examples of lower court adherence to anti-rulification rules in ineffective-assistance-of-counsel cases, see Miles v. Ryan, 713 F.3d 477, 491-92 (9th Cir. 2012) (holding, in light of *Pinholster's* anti-rulification rule, that the defendant's attorney did not act unreasonably simply by deciding not to investigate the defendant's social history); State v. Starks, 833 N.W.2d 146, 164 (Wis. 2013) (acknowledging "that *Strickland* [does not] impose[] a constitutional duty upon counsel to investigate.")); Commonwealth v. Philistin, 53 A.3d 1, 26 (Pa. 2012) (noting that "specific guidelines are not appropriate" for determining whether an "attorney's representation amount to incompetence"). Lower courts have expressed similar reluctance to rulify the Supreme Court's standards governing requests for equitable tolling of filing deadlines. *See, e.g.*, Palacios v. Stephens, 723 F.3d 600, 606 (5th Cir. 2013) (rejecting a proposed rulification of the equitable tolling standard on the ground that it would "be in tension with . . . the Supreme Court's recent guidance that equitable tolling decisions 'must be made on a case-by-case basis'"); Pabon v. Mahoney, 654 F.3d 385, 399 (3d Cir. 2011) ("There are no bright lines in determining whether equitable tolling is warranted in a given case. Rather, the particular circumstances of each petitioner must be taken into account.").

and private interests."[67] More generally, courts have repeatedly incanted *Mathews*'s anti-rulification rhetoric, emphasizing, for instance, that "administrative proceedings . . . must be carefully assessed to determine what process is due given the specific circumstances involved,"[68] and that "[t]he precise procedural protections of due process vary, depending upon the circumstances, because due process is a flexible concept unrestricted by any bright-line rules."[69]

Consider too the way in which the Court's *eBay* decision has affected subsequent lower-court analyses of equitable remedies. In *Sanders v. Mountain America Federal Credit Union*,[70] for example, the Tenth Circuit invalidated a "pleading rule" that a district court had applied to requests for injunctive relief under the federal Truth in Lending Act ("TILA"). The rule, as the Tenth Circuit described it, "require[d] *all* consumers who seek to compel TILA rescission [of an unlawful loan] to plead their ability to repay the loan" as a precondition to the district court's granting of such relief.[71] But by issuing such a rule the district court had ignored the fact that "[t]he Supreme Court has rejected the application of categorical rules in injunction cases."[72] *eBay*'s anti-rulification rule, in other words, had made clear that "categorical relief is beyond the reach of the courts' equitable powers."[73] Rather than issue a rule applicable to *all* consumers in *all* TILA cases, the district court should have "weigh[ed] the case-specific equities in favor of both parties and the public interest."[74]

Case law involving both the Patent Act's "obviousness" standard and the Copyright Act's fair-use defense also reveal lower court adherence to the Supreme Court's anti-rulification rules. The Federal Circuit recently rejected an inventor's claim of nonobviousness as premised on a "restrictive view" that would "present a rigid test" for obviousness, in violation of the Supreme Court's command that "[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation."[75] Similarly, the Second Circuit has refused to adopt a rule under which a defendant's bad-faith appropriation of copyright

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[67] McClure v. Bisenbach, 355 Fed. Appx. 800, 806 n.2 (5th Cir. 2009); *see also* Lezcano-Bonilla v. Matos-Rodriguez, No. 07-1453, 2010 WL 3372514, at *7 (D.P.R. Aug. 24, 2010) ("*Gilbert v. Homar,* 520 U.S. 924, 932 (1997), 'rejected a categorical rule imposing constitutional due process requirements on suspensions without pay.' Accordingly, this Circuit has rejected the notion that due process always requires a predeprivation hearing.") (quoting Torres–Rosado v. Rotger–Sabat, 335 F.3d 1, 9 (1st Cir. 2003)).

[68] Ching v. Mayorkas, 725 F.3d 1149, 1157 (9th Cir. 2013);

[69] Steinert v. Winn Grp. Inc., 440 F.3d 1214, 1222 (10th Cir. 2006).

[70] 689 F.3d 1138 (10th Cir. 2012).

[71] *Id.* at 1143.

[72] *Id.* at 1144 (quoting RoDa Drilling Co. v. Siegel, 552 F.3d 1203, 1210 (10th Cir. 2009)).

[73] *Id.* at 1143-44

[74] *Id iat 1144.* A related set of cases involves the so-called "presumption of irreparable harm" in patent and copyright cases, which, prior to *eBay*, many lower courts had routinely applied in connection with requests for injunctive relief. Although "[t]he Supreme Court [in *eBay*] did not expressly address the presumption of irreparable harm," Robert Bosch LLC v. Pylon Mfg. Corp., 659 F.3d 1142, 1148 (Fed. Cir. 2011), at least three courts of appeals have since jettisoned the presumption as inconsistent with *eBay*'s rule against rulification. *Id.*; Perfect 10, Inc. v. Google Inc., 653 F.3d 976, 981 (9th Cir. 2011) (characterizing the presumption as "clearly irreconcilable with the reasoning of the Court's decision in *eBay*); Salinger v. Colting, 607 F.3d 68, 76-78 (2d Cir. 2010). *eBay*, the Federal Circuit has explained, made clear that 'broad classifications' and 'categorical rule[s]' have no place in this inquiry," meaning that plaintiffs "can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction." *Robert Bosch*, 659 F.3d at 1148-49. Put another way, *eBay* "warned against reliance on presumptions or categorical rules," meaning that "the propriety of injunctive relief" in patent and copyright cases "must be evaluated on a case-by-case basis in accord with traditional equitable principles and without the aid of presumptions or a 'thumb on the scale' in favor of issuing such relief." *Perfect 10*, 653 F.3d at 979-81.

[75] Altana Pharma AG v. Teva Pharmaceuticals USA, Inc., 566 F.3d 999, 1008 (Fed. Cir. 2009).

material would be "dispositive of a fair use defense,"[76] citing the Supreme Court's "warning against the application of 'bright-line' rules in fair use analysis."[77]

Finally, in *Quebedeaux v. United States*, the Court of Federal Claims confronted a takings claim arising from government-induced flooding of private land.[78] In *Arkansas Game & Fish Commission*, recall, the Court had refused to hold that temporary floodings of land fell categorically beyond the scope of the Takings Clause, holding instead that the takings analysis required "reference to the particular circumstances of each case."[79] *Quebedeaux*, by contrast, raised the question of *how often* such floodings needed to occur in order to implicate just-compensation requirements. The Government had asked the lower court to adopt a "bright-line rule" according to which "a single flooding event may not give rise to a takings," but the court rejected this approach as inconsistent with the "multi-factored, factually-intensive nature of the takings analysis."[80] Instead, the court held, the inquiry "require[d] an examination of multiple factors, certainly beyond whether actual flooding has occurred once, twice, or even a dozen times."[81]

These examples highlight the breadth of anti-rulification rules. In none of these cases did lower courts reject rulifications identical to ones that the Supreme Court had previously rejected; much to the contrary, they rejected rulifications that the Court had never before considered. And they did so because they read the applicable Supreme Court precedents to establish not just a substantive prohibition on one particular rulification, but also a methodological prohibition on any and all attempts to make a standard a rule.

C. The Alternative Approach

By now, the reader may be thinking: "Wait a minute! These examples stand for only the utterly unremarkable proposition that the Supreme Court sometimes adopts standards. That's hardly worth writing home about, much less in law-review-article form." But the rejoinder to that argument has already been advanced: as Part I made clear, a standard accompanied by an anti-rulification rule (what I have called a "mandatory standard") is not the same thing as a

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[76] NXIVM Corp. v. Ross Institute, 364 F.3d 471, 479 (2d Cir. 2004).

[77] *Id.*; *see also* Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 n.6 (9th Cir. 1997) ("The district court concluded that Penguin and Dove may not employ the four-factor fair use analysis if the infringing work is not a parody. The application of this presumption is in error. The Supreme Court has thus far eschewed bright line rules, favoring a case-by-case balancing."); Sega Enterprises Ltd. V. Accolade, Inc., 977 F.2d 1510, 1520 (9th Cir. 1992) (refusing to recognize a "per se right to disassemble object code" in light of the "case-by-case" and "equitable" nature of fair use analysis); Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1279 (11th Cir. 2001) (Marcus, J. concurring) ("Fair use adjudication requires case-by-case analysis and eschews bright-line rules.") (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)); Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006) ("[T]he determination of fair use is an open-ended and context-sensitive inquiry. In *Campbell,* the Supreme Court warned that the task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). For examples from the patent law context, *see, e.g.*, Innogenetics, N.V. v. Abbott Laboratories, 512 F.3d 1363, 1374 n.3 (Fed Cir. 2008) ("We are mindful that in *KSR,* the Supreme Court made clear that a finding of teaching, suggestion, or motivation to combine is not a 'rigid rule that limits the obviousness inquiry.'") (quoting KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 419 (2007)); Rentrop v. Spectranetics Corp., 550 F.3d 1112, 1118 (Fed. Cir. 2008) (finding that the lower court's jury instructions did not violate the Supreme Court's methodological instructions regarding the TSM principle because the court described the principle in "unrigid terms").

[78] 112 Fed. Cl. 317 (2013).

[79] Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 521 (2012).

[80] *Quebedeaux*, 112 Fed. Cl. at 324.

[81] *Id.* at 324.

standard standing alone (what I have called a "permissive standard"). I have already offered conceptual support for that point, but let me briefly hammer it home with a few concrete examples of permissive standards at work.

One permissive standard resides within *Miranda* doctrine. Though the *Miranda* warning itself reflects a bright-line rule, courts must still determine *when* such warnings are necessary. And here the Supreme Court's guidance has taken on a more standard-like character. Specifically, the Court has explained that *Miranda* applies once an interaction between law enforcement and an individual takes the form of a "custodial interrogation."[82] What counts as a custodial interrogation? While the Court has offered some guidance on this point, it has largely delegated the development of governing law to the lower courts.[83] This move, in turn, has led some courts to rulify important aspects of their doctrines concerning the scope of custodial interrogations. The Third Circuit, for instance, has stipulated that the routine questioning of immigrants at border checkpoints qualifies as *per se* noncustodial for *Miranda* purposes.[84] Relatedly, several circuits have ruled that valid *Terry* stops never give rise to custodial circumstances.[85] Until recently, the Sixth Circuit had applied a "bright-line test" to cases involving in-prison interrogations, according to which *Miranda* warnings "must be given when an inmate is isolated from the general prison population and interrogated about conduct outside of the prison."[86] And the Court itself has deemed questioning pursuant to a "routine traffic stop" to be noncustodial.[87] These rulifications of *Miranda*'s definition of "custody" remain good law today, notwithstanding the fact that *Miranda* originally defined "custody" by reference to a standard rather than a rule.

