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Rules Against Rulification

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. Less well 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 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 sheds only limited light on the special problems that anti-rulification rules present. This Article addresses these problems head-on, disentangling the sometimes-unintuitive consequences that follow from the Court's adoption of anti-rulification rules, while also offering practical insights as to when and how these rules should be deployed. Among other things, the Article points out that anti-rulification rules, while useful in some circumstances, can carry the surprisingly maximalist consequences of freezing the development of the law and constraining the methodological choices of lower court actors. In addition, the Article sets forth some prescriptive suggestions regarding the creation and detection of anti-rulification rules, proposing, for instance, that the Court should proceed cautiously before pronouncing rules against rulification and that lower courts should insist on express prohibitions from the Court before deeming themselves barred from the rulification endeavor.

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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] Most cases that reach the Court's docket present some version of this design dilemma, and virtually every opinion that the Court issues reflects some determination as to where on the rule/standard spectrum its holding ought to lie.

The choice between rules and standards sometimes gives rise to a second choice, which materializes 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, un-"rulified" form? Put differently, the Court must choose between adopting a *permissive standard*, whose application may be assisted by the development of ancillary rules, or a *mandatory standard*, whose content is fortified against future doctrinal development 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,[3] which, as defined by the 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."[4] 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*.[5] In so holding, the Florida court identified several criteria for evaluating the drug detection credentials of canine cops: among other things, the government bore the burden of adduc-

1. *See infra* note 19.

2. 133 S. Ct. 1050 (2013).

3. *Id.* at 1053.

4. 462 U.S. 213, 238 (1983). Rather than tethering probable cause to the presence of precise, outcome-determinative criteria, the Court in *Gates* 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.*

5. *Harris*, 133 S. Ct. at 1055.

ing "the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog."[6] Applying this highly specific minimum-showing requirement, the state court went on to hold that the police lacked probable cause to conduct the search.[7]

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."[8] In this way, the state court had employed the "antithesis of a totality-of-the-circumstances analysis," as it had not allowed evidentiary deficiencies as to a dog's training credentials to "be compensated for . . . by a strong showing as to . . . other indicia of reliability."[9] The "inflexible checklist," simply put, was not "the way to prove reliability."[10] 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."[11]

The Supreme Court's disapproval of the lower court's decision encompassed not just a *substantive* disagreement with the conclusion that the police 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 into each individual canine-based search; 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 embracing an anti-rulification rule, making clear that the *Gates* standard was mandatory rather than permissive as applied to sniff-search probable cause review. Lower courts may not, according to this rule, attempt to objectify the standard's operation across broad categories of future sniff-search cases. Rather, they must take care to preserve the standard in its present-day, un-rulified form.[12]

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6. Harris v. State, 71 So. 3d 756, 775 (Fla. 2011).

7. *Id.* at 775.

8. *Harris*, 133 S. Ct. at 1056.

9. *Id.* (second alteration in original) (quoting *Gates*, 462 U.S. at 233).

10. *Id.*

11. *Id.* at 1058.

12. A terminological point: unless otherwise stated, my use of the term "lower courts" is intended to encompass all courts that rank below the Supreme Court of the United States with re-

Rules against rulification are a curious breed. In one sense, they further many of the benefits associated with standards writ large. They guard against over-inclusive and under-inclusive doctrinal formulations and promote fairness on an individualized basis. They reduce the risk of legal obsolescence over time. They encourage the case-specific deliberation long associated with the common law method. At the same time, rules against rulification are themselves rules—rules that limit lower court involvement in the implementation of Supreme Court doctrine. When the Supreme Court promulgates a permissive standard, 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.[13] When, in contrast, a rule against rulification makes a standard mandatory rather than permissive, lower courts may do nothing more than apply that standard in a holistic and case-specific fashion, one that leaves no room for further specifying what the standard itself requires.

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 by means 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 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 that result. Invoking considerations related to doctrinal uncertainty, decisional experimentation, and geographic uniformity, among others, the Article will demonstrate that the Court might sometimes sensibly choose to adopt a standard on the one hand, while permitting its rulification on the other.

By introducing the concept of anti-rulification rules and offering a preliminary appraisal of their advantages and disadvantages, this Article aims to contribute to at least three ongoing areas of scholarly inquiry. The first involves the rules-standards problem itself. Beginning at least with the legal realists,[14]

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spect to judgments of federal law, including, but not limited to, state supreme courts, state appellate courts, U.S. circuit courts, and U.S. district courts.

13. 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 (2005). *See infra* Part I.B (describing the process in greater detail).

14. *See, e.g.*, ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115-20 (1922); *see also* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 977 (2009) ("Some of the early realists realized that rules and standards served different functions.").

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.[15] While not intervening directly in the longstanding rules-standards debate, this Article does shine new light on the issue by suggesting how choices between rules and standards at the Supreme Court level can end up affecting the development of law at the lower court level. Among other things, for instance, the Article suggests that when standards are permissive rather than mandatory, proponents of rules should sometimes be willing to tolerate the adoption of such standards by the Supreme Court itself, on the theory that permissive standards still leave room for lower courts to clear up uncertainties in the doctrine with rules of their own creation. Put another way, a standard adopted by the Supreme Court need not translate into totality of the circumstances review in every lower court case. Moreover, the articulation of a standard by the Supreme Court—if permissive rather than mandatory—may facilitate the Court's own fashioning of rules in a future set of cases.

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.[16] For this reason, 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.[17] This Article, however, offers an important caveat regarding this jurisprudential stance. I suggest that standards more comfortably jibe with minimalism when articulated in a way that permits the development of follow-on rules. The Court does not necessarily 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 the application of the standard. Rather, the more minimalist court 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. From a law-development perspective, that is, the minimalist virtues of standards will tend to dissipate when rules against rulification enter the picture: it is with

15. *See infra* note 19.

16. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix (1999).

17. *See infra* Part III.F.

permissive standards, but not mandatory standards, that the Court can effectively "leave things undecided."

Finally, in describing and examining the Court's existing 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 it oversees. The academic literature on this question has focused primarily on issues of statutory interpretation, inquiring into the possibility, reality, and desirability of according binding effect to various methods by which courts glean meaning from statutory texts. Scholars in this line of work have asked, for instance, whether the Court should require future interpreters of a statute to employ textualism over purposivism, prohibit lower courts' reliance on legislative history, or otherwise constrain the methods by which judges discern the meaning of statutory commands.[18] While this Article does not specifically engage with these questions, it may offer a new perspective on the problem, 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 current willingness to impose methodological constraints on lower courts' application of precedential standards can be reconciled with its current unwillingness to do the same when it comes to the interpretation of statutory texts.

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 in several different areas of Supreme Court doctrine. In doctrinal 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 *consequences* of rules against rulification, focusing on the various ways in which they influence the application and development of the Supreme Court's doctrinal commands. Among other things, the analysis suggests that rules against rulification tend to reduce the extent of over- and under-inclusiveness problems within a given area of law, while also helping to promote the appearance (though not necessarily the reality) of uniformity across the various sub-jurisdictions that the Supreme Court oversees. Rules against rulification also tend to enhance the decisional autonomy of trial courts, while correspondingly reducing the supervisory powers of their intermediate-level counterparts. And rules against rulifi-

18. *See infra* Part IV.B.2.

cation tend to restrict the extent to which lower courts may experiment with doctrine and, by extension, the extent to which the Supreme Court can learn from the lower courts' work. Anti-rulification rules, in short, can accomplish and frustrate a variety of different doctrinal objectives.

Part IV then raises and addresses 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 should lower courts determine whether the Supreme Court has imposed an anti-rulification rule? Here, I offer a variety of prescriptive suggestions. I posit, for instance, that the Court should take care to divorce its *methodological* justifications for a rule against rulification from its *substantive* criticisms of a particular rulification that a lower court has employed. I also suggest that lower courts should embrace a default presumption against the existence of rules against rulification, demanding from the Supreme Court a clear statement as to when it intends to propound a mandatory standard as opposed to a permissive one. But I also propose that when the Supreme Court has explicitly articulated anti-rulification rules, lower courts should not dismiss them as nonbinding dicta.

In Part V, I consider variations on the theme of anti-rulification rules, imagining and evaluating other doctrinal formulations that the Supreme Court might employ in attempting to control the manner in which lower courts apply standards to individual cases. I discuss, 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 whatsoever that concern 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 not find it in the analysis that follows. The reason 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 becomes identifying the considerations that weigh for and against their operation. But there is one definitive point that I do hope to establish: 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?[19] The distinction depends in large part on specificity.[20] The paradigmatic "rule" falls toward the high end of the specificity spectrum; it ascribes definitive consequences to the satisfaction of precise and determinate criteria.[21] "Must be at least five feet tall to ride," for instance, leaves little room for interpretation: if you are at least five feet tall, you can go on the ride;[22] if you are shorter than five feet, there is no use waiting in line. The paradigmatic "standard," by contrast, leaves many application-related details unresolved.[23] "Must be mature enough to ride," for instance, offers only a hazy definition of eligible riders. What does the sign 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 decision maker's judgment 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

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

20. *See, e.g.*, James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 130 (2012) ("Rules 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."); *see also* Kaplow, *supra* note 19, at 561-62 ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider.").

21. In the words of 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 19, at 58.

22. Logically speaking, "must be at least five feet tall to ride" establishes a necessary but not sufficient condition of ride eligibility. Strictly read, that is, the rule would not necessarily preclude a ride administrator from prohibiting admission to a six-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 commonsense understanding that it guarantees ridership to all individuals who are at least five feet tall.

23. Again, in 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." Sullivan, *supra* note 19, at 58.

"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. For that reason, we need not (and probably should not) bother to define a fixed point on the specificity spectrum that divides the realm of rules from the realm of standards.[24] The two categories simply facilitate discussion of something that is very much a matter of degree.[25]

B. The Rulification Process

In a precedential system, the initial pronouncement of a legal norm marks only the beginning of its development. As cases begin to arise under a nonspecific standard, courts must decide whether a particular set of facts satisfies the standard's triggering criteria. By rendering such decisions—which carry precedential force—courts will begin to elaborate on 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 that an individual does or does not meet the

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24. *See* Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 18 ("The 'specificity-generality continuum' may be treated, for simplification, as 'a dichotomy between "rules" and "standards."'" (quoting Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 258 (1974))).

25. 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 "guidance-specificity" of a court's holding. These two variables often work at cross-purposes: fact-specific reasoning yields generalized (standard-like) guidance, whereas generalized reasoning yields specific (rule-like) guidance. Suppose, for instance, that a court decides that a driver should be penalized because and only because she exceeded a rate of ninety miles per hour: abstracting away all other facets of the driver's driving, that is, the court treats the single fact of the driver's speed as reason enough to impose the penalty. That holding would reflect an affirmatively non-fact-specific analysis, but it would nonetheless create a highly specific rule for future cases—namely, that driving in excess of ninety miles per hour is categorically illegal. If, by contrast, the court had scrutinized multiple aspects of the particular driver's conduct—including, but not limited to, the rate of her speed—its opinion would have yielded less specific guidance for future decision makers. 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 level of instruction that the norm provides to its future appliers.

five-foot minimum are not likely to tell us significantly more about what the five-foot requirement permits and prohibits. For less specific standards, by contrast, common law adjudication stands ready to convert an open-ended pronouncement into a far more specific patchwork of rules.[26]

Return to the "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 standard can be immediately predicted: under virtually all plausible interpretations of the "mature enough" standard, 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 eight-year-old? A ten-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 twelve-year-old, while another application grants eligibility to an otherwise similar thirteen-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

26. This discussion draws on the work of 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 U. L.J. 691, 696 (2005) (noting that, as standards are applied over time, they "almost always become[] increasingly rule-like," and that "[t]his occurs because cases involve 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, 491 (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."). 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* Schauer, *supra* note 13,at 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 . . . ." (footnote omitted)); *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"); Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 106 (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"). It is these more conscious attempts at rulification that anti-rulification rules are most likely to prevent. *See infra* Part I.C.

applications of the standard. We will know, for instance, that being a teenager counts as a factor in favor of ride eligibility, 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 cut the other way. As these holdings continue to accrete, the judicially developed contours of the "mature enough" standard will become more and more apparent.[27] Eventually, anyone who digs into the relevant case law should be able to translate the initially articulated standard into a rule-like formulation. Moreover, 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 increase its rule-like character. This process of "rulifying" a standard is common and unobjectionable; indeed, it is a natural and recurring consequence of issuing opinions with precedential effect.[28]

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27. As Frederick 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 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).

28. This is a point that sometimes gets elided in the rules-standards literature. To take a recent example, Steven Calabresi and Gary Lawson have argued "that Justice Scalia is wrong to insist upon rules and only rules in adjudication in circumstances in which the Constitution clearly prescribes standards instead. . . . If the Constitution prescribes the exercise of relatively unconstrained judicial judgment in some contexts, that is its prerogative, however wise or unwise that prescription might be." Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. (forthcoming 2014), manuscript at 31, http://ssrn.com/abstract=2412025 [http://perma.cc/B7U5-TGVW]; *see also id.* at 14 (noting that "[t]here are numerous instances . . . in which Justice Scalia has firmly opted for a rule-like norm when the 'correct' originalist answer is either a standard or, at best, unclear"). But the various constitutional provisions they cite in support of their claim—for instance, the Excessive Fines Clause, the Fourth Amendment "reasonableness" requirement, and the Necessary and Proper Clause—do not actually "prescribe" the use of standards by courts; rather, they merely *employ* standards, without further specifying how courts should go about applying those standards to the facts of individual cases. Calabresi and Lawson appear to be reading rules against rulification into the constitutional text, where all the text actually reveals is a set of plain-vanilla standards that judges might or might not choose to rulify as they see fit.

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 a "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, whereas 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 someone who is "close to five feet in height and able to handle the demands of the ride," or by clarifying that riders need only be "reasonably tall" – she will now be creating law that conflicts with the original rule's substantive commands.[29] Instead of clearing up a point of uncertainty that a norm leaves open, the standard-ification process introduces substantive outcomes that the norm had purported to close off. The "five feet or taller" rule, for example, logically implied that *no* four-foot-eleven individuals could board the ride; with the new standard-ified command in place, however, some four-foot-eleven individuals can in fact make it on board. Thus, whereas rulifying standards merely adds paint to a canvas that a norm has left blank, standard-ifying rules removes paint that was already there.

None of this is to say that lower courts do not ever standard-ify the Supreme Court's rules. Examples of that process, too, are not difficult to find.[30] Nor is it to say that the standard-ification of rules is necessarily inconsistent

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Of course, further examination of Founding-era evidence might reveal that the framers understood the Constitution's standards to incorporate (albeit implicitly) a strong presumption against judicial rulification. *But see* THE FEDERALIST NO. 37 (James Madison) ("All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."). But given that merely articulating a standard is not the same as actually prohibiting rulification of that standard, the standard-like nature of various constitutional provisions does not on its own demonstrate that Justice Scalia's preference for rules is textually illegitimate.

29. I do not argue that the "standard-ification" of rules is impossible. Indeed, the phenomenon occurs all the time, as several scholars have documented. *See* Schauer, *supra* note 13, at 804-05 (collecting examples). 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 "rulify" its standards. *Cf.* Frederick N. Schauer, Editor's Introduction, *Llewellyn on Rules*, *in* KARL LLEWELLYN, THE THEORY OF RULES 24 (Frederick N. Schauer ed., 2011) ("The central feature of a rule, and one especially apparent when rules are compared to standards, is *entrenchment*, the firmly fixed instructions that will resist the urge on the part of an interpreter, applier, or enforcer to avoid the rule in the service of what the interpreter, applier, or enforcer believes the purpose behind the rule to be, or believes the best all-things-considered decision would be.").

30. *See, e.g.*, Schauer, *supra* note 13, 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 cri[sp] rules may have their edges rounded upon application, interpretation, or enforcement.").

with vertical stare decisis norms; even if rounding out the edges of a bright-line command creates some substantive inconsistencies with the Court's original instructions, there are still ways to characterize the change as something other than outright defiance of the instructions themselves.[31] But it is to suggest that, in light of the dictates of vertical stare decisis, lower courts face a lesser justificatory burden when attempting to move the doctrine in the direction of more specificity rather than less. A court might, for instance, permissibly declare that the "five-foot" rule requires measurements that include the height of a would-be rider's shoes, it might require that the controlling measurement occur within sixty days of the ride, and so on, all without having to explain away any seeming inconsistencies with the original set of instructions that the high court established. But these holdings render the rule more specific, not less. Any attempt, by contrast, to standard-ify the rule—by introducing, for example, a soft exception to the five-foot-tall requirement—can succeed only when the decision maker further demonstrates that the seemingly categorical five-foot minimum can in fact accommodate some riders who are less than five feet tall.[32] Under a strict stare decisis regime, then, highly specific rules are at

31. Perhaps, for instance, a lower court might suggest that a doctrinal norm that seems categorical on its face actually contains 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, when standard-ifying rules, a court 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 use 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 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 simply drifts along with the current, whereas the standard-ifier of rules must struggle to swim upstream.

32. 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 would stand in the way of a subsequent lower court's

least somewhat insulated against standard-ification in the courts subordinate to the rule's promulgator, whereas not-so-specific standards are inherently exposed to rulification in these subordinate courts. As a result, if the creator of a standard wants to prevent rulification, then 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 concerning the *method* with which to apply the standard. In the same way that a superior court demands adherence to the substantive standard it has adopted, it might also require applying that standard in a way that does not produce a body of ancillary rules. Continuing with our hypothetical, we might imagine the creator of the "mature enough to ride" standard stipulating that the maturity of a given rider must be evaluated on an individualized, case-by-case basis, according to the "totality of the circumstances," and without reliance on generalizations, presumptions, per se exemptions, and the like.[33] Higher courts could also strike down lower court precedents that have taken the doctrine too far up the specificity spectrum, identifying error in overly mechanical reasoning that does away with much of a standard's flexibility. Any sort of command along these lines qualifies as a "rule against rulification"; the creator of the standard not only prescribes a substantive standard for future courts to apply, but also takes the further step of instructing future courts *not* to rulify the standard when applying it to concrete cases.[34]

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attempt to undo its own previously adopted rulification of a standard. For instance, if a lower court thinks better of a previous elaboration on the "mature enough to ride" requirement, then it might well be able to overrule its prior precedent and reduce the overall specificity of its doctrinal commands. What the lower court cannot do, however, is displace a higher court rule with a standard of its own. It could not, for instance, declare that it would prefer to apply a "reasonably tall" requirement instead of the "five feet tall" requirement that the Court has instructed it to apply.

33. As the next Part will reveal, many of the Supreme Court's anti-rulification rules take the form of instructions to consider "the totality of the circumstances" when applying a standard to the facts of a case. But while a mandated totality of circumstances inquiry reflects one potential formulation of a rule against rulification, the Court can use (and has indeed used) other formulations as well.

34. For the more visually oriented, the following diagrams offer another illustration of the basic idea. Suppose that some doctrinal command, A, lies toward the "standard" end of the rule/standard spectrum. If A is a permissive standard, we may expect some lower courts to adopt successive rulifications of A – call them $R_1(A)$, $R_2(A)$, $R_3(A)$, etc. – whose cumulative effect is to move the operative doctrine further toward the "rule" end of the spectrum, as follows:

At this point, an important question emerges: won't anti-rulification efforts always prove futile in the end? After all, as originally described, rulification occurs as a natural byproduct of precedent-driven decision making. 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 elaborations on the standard, and these elaborations should eventually come to light regardless of whether courts articulate their holdings in terms of generalizations, presumptions, and other rule-like norms. If the process really does work in this manner, then the only viable means of prohibiting the rulification of a standard would be to prohibit lower courts from creating any precedents about the standard at all. Absent this extreme solution,[35] 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. 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 in a precedent-driven system, the pace at which it occurs can still be controlled. Suppose that Suzie Q, a thirteen-year-old veteran of the fairground, wishes to experience a ride that is 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. 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 this 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 *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 age thirteen

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$A - - \rightarrow R_1(A) - - - \rightarrow R_2(A) - - - \rightarrow R_3(A) \ldots$ *(rulification process)*

Standard ->*Rule*

If *A* is a mandatory standard, by contrast, any such rule-ward movement will be barred, and the relevant doctrine will remain in the form of *A*, relatively near the point on the rule/standard spectrum at which it originally existed. (Here the anti-rulification rule is represented by a closed bracket, which "blocks" any potential movement of *A* in a rule-ward direction.)

$A - - \rightarrow]$ *(blocked by rule against rulification)*

Standard ->*Rule*

35. For an extended discussion of this possibility, see *infra* Part V.C.

and up. 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 of 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. This point, 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 will be less likely to resolve *In re Suzie Q* according to categorical reasoning (that is, "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 (that is, "Suzie Q gets to go on the ride because, all things considered, she seems like a pretty mature kid"). The rule against rulification therefore tends to reduce the extent of future substantive guidance provided by the decision, yielding a slower rate of rulification over time. For this reason, anti-rulification rules can in fact have significant practical effects. At the very least, they ensure that standards remain static over the short run, even if they inevitably evolve into rules over the long run.

D. Subtleties, Nuances, and Complicating Factors

Lurking beneath the seemingly simple terms "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 elucidate the core features of the concepts introduced. Before moving from tidy theory to messy reality, however, we should expose some of these simplifying assumptions; this endeavor reveals some difficulties that arise when one attempts 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 rule/standard frame with scalar comparisons of specificity, determining the extent to which one norm is more or less specific than another is not always a

straightforward exercise.[36] 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 "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 increase in specificity can happen when paradigmatic standards become paradigmatic rules. But it can also happen, for instance, when courts make specific rules even more specific (for example, "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 courts make highly amorphous standards somewhat less so (for example, "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 that (a) 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 lower courts 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 rulification of the standard. Sometimes, the Court may reject a *particular* rulification of a standard without further indicating whether its rejection of that rulification extends to alternative rulifications as well. In these and other cases, Supreme Court precedents leave anti-rulification rules debatably—and not definitively—present in the doctrine. In Part III of the Article, I will consider this problem in greater detail. For now, it suffices to note that observ-

36. 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.

ers will not always agree on 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 decision making. But this, too, is an oversimplification. Courts do not always abide by 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. 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, and results-oriented reasoning, to name a few. 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.

Even so, as long as rules against rulification *sometimes* operate as advertised, an investigation into their legal and doctrinal character strikes me as well worth conducting. The project becomes fruitless, in other words, only on the premise that legal doctrine exerts no force whatsoever on judicial decision making. That premise strikes me as implausible.[37] At the same time, nothing in the pages that follow should be taken to imply a total faith in the constraining nature of legal doctrine. Rather, the analysis proceeds on the premise that rules against rulification, like many other doctrinal rules, will at least sometimes be taken seriously by the lower courts tasked with applying Supreme Court law.[38]

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. This Part has two aims.