A second example involves the identification of circumstances triggering application of the Sixth Amendment right to counsel. In *Massiah v. United States*, the Supreme Court held that

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[82] Berkemer v. McCarthy, 468 U.S. 420, 425 (1984).

[83] On one point, the Court has been clear: the determination must be based on the "objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323 (1994).

[84] United States v. Kiam, 432 F.3d 524 (3d Cir. 2006) ([T]here is not likely to be the "restraint on freedom of movement of the degree associated with a formal arrest" in normal immigration practice, where questioning and delay is the norm. . . . This is the only possible "line" which sufficiently reflects the deference due inspectors at the border of the United States."). For a different, more standard-oriented approach, see *United States v. FNU LNU*, 653 F.3d 144 (2011) (noting that "the inquiry remains a holistic one in which the nature and context of the questions asked, together with the nature and degree of restraints placed on the person questioned, are relevant).

[85] *See, e.g.*, United States v. Trueber, 238 F.3d 79, 92 (1st Cir. 2001) ("As a general rule, *Terry* stops do not implicate the requirements of *Miranda*. . . .").

[86] Fields v. Howes, 617 F.3d 813, 822 (6th Cir. 2010). The test was recently rejected by the Supreme Court, though not in a manner suggesting that any and all bright-line rules must be discarded for purposes of distinguishing between custodial and noncustodial interrogations. Howes v. Fields, 132 S. Ct. 1181 (2012). To be sure, the Court did suggest in *Howes* that "the determination of custody should focus on all of the features of the interrogation." *Id.*. at 1192. But that language must be weighed against other suggestions in the opinion that the Sixth Circuit had erred only with respect to the *particular* bright-line rule it had adopted. *See, e.g.*, *id.* at 1185 ("[*T*]*he rule applied by the court below* does not represent a correct interpretation of our *Miranda* case law." (emphasis added)); *id.* at 1187 ("[W]e have repeatedly declined to adopt any categorical rule *with respect to whether the questioning of a prison inmate is custodial*" (emphasis added)); *id.* at 1189 ("The three elements of that rule . . . are not necessarily enough to create a custodial situation for *Miranda* purposes."). Thus, I am inclined to read the case as setting forth only the relatively narrow principle that a *per se* custody rule is inappropriate as applied to prison interrogations, while leaving open the possibility that other per se rules (either for or against *Miranda* warning) make sense with respect to other types of "custody" claims.

[87] Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984).

the post-indictment right-to-counsel covered not only overt interrogations by known government officers, but also covert investigations conducted by "government agents."[88] Yet the Court has offered little guidance as to who counts as a "government agent"[89]—what to do, for instance, about government informants?—and the lower courts have hazarded different means of answering the question for themselves. Some circuits have applied a "bright-line rule," under which an individual becomes a "government agent" only when "instructed by the police to get information about the particular defendant."[90] Other circuits, by contrast, utilize a standard-based approach, identifying *Massiah*-worthy government agents by reference to the "facts and circumstances" of each case.[91] Thus, by allowing lower courts to choose between rules and standards to facilitate their application of the "government agent" test, *Massiah* appears to have left a permissive standard in its wake—one as to which further rulification is neither required nor prohibited.

One further example comes from administrative law. In *United States v. Mead Corp.*, the Supreme Court expounded on its holding in *Chevron, U.S.A. Inc. v. National Resources Defense Council*, which set forth the basic framework for reviewing agencies' interpretations of their enabling statutes.[92] Specifically, *Mead* held that *Chevron* deference applies only when an agency has offered its interpretation when exercising validly delegated powers to act with "the force of law"; when, in contrast, the agency does not so act, courts must apply the somewhat less deferential (and more open-ended) framework of *Skidmore v. Swift Co.* This distinction—between actions that do and do not "carry the force of law"—drew immediate criticism from Justice Scalia, who, dissenting in *Mead*, attacked the standard as hopelessly vague.[93] In a subsequent analysis of the decision, however, Professor Thomas Merrill argued persuasively that the lack of any clarity in *Mead*'s "force-of-law" was hardly a harbinger of doctrinal doom. In his view, "nothing the Court did or said [in *Mead*] precludes future decisions that brush away the fuzziness in the majority's exposition, leaving us with a clear and defensible meta-rule" for determining when *Chevron* applies.[94] Put another way, as substantively vague as the "force-of-law" requirement might seem to have been, the Court did not attach to it any anti-rulification

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[88] 377 U.S. 201, 206-07 (1964). *But cf.* United States v. Henry, 447 U.S. 264, 274 (1980) (holding that *Massiah* applies to post-indictment contacts between defendant and government agents, where agents actively solicit information from defendant).

[89] Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 893 (3d Cir.1999) ("The Supreme Court has not formally defined the term 'government agent' for Sixth Amendment purposes").

[90] United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997); Moore v. United States, 178 F.3d 994, 999 (8th Cir. 1999); *see also* Ayers v. Hudson, 623 F.3d 301, 310 (6th Cir. 2010) (characterizing this approach as "bright line").

[91] *Ayers*, 623 F.3d at 311 (noting that several circuits have endorsed the view that "'[t]here is, by necessity, no bright-line rule for determining whether an individual is a government agent for purposes of the sixth amendment right to counsel. The answer depends on the facts and circumstances of each case.' (quoting Depree v. Thomas, 946 F.2d 784, 793-94 (11th Cir. 1991)); *Matteo*, 171 F.3d at 906 (3d Cir. 1999) ("the infinite number of ways that investigators and informants can combine to elicit information from an unsuspecting defendant precludes us from establishing any litmus test for determining when an informant is acting as a government agent under *Massiah.*").

[92] *See* Merrill & Hickman, *Chevron*'s domain.

[93] United States v. Mead Corp., 533 U.S. 218, 251 (2001) (Scalia, J., dissenting); *see also* Adrian Vermeule, Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 356 (2003) ("[I]t is a valid, if rather obvious, objection to Mead that it overvalues the decisional benefits of standards and undervalues the decisional benefits of rules.").

[94] Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards,* 54 ADMIN. L. REV. 807, 833-34 (2002). Professor Merrill calls the "force of law" requirement a "meta-standard," in the sense that it governs the first-order choice between applying the relatively "rule-like" framework of *Chevron* and the more "standard-like" framework of *Skidmore*.

rules. And so Justice Scalia's concerns about doctrinal vagueness may well prove misbegotten as courts—including the Supreme Court—create sharp-edged rulifications of *Mead* over time.

The like locus of subsequent rulification, in Professor Merrill's view, was the Supreme Court itself, rather than in the circuit courts tasked with applying the "meta-standard" of *Mead*.[95] But there is no reason why lower courts cannot start "brush[ing] away the fuzziness" for themselves while awaiting further guidance from the Court. They might, for instance, hold that some forms of agency guidance (such as interpretive rules passed pursuant to notice-and-comment procedures) are presumptively entitled to *Chevron* deference,[96] whereas other forms (such as agency positions set forth in amicus briefs) are presumptively entitled to no such deference.[97] Building on a suggestion offered by *Mead* itself,[98] lower courts might hold that properly enacted legislative rules, having undergone notice-and-comment procedures, automatically trigger *Chevron* deference—thus establishing a safe harbor for agencies wanting to ensure deferential review of the interpretations they have propounded.[99] None of this is to say that lower courts have no right to express confusion and frustration as to precisely what *Mead* and its progeny have instructed them to do.[100] Nevertheless, they remain free to mitigate the confusion by rulfiying the "force of law" criterion on their own.[101] That option would not have

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[95] Merril, *supra* note ?, at ?.

[96] *See, e.g.*, Swallows Holding Ltd. v. Commissioner, 515 F.3d 162, 169 (3d Cir. 2008) ("Here, the Secretary opened the [interpretive] rule to public comment, a move that is indicative of agency action that carries the force of law.").

[97] *See, e.g.*, Matz v. Household Int'l Tax Reduction Inv. Plan, 265 F.3d 572, 575 (7th Cir. 2001) ("Upon reading *Mead*, we find that a litigation position in an *amicus* brief, perhaps just as agency interpretations of statutes contained in formats such as opinion letters, policy statements, agency manuals, and enforcement guidelines are entitled to respect only to the extent that those interpretations have the power to persuade pursuant to *Skidmore*." (internal citations omitted)).

[98] *Mead*, 533 U.S. at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

[99] *See, e.g.*, BCCA Appeal Grp. v. EPA, 355 F.3d 817, 825 (5th Cir. 2003) ("Because notice-and-comment rulemaking is a formal process, EPA's final rules . . . , will be afforded *Chevron* deference.").

[100] As it turns out, Professor Merrill's prophesies of reduced fuzziness remain largely unfulfilled, though not for reasons having to do with the vagueness of *Mead* itself. The central cause of the post-*Mead* muddle, as Professor Lisa Schultz Bressman has shown, is the Court's subsequent decision in *Barnhart v. Walton*, 535 U.S. 212 (2002). *See* Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005). *Barnhart*, as Professor Bressman shows, embraced *sub silentio* a seemingly distinct formulation of "*Chevron* Step Zero," without making clear how to reconcile its own test for *Chevron* eligibility with the "force of law" test that *Mead* had previously established. The upshot of this is that, when deciding whether or not to apply *Chevron*, some courts "consider *Mead*-inspired factors," others consider "*Barnhart*-inspired" factors, and no courts "acknowledge that they have chosen one [test] over another." *Id.* at 1443-44.

Such confusion, to be clear, may represent a serious doctrinal problem, worthy of further attention from commentators and the Court itself. But the problem should not be blamed on the open-ended nature of the "force of law" criterion that *Mead* set forth. The culprit, instead, is *Barnhart*, and its seemingly contradictory signals regarding the ongoing validity of *Mead*. Consequently, the lower-court confusion that Professor Bressman has identified should not count as evidence against the redemptive potential of permissive standards: At the time of its adoption, *Mead*'s original formulation of "*Chevron* Step Zero" could reasonably be regarded as eminently clarifiable—via subsequent rulification of the permissive standard it embraced. Had *Mead* set forth a mandatory standard, by contrast, the hopes for reduced fuzziness going forward would have been considerably reduced.