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37. That is especially so, moreover, in the sorts of cases on which this Article focuses: run-of-the-mill lower court cases that lack politically salient dimensions. *Cf.* Michael J. Klarman, Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 138 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").

38. One final subtlety worth pointing out: in studying the use of anti-rulification rules by the Supreme Court, I do not mean to suggest that other institutional actors are not capable of producing similar rules. Most obviously, state supreme courts can issue their own anti-rulification rules in connection with supreme pronouncements of state law. Of equal importance, both state supreme courts and U.S. circuit courts can attach anti-rulification rules to federal-law standards that the Supreme Court itself has treated as permissive. In other words, even if the Court has opted not to yoke a substantive standard to an anti-rulification rule, nothing prohibits an intermediate court from prohibiting intrajurisdictional trial courts from rulifying those standards for themselves. Legislatures might also adopt rules against rulification in connection with whatever substantive standards they have enacted into law.

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. In other words, the Part attempts to show both that the Court has injected anti-rulification rules into a variety of doctrinal areas and that lower courts at least sometimes pay attention to those rules when applying the substantive standards to which they attach.

A. The Supreme Court's Commands

Florida v. Harris provides a nice introductory example of an anti-rulification rule. As we have already seen, the Court in *Harris* made clear that, in applying the probable cause test, lower court judges must reject "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."[39] Similar pronouncements have arisen in other areas of Fourth Amendment law. For instance, in evaluating the voluntariness of a defendant's consent to a search, the Court has "eschewed bright-line rules" and "disavowed any 'litmus-paper test[s],'" favoring instead a "traditional contextual approach" that accommodates the "endless variations in the facts and circumstances" that individual cases present.[40] It has done the same in defining the conditions under which citizens' encounters with the police count as a Fourth Amendment "seizure."[41] And in asking whether exigent circumstances justify a warrantless search, the Court has recently called for a "finely tuned

39. Florida v. Harris, 133 S. Ct. 1050, 1055-56 (2013). *Harris*'s anti-rulification commands accord with other Supreme Court descriptions of the probable cause standard. *See, e.g.*, 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."); Illinois v. Gates, 462 U.S. 213, 232, 235 (1983) (rejecting a previous formulation of the probable cause standard as a "complex superstructure of evidentiary and analytical rules," and instead describing 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").

40. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (quoting Florida v. Royer, 460 U.S. 491, 506 (1983); Michigan v. Chesternet, 486 U.S. 567, 572-73 (1988)); *see also* 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.").

41. 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, and insisting that lower courts should "consider all the circumstances surrounding the encounter" in applying the applicable test).

approach"[42] that evaluates "each case of alleged exigency based 'on its own facts and circumstances.'"[43]

Other areas of criminal procedure 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.'"[44] 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."[45] In describing the reasonableness standard that defines the Sixth Amendment right to effective assistance of counsel, the Court has emphasized that "specific 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.[46] Moreover, in articulating the boundaries of so-called "plain error" doc-

42. Missouri v. McNeely, 133 S. Ct. 1552, 1559 (2013) (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 347 n.16 (2001)) (internal quotation marks omitted).

43. *Id.* (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)); *cf.* Mincey v. Arizona, 437 U.S. 385, 395 (1978) (rejecting the state court's attempt to adopt a categorical "murder scene exception" to the warrant requirement, and concluding that the warrantless search of the defendant's apartment "was not constitutionally permissible simply because a homicide had recently occurred there").

44. Perry v. New Hampshire, 132 S. Ct. 716, 724 (2012) (quoting Neil v. Biggers, 409 U.S. 188, 201 (1972)); *see also* Simmons v. United States, 390 U.S. 377, 384 (1968) (holding that, when assessing police identification procedures, "each case must be considered on its own facts").

45. Holland v. Florida, 560 U.S. 631, 649-50 (2010) (quoting Baggett v. Bullitt, 377 U.S. 360, 375 (1964); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944)) (internal quotation marks omitted).

46. Cullen v. Pinholster, 131 S. Ct. 1388, 1406 (2011) (quoting Strickland v. Washington, 466 U.S. 668, 688-89 (1984)) (internal quotation marks omitted)); *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) (opinion of Stevens, J.) (internal quotation marks omitted)). 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, 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) (arguing that "the distinction between misrepresentations and omissions, on which the majority relies in classifying lower court precedent, implies a categorical rule that is inconsistent with *Strickland*'s requirement of a case-by-case assessment of an attorney's performance").

trine (governing 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 it has found to be flatly inconsistent with the "case-specific and fact-intensive basis" on which plain error analysis is supposed to proceed.[47]

The Court has also invoked anti-rulification rules in civil cases. When it first set forth the three-part balancing test of *Mathews v. Eldridge*,[48] for instance, the Court made clear that the open-ended nature of the test reflected "the truism that '"[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[49] Following up on this point some twenty years later, the Court invalidated a lower court's 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.[50] Or as the Court has more recently put it, "[b]ecause the requirements of due process are 'flexible and cal[l] 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."[51]

Consider also the Court's recent description of the "equitable principles" governing the issuance of permanent injunctions in civil cases. In *eBay v. MercExchange*, the Court defined these principles in terms of a "four-factor test" and then went on to fault both lower court decisions in the case for

47. Puckett v. United States, 556 U.S. 129, 142 (2009) (quoting United States v. Young, 470 U.S. 1, 16 n.14 (1985)). 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). 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.

48. 424 U.S. 319 (1976). 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." *Id.* at 335.

49. *Id.* at 334 (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961)) (alteration in original); *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.").

50. Gilbert v. Homar, 520 U.S. 924, 931 (1997).

51. Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (alteration in original) (citation omitted) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

applying this test in an unduly rulified way.[52] 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."[53] The court of appeals had erred, meanwhile, by adopting a "general rule" that was too accepting of injunctive relief.[54] Though each court had reached a different result, both had committed the same methodological mistake: "Just as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals erred in its categorical grant of such relief."[55] 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."[56] Going forward, as Justice Kennedy's concurring opinion put the point, courts were to apply the "well-established[] four-factor test—without resort to categorical rules."[57]

Various substantive standards in intellectual property law have also been yoked to rules against rulification. 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."[58] These precedents, the Court emphasized, "set forth an expansive and flexible ap-

52. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 393-94 (2006) (articulating the "traditional test" for determining when a defendant is entitled to injunctive relief). The Court has applied a somewhat similar test in connection with preliminary injunctions, one that also purports to discourage rulification in the courts below. *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) ("In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987))). *See generally* Samuel L. Bray, The Supreme Court and the New Equity, 68 VAND. L. REV. (forthcoming 2015), manuscript at 34-35, http://ssrn.com/abstract=2436614 [http://perma.cc/9LJ7-2T2W] (suggesting that *Winter* "extend[ed] *eBay* to preliminary injunctions").

53. *eBay*, 547 U.S. at 393.

54. *Id.* at 393-94.

55. *Id.* at 394.

56. *Id.* at 393. *But see* Holland v. Florida, 560 U.S. 631, 669 (2010) (Scalia, J., dissenting) (noting that the Court had previously "rejected th[e] canard" that "all general rules are *ipso facto* incompatible with equity").

57. *eBay*, 547 U.S. at 395 (Kennedy, J., concurring); *see also* Meyer v. Portfolio Recovery Assocs., 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"); Richard Dannay, *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").

58. KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 427-28 (2007).

proach" to obviousness determinations, which should not be "transform[ed] . . . into a rigid rule that limits the obviousness inquiry."[59] The Court has sung a similar tune in defining copyright law's "fair use" defense, admonishing that the analysis of fair-use claims is "not to be simplified with bright-line rules."[60] Congress, in short, had "eschewed a rigid, bright-line approach to fair use" when it codified the defense,[61] 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."[62]

Finally, consider the Court's Takings Clause doctrine. While the Court has characterized some types of government conduct as "per se" takings,[63] it has emphasized that outside the context of these "per se" categories, takings analysis must proceed in a manner that accounts for the "particular circumstances of each case."[64] In *Arkansas Game & Fish Commission v. United States*, for instance, a lower court had held that recurrent, though temporary, floodings of land could never constitute a taking of property.[65] 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."[66] 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

59. *Id.* at 415, 419.

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

61. *Id.* at 584 (quoting Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 499 n.31 (1984)).

62. *Id.* at 581.

63. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (creating a per se rule for "total regulatory takings"); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (creating a per se rule for physical takings).

64. United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958); *see also* United States v. Caltex, Inc., 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.").

65. Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1374, 1376 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

66. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. at 521.

rules.'"[67] The proper approach, in other words, called for "situation-specific factual inquiries."[68]

In sum, several different areas of Supreme Court doctrine,[69] spanning both constitutional and non-constitutional 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 attention to these commands once they have been put in place.

B. The Lower Courts' Responses

This Part highlights lower court cases that cite anti-rulification rules as reasons not to rulify a standard. In considering a potential rule-like application of a standard, the courts deciding these cases have invoked the authority of an anti-rulification rule as precluding such an approach. These examples cannot definitely prove that anti-rulification rules carry real-world force. Sometimes,

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67. *Id.* at 521 (quoting *Cent. Eureka Mining Co.*, 357 U.S. at 168).

68. *Id.* at 518.

69. There are other examples. In the securities fraud context, for instance, the Court has recently held that determining "the materiality of adverse event reports" under Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 "cannot be reduced to a bright-line rule" and instead requires a "contextual inquiry." Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1313-14, 1321 (2011). Similarly, in the employment discrimination context, the Court has held that the remedy-related provisions of Title VII "do not permit a court to announce a categorical rule precluding an expressly authorized form of relief as inappropriate in all cases in which the employee has signed an arbitration agreement," because the relevant statutory language "obviously refer[s] to the trial judge's discretion in a particular case to order reinstatement and award damages in an amount warranted by the facts of that case." EEOC v. Waffle House, Inc., 534 U.S. 279, 292-93 (2002); *see also id.* at 304 n.8 (Thomas, J., dissenting) ("I agree with the Court that, in order to determine whether a particular remedy is 'appropriate,' it is necessary to examine the specific facts of the case at hand. For this reason, the statutory scheme does not permit us to announce a categorical rule barring lower courts from *ever* awarding a form of relief expressly authorized by the statute. When the same set of facts arises in different cases, however, such cases should be adjudicated in a consistent manner. Therefore, this Court surely may specify particular circumstances under which it would be inappropriate for trial courts to award certain types of relief, such as victim-specific remedies." (citation omitted)). And just this past term, the Court rejected the Federal Circuit's approach to awarding attorneys' fees under the Patent Act, characterizing it as an "overly rigid" formulation that "superimpose[d] an inflexible framework onto statutory text that is inherently flexible," and stipulating that courts should conduct the fee-related inquiry "in the case-by-case exercise of their discretion, considering the totality of the circumstances." Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749, 1756 (2014); *see also* Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014) (noting that "[o]ur opinion in *Octane Fitness* . . . rejects [the Federal Circuit's] framework as unduly rigid").

for instance, lower courts might invoke the Court's anti-rulification rules as post-hoc rationalizations for holdings that they were already inclined to issue.[70] Nevertheless, the examples provide some evidence that anti-rulification rules do at least place some weight on the methodological scale, rendering judges less inclined to rulify the Supreme Court's standards than they otherwise would be.

Consider first the lower courts' applications of the Fourth Amendment probable cause standard. In *United States v. Brundidge*,[71] 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."[72] Such a rule was inappropriate, the court reasoned, not only because it lacked direct support in prior cases,[73] but also, and more fundamentally, because the Supreme Court has "criticiz[ed] per se rules for the determination of probable cause."[74] 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.[75]

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70. Sometimes, in fact, 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 violation of a rule against rulification).

71. 170 F.3d 1350 (11th Cir. 1999).

72. *Id.* at 1353.

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

74. *Id.*

75. 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, 170-71 (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). Such claims have also involved the presence of Fourth Amendment seizures. *See, e.g.*, United States v. Stephens, 232 F.3d 746, 747-48 (9th Cir. 2000) (O'Scannlain, J., dissenting from denial of rehearing en banc) (admonishing the majority for adopting a per se rule contrary to controlling Supreme Court precedent); United States v. Broomfield, 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

Similar results appear in cases concerning the right to effective assistance of counsel, where the Court has warned against the use of specific guidelines to assess the reasonableness of an attorney's conduct.[76] In *Harrington v. Gillis*,[77] for example, the Third Circuit reviewed the ineffective-assistance claim of a habeas petitioner, who argued that his defense attorney's failure to appeal from a criminal conviction violated the Sixth Amendment. The state court had rejected this claim,[78] invoking a prior case in which it had held 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."[79] But the Third Circuit rejected the state court's reasoning, holding that it contravened clearly established federal law. The problem, again, had to do with the *method* of analysis reflected by the state court's approach. The Supreme Court had "definitively rejected any per se rules for adjudicating claims of ineffective assistance of counsel,"[80] and the state court had attempted to apply a per se rule. Put another way, the state court had treated one and only one 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*."[81]

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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"). Finally, these claims have involved the presence of exigent circumstances justifying a warrantless search. *See, e.g.*, United States v. Bradley, 488 F. App'x 99, 103 (6th Cir. 2012) ("[W]e have . . . established that the appropriate inquiry when evaluating exigent circumstances is to consider the totality of the circumstances . . . ."). Relatedly, lower courts have 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))).

76. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1407 (2011) (noting that "[t]he Court of Appeals erred in attributing strict rules to this Court's recent case law").

77. 456 F.3d 118 (3d Cir. 2006).

78. *Id.* at 126.

79. Commonwealth v. Harmon, 738 A.2d 1023, 1024 (Pa. Super. Ct. 1999).

80. *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))).

81. *Harrington*, 456 F.3d at 126 (quoting Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Roe v. Flores-Ortega, 528 U.S. 470, 478-79 (2000)) (internal quotation marks omitted). 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); Com-

Procedural due process doctrine also provides examples of lower courts taking seriously the Supreme Court's anti-rulification commands. In *McClure v. Biesenbach*,[82] for instance, the Fifth Circuit made short shrift of a claim that due process required pre-deprivation 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 and private interests."[83] 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,"[84] 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."[85]

Consider, too, the way in which the Court's *eBay*[86] decision has affected subsequent lower court analyses of equitable remedies. In *Sanders v. Mountain America Federal Credit Union*, 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).[87] 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

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monwealth v. Philistin, 53 A.3d 1, 26 (Pa. 2012) (noting that "specific guidelines are not appropriate" for determining whether an "attorney's representation amounted to incompetence" (quoting Harrington v. Richter, 131 S. Ct. 770, 788 (2011)) (internal quotation marks omitted)); State v. Starks, 833 N.W.2d 146, 164 (Wis. 2013) (acknowledging "that *Strickland* [does not] impose[] a constitutional duty upon counsel to investigate"). 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'" (quoting Holland v. Florida, 130 S. Ct. 2549, 2563 (2010))); 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.").

82. 355 Fed. App'x 800 (5th Cir. 2009).

83. *Id.* at 806 n.2; *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))).

84. Ching v. Mayorkas, 725 F.3d 1149, 1157 (9th Cir. 2013).

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

86. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

87. 689 F.3d 1138, 1143-45 (10th Cir. 2012).

to the district court's granting of such relief.[88] 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."[89] *eBay*'s anti-rulification rule, in other words, helped to bolster the court's conclusion that "categorical relief is beyond the reach of the courts' equitable powers."[90] 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."[91]

Case law involving both the Patent Act's "obviousness" standard and the Copyright Act's fair-use defense also provides examples of lower courts' adherence to the Supreme Court's anti-rulification rules. The Federal Circuit recently rejected an inventor's claim of nonobviousness as incorrectly 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."[92] Similarly, the Second Circuit has refused to adopt a rule under which a defendant's bad-faith appropriation of copyright material would be

88. *Id.* at 1143.

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

90. *Id.* at 1143-44.

91. *Id.* at 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, *see, e.g.*, 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* (quoting Miller v. Gammie, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))); *Robert Bosch*, 659 F.3d at 1148; 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 shortcuts to support a request for a permanent injunction." *Robert Bosch*, 659 F.3d at 1148-49 (alteration in original) (quoting *eBay*, 547 U.S. at 393). 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 (quoting Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2757 (2010)).

92. Altana Pharma AG v. Teva Pharm. USA, Inc., 566 F.3d 999, 1008 (Fed. Cir. 2009) (quoting KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398, 419 (2007)).

"dispositive of a fair use defense,"[93] citing the Supreme Court's "warning against the application of 'bright-line rules' in fair use analysis."[94]

Finally, in *Quebedeaux v. United States*, the Court of Federal Claims confronted a takings claim arising from government-induced flooding of private land.[95] 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.'"[96] *Quebedeaux*, by contrast, raised the question of *how frequent* such floodings needed to be in order to implicate the Fifth Amendment's just-compensation requirement. 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 lower court rejected this approach as inconsistent with the "multi-factored, factually-intensive nature of the takings analysis."[97] 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."[98]

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93. NXIVM Corp. v. Ross Inst., 364 F.3d 471, 479 (2d Cir. 2004).

94. *Id.* (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994)); *see also* 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.'" (quoting *Campbell*, 510 U.S. at 577-78)); 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*, 510 U.S. at 577)); Dr. Seuss Enters. 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 Enters. 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 (emphasis omitted)). For examples from the patent law context, see *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1374 n.3 (Fed. Cir. 2008) (quoting *KSR*, 550 U.S. at 419), in which the court stated that it was "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'"; and *Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1118 (Fed. Cir. 2008), in which the court found 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."

95. 112 Fed. Cl. 317 (2013).

96. Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 521 (2012) (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958)).

97. *Quebedeaux*, 112 Fed. Cl. at 321, 323-24.

98. *Id.* at 324.

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. Instead, lower courts rejected rulifications that the Court had never before considered. They did so because they read the applicable Supreme Court precedents to establish not just a substantive prohibition on the use of one particular rulification of a standard but also a methodological prohibition on any and all attempts to apply the standard in rule-like terms. It was, in other words, the act of formulating a standard in rule-like terms, rather than any one particular formulation, that the lower courts deemed off-limits. In that sense, they were taking both substantive and methodological guidance from the Supreme Court's rules against rulification.

C. The Alternative Approach

By now, the reader may be thinking: "Wait a minute! These examples stand for only the unremarkable proposition that the Supreme Court sometimes adopts standards. That's hardly worth writing home about, much less in law-review-article form."[99] 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 standard standing alone (what I have called a "permissive standard"). I have already offered conceptual support for that point, but let me briefly offer a few concrete examples of permissive standards at work.

One permissive standard resides within *Miranda* doctrine. Although the *Miranda* warning itself reflects a bright-line rule, courts must still determine *when* such warnings are necessary. 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."[100] 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.[101] This move, in turn, has led some courts to rulify important aspects of their

99. The reader may also be thinking that even if mandatory standards are meaningfully different from permissive standards, the choice between mandatory and permissive standards implicates the same basic set of considerations as does the first-order choice between rules and standards. I take up that set of concerns in the next Part.

100. Berkemer v. McCarty, 468 U.S. 420, 428 (1984).

101. 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) (per curiam).

doctrine concerning the scope of custodial interrogations. The Third Circuit, for instance, has stipulated that admissibility-related questioning of individuals at border checkpoints qualifies as per se noncustodial for *Miranda* purposes.[102] Relatedly, several circuits have ruled that valid *Terry* stops do not normally give rise to custodial circumstances.[103] 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 occurring outside of the prison."[104] Moreover, the Court itself has deemed questioning pur-

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102. United States v. Kiam, 432 F.3d 524, 530 (3d Cir. 2005) ("[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.") (citation omitted) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). For a different, more standard-oriented approach, see *United States v. FNU LNU*, 653 F.3d 144, 154 (2d Cir. 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").

103. *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* . . . ." (quoting United States v. Streifel, 781 F.2d 953, 958 (1st Cir. 1986))); United States v. Perdue, 8 F.3d 1455, 1464 (10th Cir. 1993) ("The traditional view . . . is that *Miranda* warnings are simply not implicated in the context of a valid *Terry* stop. This view has prevailed because the typical police-citizen encounter envisioned by the Court in *Terry* usually involves no more than a very brief detention without the aid of weapons or handcuffs, a few questions relating to identity and the suspicious circumstances, and an atmosphere that is 'substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*.'" (citations omitted)); United States v. Bautista, 684 F.2d 1286, 1291 (9th Cir. 1982) ("*Terry* stops, though inherently somewhat coercive, do not usually involve the type of police dominated or compelling atmosphere which necessitates *Miranda* warnings.").

104. 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 that "the determination of custody should focus on all of the features of the interrogation." *Id.* at 1192. But that language comes alongside 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."). I am therefore 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* warnings) make sense with respect to other types of "custody" claims.

suant to "ordinary traffic stops" to be noncustodial.[105] These rulifications of *Miranda*'s definition of "custody" remain good law today, notwithstanding the fact that *Miranda* originally defined *Miranda*'s applicability in the form of a standard rather than a rule.

A second example involves the identification of circumstances triggering application of the Sixth Amendment right to counsel. In a series of cases beginning with *Massiah v. United States*, the Supreme Court has held that the right to counsel prohibits "government agents" from covertly eliciting testimony from a defendant in the absence of counsel once a criminal prosecution has begun.[106] Yet the Court has offered little guidance as to who counts as a government agent for *Massiah* purposes[107]—what to do, for instance, about government informants acting on their own initiative?—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."[108] Other circuits, by contrast, use a standard-based approach, identifying *Massiah*-worthy government agents by reference to the "facts and circumstances" of each case.[109] Therefore, 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 prohibited nor required.

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105. *Berkemer*, 468 U.S. at 440 (1984).

106. 377 U.S. 201, 206-07 (1964); *see also* United States v. Henry, 447 U.S. 264, 270 (1980) ("The question here is whether under the facts of this case a *Government agent* deliberately elicited incriminating statements . . . within the meaning of *Massiah*." (emphasis added) (internal quotation marks omitted)).

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

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

109. *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." (alteration in original) (quoting Depree v. Thomas, 946 F.2d 784, 793-94 (11th Cir. 1991))); *Matteo*, 171 F.3d at 906 (McKee, J., concurring) ("[T]he 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*.").