[101] Such an interim arrangement might fail to yield *uniform* treatments of *Mead* between and among the U.S. Courts of Appeals—a non-ideal outcome from the perspective of Justice Scalia and his adherents. Still, *within the circuits themselves*, the opinion certainly does not preclude courts from defining with greater precision when and how the

been available to them if *Mead* had stipulated that downstream appliers of the "force of law" test must issue holdings on a "case-by-case" basis, only by reference to the "totality of the circumstances."[102] But *Mead* said nothing of the sort; it simply adopted an open-ended standard without placing limits on lower-courts' ability to specify the content of that standard over time.

III. THE LIMITED VALUE OF ANTI-RULIFICATION RULES

Thus far, this Article has established that standards laid down by the Supreme Court may operate in either of two ways. If such standards are accompanied by rules against rulification, then lower courts may not develop specific rules concerning the standard's application. But if they are not accompanied by rules against rulification, then lower courts may freely choose to rulify or not to rulify as they best see fit. With this descriptive picture drawn, the Article now turns to a normative appraisal. What is the value of anti-rulification rules? What respective costs and benefits do they generate? When should courts use them, and when should they not?[103]

At an intuitive level, the value of anti-rulification rules seems clear: Once the Court has opted for a standard over a rule, an anti-rulification rule ensures allegiance to that choice. We have already seen that the standard-like nature of a legal norm does not in and of itself prohibit further specification (and, thus, rulification) by lower ranking actors. A standard-like norm is an unelaborated norm; lower courts can and do flesh out the meaning of that norm in concrete and particular terms. To the extent, then, that the Supreme Court sees virtue in a standard-dependent method of applying law to fact, a rule against rulification imposes the additional constraint needed to prohibit lower court departures from that choice.

To see the point more clearly, consider the tradeoff between the substantive value of *fit*, on the one hand, and the procedural values of *predictability*, *uniformity*, and *low decision costs*, on the other. The great virtue of standards—and the corresponding vice of rules—relates to the minimization of over- and under-inclusiveness problems. Rules are the product of broad brushes; standards the fine-tipped pen. Thus, standards are less likely than rules to yield individual outcomes that seem obtuse, unfair, or otherwise contrary to the "spirit" of the doctrinal inquiry. But that benefit comes at a price: all else equal, applying a rule to the facts of a case decreases the workload of judges and litigants who engage in the task. It requires little effort—and engenders minimal uncertainty—to determine whether an individual is or is not

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"force of law" criterion applies, and that in turn should enhance the clarity of the doctrine that they themselves employ.

[102] Justice Scalia's dissent in *Mead* characterized the majority as adopting "[t]he test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test." *Mead*, 533 U.S. at 241 (Scalia, J., dissenting). This characterization, however, is accurate only insofar as *Mead* is read to *prohibit* lower courts from rulifying the standard the opinion sets forth. If, as I have suggested, *Mead* merely sets forth a permissive standard, then judges "unwilling to be held to rules" must still resist rulification in the courts below, just as litigants "who want to know what to expect" can actively fight for the same.

[103] In confronting these questions, my aim is not to rehearse arguments associated with the first-order choice between standards and rules. A huge body of literature already dedicates itself to this inquiry, identifying circumstances in which courts should articulate holdings in terms of highly specific rules as opposed to not-so-specific standards, and vice versa. *See* sources cited in *supra* note ?. My inquiry, by contrast, begins where the first-order choice has ended. That is, I evaluate the desirability of anti-rulification rules *from the perspective* of a Court that has already decided to articulate its holding in terms of a standard rather than a rule. Put another way, I omit discussion of the somewhat obvious conclusion that rules against rulification are not appropriate in circumstances where rules are preferable to standards. The question addressed here is whether a standard, once chosen, should be accompanied by an anti-rulification rule.

taller than five feet. By contrast, determining whether she is "mature enough" to board a ride entails a more difficult, more variable, and less predictable task.

When a Court opts for a standard over a rule, it will have implicitly decided that, given the nature of the particular doctrinal inquiry at issue, the fit-related benefits of the standard are significant enough to outweigh the uniformity- and predictability-related benefits of a rule. Put another way, the adoption of a standard signals an attitude from the Court that, whatever benefits a rule-like formulation might have offered along the lines of certainty, simplicity, and reduced decision costs, these pluses are outweighed by the fit-related benefits that a standard confers.[104] But where the need to minimize over- and underinclusiveness is *especially* significant, the Court might conclude that downstream rulification of the standard would eradicate the very same benefits that initially warranted its adoption. When the Court adopts a rule against rulification, it is effectively saying: "Look. We think that considerations of fit and fairness take on paramount importance within this area of doctrine. Therefore, in addition to opting for a standard over a rule, we are making clear that the methodological question is not open for relitigation in future cases. You may be tempted to ease decisional burdens on yourself by rulifying the standard we have enunciated—but, if you did that, you would create the very same problems that compelled us to adopt the standard in the first place. Therefore, you *must* apply this standard on a case-by-case basis, without any reliance on ancillary rules."

Under many circumstances, however, the proponent of a legal standard might reasonably decide *not* to adopt an anti-rulification rule. And the remainder of this Part sets out to identify those sorts of circumstances in detail. When, in other words, might the Court wish to implement a standard on the one hand, while still leaving open pathways for its eventual conversion into a patchwork of rules? Tempting as it may be to suppose that the desirability of an anti-rulification rule always follows from the desirability of a standard itself—to suppose, in other words, that any time the Court opts for a standard over a rule, it should naturally want to fortify the standard against rulification in subsequent cases—the proposition turns out not to be true, or so I will argue in this Part. There are in fact several reasons why a Court might wish to withhold anti-rulification rules from even its most standard-like pronouncements. The remainder of this Part takes on the task of identifying when this might be so.

A. Experimentation

A primary downside to anti-rulification rules relates to the lower courts' role in developing Supreme Court doctrine. These courts, unlike the Supreme Court, are categorically bound by Supreme Court precedents; according to well established principles of vertical stare decisis, they cannot simply set aside Supreme Court rulings that they regard as counterproductive or unwise. Even faced with such strict precedential constraints, however, lower courts make their own independent contributions to the Supreme Court's work. Lower courts apply existing Supreme Court law to new fact patterns, and in so doing provide a substantial information base for the Court to draw on when considering further changes to the law. By resolving the lion's share of cases that arise under the Supreme Court's precedents, lower courts attempt to make sense of these precedents in innumerable ways. When the time later comes for the Court itself to update these precedents, the lower courts' body of work can valuably inform the Court's decision of which way to go.

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[104] As Justice Frankfurter once memorably put it, standards help to prevent judges from "falsifying the actual process of judging or . . . using the formula as an instrument of futile casuistry." Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

Given this fact, the Court should avoid anti-rulification rules when it faces uncertainty as to whether a rule-like or standard-like pronouncement would better serve an area of doctrine. When this is so, the Court might benefit from freeing up the lower courts to experiment with both rules and standards in applying the permissive standard it has tentatively adopted. The increased methodological freedom afforded the lower courts would then benefit the Court's ultimate resolution of the rules/standard question for itself. For example, the Court might become more inclined to replace the (permissive) standard with a rule after observing that all of the lower courts have immediately undertaken efforts to rulify the interim standard. Or it might be inclined to make the standard mandatory after encountering dicta in a lower court opinion that persuasively explains why rulification of the standard would be counterproductive. Or, if the lower courts apply divergent approaches (with some preserving the standard in its original form and with others converting the standard into a system of rules), the Court might base its ultimate decision on a sort of comparative assessment of how the norm has fared in rulifying and non-rulifying jurisdictions.

What is more, due recognition for the benefits of lower-court experimentation might also lead the Court to adopt a permissive standard *even when it knows that rules should ultimately control the relevant field of law*. This is because lower-court experimentation might usefully assist the Court in selecting the appropriate formulation of the rule (or rules) that will one day prevail. The Court may be interested to know, in other words, how "rulifying" jurisdictions go about specifying the content of the open-ended standard it has provisionally articulated, so that on a future occasion, it may consider between and among the lower courts' different rulification strategies in ultimately settling on its own rule-like articulation of the norm. To take a simple example, holding that a driver broke the law because he drove "unreasonably" settles far less law than holding that the driver broke the law because (and only because) his speed exceeded 65 miles per hour. With the first holding on the books, lower courts would have to grapple with the meaning of the Court's "reasonableness" requirement. They will consider difficult cases at the margins of reasonable driving, and in so doing, identify a more specific set of conditions under which reasonableness can and cannot be shown. (For example, the lower courts might hold that driving under the influence is always unreasonable, that driving while talking on the cellphone is always unreasonable, except when the phone call involves an emergency, and so on.) Eventually, these courts' work could provide the basis for better-informed, down-the-road specification by the Court itself.

There is a close parallel here to the well-accepted practice by which the Court lets unsettled legal questions "percolate" in the lower courts below before granting certiorari to resolve the questions for itself. In many instances, the Court lets lower courts process a difficult legal problem before attempting to impose a single solution on the nation as a whole. Indeed, the Justices themselves have openly stated that many denials of certiorari rest on this ground.[105] But percolation might still remain desirable even after the Court has granted certiorari in a given case

[105] *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 1198 n.1 (1995) (Ginsburg J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."); McCray v. New York, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (explaining vote to deny cert on the ground that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court"). For an especially helpful analysis of the "percolation" rationale, see Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481-500 (2012).

and decided it on the merits. Some aspects of a legal problem may be ripe for definitive resolution, even though others are not. And for those aspects of the problem warranting further percolation, the Court can activate the percolation process through the provisional selection of a standard over a rule.

When utilizing standards to transform lower courts into laboratories, the Court should not pair those standards with rules against rulification. Lower courts cannot experiment with different rule-like approaches to a problem if the Supreme Court has prohibited rulification altogether. To return to the example of the unreasonable driver, if the presence of bad motoring must always be adjudged by reference to the "totality of circumstances," without the assistance of rule-like specifications of the reasonableness requirement, then lower courts' application of the standard will yield less valuable information for the Court to draw upon in case it wants to replace the standard with a set of hard-and-fast rules. The rule against rulification, in other words, freezes future law development in the lower courts, thus depriving the Court of useful data points regarding potential formulations of a rule, arguments for and against those formulations, the behavioral effects of those formulations within the jurisdictions that employ them, and so on. That is not to say that the absence of lower court data *precludes* the Court from replacing a mandatory standard with a rule; doctrinally speaking, the Court may always choose to ignore its own previous anti-rulification rule and specify the standard however it pleases. But if the only lower court precedents on the books are ones that apply the standard in a holistic, highly standard-based fashion, the Court's own later reshaping of the standard must essentially start from scratch.

B. Downward Delegation

In evaluating the desirability of an anti-rulification rule, courts must also consider its *delegating* effects. Standards, unlike rules, carry the consequence of devolving decisionmaking downward. Rather than specify what an operative norm does and does not permit, the enactor of a legal standard leaves such matters for lower-ranking actors to decide—via the repeated resolution of cases arising under the standard's open-ended terms. Thus, as other commentators have noted, the decision to adopt a standard is, in effect, a decision to delegate downward, vesting lower-ranking actors with the ultimate authority to dictate results in a wide range of cases. Justice Scalia himself has noted this point, observing that "when we decide a case on the basis of what we have come to call the 'totality of the circumstances' test, it is not *we* who will be 'closing in on the law' in the foreseeable future, but rather thirteen different courts of appeals—or, if it is a federal issue that can arise in state court litigation as well, thirteen different courts of appeals and fifty state supreme courts."[106]

Standards thus delegate authority downward. The more subtle point is that the destination of the delegation depends on whether the Court supplements its newly declared standard with an anti-rulification rule. Permissive standards achieve the result that Justice Scalia predicts; they vest lawmaking authority in judicial actors at the intermediate court level. Mandatory standards, by contrast, will push the delegation all the way down to the bottom of the judicial hierarchy, largely bypassing the intermediate courts on the way down.

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[106] Scalia, *supra* note ?, at 1179; *see also* Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards To Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 515 (2012) (noting that "higher courts use standards when they trust their lower court agents and rules when they are less trustful") (citing Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, 23 J. L. ECON & ORG. 326, 333 (2007)).

Recall that *only* permissive standards empower intermediate-level courts (such as the thirteen circuit courts or the fifty state supreme courts) to impose rules on the lower courts they oversee; mandatory standards, by contrast, prohibit the intermediate courts from doing much more than affirming or reversing each trial court decision on the basis of its own unique record. Anti-rulification rules, in other words, substantially limit the amount of precedential guidance that intermediate-level courts can provide to the courts within their purview, thus giving bottom-level courts (i.e., federal district courts and state trial courts) freer rein to apply Supreme Court standards according to their own best judgments. To be sure, intermediate courts can, do, and should continue to reverse lower-level decisions that in their view *misapply* the governing standards. But with the pronouncement of an anti-rulification rule comes the crucial added condition that such reversals may not be accompanied by opinions going far beyond the facts of the case. The precedential sweep of these intermediate court rulings will therefore be narrow. And with intermediate courts constrained in their ability to direct the efforts of their subordinate actors, the subordinate actors necessarily acquire increased control over the standard's implementation.

Related to the *de facto* delegation of authority to lower courts effected by mandatory standard is another recurring feature of Supreme Court doctrine: the combination of anti-rulification rules with deferential standards of appellate review.[107] The latter, like the former, prevents intermediate-level courts from circumscribing trial court discretion in the application of an open-ended legal norm. Deferential review accomplishes this result in a retrospective manner; it limits the extent to which reviewing courts can upset lower court judgments that have already been rendered. Rules against rulification accomplish the result prospectively; they limit the extent to which reviewing courts can constrain trial courts' application of a standard by imposing rules for future cases. Mandatory standards thus prevent reviewing courts from achieving in an *ex ante* fashion the same sorts of incursions on trial-court autonomy that deferential review standards aim to discourage *ex post*.

There remains a final difference between mandatory standards and permissive standards in terms of their delegation-related effects. Mandatory standards, as we have seen, delegate decisional authority all the way to the bottom of the legal hierarchy. Permissive standards, by contrast, delegate decisional authority to intermediate-level courts. But notice that only permissive standards permit the delegee to redelegate. From the Court's refusal to adopt an anti-rulification rule, it does not follow that an intermediate court *must* issue rules that constrain the trial courts' application of the standard. The intermediate court might instead decide that the standard makes sense as articulated by the Supreme Court, and that no further rulification is necessary. Having so decided, the intermediate court would effectively delegate its own decisional authority down to the courts below it: rather than choose to provide further guidance to the lower courts in the form of rule-like specifications of a standard, it would allow the lower courts to take up the laboring oar for themselves. Thus, while I earlier noted that permissive standards transmit decisional authority to intermediate-level courts, it is perhaps more accurate to say that permissive standards *leave open* the ultimate question of where in the judicial hierarchy such decisional authority will vest. Mandatory standards, by contrast, cut the intermediate courts out of the lawmaking loop.

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[107] *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983) (setting forth mandatory standard for probable cause test while also emphasizing that "[a] magistrate's determination of probable cause should be paid great deference by reviewing courts" (internal quotations omitted)).

C. Deliberation

One of the oft-cited benefits of standards over rules is that standards (unlike rules) demand serious and continuous judicial engagement with the law.[108] From this perspective, the mechanistic nature of rule-application counts as a minus rather than a plus. The applier of a rule need only determine whether its triggering conditions are present (e.g., the driver did or did not exceed 65 mph) and resolve the case accordingly (e.g., the driver did or did not break the law). The applier of a standard, by contrast, has to wade deeply into the underlying dispute (e.g., what is it about *this driver's* conduct that makes us think it was reasonable or unreasonable?). This sort of engagement can benefit both the court and its audience in a variety of ways. Among other things, it works against calcification and obsolescence in the face of changing factual circumstances, it can improve judges' understanding of a recurring doctrinal problem, and it can promote useful debate and dialogue regarding the purposes, scope, and soundness of the standard itself. Courts, in short, are more likely to explore and explain what the law is about when applying standards as opposed to rules, and these explorations and explanations can benefit the substance of the law itself.

How do deliberation values affect the choice between mandatory and permissive standards? On the one hand, anti-rulification rules safeguard deliberation values by stultifying a standard's gradual evolution into a rule. Lower court judges cannot specify the substance of a mandatory standard in crisp, generally-applicable terms, which means that mandatory standards stand a better chance of remaining standard-like (and accordingly deliberation-inducing) as time moves forward. On the other hand, permissive standards may promote richer and more robust forms of deliberation, especially over the short term. With mandatory standards, certain types of reasoning are effectively off-limits; courts must take care, for instance, not to rely too much on generalizations and presumptions applied across cases, lest their doing so push the operative law too far away from the individualized, case-by-case analysis that the mandatory standard requires.

Recall what happened in *Florida v. Harris*. In setting forth the "rigid evidentiary checklist" that the Supreme Court rejected, the Florida Supreme Court sought to shed light on a set of recurring problems presented by canine searches. The state court expressed concern, for instance, about the absence of a uniform certification standard for drug-sniffing dogs, inadequate record-keeping procedures regarding the success rates of their searches, and—to the extent that such records existed—defendants' difficulties in accessing them.[109] These deficiencies, the state court concluded, not only placed an unfair burden on the defendant in *Harris*, but would continue to place such burdens on similarly-situated defendants in future cases. By fixing attention on these matters, however, the state court could not help but reduce the degree to which future applications of the *Gates* test would permit a "flexible" and "all-things-considered" analysis. The court was, after all, tipping its hand as to the sorts of evidentiary deficiencies it would deem to be of central importance in future cases. And so, subordinate courts in Florida received a telling message as to what sorts of sniffs by what sorts of dogs would withstand down-the-line constitutional attack. To be sure, the Florida court need not have gone as far as it

[108] *See* Sullivan, *supra* note ?, at 67 ("The argument that rules desirably allocate questions of substantive value away from judges toward the political branches has a counterargument: rules favor the judicial abdication of responsibility, while standards make the judge face up to his choices - he cannot absolve himself by saying "sorry, my hands are tied." On this view, standards make visible and accountable the inevitable weighing process that rules obscure.").

[109] Harris v. State, 71 So.3d 765, 767-68, 770 (Fla. 2011).

did; it could have discussed all of these issues without taking the additional step of adopting formal prerequisites for the government to satisfy in every future case. But even if it had not taken that additional step, its focus on a limited category of the attributes of sniff searches was designed to channel the reasoning of lower courts in a way that *Harris* undertook to foreclose.

To be sure, courts might sometimes deliberate best by focusing narrowly on the case before them, resisting the inclination to consider broader regulatory issues that its fact pattern might raise. In *Harris*, for instance, the U.S. Supreme Court might justifiably have worried that—in attempting to think generally about problems presented by sniff-search probable cause review—the state court would deprive future sniff-search litigants the fact-sensitive attentiveness they deserve. But there's undoubtedly a deliberation-related cost to the sort of case-by-case, totality-of-the-circumstances review that anti-rulification rules require. When lower courts must refrain from looking beyond the individual facts of a case, important aspects of a doctrinal problem may escape their notice. A mandatory standard, in short, may guarantee case-by-case deliberation over the long haul, but—by insisting on case-by-case applications of unspecified standards—it may guarantee forms of deliberation that are unduly myopic.

D. Transparency

A final potential downside to mandatory standards relates to the transparency of lower-court decisionmaking. Judges who confront a recurrent fact pattern may come to rely upon hidden rules of thumb to govern their implementation of an open-ended legal norm. (For example, if the driver was exceeding 65 mph, a judge might always rule that his driving was unreasonable; if the dog was not certified by this or that agency, a judge might always regard its alerts as unreliable; etc.). But if the standard is mandatory, the judge has no reason to reveal—and indeed, a strong reason *not* to reveal—the existence of the rules of thumb on which she relies. Put another way, rather than deter lower courts from relying on rules, mandatory standards may serve only to push judicial reliance on rules behind closed doors. And that in turn means more confusion and less accountability within the law.

This last point, to be clear, should not count as a dispositive factor against adopting an anti-rulification rule. Many dubious factors can and probably do influence lower court deliberation, even in the face of Supreme Court commands to the contrary.[110] That such factors carry influence, however, does mean that the Court must resign itself to their existence. Thus, when the Court has concluded that the rule-based implementation of a standard would take the doctrine in a bad direction, it should instruct the lower courts not to rulify, even if some lower courts might subversively employ hidden rules of thumb. (After all, not all lower courts will ignore the Supreme Court's direction, and at least a high court declaration of a rule against rulification will push against *widespread* deployment of either open or clandestine rules of thumb.) On the other hand, if the case against rulification is weaker, and/or the lower courts will face particularly powerful temptations to rulify, transparency concerns could tip the scale in favor of permissive standards. Under these circumstances, the benefits to be derived from an anti-rulification are not likely to outweigh the costs of creating a disconnect between doctrinal rhetoric and decisional reality.