One further example comes from administrative law. In *United States v. Mead Corp.*,[110] the Supreme Court expounded on its holding in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[111] which set forth the basic framework for reviewing agencies' interpretations of their enabling statutes.[112] Specifically, *Mead* held that *Chevron* deference applies only when an agency has exercised validly delegated powers to act with "the force of law."[113] 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.*[114] This distinction – between agency 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.[115] In a subsequent analysis of the decision, however, Thomas Merrill argued persuasively that the lack of clarity in *Mead*'s force of law requirement 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.[116] Put another way, as substantively vague as the force of law requirement might have seemed, the Court had not prescribed along with it a hard-and-fast rule against rulification. So Justice Scalia's concerns about doctrinal vagueness were in fact overstated, as both the Supreme Court and lower courts remained free to create sharp-edged rulifications of *Mead*'s open-ended "force of law" requirement.

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110. 533 U.S. 218 (2001).

111. 467 U.S. 837 (1984).

112. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 986 (2005) ("*Chevron* established a familiar two-step procedure for evaluating whether an agency's interpretation of a statute is lawful.").

113. *Mead*, 533 U.S. at 221.

114. 323 U.S. 134 (1944); *see also* Hagans v. Comm'r of Social Sec., 694 F.3d 287, 294-95 (3d Cir. 2012) ("Where *Chevron* deference is inappropriate, a court may instead apply a lesser degree of deference pursuant to *Skidmore v. Swift & Co.*"). *But see* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 85 (2011) (suggesting, on the basis of several empirical studies, that "a court's choice of which doctrine to apply in reviewing agency action is not an important determinant of outcomes in the Supreme Court or the circuit courts").

115. *Mead*, 533 U.S. at 245-46 (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.").

116. Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 833-34 (2002). 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*.

Merrill emphasized the rulifying potential of the Supreme Court itself, rather than the circuit courts tasked with applying the "meta-standard" of *Mead* in the mine run of cases.[117] But there is no reason why lower courts cannot start "brush[ing] away the fuzziness" for themselves while awaiting further guidance from above. And indeed, lower courts have attempted to do just that. Building on a suggestion offered in *Mead* itself,[118] most courts have held that legislative rules enacted pursuant to notice-and-comment procedures are presumptively entitled to *Chevron* deference, thus establishing a safe harbor for agencies that want to ensure deferential review of the interpretations they have propounded.[119] Furthermore, various lower courts have set forth rules of their own concerning more specific categories of agency action—holding, for instance, that *Chevron* deference generally applies to positions embraced in Treasury Department regulations,[120] FEC advisory opinions,[121] and precedential opinions of the Board of Immigration Appeals (BIA),[122] and that *Skidmore* deference generally applies to positions set forth in IRS Revenue Rulings,[123]

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117. *Id.* at 821 ("As the Court gradually decides cases in these intermediate areas, it should eventually transform the meta-standard into something more like a complex meta-rule, thereby reducing lower court discretion.").

118. *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.").

119. *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."); U.S. Freightways Corp. v. Comm'r, 270 F.3d 1137, 1141 (7th Cir. 2001) ("After *Mead*, we know that we give full deference under [*Chevron*] only to regulations that were promulgated with full notice-and-comment or comparable formalities.").

120. Mayo Found. v. United States, 568 F.3d 675 (8th Cir. 2009) ("Treasury Regulations interpreting the Internal Revenue Code are entitled to substantial deference."), *aff'd*, 131 S. Ct. 703, 714 (2011) ("The principles underlying our decision in *Chevron* apply with full force in the tax context."); *see also* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 468-69 (2013) (noting that while the "*Mayo* Court declared clearly and unequivocally that Treasury regulations promulgated using notice-and-comment rulemaking carry the force of law for the purpose of *Mead* and *Chevron*," the case law remains "mixed" on the question of whether *Chevron* deference should apply to "temporary" and "interpretative" Treasury regulations that are promulgated without notice and comment).

121. FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173, 185 (D.C. Cir. 2007).

122. Marmolejo-Campos v. Holder, 558 F.3d 903, 909 (9th Cir. 2009) ("[W]e have held that the Board's precedential orders, which bind third parties, qualify for *Chevron* deference because they are made with a 'lawmaking pretense.'").

123. *See, e.g.*, Kornman & Assocs. v. United States, 527 F.3d 443, 453 (5th Cir. 2008) ("After careful consideration, we conclude that revenue rulings are not entitled to Chevron deference . . . .").

agencies' amicus briefs,[124] and non-precedential opinions of the BIA.[125] 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.[126] But it is to say that the Court has afforded lower courts a means of mitigating the confusion by permitting them to rulify the standards that *Mead* and subsequent cases have set forth.[127] That option would not have been available to the lower courts if *Mead* had stipulated that downstream appliers of the force of

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124. *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)).

125. *Marmolejo-Campos*, 558 F.3d at 909 ("We have not accorded *Chevron* deference to the Board's unpublished decisions . . . because they do not bind future parties."). For a more detailed list of lower court decisions regarding the applicability (or non-applicability) of *Chevron* deference across a wide variety of different agency actions, see Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1458 n.101 (2005).

126. Much fuzziness still remains in the post-*Mead* case law, though not for reasons having to do with the vagueness of the "force of law" requirement itself. Instead, the central cause of lower courts' difficulties, as Lisa Schultz Bressman has shown, is the Court's subsequent decision in *Barnhart v. Walton*, 535 U.S. 212 (2002). *See* Bressman, *supra* note 125, at 1445-46. *Barnhart*, as 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. *See id.* at 1464 (noting that "[t]he Supreme Court has not clarified the relationship between the two decisions"). The upshot is that, when deciding whether to apply *Chevron*, some courts "consider *Mead*-inspired factors," others consider "*Barnhart*-inspired" factors, and very few courts "acknowledge that they have chosen one [test] over another." *Id.* at 1459.

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 mixed signals regarding the ongoing validity of *Mead*. Consequently, the lower court confusion that Bressman has identified should not count as evidence against the clarifying potential of permissive standards: when *Mead* came down, one could reasonably have thought that the case's formulation of "*Chevron* Step Zero" could be easily clarified – 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.

127. Such an interim arrangement might fail to yield uniform treatments of *Mead* among the U.S. Courts of Appeals – a non-ideal outcome from the perspective of Justice Scalia and other firm proponents of rules. Still, within the circuits themselves, the opinion certainly does not preclude courts from defining with greater precision when and how the "force-of-law" criterion applies, and that in turn should enhance the clarity of the doctrine that they employ.

law test were required to adjudge its applicability on a "case-by-case" basis, by reference only to the "totality of the circumstances" accompanying each individual agency action.[128] 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 EFFECTS OF ANTI-RULIFICATION RULES

To recap, standards laid down by the Supreme Court may operate in one of two ways. If such standards are accompanied by rules against rulification (operating as what I have called "mandatory standards"), then lower courts may not develop specific rules regarding the application of these standards in future cases. If substantive standards are not accompanied by rules against rulification (operating as what I have called "permissive standards"), then lower courts may freely choose to rulify or not to rulify such standards as they see fit. The analysis thus far has attempted to establish both the conceptual validity and doctrinal reality of rules against rulification. But it still remains to be asked: what exactly is at stake here? Why, in other words, does it matter whether the lower courts are barred from rulifying a standard, and what consequences, if any, are likely to follow from the Supreme Court's commands to that effect?

This Part addresses those questions. They are important questions to address because it is only by understanding the consequences of anti-rulification rules that we can develop a framework for evaluating them: we need to know how rules against rulification affect the doctrine in order to know whether and, if so, when they should be incorporated into it. And, as this Part suggests, rules against rulification do in fact carry several significant consequences for the substantive standards to which they attach. Across a wide range of substantive contexts, anti-rulification rules achieve at least five important doctrinal results, some positive, some negative, and some whose desirability will vary from case to case. Specifically, rules against rulification will tend to (1) mitigate problems of fit; (2) discourage forms of substantive and methodological experimentation; (3) increase the decisional autonomy of trial court actors vis-à-vis inter-

128. Justice Scalia's dissent in *Mead* characterized the majority as adopting the "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 it suggests that the majority itself looked to the totality of the circumstances in determining whether the agency action before it carried the force of law. The characterization was inaccurate, however, to the extent it implied that the majority had imposed on lower courts the *obligation* to analyze the totality of the circumstances in applying *Mead*'s "force-of-law" requirement to the facts of future cases.

mediate court supervisors; (4) reduce judicial transparency; and (5) promote apparent, but not actual, uniformity within the law. The ensuing discussion describes these effects, while offering some tentative normative conclusions as to how they might influence the Court's evaluation of anti-rulification rules across a range of different cases.

Throughout this discussion, my focus is *not* on the first-order choice between rules and standards writ large.[129] My inquiry, by contrast, begins where that first-order choice has ended. The relevant point of comparison is not between mandatory standards and first-order rules, but rather between mandatory standards on the one hand and permissive standards on the other. Put another way, I omit discussion of the obvious conclusion that standards accom- accompanied by rules against rulification will generate outcomes quite different from what first-order rules would have produced. Instead, the analysis assumes that a substantive standard is already in place and looks only to the question of how the presence or absence of an anti-rulification rule will affect the standard's operation going forward.

A. Fit

A virtue of standards—and a corresponding vice of rules—relates to the minimization of over- and under-inclusiveness problems. Rules, but not standards, allow judges to tailor their holdings closely to the underlying facts of a case. Consequently, rules are more likely than standards to yield individual outcomes that seem obtuse, unfair, or otherwise contrary to the "spirit" of the doctrinal inquiry being conducted. But the fit-related benefits of a standard are not guaranteed to last forever. Lower courts might eventually develop rulifications of that standard, and these rulifications will in turn generate over- and under-inclusiveness problems of the sort that the original standard had managed to avoid.

When a rule against rulification enters the picture, the fit-related benefits of a substantive standard become more likely to endure over time. The whole point of the anti-rulification rule is to foreclose lower court reliance on categorizations, presumptions, and other decision-making "short-cuts" as substitutes for holistic, case-by-case application of the standard itself. All else equal, free-wheeling application of an open-ended standard will produce fewer outcomes that seem obviously contrary to or inconsistent with a standard's animating purposes, at least as compared to the alternative of strictly adhering to rules. If, for instance, the relevant standard prohibits "unreasonable driving," and lower

129. The various consequences flowing from that choice have been exhaustively analyzed elsewhere. *See* sources cited *supra* note 19.

courts apply the standard without reliance on ancillary rules, then driving will tend to qualify as "unreasonable" where it really does strike those courts as unreasonable. But if lower courts proceed to rulify the "unreasonable driving" standard – by stipulating, for instance, that driving over seventy miles per hour is per se unreasonable – then some acts of driving would count as "unreasonable" even when circumstances strongly favored a finding to the contrary. (Consider, for instance, the example of a physician driving eighty-five miles per hour on the way to a medical emergency.) Standing alone, a standard cannot prevent these latter sorts of outcomes from arising. But standing next to a rule against rulification, a standard most certainly can.

The Court's opinion in *Florida v. Harris* helps to illustrate this point. The Court openly worried that the Florida Supreme Court's "checklist" approach to probable cause review would sometimes generate crude and seemingly arbitrary results – leading Florida courts to find (or not find) probable cause when common sense and intuition would have suggested otherwise.[130] Simply reiterating the content of *Illinois v. Gates*'s substantive standard,[131] however, was not enough to foreclose similar results in future cases. Open-ended as that standard purported to be, problems of fit remained a threat as long as lower courts could develop their own rules to govern *Gates*'s application to different categories of cases. Hence the Court took pains in *Harris* to establish not just that the Florida court's probable cause finding was substantively erroneous, but also that the finding rested on an impermissible attempt to embed within *Gates*'s framework a detailed set of rules. It is this latter component of the holding in *Harris*, far more than the open-ended nature of the *Gates* test itself, that offers the strongest safeguard against over- and under-inclusiveness problems in future probable cause cases.[132]

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130. Florida v. Harris, 133 S. Ct. 1050, 1052 (2013) (noting that under the Florida court's approach, "[n]o matter how much other proof the State offers of the dog's reliability, the absent field performance records will preclude a finding of probable cause").