E. Conclusion: Minimalism Redux?

There is a thematic unity to the various problems I have discussed in this Section. Each of these problems, in one way or another, relates to an overarching concern that anti-rulification

[110] I have elsewhere described this phenomenon in greater detail. *See* Michael Coenen, *Of Speech and Sanctions*, 112 COLUM. L. REV. 991, 1042-44 (2012).

rules can close off space that would better be left open for further doctrinal development—such rules, in other words, may decide too much too soon. Considerations related to lower court experimentation, the dispersion of decision-making authority, the inducement of deliberation, and the promotion of judicial transparency will often favor decisional approaches that, in Professor Sunstein's words, are "catalytic rather than preclusive"—apt to spur more, rather than less, investigation, experimentation, and debate regarding the appropriate architecture of judicial doctrine.[111] But anti-rulification rules often work against such outcomes.

The anti-minimalist streak of anti-rulification rules raises two final points regarding their desirability. First, given the substantial tension between the priorities of minimalists and the effects of anti-rulification rules, I suspect that one's overall attitude towards minimalism will operate as a reasonably reliable proxy for one's overall attitude towards the project of prohibiting down-the-road rulification of Supreme Court standards. The ardent minimalist should find much to fear in rules against rulification, whereas the milquetoast minimalist (and especially the ardent maximalist) will not be much moved by the foregoing critiques. If nothing else, I hope that my analysis has made this point clear: Minimalists in particular ought to view anti-rulification rules with a healthy degree of skepticism.

The second point stems from the first. Legal commentators have often drawn a quick association between minimalist judging and standard-based judging. As Professor Sunstein himself has put it, "[a] preference for minimalism is very close, analytically, to a preference for standards over rules."[112] The analysis I have offered here suggests an important qualification to this assertion—namely, that minimalist-based judging maps onto standard-based judging *only insofar as the standards at issue are permissive rather than mandatory*. In other words, a minimalist ought view the mere *enunciation* of a standard for now quite differently from the outright *imposition* of that standard as a lodestar for future cases. The latter sort of decision is, in my view, not significantly less maximalist than a decision imposing a first-order rule. Both of these moves are maximalist because they push toward definitive doctrinal solutions for here and everafter, rather than provisional solutions, amenable to further tinkering (if not outright rethinking) in the lower courts and the Supreme Court itself.

This observation may seem counterintuitive at first: If plain-vanilla standards promote minimalism, should not mandated standards promote it even more effectively? In fact, however, the maximalist nature of anti-rulification rules is easy to reconcile with the basic observation that (permissive) standards and minimalism go well together. Rules against rulification, after all, are *rules* themselves. And just as substantive, first-order rules foreclose experimentation, deliberation, and delegation in the project of defining the proper scope of a legal norm, so too do second-order *methodological* rules (such as rules against rulification) foreclose experimentation, deliberation, and delegation in identifying the proper means of applying that norm across cases. True, an anti-rulification rule *commands* the use of standards, and standards themselves are

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[111] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 6 (1999).

[112] Cass R. Sunstein, *Problems With Minimalism*, 58 STAN. L. REV. 1899, 1909 (2002); *see also* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORN. L. REV. 1, 29 (2009) (noting that "[t]he debate between vertical maximalism and minimalism may resemble, in some respects, the familiar debate over rules and standards," while also highlighting some differences); Robert Anderson IV, *Measuring Meta-Standards: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J. L. & PUB. POL'Y 1045, 1084 (2009) (noting that "at least in the context of the Rehnquist Court, there seems to be a close connection between rules and maximalism on the one hand and standards and minimalism on the other, and indeed scholars often lump the two categories together").

friendly to the minimalist cause. But standards are friendly to the minimalist cause largely because they leave the law open for further elaboration in subsequent cases. By categorically precluding standards from accomplishing that result, rules against rulification end up undermining the decisional virtues of minimalism in much the same way that any other set of rules might do so.

IV. WORKING WITH ANTI-RULIFICATION RULES

The previous Part identified several problems that might arise from the adoption of a rule against rulification. Putting such problems on the table, however, is different from declaring that anti-rulification rules should never be used. And nothing I have said thus far should be taken to suggest that courts *never* ought to issue rules against rulification. Sometimes the benefits of such rules will outweigh their costs: Thus, when the Court determines that an area of law is best served by standard-based decisionmaking, rules against rulification help to ensure that future decisions will embrace this approach. Determining when such a decision is appropriate, however, is a complicated and context-dependent task. While I cannot offer a straightforward rubric for determining when and when not to implement rules against rulification, I do hope to have laid on the table the considerations that should guide the decision.

But let us now turn to a second set of issues, which involve not the question of *whether* to adopt anti-rulification, but rather *how* to deal with anti-rulification rules once the decision to adopt them has been made. Section A offers some preliminary thoughts on how the Supreme Court should go about articulating rules against rulification within its own decisions. Section B then turns to the lower courts' task of *detecting* such rules, asking in particular how lower courts should interpret mixed signals from the Court about the presence of anti-rulification rules and whether the courts may permissibly regard even clearly stated anti-rulification rules as non-binding dicta.

A. Creating Anti-Rulification Rules

1. Separating Substance from Methodology

The Court often announces an anti-rulification rule while reviewing a lower court's effort to rulify a standard. (In *Harris*, for instance, the Court reviewed a Florida Supreme Court decision that had established, in the Court's words, a "strict evidentiary checklist" for establishing requisite level of reliability for drug-detection dogs.[113]) But simply invalidating one rulification in particular will not suffice to create a *general* rule against rulification. Absent further explanation, such a holding would merely establish that the lower court erred by rulifying the standard in the way it did. And such a holding in its nature does not stand for the broader proposition that all other attempts at rulifying the standard are similarly invalid. Standards can be rulified in many ways. Deeming one such rulification inappropriate is not the same as prohibiting rulification across the board.

Thus, in setting forth a rule against rulification, the Court must take care to disaggregate its substantive evaluation of a particular rulification from its methodological evaluation of whether a standard may ever be rulified. This the Court does not always do, as *Harris* itself reveals. Some portions of the Court's opinion criticized the Florida Supreme Court for failing to evaluate the probable-cause question on a flexible, case-by-case basis.[114] Other portions of the opinion, however, criticized the substance of the particular evidentiary checklist that the Florida

[113] Florida v. Harris, 133 S. Ct. 1050, 1056 (2013).

[114] *Harris*, 133 S. Ct. at 1056 ("No more for dogs than for human informants is such an inflexible checklist the way to prove reliability, and thus establish probable cause.").

court had devised.[115] Logically, these lines of argument point to different conclusions. If the problem with the Florida court's opinion lay in its rulifying methodology, then the adequacy of the checklist should have been irrelevant to the determination and the Court could have reversed by relying on *Gates* without more. If, by contrast, the problem with the Florida court's opinion stemmed from the substance of the checklist itself, then the Court should have reversed, while making clear that other lower courts remained free to experiment with other sorts of evidentiary checklists (or alternative rulifications of the *Gates* standard) in future cases. Under no circumstances, however, should it have followed from the substantive inadequacy of the Florida court's checklist that all future assessments of a dog sniff's reliability must eschew reliance on determinate rules.[116]

There is another point too. It may well be that the most effective vehicles for establishing anti-rulification rules will be cases—unlike *Harris*—in which the particular rulifications at issue do not strike the Court as egregiously off-base. If the Court really wishes to convince us that a given standard should never be rulified, it should focus on the best possible attempts at rulification, rather than highlight defects in the obviously misguided ones. Consider, for instance, the Court's discussion of the Patent Act's "nonobviousness" requirement in *KSR International v. Teleflex, Inc.*[117] There, the Federal Circuit had developed a "teaching, suggestions, and motivations" ("TSM") test for evaluating the obviousness of combination-based inventions. In stark contrast to *Harris*, where the Court went out of its way to criticize several substantive assumptions underlying the lower court's attempted rulification of the *Gates* standard, the *KSR* opinion actually endorsed the intuitions underlying the lower court's TSM test. The test, the Court emphasized, had "captured a helpful insight"; among other things, the it reflected the common-sense principle that "it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does."[118] But even helpful insights, the Court went onto explain, could not justify the adoption of "rigid and mandatory formulas," which threatened to reduce the obviousness analysis to "a formalistic conception of the words teaching, suggestion, and motivation."[119] Having endorsed the substantive thrust of the test, the Court could more easily demonstrate why the "[r]igid preventative rules" that emerged from the test were not good—why, that is, such rules threatened to "deny factfinders recourse to common sense" in evaluating obviousness claims.[120] By steering its focus away from the substantive underpinnings of the TSM test, and focusing more on the rigidity of the test itself, the Court in *KSR International*

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[115] *Id.* at 1056-57 (criticizing the Florida Court's reliance on field data, which "may markedly overstate a dog's real false positives," and contending that "[t]he better measure of a dog's reliability thus comes away from the field, in controlled testing environments").

[116] This is not to say that a Court wishing to establish an anti-rulification rule must avoid critiquing the particular rulification before it. Pointing out the inadequacies in an individual rulification might enable the Court to illustrate the bad results that bright-line rules might beget. Even if, in other words, the substantive inadequacies of one rulification cannot logically establish the futility of trying to rulify in the first place, they may highlight *the sort of* problems that many (if not all) rulifications of a standard are likely to share. That might have been a way for the Court in *Harris* to reconcile its criticisms of the Florida Court's checklist with a categorical prohibition on rulification in future cases. But at the least, the Court was not careful to frame its opinion in this way.

[117] 550 U.S. 398, 427-28 (2007).

[118] *Id.* at 418.

[119] *Id.* at 419.