131. 462 U.S. 213, 238 (1983).

132. *Harris* reveals another important point about fit-related values. Saying that anti-rulification rules mitigate problems of fit is different from saying that such rules are a boon to individual rights. Sometimes, to be sure, anti-rulification rules will promote liberty interests in an obvious way. (Recall, for instance, *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), where the Court invoked a rule against rulification in reversing a lower court's holding that temporary floodings could never constitute a taking of property; there, the anti-rulification rule eliminated a prior holding that Takings Clause claimants would have systematically disfavored.) But anti-rulification rules are just as capable of generating (and have in fact generated) results in the other direction, invalidating rulifications of standards that might otherwise have benefited rights-based claimants. That was true in *Harris*, for example. The anti-rulification rule adopted there resulted in a more government-friendly probable cause standard than the Florida courts would have otherwise applied. And the point rings true in many other cases. The anti-rulification rule that accompanies the

At its core, then, the relationship between fit-related values and rules against rulification is simple. Standards, as compared to rules, promote closeness of fit; consequently, anti-rulification rules—which help to preserve a standard's open-ended character—amplify the standard's fit-promoting effects. When the Court regards closeness of fit as a paramount doctrinal priority, rules against rulification will serve its purposes well. To put the point somewhat differently, if the first-order choice of a standard over a rule stems primarily from the Court's desire to minimize problems of over- and under-inclusiveness in the application of law to fact, then the Court will have good reason to bolster the standard with an anti-rulification rule.

This motivation, however, will not always be at work. As the next few sections reveal, standards sometimes reflect more than just a single-minded judicial desire to ensure closeness of fit. Where alternative motivations are in play, assessing the value of a rule against rulification becomes a more complicated endeavor, as fit-promoting benefits must be considered alongside a variety of other doctrinal effects.

B. Experimentation

Lower courts, unlike the Supreme Court, are categorically bound by Supreme Court precedents. According to well-established principles of vertical stare decisis, lower courts cannot 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. They apply existing Supreme Court law to new and unforeseen fact patterns and, in so doing, provide a substantial information base for the Court to consider when contemplating further doctrinal reforms. 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 a variety of ways. When the time later comes for the Court to update these prec-

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Strickland standard, for instance, has prohibited some lower courts from imposing on defense counsel a per se duty to investigate potential mitigation defenses—a duty that, all else equal, would make the Sixth Amendment right to effective assistance of counsel easier for criminal defendants to invoke. Striving for closeness of fit, in short, is different from striving for the maximization of liberty; it is the former objective and not the latter that anti-rulification rules seem inherently well suited to achieve.

Theoretically, the Court could adopt an anti-rulification rule that ran only in one direction—holding, for instance, that lower courts are free to develop categorical "safe harbor" provisions that benefit rights-based claimants, while still insisting that any *denial* of rights-based claims be defended by reference to the totality of the circumstances. I am not aware of any doctrines that operate in this way, but it strikes me as a possibility worth further consideration.

edents, the lower courts' body of work can valuably inform the Court's decision regarding which way to go.

Acknowledging the lower courts' role in the development of doctrinal rules, the Supreme Court has often recognized the value of letting a legal issue "percolate" below before stepping in to provide a definitive resolution from above. The rationale most often surfaces in connection with denials of certiorari, with the Justices declining review of a disputed legal issue for the sake of affording lower courts more time to grapple with its intricacies.[133] Analogous logic could prompt the Court to decide, after granting certiorari, that an issue is better resolved by means of a standard rather than a rule. A standard-like formulation of a Supreme Court holding will "decide less" than a rule-like formulation, thereby providing lower courts with a greater degree of freedom to continue experimenting with the substance of the doctrine under review.[134] To take a

133. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 23 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 certiorari 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"). An especially helpful analysis of the "percolation" rationale is provided by Doni Gewirtzman. *See* Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481-501 (2012) ("Among other things, a robust percolation process allows the Court to use its limited monitoring resources more efficiently, minimizes the Court's expenditures of political capital, incentivizes lower court judges to take their job more seriously, and lets the Court measure support for a potential ruling among lower court judges, who are ultimately charged with applying the rule and whose allegiance is necessary for the Court to enforce its will.").

134. Why, one might ask, would a Court considering a case on the merits ever continue to care about lower court percolation? After all, wouldn't the earlier decision to grant certiorari reveal that the Court has already adjudged that further percolation on the issue would offer little additional value? That might well be true in some cases, but it is not difficult to imagine other cases that are cert-worthy while still presenting issues worthy of further percolation. Perhaps, for instance, the Court has granted certiorari in a case for the purpose of ruling out one particular approach to a legal question as obviously deficient. Having done so, the Court could still logically conclude that further percolation might assist in identifying the "correct" approach to that issue. Perhaps a case contains an obviously cert-worthy issue that is reachable only through the resolution of other, less cert-worthy threshold issues. Or perhaps the Court granted certiorari because it regarded a particular *dispute* as especially important—think of *United States v. Nixon*, *New York Times Co. v. United States*, or perhaps *Bush v. Gore*—even while acknowledging that the abstract legal questions presented by the dispute might continue to benefit from additional lower court input and experimentation. In these and other scenarios, percolation values might justifiably push the Court toward articulating its holding in standard-like terms, even if the case presenting the issue warrants immediate attention from the Court.

simple example, the holding that a driver broke the law because he drove "unreasonably" settles far less than the holding that the driver broke the law because (and only because) his speed exceeded sixty-five miles per hour. With the latter holding on the books, there remains little left for lower courts to do aside from asking whether each individual did or did not exceed the sixty-five miles per hour threshold. With the former holding, by contrast, lower courts would still need to grapple with the meaning of the Court's "reasonableness" requirement and the many potential rulifications that might flow from it. The lower courts would consider difficult cases at the margins of reasonable driving and, in so doing, identify a more specific set of conditions under which reasonableness might or might not be shown. (For example, the lower courts might hold that driving under the influence is always unreasonable, that driving while talking on a cellphone is always unreasonable except when the phone call involves an emergency, and so on.) Eventually, these courts' work might provide the basis for better-informed, down-the-road specifications of the standard by the Supreme Court itself.

But when a rule against rulification accompanies the standard, lower courts will enjoy fewer opportunities to tinker with the doctrine. Most obviously, lower courts will no longer have occasion to ask whether rulification of the standard is warranted under all, some, or no circumstances. A permissive standard allows (but does not require) lower courts to rulify certain aspects of the doctrine being applied. But a mandatory standard forecloses that possibility altogether. To the extent, then, that the Court remains interested in rulifying the standard in a later case, a permissive standard seems better suited to promote further study of the issue. Unrestrained by the methodological dictates of an anti-rulification rule, lower courts might generate opinions that explain why rulification of the standard might be useful, why it might be counterproductive, or why the question presents a close call. What is more, the lower courts opting to rulify the standard would further confront the question of *how* to translate the standard into a rule and in so doing embrace different rule-like formulations of the standard itself. All of this work at the lower court level would thereby generate useful data for the Supreme Court to consider when revisiting the doctrine in a future case.[135]

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135. To see all these points more concretely, suppose that the Court one day confronts a *Massiah* claim arising from a government informant's acquisition of information from a criminal defendant. *See* Massiah v. United States, 377 U.S. 201 (1964). Current Supreme Court case law leaves it unclear how to determine whether the informant in question qualifies as the sort of "government agent" necessary to trigger application of *Massiah*'s recognized protections. *See supra* notes 105-108 and accompanying text. Happily for the Court, however, the Federal Reporter now relates a variety of attempted means of attacking this problem – some more rule-like than others – along with discussions of these methods' respective tradeoffs. This useful information has materialized thanks largely to the lack of an anti-rulification rule

Rules against rulification also disserve the "percolation" process in a subtler way—namely, by discouraging forward-looking *deliberation* about the system-wide problems implicated by a given doctrinal regime. *Harris* once again proves instructive. In setting forth the "strict evidentiary checklist" that the Supreme Court rejected, the Florida Supreme Court had sought to shed light on a set of recurring problems presented by canine searches within the state of Florida.[136] The state court had 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 obtaining them.[137] One likely effect of the *Harris* decision will be to render ruminations of

governing *Massiah* "government agent" determinations. Had the lower courts been operating under strict instructions to apply a highly contextualized, fact-specific approach to determining whether an individual qualifies as a "government agent," they would have lost the opportunity to determine (a) whether such a fact-specific approach to the problem actually made sense; and (b) if not, what sorts of rule-like approaches to identifying "government agents" would have been effective alternatives. Should it always matter, for instance, whether the informant received explicit instructions from the government to acquire the information in question? *See, e.g.*, United States v. Birbal, 113 F.3d 342, 346 (2d Cir. 1997) ("[A]n informant becomes a government agent . . . *only when* the informant has been instructed by the police to get information about the particular defendant.") (emphasis added). Even if not a necessary condition for establishing a *Massiah* violation, should the presence of "direct written or oral instructions by the State to a jailhouse informant" at least qualify as a sufficient condition for the same? *E.g.*, Ayers v. Hudson, 623 F.3d 301, 311 (6th Cir. 2010) ("Thus, we hold that although direct written or oral instructions by the State to a jailhouse informant to obtain evidence from a defendant would be sufficient to demonstrate agency, it is not the only relevant factor."). Might courts instead apply a multi-factored approach to the inquiry, *see, e.g.*, Wallace v. Price, 265 F. Supp. 2d 545, 565-66 (W.D. Pa. 2003), reflecting "the infinite number of ways that investigators and informants can combine to elicit information"? Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 906 (3d Cir. 1999). Indeed, the lower courts have pondered just those sorts of questions, creating a rich precedential record for the Court to consult when it revisits these issues for itself.

136. Florida v. Harris, 133 S. Ct. at 1056.

137. Harris v. State, 71 So. 3d 756, 767-70 (Fla. 2011). To be sure, rules against rulification do not categorically prevent lower courts from thinking about, or even writing about, the "big-picture" dimensions of the individual cases they confront. A court might apply a totality of the circumstances test to the facts of a case, while then explaining in dicta why the facts of the case reflect a troubling trend within its jurisdiction or even nationwide. My point is that rules against rulification will reduce the *need* for deliberation of this sort and thereby reduce—at least at the margin—the likelihood that the deliberation will occur. It is in the context of fashioning rules for a broad category of cases that courts are most likely to view the cases as a category, with due attention to the recurring patterns and problems that they reflect. But when the Supreme Court has instructed the lower courts to take each individual case on its own individual terms, the lower courts are more likely to stay focused on the trees rather than the forest, engaging in forms of deliberation that might sometimes prove unduly myopic.

this sort less common in future sniff-search cases,[138] shielding potentially important regulatory dimensions of the problem from meaningful analysis—both in the courts below and, by extension, in the Supreme Court itself.[139]

The upshot of all this is that anti-rulification rules will not always prove helpful when the Court is operating under conditions of significant uncertainty. Standards can accommodate this uncertainty nicely, by leaving lower courts with ample flexibility to explore a variety of doctrinal specifications that a standard does not explicitly foreclose. But this flexibility exists only as long as the standard operates as a permissive one. A rule against rulification, by making the standard mandatory, will close off much of this deliberative space, curtailing lower-court opportunities to think about and experiment with competing approaches to a difficult doctrinal problem.

C. Delegation

A further effect of anti-rulification rules involves the allocation of authority between trial-level and intermediate-level courts. Standards, unlike rules, carry the consequence of devolving decision making 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. As other commentators have noted, the decision to adopt a standard is, in effect, a deci-

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138. A moment's thought should reveal why this is so. By offering general observations regarding system-wide problems with canine searches, a state supreme court cannot help but reduce the degree to which future in-state applications of the *Gates* test will involve a flexible and all-things-considered analysis. By providing such observations, the state court is in effect tipping its hand as to the sorts of evidentiary deficiencies it will and will not deem problematic going forward. As a consequence, subordinate courts in Florida will have to keep these generally applicable impressions in mind when deciding future cases—something that the Supreme Court of the United States has now stipulated that they should not do. Thus, if the Florida Supreme Court wishes to comply with *Harris*'s rule against rulification, it must take care to confine its observations to the particular facts of each future sniff-search case that it confronts.

139. That is not to say that rules against rulification discourage all meaningful forms of deliberation. Indeed, anti-rulification rules—by inhibiting the development of rules—effectively promote the forms of fact-sensitive deliberation that have long been associated with standards writ large. *See* Sullivan, *supra* note 19, 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."). My point, rather, is that this fact-specific form of deliberation comes at the expense of meaningful "big-picture" deliberations about the law itself.

sion to delegate, vesting lower-ranking actors with the ultimate authority to dictate results in a wide range of cases. Justice Scalia has noted this point, observing that:

> [W]hen 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.[140]

Standards thus delegate authority downward. But this is not all there is to the point, as the ultimate destination of the delegated authority will vary depending on the presence of an anti-rulification rule. Permissive standards will achieve the result that Justice Scalia predicts, vesting primary lawmaking authority in intermediate-level courts of appeals. 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 there.

Why is that so? The answer relates to the constraining effect of rules. Only permissive standards empower intermediate 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 a case's particular record. Anti-rulification rules, in other words, substantially limit the amount of precedential guidance that intermediate courts can provide to the courts within their purview, thus giving bottom-level courts (that is, federal district courts and state trial courts) freer rein to apply Supreme Court standards according to their own best judgment. To be sure, rules against rulification do not prevent intermediate courts from reversing lower-level decisions that in their view misapply a governing standard. But they do prevent intermediate courts from accompanying these reversals with opinions that sweep far beyond the facts of each case. The precedential reach of the intermediate court rulings must therefore remain narrow. And with intermediate courts constrained in their ability to direct the efforts of subordinate

140. Scalia, *supra* note 19, 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))).

actors, the subordinate actors necessarily acquire increased control over the standard's implementation.[141]

That point perhaps helps to explain why anti-rulification rules sometimes operate in tandem with deferential standards of appellate review.[142] Deferential review standards, like rules against rulification, prevent intermediate 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 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 courts. But notice that only permissive standards permit the delegee to redelegate. From the Supreme Court's refusal to adopt an anti-rulification rule, it does not follow that an intermediate court *must* assume

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141. The delegation-related effects of rules against rulification suggest that the Court should deploy these rules when it wishes to afford trial courts increased autonomy in applying law to fact. Why, if ever, would the Court pursue that objective? One set of considerations relates to the value of fit. When a given doctrinal test demands highly contextualized applications of law, the Court might regard trial courts—that is, the ones that actually have done the fact-finding work for themselves—as better situated than intermediate courts to generate sensible and fact-sensitive outcomes. Ideological considerations might sometimes come into play as well. When a single circuit court predominates within a particular subject area (think, for instance, of the Federal Circuit and patent law or, to a lesser extent, the D.C. Circuit and administrative law), ideological tensions might sometimes prompt the Supreme Court to use anti-rulification rules as a means of disempowering an adversary. I do not know whether any of the examples I discussed in Part II owe their origin to ideologically driven motivations. At least in theory, however, rules against rulification could be wielded for such purposes—precisely because they enhance trial courts' autonomy vis-à-vis their appellate court overseers.

142. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 394 (2006) (prohibiting rulification of the traditional standard for issuing permanent injunctions, while also noting the "'considerable discretion' district courts have 'in determining whether the facts of a situation require it to issue an injunction'" (quoting Roche Prods., Inc. v. Bolar Pharm. Co., 733 F.2d 858, 865 (Fed. Cir. 1984))); Illinois v. Gates, 462 U.S. 213, 236 (1983) (setting forth a mandatory standard for a probable cause test while also emphasizing that "[a] magistrate's 'determination of probable cause should be paid great deference by reviewing courts'" (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969))).

primary control over a standard's implementation. 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 direct the lower courts in the form of rule-like specifications of a standard, the intermediate court would instead let the lower courts take up the laboring oar for themselves. Thus, while I earlier noted that permissive standards transmit decisional authority to intermediate courts, it is perhaps more accurate to say that permissive standards leave it up to the intermediate courts to decide where in the judicial hierarchy such decisional authority will reside. Mandatory standards, by contrast, deprive intermediate courts of the ability to make that choice for themselves.

D. Uniformity

Anti-rulification rules also influence the uniformity of substantive law. At first glance, the correlation seems to be a positive one. With a rule against rulification on the books, different courts may not develop different, non-uniform rulifications of a single Supreme Court precedent. Instead, they must all apply the precedent in the same, unrulified form that the Court originally prescribed. That appears to be a uniform result. But in fact, the result fails to promote—and may actually undermine—uniformity in another important sense.

This idea becomes clear if one draws a distinction between "norm uniformity," on the one hand, and "outcome uniformity," on the other. Norm uniformity manifests itself when different courts apply the same doctrinal norms across similar cases; outcome uniformity manifests itself when applications of those norms in fact produce similar outcomes in similar cases. (Put somewhat differently, norm uniformity is appearance-based, related to the way the doctrine "looks" on the outside, whereas outcome uniformity is reality-based, related to the way the doctrine works on the ground.) Norm uniformity and outcome uniformity often coexist. When the Court articulates doctrine in the form of bright-line rules, lower courts will apply those same rules in factually similar cases (giving rise to norm uniformity), and the highly specific nature of those rules will tend to promote similar judicial outcomes (giving rise to outcome uniformity). But norm uniformity can sometimes exist in the absence of outcome uniformity. When the Court formulates doctrine in terms of open-ended standards, for instance, all lower courts might apply those same standards in factually similar cases (norm uniformity), but the open-endedness of the

standards will result in some lower courts failing to "treat like alike" (outcome non-uniformity).[143]

By their nature, the Supreme Court's standards will fail to achieve outcome uniformity nationwide: their very open-endedness causes similar borderline cases to come out differently in the courts below. But Supreme Court standards are capable of producing outcome uniformity within (but not necessarily among) the various sub-jurisdictions that the Supreme Court oversees (that is, state court systems and the federal circuits). Those sub-jurisdictions, as we have seen, can themselves choose to rulify a standard, and in so doing, prospectively narrow the range of outcomes that their own future decisions will produce. By promoting such uniformity at the *intra*-jurisdictional level, however, these jurisdictions will undermine norm uniformity at the *inter*-jurisdictional level. Once some sub-jurisdictions start to rulify a standard, they will make the law appear to be different depending on where a claim is brought. If a claim is brought, for instance, in the Second Circuit, it might trigger a per se rule; if the same claim is brought in the Northern District of California, it might trigger a weak presumption; if brought in New Hampshire state court, it might trigger a totality of the circumstances analysis. Where once an outside observer saw a single, un-rulified standard governing across all sub-jurisdictions nationwide, she will now perceive a patchwork of varying legal approaches that differ from state to state and circuit to circuit.

To the extent that the Court wants to avoid this outcome, an effective solution is to promulgate a rule against rulification. The anti-rulification rule will ensure "norm uniformity" across sub-jurisdictions by requiring that all sub-jurisdictional applications of the standard invoke the same doctrinal test, shorn of any divergent rule-like elaborations that might otherwise crop up around the country. To be clear, the rule against rulification will have little effect on outcome uniformity within these sub-jurisdictions. Indeed, by prohibiting individual sub-jurisdictions from pursuing outcome uniformity within their own boundaries, the anti-rulification rule might even undermine outcome uniformity, at least at the local level. At the end of the day, though, that may be a price worth paying in exchange for the virtues of norm uniformity. Appearances can be important, even when deceiving.[144] Where uniformity is involved, for instance, there may be sound reasons—grounded in values of fairness, stability, or legitimacy—for making the law "look" as constant as possible, even if devia-

143. *Cf.* Scalia, *supra* note 19, at 1179 (noting that to adopt a "totality of the circumstances" approach to the law "is effectively to conclude that uniformity is not a particularly important objective with respect to the legal question at issue").

144. *See generally* Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563 (2012) (documenting and analyzing the use of "appearance-based" justifications in the law).

tions in application will inevitably occur.[145] If, in contrast, below-the-surface reality matters more than surface-level appearance, then rules against rulification will not provide much in the way of uniformity-enhancing assistance. In fact, the "half-loaf" result of promoting outcome uniformity within, but not across, national subunits may be preferable to the "no-loaf" result of failing to promote any outcome uniformity at all.

An altogether different take on these issues might maintain that uniformity values should play a minimal role in influencing the choice between mandatory and permissive standards. One might conclude, for instance, that neither actual nor apparent uniformity represents an especially important value within the law, contending that uniformity serves at most as an indirect proxy for other values such as fairness, legitimacy, and efficiency that we should simply pursue directly.[146] A related argument might posit that even though uniformity should sometimes influence doctrinal design, it should not do so once the Court has made up its mind as to the first-order choice between standards and rules. If the Court wishes to promote uniformity, then it should simply articulate the governing test in terms of a rule, thereby securing for itself *both* outcome uniformity and norm uniformity across and within all sub-jurisdictions. But once that choice comes out in favor of a standard, the argument would continue, the Court should no longer consider uniformity-related values when deciding whether to adopt a rule against rulification. These arguments, which I can only sketch here, certainly merit further examination. For now, however, it suffices to note that even with standards on the books, the Court and its subordinates can continue to manipulate the different types of uniformity (and nonuniformity) that these standards yield in the courts below. That is a consequence worth taking seriously for anyone who regards uniformity as worth pursuing for its own sake.

145. Evan Caminker has suggested, for instance, that "uniform interpretation of federal law helps to secure popular respect for judicial authority" and that "[f]ederal courts depend on the *perceived* legitimacy of their enterprise for their authority over other government actors and the general public." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 40 (1994) (emphasis added). On this rationale alone, norm uniformity of doctrine might itself be intrinsically valuable, even if actual disuniformity lurks below the surface.

146. *Cf.* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571 (2008) ("Although this Article does not claim that heterogeneity is never problematic, it does question whether uniformity for its own sake is always worth the (sometimes significant) costs of trying to achieve it . . . .").