[120] *Id.* at 421.

could offer a more focused and persuasive justification for its methodological prohibition on rulifying the obviousness standard.[121]

2. Practicing What One Preaches

A second guiding principle for the creation of anti-rulification rules may seem self-evident. Once the Court has prohibited rulification of a standard, it should abide by its own proscription. In this respect, too, the Court's opinion in *Harris* fell flat. Having upbraided the Florida Supreme Court for relying on an "evidentiary checklist" to guide its own standards for canine reliability review, the Court went on to prescribe what reads much like an evidentiary checklist of its own. Consider some of the guidance the Court offered regarding the proper way to conduct a dog-sniffing probable cause inquiry (which, for dramatic effect, I present in quasi-checklist format):

- "[T]he decision below treats records of a dog's field performance as the gold standard in evidence, when in most cases they have relatively limited import."[122]

- "The better measure of a dog's reliability thus comes away from the field, in controlled testing environments."[123]

- "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert."[124]

- "The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs."[125]

- "A defendant, however, must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witness."[126]

- "If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause."[127]

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[121] This is, to be clear, not a distinction I wish to overdraw. The boundary between substance and methodology is, much like the boundary between substance and procedure, not always easy to draw. Arguably, some of the *KSR* Court's criticisms of the Federal Circuit's analysis went as much to the "substance" of the TSM test as they did to the rule-like nature of the test. *See, e.g.*, *id.* at 421 (criticizing the TSM test as reflecting an unduly pessimistic view of judges' susceptibility to hindsight bias in evaluating obviousness claims). Even so, *KSR* did take pains to suggest that basic underlying insights of the TSM test were valid and worth attending to, whereas *Harris* took pains to suggest that the Florida Supreme Court's evidentiary checklist suffered from a bevy of erroneous premises. If the purpose of the decision is to establish a *general* rule against rulification, applicable across the whole range of potential rulifications that a lower court might derive, then a *KSR*-type analysis, which identifies problems with rulification *even in the presence of a pretty decent substantive* rule, is more likely to be satisfactory.

[122] *Harris*, 133 S. Ct. at 1056.

[123] *Id.* at 1057.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 1058.

In fairness to the Court, none of these prescriptions *absolutely* requires that future assessors of dog reliability accord dispositive weight to one or another type of evidence.[128] But these and other statements from *Harris* set forth a surprisingly specific framework for evaluating such reliability in future cases, thus complicating lower courts' ability to apply the probable cause standard in the "fluid" and "flexible" manner that *Harris* seemed to demand.[129] Having called for the pure application of an unrulified standard to the facts of each case, the Court muddied the waters of its own methodological directive, by identifying several general, seemingly non-totalistic principles that all such applications must honor.[130]

Consider, for instance, the post-*Harris* plight of a lower court asked to render a reliability determination vis-à-vis a dog that has been certified by a newly established and highly reputed training agency. The court might wish to establish, as a general rule, that certification by the agency is *per se* sufficient to establish a dog's reliability. Can it so hold? On the one hand, doing so seems consistent with (if not expressly required by) the *Harris* Court's suggestion that "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert."[131] On the other hand, such a holding would seem to establish the very sort of "bright-line rule" that *Harris* explicitly eschewed. In short, the lower court faces a Catch-22: It may accord the agency's certification non-dispositive weight and thereby invite reversal on the ground that it undervalued a type of evidence that *Harris* deemed to be critically important. Or, it may treat the agency's certification as dispositive and thereby invite reversal on the ground that it was "prescrib[ing] . . . an inflexible set of evidentiary requirements."[132] Acting one way would ignore *Harris*'s substantive guidance regarding credible evidence of sniff-search reliability; acting the other way would violate its anti-rulification rule.

In all likelihood, *Harris* did not quite mean what it said. The point of *Harris* was not that lower courts must eschew presumptions and generalizations altogether, but rather that they should go no further with these presumptions and generalizations than the Court has told them to go. *Harris* thus accomplishes a partial rulification of the probable cause inquiry, while also suggesting that lower courts should not move that inquiry any farther toward the rule end of the spectrum. There is nothing illogical in such a holding; the Court can cogently instruct its subordinates to establish this much *ex ante* guidance, but not any more. To the extent that this is the true holding of *Harris*, however, it is a holding at odds with the anti-rulification language that permeates the opinion itself. The true import of the decision would have been easier to discern if the Court either had toned down its rhetoric regarding the "fluid" and "common sense" nature of probable cause review or had refrained from giving such detailed guidance regarding future applications of the probable cause standard.

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[128] Although the same could have been said of the Florida court's opinion as well. *See, e.g.*, id. *at* 1056 n.1 (noting that the defendant himself had argued that the court's decision "did not impose any such [mandatory] requirement").
[129] *Id.* at 1055-56.
[130] *See* Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. L. REV. COLLOQUY 64, 65 (2013) (characterizing the Court's holding in *Harris* as "a sweeping rule that a drug dog's positive alert is enough to create a presumption of probable cause so long as the dog either 'recently and successfully completed a training program' or was certified by a 'bona fide organization'"); *see also id.* at 79 (noting that the opinion "generate[s] rigid rules in place of the more commonsense totality-of-the-circumstances standards favored in the Court's precedents").
[131] *Id.*
[132] *Id.* at 1057.

B. *Detecting Anti-Rulification Rules*

1. Thresholds of Clarity

What about the role of lower courts in determining whether they are bound by anti-rulification rules? As we saw from Part II, the Supreme Court does not always speak with clarity regarding the methodological obligations it wishes to impose on the courts below. One difficulty, as we have seen, is the occasional opinion that blends together substantive and methodological critiques: when the Supreme Court attacks a lower court's rulification of a standard, does it intend to wipe out all such rulifications of that standard, or merely the particular rulification that the lower court used? Further difficulties arise when, as in *Harris*, the Court condemns rulification with one hand while engaging in rulification with the other. And most commonly, the Court is often unclear as to whether it is merely defending its own choice to adopt a standard or taking the further step of prohibiting rulification of the standard in future cases. In these and other ways, the Supreme Court can generate uncertainty regarding the existence of an anti-rulification rule. And in the face of such uncertainty, the question arises: What should lower courts do?

Consider, for instance, the law of personal jurisdiction. When the Court first set forth its "minimum contacts" standard for personal jurisdiction analysis, it characterized the inquiry as one that could not "be simply mechanical or quantitative," but rather must "depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."[133] This language—along with other statements from the Court's personal jurisdiction case law[134]—has led some lower courts to resist adopting rules to facilitate their own application of *International Shoe* and its progeny. These courts, in other words, felt bound not only by the substance of the minimum contacts standard, but also by what they saw as the Supreme Court's methodological preference for standards over rules within the context of personal jurisdiction analysis.[135] But if you go back and peruse the relevant case law, you won't find the Court ever issuing a direct edict of the sort it

[133] International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[134] *See* Kulko v. Superior Court, 436 U.S. 84, 92 (1978) ("We recognize that this determination is one in which few answers will be written 'in black and white.' The greys are dominant and even among them the shades are innumerable."); Burger King Co. v. Rudzewicz, 471 U.S. 462, 478 (1985) ("The Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests or on 'conceptualistic . . . theories'"). *But see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (noting that due process is intended to "give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit").

[135] *See, e.g.*, O'Connor v. Sandy Lane Hotel Co., 496 F.3d 312, 320 (3d Cir. 2007) (declining—for purposes of specific jurisdiction analysis—to treat but-for causation as a dispositive indicium of an alleged tort's' "relatedness" to the defendants contacts with the forum state, in part because "the Supreme Court's personal jurisdiction cases have repeatedly warned against the use of 'mechanical or quantitative' tests"); Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009) ("We have not developed or adopted a specific approach to determining relatedness; instead, we have heeded the Supreme Court's warning against using 'mechanical or quantitative' tests"); Core-Vent Corp. v. Nobel Industries AB, 11 F.3d 1482, 1487 (9th Cir. 1993) (declining to adopt the per se rule that "acts intended to harm a corporation cannot be said to be directed at any particular geographic location" on the ground that "[s]uch a categorical approach is antithetical to [the Court's] admonishment that the personal jurisdiction inquiry cannot be answered through the application of a mechanical test"); *see also* Clemens v. McNamee, 615 F.3d 374, 386 (5th Cir. 2010) (Haynes, J., dissenting) (arguing that the majority opinion—whose personal jurisdiction analysis focused heavily on the "setting of [the defendant's] allegedly defamatory statements"—had the effect of "unduly narrow[ing] the minimum contacts and specific jurisdiction inquiry to a mechanical or technical formulation, rather than the 'highly realistic' approach urged by the Supreme Court").

issued in the case law I discussed in Part II—insisting, in other words, that *lower courts apply* the minimum contacts standard in a way that proceeds case-by-case and takes into account the totality of the circumstances. Rather, *International Shoe*'s warnings about mechanistic and quantitative decision-making addressed the issue of what sort of substantive inquiry the *Court itself* should adopt for purposes of establishing guiding principles of minimum contacts analysis. But what works best for the Court in denoting first-order doctrinal principles of personal jurisdiction doctrine may not work best for subordinate courts tasked with translating those principles into on-the-ground results. Put another way, one reason why the Court might wish to decline adopting a "mechanical or quantitative" test is precisely because such a test would reduce lower courts' freedom to shape the personal jurisdiction inquiry in whatever manner they see fit. So, *International Shoe* and its progeny could be read as simply offering a justification for the Court's choice of a standard over a rule, rather than an explicit instruction that the standard, once adopted, may not be rulified in future cases.

How should lower courts resolve uncertainties of this sort? In my view, they should apply a strong presumption against anti-rulification rules, agreeing to adhere to such rules only when the Court has established them with crystal clarity. In part, that preference derives from the benefits of permissive standard that I have identified in Part III. Given these benefits, I would rather that lower courts—and especially intermediate-level courts of appeals—retain freedom to work through difficult doctrinal problems with toolkits that include the power to rulify.

Whatever the intrinsic merits of anti-rulification rules, however, there is an additional reason to treat them as non-existent until proven otherwise. This reason stems from the "information-forcing" benefits that such a presumption would produce.[136] Simply put, where a lower court seeks further guidance from the Supreme Court regarding the existence of an anti-rulification rule, it is more likely to receive that guidance by assuming for now that no such rule exists.

To see why, suppose that all the lower courts treated an area of case law—for instance, the Court's personal jurisdiction case law—as establishing a rule against rulification. Going forward, the lower courts would apply the minimum contacts standard in a narrow, fact-specific manner, issuing opinions that did not venture far beyond the unique circumstances of each case. That, in turn, would render the lower courts less likely to produce opinions that attracted the Supreme Court's attention. They would sometimes err in applying the standard too leniently or too strictly, but the consequences of their errors would be relatively minor, owing to the highly fact-specific nature of the opinions in which the errors occurred. If, by contrast, the lower courts painted broadly—that is, they issued specific and widely applicable directives regarding the application of the minimum contacts test—their decisions would be more likely to arouse the interest of the Court itself and thus generate clarifying guidance as to whether a rule against rulification does in fact exist.

2. Dicta Versus Holding?

Even if Supreme Court precedent establishes an anti-rulification rule with absolute clarity, lower courts might remain tempted to dismiss such a rule as "dicta" rather than

[136] *Cf.* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 97 (1989) (outlining a theory of "penalty default rules," which "can be justified as a way to encourage the production of information").

"holding." The dicta/holding distinction defies easy definition,[137] but, in simplified form, it rests on the idea that pronouncements of law underpinning the actual result of a case are different from pronouncements of law that merely accompany the result. Only the former sorts of propositions, longstanding convention holds, constitute binding authority subject to both horizontal and vertical stare decisis. Extracurricular ponderings about the law—not necessary to the outcome of a case—may be treated as persuasive authority, but nothing more.

Might anti-rulification rules qualify as non-binding dicta? Certainly, we can imagine cases where the answer is "yes." If, say, the Court were to opine on the standard-based nature of the *eBay* four-factor test in a case having nothing to do with a request for injunctive relief, then its discussion of *eBay* would count as non-binding dicta under even the narrowest definitions of the term. But more difficult questions emerge in cases of the sort we examined in Part II, where the Court reverses the lower court on the ground that it erroneously relied on a rule to facilitate its application of a standard. Arguably, anti-rulification rules might still qualify as dicta in these circumstances, on the theory that only the Court's objection to the particular rulification at issue in the case is necessary to the outcome of that case. On this understanding, for instance, the Court's analysis in *Harris* yielded a holding only insofar as it rejected the particular "evidentiary checklist" that the Florida Supreme Court employed. Its broader insistence that no rulifications should ever attend sniff-search reliability evaluations was not needed to reach that result: whatever the Court's feelings about alternative lower-court rulifications in other cases, the invalidity of the Florida court's checklist was itself sufficient to doom the decision below. And more generally, the argument goes, globally applicable anti-rulification rules will always count as dicta as long as they prove broader than necessary to justify the Court's invalidation of one and only one means of rulifying a standard.

This line of reasoning proves too much. It would suggest that all Supreme Court rules (whether or not about rulification) count as dicta rather than holding, since all rules purport to decide more than the particular case that accompanies their announcement. Analogous reasoning, for instance, would hold that the prophylactic rule adopted in *Miranda* was non-binding dicta, on the theory that a detailed description of how police officers should warn suspects in future cases was not necessary to the Court's holding that the particular warning before it violated the law. But no one treats *Miranda*'s requirements as dicta; rather, everyone treats the *Miranda* warning as stemming from a binding holding of the case. And that is true of many rules that the Court has adopted; lower courts adhere to the rule, even though the rule decides more than the particular case from which it emerged.

An alternative attempt to classify anti-rulification rules as dicta might emphasize their methodological character. Stare decisis norms, this argument would go, typically apply to first-order dictates of law and not to second-order rules about crafting the dictates themselves. Along these lines, as several legislation scholars have noted, lower courts typically do not treat the Supreme Court's preferred methods of statutory interpretation as carrying *stare decisis* effect.

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[137] *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1072 (2005) (noting that "a judge's selection of a particular interpretive methodology will not necessarily credit that methodological choice as a holding"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1256 (2006) ("If the court's judgment and the reasoning which supports it would remain unchanged, regardless of the outcome in question, that proposition plays no role in explaining why the judgment goes for the winner. It is superfluous to the decision and is dictum."); *see also* Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

For instance, even if the Supreme Court has eschewed reliance on legislative history when interpreting some statute, lower courts may still consult legislative history in interpreting the same law.[138] And if that is true regarding *methods* of statutory interpretation, should it not also be true regarding the *methods* of law application as well?

This argument, however, conflates two different questions: (1) whether the Court *does* accord stare decisis effect to its methodological rules; and (2) whether the Court may in fact do so. The curiosity regarding methodologies of statutory interpretation arises from the Court's general refusal to enter the precedential fray, not from any sort of widespread understanding that the Court would be powerless to create binding rules of interpretive methodology if it so desired. In fact, as Professor Abbe Gluck has pointed out, the Court routinely assigns binding precedential status to a wide range of methodological rules outside the statutory interpretation context, including "Title VII's burden-shifting regime, the rules of federal contract interpretation, federal choice-of-law rules, interpretive regimes for admiralty, and so on." [139] Moreover, lower courts do not bat an eye at the idea that they must treat such rules as binding precedent. Rules against rulification, which the Court characterizes as binding on the courts below, are no different. If common practice is a guide, then—*pace* the unusual case of statutory interpretation—the methodological character of anti-rulification rules is not likely to deprive them of binding effect.[140]

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[138] Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology*, 96 GEO. L.J. 1863 (2008); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 (2011).

[139] Gluck, *supra* note ?, at 1918, 1968-80; Foster, *supra* note ?, at 1882 ("Indeed, in some cases the Justices agree that particular interpretive principles—such as the rule of lenity—or particular interpretive frameworks--such as the *Chevron* framework—apply, although it is also true that they frequently disagree about the contours of those principles and frameworks."); *see also* Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis As Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 684 (2008) (noting that "the Supreme Court already treats many, but not all, subdecisions based on statutory interpretation as binding precedent without explicitly saying so"). And that is to say nothing of the practices in state courts and courts in other countries, which very often accord *stare decisis* effect to methodological rules, including those that concern statutory interpretation. *See* Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 199 YALE L.J. 1750, 1847 (2010) ("[T]he ability of the state courts studied to articulate a single methodological approach—and so to treat methodology as "law"—is not unique. Highest courts in other countries, too, have implemented controlling interpretive regimes."); *see also* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010); Scalia, *supra* note ?, at 1177 (suggesting that, when applying Supreme Court precedent, lower courts should be bound not only by the "*outcome* of that decision," but also "the *mode of analysis* that it applies"). A related line of investigation concerns the question whether Congress may require courts to favor one set of interpretive methodologies over another. *Compare* Nicholas Quinn Rosencranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (yes), *with* Larry Alexander & Sai Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMM. 97 (2003) (no).

[140] Common practice could be wrong, however. Perhaps there really is something different about the Court's methodological directives that render them something other than "law" and hence beyond the *stare decisis* ken. That is an interesting question, to be sure, and one on which the burgeoning literature on the precedential status of interpretive methodologies has hazarded some preliminary answers. *See, e.g.*, Scott, *supra* note ?, at 345 ("The common law should be understood to encompass judicial methodology in addition to the traditional substantive common law subjects, such as the law of torts."); Connor, *supra* note ?, at 684 (noting that "that the purposes behind traditional stare decisis suggest that the appropriate reform is to extend the scope of stare decisis to statutory interpretation subdecisions"). For our purposes, however, the law-like nature (or lack thereof) of anti-rulification rules probably matters less than the simple fact that the Court purports to make them binding on the courts below. That fact, coupled with the equally unremarkable fact that the Court can always reverse lower court judgments that

V. VARIATIONS ON THE THEME

Rules against rulification represent the primary means by which the Supreme Court constrains the *method* of applying and implementing its precedents in subsequent cases. Might there be other means of imposing such methodological constraints? I here consider three such alternative devices—devices that, to the best of my knowledge, the Court has never explicitly employed, but that, like rules against rulification, might restrict (or direct) methodological choices in helpful and productive ways. First, I consider the possibility of "pro-rulification rules," which would expressly *instruct* the lower courts to rulify standards that the Supreme Court itself has settled on. Second, I consider the possibility of "anti-rulification standards," which *discourage* but not outright prohibit lower-court rulification. Finally, I consider the possibility of "anti-publication rules," which would prohibit lower courts from issuing published opinions (and hence creating binding precedents) in connection with a particular standard the Court has created.

A. Pro-Rulification Rules

In Part III, we saw that there exist a variety of reasons why the Court might wish *not* to create a rule against rulification. One such reason relates to the value of lower court experimentation; in particular, when the Court envisions that it might one day offer specific guidance regarding the application of a legal norm, but is not yet sure as to what that guidance will be, the best course of action might be to issue a permissive standard for now and to see what the lower courts come up with. Under these circumstances, an anti-rulification rule would prove counterproductive, on the theory that prohibiting lower court rulification would defeat the purpose of adopting the standard itself.

If the Court really wished to examine the fruits of lower court rulification processes before settling on its own rule-like formulation of a standard, perhaps it should do more than simply *not prohibit* lower courts from rulifying. Maybe, that is, the court should affirmatively *require* lower courts to do just that.

For a rough analogue to this idea, consider the Court's discussion of Article III standing doctrine in *Allen v. Wright*.[141] There, in discussing the "injury-in-fact" requirement, the Court conceded that the requirement "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise."[142] At the same time, however, the Court went on to note that "[t]he absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing."[143] Why? Because Article III standing "is built on a single basic idea—the idea of separation of powers" and "both federal and state courts have long experience in applying and elaborating in numerous contexts the pervasive and fundamental notion of separation of

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run afoul of its commands, provides reason enough for lower courts to resist rulification when the Supreme Court has expressly instructed them to do so. *See* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2049-50 (2013) (concluding, on the basis of empirical study, that "lower courts very rarely invoke the holding-dictum distinction to reach decisions at odds with higher court dicta"). That point seems sufficient as a descriptive matter, and perhaps also enough as a normative matter, to support the proposition that anti-rulification rules, once clearly established, carry binding precedential force. *See id.* at 2048 (noting that "there is a strong argument to be made that theory entirely divorced from practice can have only limited utility, especially insofar as it is aimed at lawyers in training or practice and is meant not only to identify normative ideals but also to help clarify thinking about how law operates").

[141] 468 U.S. 737 (1984).

[142] *Id.* at 751.

[143] *Id*.

powers."[144] Put somewhat differently, subsequent clarification of the doctrine might occur in the lower courts themselves, since "[d]etermining standing in a particular case may be facilitated by clarifying principles or even clear rules developed in prior cases."[145] This was, to be sure, not always going to be possible; many issues of Article III standing would always require "careful judicial examination of a complaint's allegations."[146] But, given the overarching separation-of-powers principles at play, and given the lower courts' ability to flesh out the contours of these principles through the common law method, the Court saw an opportunity for "the gradual clarification of the law through judicial application."[147]

To be sure, this language hardly obligated lower courts to start developing clarifying rules regarding the scope of the injury-in-fact requirement. Perhaps the Court intended merely to assuage fears that a vaguely formulated injury-in-fact requirement presaged eternal doctrinal confusion. But one at least sees within the passage the seeds for what might be a new, and sometimes useful technique for developing the contours of the law in an especially inclusive and dialogic way: create a standard at the Supreme Court level and then expressly invite (if not outright obligate) the lower courts to develop rules about the standard in subsequent cases. Insofar as greater clarity and specificity of the doctrine are the overarching desiderata, and insofar as the Court seeks lower court input on how the doctrine should be clarified and specified, then a "pro-rulification rule" might best serve the interests of the Court itself.

B. Anti-Rulification Standards

Anti-rulification rules, I have argued, can suffer on account of their rule-like nature. They *categorically* render rulification off-limits, leaving minimal room for future discretion in determining whether the process should take place. When the absolutism of an anti-rulification threatens to do harm, one possible corrective is to reduce its absoluteness. Rather than prohibit rulification outright, the Court might simply issue a non-categorical caution against rulifying, while still permitting the practice to proceed when exceptional circumstances so warrant.

I would term such a directive a "standard against rulification." One can imagine various forms that such a standard would assume. The Court might hold, for instance, that lower courts may not rulify unless doing so is "absolutely necessary to constrain trial court decisionmaking." Or, it might provide that lower courts may rulify, but only in a way that "maintains an adequate degree of fit between the purpose of the norm and the outcomes that it generates." And so forth. The idea, in short, would be to place a thumb on the scale against rulification without banning the practice outright.

Again, I am unaware of any holdings that follow directly along these lines.[148] In practice, though, a standard against rulification might not operate all that differently from Supreme Court

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[144] *Id.* at 752.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] Perhaps one could identify such an anti-rulification standard as implicit in the recent Fourth Amendment case of *City of Ontario, Cal. v. Quon*, 130 S. Ct. 2619 (2010). There, in declining to adopt a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment," the Court pointed to "rapid changes in the dynamics of communication and information transmission" and uncertain predictions as to "how workplace norms . . . will evolve." *Id.* at 2630; *see also id.* ("It is preferable to dispose of this case on narrower grounds."). Although never explicitly prohibiting courts from rulifying the standard it embraced, the Court's emphasis on evolving technologies and social norms might be read as strongly cautioning them against such an approach. I thank Bill Corbett for pointing this out to me.

doctrines that leave the existence of an anti-rulification rule unclear.[149] And these sorts of doctrines, as we saw in the previous Part, do indeed exist. In these areas of doctrine, recall, uncertainty arises not from a deliberate choice on the part of the Court to vest some measure of rulification discretion in the courts below. Rather, the issue is whether, in justifying its own decision to adopt a rule over a standard, the Court has (intentionally or not) directed its subordinates to follow suit when applying that standard to future cases. This difference aside, however, the upshot of both sorts of decisions is the same. When the Court sends mixed signals about the existence of anti-rulification rule, lower courts may feel some, but not total, pressure to avoid rulifying the standard, much as they would do in the face of an express directive from the Court instructing them, say, to avoid rulifying unless absolutely necessary.

As compared to a debatably existent rule against rulification, however, a standard against rulification is more likely to yield manageable and satisfactory forms of lower court discretion. For one thing, if a lower court determines that uncertain precedents do in fact create an anti-rulification rule, then, within that court's jurisdiction at least, rulifying discretion totally and completely disappears. With an anti-rulification standard, by contrast, all intermediate courts may proceed with the knowledge that rulification might be appropriate under some circumstances. In addition, standards against rulification better enable the Court to identify the conditions under which rulification may take place. If the only source of lower court discretion is doctrinal confusion regarding the presence of an anti-rulification rule, then the lower courts may leverage that confusion to steer their case law in unanticipated and undesirable directions. If, by contrast, the source of lower court discretion is a direct vesting of such discretion by the Court itself, then the Court can more effectively channel that discretion in the direction it wants it to go.

C. Anti-Publication Rules

Thus far, we have explored alternatives to anti-rulification rules that are friendlier to the development of rule-based doctrines in the lower courts. Here, by contrast, I consider a final possibility that, in my view, would deter rulification even more effectively than anti-rulification rules themselves. As we have previously seen,[150] even with anti-rulification rules in place, the accretion of precedents over time will tend to increase the specificity of legal doctrine. Anti-rulification rules slow down this process, but at the end of the day, even the most categorical rules against rulification cannot stop rulification from occurring at all. Today's decisions become tomorrow's precedents. And with enough precedents on the books, application of even mandatory standards will be far more constrained and far less holistic than the Court might wish for it to be.

Would the Court be able to stave off even these very gradual processes of rulification that anti-rulification rules are powerless to stop? In theory, yes. If gradual rulification inevitably results from precedential decision-making, the Court could nip it in the bud by prohibiting precedential opinions. Most federal courts of appeals regularly issue unpublished opinions, which carry minimal, if any, precedential weight. This practice is highly controversial: among other things, nonprecedential opinions (called summary orders in some circuits) have been criticized as unconstitutional,[151] unwise,[152] and unfair to the parties they bind.[153] But whatever

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[149] *See* Part V *infra*.

[150] See Part I.C *infra*.

[151] *See, e.g.*, Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000) (holding that a circuit rule according nonprecedential effect to unpublished opinions violate[d] Article III "because it purports to confer on the federal

their flaws, unpublished opinions do provide a means of resolving cases in the present without constraining the resolution of cases in the future.[154] And thus, if the Court were really serious about guaranteeing that each case arising under a standard enjoys case-by-case, holistic, and common-sensical review, then prohibiting the publication of opinions in these cases would prove an especially potent means of achieving that result.

Many readers, I suspect, would blanch at this proposal. Wholly apart from its potential illegality, the promulgation of anti-publication rules would seem an especially meddlesome and heavy-handed move for the Court to make. Why should the lower courts be told how to handle their own business? Can't they figure out for themselves whether or not to issue a precedential opinion in a given case? Or, put somewhat differently, wouldn't anti-publication rules severely impair lower courts' abilities to develop and elaborate on Supreme Court precedents in useful and beneficial ways?

You can probably see where I am going with this. If rules against publication strike you as absurd, then rules against rulification ought at least to strike you as problematic. Anti-publication rules, after all, would amount to nothing more than anti-rulification rules in a super-strong form. Whereas anti-rulification rules limit a lower court's power to make law for itself, anti-publication rules would totally destroy it. Thus, many of our objections to rules against publication would apply to rules against rulification as well, albeit in somewhat muted form. The judicial system derives value from letting lower courts make law about what Supreme Court standards entail. And for the same reasons that anti-publication rules would eliminate that value, anti-rulification rules would substantially reduce it.

CONCLUSION

Any system of adjudication must reconcile two basic tasks. The first is resolving individual cases, the second is the task of shaping and enunciating controlling norms of law. These two tasks, as many commentators have noted, rest in uneasy repose. Efforts to ensure the fair and just resolution of cases often come at the expense of promoting the sound development of the law, and vice versa. What is good for the parties to a particular dispute may be bad for the doctrine writ large; what is good for the doctrine writ large may be bad for the parties to a particular dispute. Many classic disputes over the judge's role boil down to this basic tradeoff:

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courts a power that goes beyond the 'judicial'"), *vacated as moot on reh'g en* banc, 235 F.3d 1054 (8th Cir. 2000); *see also* Jessie Allen, *Just Words? The Effects of No-Citation Rules in Federal Courts of Appeals*, 29 VT. L. REV. 555, 574-91 (2005) (arguing that nonprecedential opinions violate procedural due process).

[152] *See, e.g.*, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 788-89 (2003) (arguing that "[t]here is cause to doubt that those 400,000 non-precedential cases decided in the past two decades received [full consideration]").

[153] *See, e.g.*, Amy E. Sloan, *A Government of Laws and Not Men; Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 732 (2004) ("A system that permits the courts to exempt some opinions from this self-governing mechanism [of *stare decisis*] allows applying courts to make arbitrary decisions because they can ignore prior opinions on an unreasoned basis, or no basis at all.").

[154] That is not to say that lower courts have relied on unpublished opinions for this purpose. Rather, the primary attraction of the unpublished opinion to the lower court judge is that it requires less work to generate, and therefore allows for a more expeditious clearing of the docket. *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 414 (2013) (characterizing unpublished opinions as one of "several practices for deciding cases more quickly").

To what extent should courts act as the mere resolvers of disputes, and to what extent should they act as active shapers of the law?[155]

The questions examined in this Article implicate this tension between the dispute-resolution and law-formulation models of judicial work. Those who emphasize the dispute resolution model should find much to like in anti-rulification rules, which help to ensure comprehensive, holistic, and commonsensical judicial deliberation about each case that makes its way through the legal system. Those who favor the law declaration model, meanwhile, should find much to dislike in anti-rulification rules, whose very attempts to realize fairness at the retail level may frustrate courts' efforts to develop workable and effective doctrine at the wholesale level. And that is so, we have seen, because prohibiting the rulification of standards means inhibiting beneficial forms of thinking about and tinkering with the substance of the law itself. Additional complexities, to be sure, might underlie this basic proposition. But the parallels nonetheless strike me as important and real. Simply put, mandatory standards reflect the values of the dispute-resolver, whereas permissive standards reflect the values of the law-declarer.

The irony remains, though, that rules against rulification are rules—reflecting, in other words, the law-declarer's command that dispute-resolution matters most. That may seem inherently contradictory, though it need not be so. If one believes that only the Supreme Court should function as the exclusive developer of law within the judicial system, then it makes perfect sense for the Court to exert its law-developing authority in a manner that ensures fair and faithful dispute resolution in the courts below. But insofar as one rejects this vision of the federal judiciary—as I do—then rules against rulification are not so easily justified. That is not to say they have no place in a judicial system in which all courts have some say over the scope and substance of legal norms. But if the vision of our system is a collaborative one, in which the Supreme Court leads but does not go it alone in developing the law, then the Court should at least take care to promulgate its rules against rulification with due attention to the law-declaration downsides that they bring.

[155] *See, e.g.*, Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (opposing settlement practices, in part because they impede courts' ability to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them"); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1291 (1976) (contrasting the dispute resolution model with the norm-articulation model, while suggesting that the latter has become ascendant); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 655, 668-69 (2012) (noting that the "Court has in significant measure embraced the premises of the law declaration model," as evidenced by its newfound exercise of "wide-ranging agenda-setting freedom to determine what issues are to be (or not to be) decided, irrespective of the wishes of the litigants").