E. Transparency

Finally, anti-rulification rules can reduce the transparency of lower court decision making. Judges who repeatedly apply an open-ended standard may come to rely on informal rules of thumb to guide their resolution of factually similar cases. (For example, a judge might come to regard all dogs certified by one agency as presumptively qualified to detect drug-related odors, while regarding all dogs certified by another agency as presumptively not qualified to do the same.) But if rulification of a standard is formally prohibited, the judge has no reason to reveal—and indeed, a strong reason *not* to reveal—the implicit bases for her decisions. Put another way, rather than deter lower courts from relying on rules, mandatory standards might instead induce them to rely on rules clandestinely. Under many circumstances, this will be a bad thing, leaving litigants and reviewing courts at least partially unaware of the actual rationales for a judge's decision.

This last point, to be clear, should not count as a universally dispositive reason against adopting an anti-rulification rule. Many dubious factors can and probably do influence lower court decision making, even in the face of clear doctrinal instructions to ignore them. But it does not follow from that fact that courts should be given free rein to rest their decisions on illegitimate considerations.[147] Thus, where the Court feels strongly that the rule-based implementation of a standard will take the doctrine in an undesirable direction, it should instruct the lower courts not to rulify regardless of whether 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 the high court's adoption of a rule against rulification will help to reduce reliance on either open or clandestine rules of thumb.) On the other hand, if the case against rulification is weaker, or if the lower courts are likely to face particularly powerful temptations to rulify a standard, transparency concerns could tip the scale in favor of permitting rulification going forward. Under these circumstances, the marginal benefits to be derived from an anti-rulification rule may fail to justify the very real costs of creating a disconnect between doctrinal rhetoric and decisional reality.

147. As I have elsewhere put the point, "Even if we could prove the realist maxim that breakfast food influences judicial decisionmaking, we would still discourage judges from writing opinions about bacon, toast, and eggs." Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 1044 (2012) (footnote omitted).

F. Conclusion: Methodological Minimalism?

If the foregoing discussion has shown anything, it is that rules against rulification exert a variety of different effects (implicating a variety of different values) on lower-court application of the Supreme Court's standards. I have looked at each of these effects in isolation, so it remains to be asked whether any general conclusions can be drawn from viewing these effects in combination. What, in light of the observations offered above, should we say about the overall desirability of rules against rulification and the circumstances in which they should be used?

One way of thinking through these issues relates to the notion of judicial minimalism. Minimalists tend to favor forms of substantive decision making that are "catalytic rather than preclusive"—apt to spur more, rather than less, investigation, information-sharing, and dialogue regarding the appropriate substance of the law.[148] This being so, legal commentators have often associated minimalist judging with standard-based judging. As Sunstein himself has suggested, "A preference for minimalism is very close, analytically, to a preference for standards over rules."[149] This makes sense as far as the substance of the doctrine is concerned, but how should a minimalist feel about rules that mandate the use of (un-rulified) standards down the line?

On one view, minimalists should favor anti-rulification rules because anti-rulification rules promote the use of standards, and standards are friendly to the minimalist cause. But standards are friendly to the minimalist cause largely because they leave matters open for renewed consideration in subsequent cases, furnishing future decisionmakers with continued, unrestricted space in which

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148. SUNSTEIN, *supra* note 16, at 6.

149. Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1909 (2006). Sunstein offers this observation in connection with the minimalist jurisprudence of Justice Sandra Day O'Connor, but he has elsewhere indicated that the point applies more generally. *See id.* at 1902 ("Any defense of minimalist adjudication is essentially the same in principle as a defense of standards over rules . . . ."); Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1087 (2009) ("Minimalists think that their approach has the key advantage of standards: flexibility in the face of an uncertain future."); *see also* Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1083 (2009) ("[A]t 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."); Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 29-31 (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).

to pursue further refinements of the law.[150] This space, it turns out, is not so unrestricted when a rule against rulification mandates strict preservation of a standard's un-rulified character. For instance, when it comes to the question of whether to emphasize values of fit in applying law to fact, a mandatory standard closes off further consideration of the issue, whereas a permissive standard does not. The same is true when it comes to the question of how (if at all) to specify the content of an open-ended norm. So, too, with the question of whether to furnish trial courts with increased decisional autonomy and the questions of whether and how to pursue uniformity within sub-jurisdictional boundaries. With respect to all these questions, and perhaps others as well, mandatory standards end the discussion, whereas permissive standards keep the discussion going. Mandatory standards, from the minimalist perspective, thus impose very real costs. Their open-ended substantive language imbues them with an attractively minimalist veneer, but their absolute prohibitions on rulification give them an intensely preclusive effect.

To the extent that any general observations can be offered about the relative merits and demerits of rules against rulification, I conclude with the following thought: given the substantial tension that exists between the priorities of minimalists and the effects of anti-rulification rules, I suspect that one's overall attitude toward minimalism will operate as a reasonably reliable indicator of one's overall attitude toward 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 find nothing of great concern. This is because rules against rulification, being rules themselves, freeze certain substantive and methodological choices that minimalists will often prefer to leave fluid. Standards leave the law unsettled, but only when those standards are themselves subject to unsettlement.

None of this is to say that minimalists will never wish to settle anything. Indeed, where the minimalist enjoys a high degree of confidence that an area of doctrine is most effectively applied in standard-like terms, then she should embrace anti-rulification rules right along with her maximalist colleagues. First-order standards, after all, will not always reflect tentativeness, ambivalence, or passivity regarding the form and substance that the doctrine should assume. First-order standards can also reflect a range of deep and definitive value judgments, to which even a minimalist might sometimes unswervingly subscribe. Within some areas of doctrine, for instance, standards may reflect the

150. Some minimalists aim to leave things undecided not for the sake of fostering the gradual development of the law, but for the sake of promoting fairness and equity in individual cases. I do not rule out that possibility, but that is not the understanding of minimalism that I reference here.

Justices' firm belief that problems of fit are especially concerning, that trial courts should enjoy substantial independence from intermediate court interference, or that norm uniformity across sub-jurisdictions is significantly more desirable than outcome uniformity within them. Where high levels of certainty on these and other matters exist, rules against rulification will often make a good deal of sense. But where such matters are subject to greater uncertainty, then prohibiting rulification of the standard conflicts with a central animating purpose of the standard itself – namely, that of postponing resolution of a difficult legal issue.

IV. WORKING WITH ANTI-RULIFICATION RULES

The previous Part identified several consequences that follow from the adoption of a rule against rulification. This Part turns to a second set of issues, which involve not the question of whether to adopt anti-rulification rules, but rather how to deal with anti-rulification rules once the decision to adopt them has been made. Part IV.A offers some preliminary thoughts on how the Supreme Court should go about articulating rules against rulification within its own decisions. Part IV.B then turns to the lower courts' task of detecting such rules, asking in particular how lower courts should respond to 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 nonbinding dicta.

A. Creating Anti-Rulification Rules

1. Separating Substance from Methodology

The Court often announces an anti-rulification rule in the course of reviewing a lower court's effort to rulify a standard. In *Florida v. Harris*, for instance, the Court reviewed a Florida Supreme Court decision that had set forth a "strict evidentiary checklist" for establishing the requisite level of reliability for drug-detection dogs.[151] But simply invalidating one particular rulification of a standard will not suffice to create a generalized 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. Furthermore, such a holding by its nature would not stand for the broader proposition that all other attempts at rulifying the standard are similarly invalid. Standards can be rulified

151. Florida v. Harris, 133 S. Ct. 1050, 1056 (2013).

in many ways. Deeming one such rulification inappropriate is not the same as prohibiting rulification across the board.

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. The Court does not always engage in this kind of disaggregation, 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.[152] Other portions of the opinion, however, criticized the substance of the particular evidentiary checklist that the Florida court had devised.[153] Logically, these lines of argument point to different conclusions. If the problem with the Florida court's reasoning lay in its rulifying methodology, then the adequacy of the particular checklist at issue should have been irrelevant to the Court's opinion. 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 the Court have inferred from the substantive inadequacy of the Florida court's checklist that all future assessments of a dog sniff's reliability should eschew reliance on determinate rules.[154]

There is another point, too. It may well be that the most effective vehicles for establishing anti-rulification rules are 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 highlighting defects in the attempts that it regards as obviously misguided. Consider, for instance, the Court's discussion of the Patent Act's "nonobvious-

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152. *Id.* 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.").

153. *Id.* at 1056-57 (criticizing the Florida Supreme 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").

154. 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 are capable of generating. 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 help to 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.

ness" requirement in *KSR International Co. v. Teleflex Inc.*[155] There, the Federal Circuit had developed a "teaching, suggestions, and motivations" ("TSM") test for evaluating the obviousness of combination-based inventions.[156] In stark contrast to *Harris*, in which 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,"[157] as 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."[158] But even helpful insights, the Court went on to 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."[159] Having endorsed the substantive thrust of the test, the Court could more persuasively 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.[160] 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* could offer a somewhat more direct and persuasive justification for its methodological prohibition on rulifying the obviousness standard.[161]

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155. 550 U.S. 398 (2007).

156. *Id.* at 407.

157. *Id.* at 418.

158. *Id.*

159. *Id.* at 419.

160. *Id.* at 421.

161. This is, to be clear, not a distinction I wish to overdraw. The boundary between substance and methodology, much like the boundary between substance and procedure, tends to break down at the margins. 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.* (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 the 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 rest on a solid justificatory foundation. Indeed, the Federal Circuit has managed to read *KSR* to just this effect. *See, e.g.*, Takeda Chem. Indus., Ltd. v. AlphaPharm Pty., Ltd., 492 F.3d 1350, 1357 (Fed. Cir. 2007) ("As long as the [TSM] test is not applied as

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 formulating an "evidentiary checklist" of its own, the Court went on to describe the applicable Fourth Amendment principles in suspiciously checklist-like terms. 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."[162]

- "The better measure of a dog's reliability thus comes away from the field, in controlled testing environments."[163]

- "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert."[164]

- "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."[165]

- "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."[166]

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a 'rigid and mandatory' formula, that test can provide 'helpful insight' to an obviousness inquiry.").

162. Florida v. Harris, 133 S. Ct. 1050, 1056 (2013).

163. *Id.* at 1057.

164. *Id.*

165. *Id.*

166. *Id.*

- "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."[167]

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. But these and other statements from *Harris* set forth a surprisingly specific framework for evaluating reliability in future cases, thereby complicating lower courts' ability to apply the probable cause standard in the "fluid" and "flexible" manner that *Harris* purported to demand.[168] 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-holistic principles that all such applications must honor.[169]

Imagine, for instance, that a post-*Harris* lower court must 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 "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert."[170] 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 criticism 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 criticism on the ground that it was "prescrib[ing] . . . an inflexible set of evidentiary requirements."[171] Acting one way would ignore *Harris*'s

167. *Id.* at 1058.

168. *Id.* at 1055-56.

169. *See* Kit Kinports, *The Dog Days of Fourth Amendment Jurisprudence*, 108 NW. U. 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'" (quoting *Harris*, 133 S.Ct. at 1057)); *see also id.* at 79 ("[The opinion] generate[s] rigid rules in place of the more commonsense totality-of-the-circumstances standards favored in the Court's precedents.").

170. *Harris*, 133 S. Ct. at 1057.

171. *Id.* at 1058.

substantive guidance regarding credible evidence of sniff-search reliability; acting the other way would violate *Harris*'s rule against rulification.

There are, to be sure, valid ways of reconciling this tension. One might suggest, for instance, that the point of *Harris* was not to condemn the use of presumptions and generalizations as a categorical matter, but rather to set an upper bound on the *extent to which* lower courts may embrace presumptions and generalizations when deciding sniff-search cases. In this sense, we might understand *Harris* as itself accomplishing a partial rulification of the probable cause inquiry, while simultaneously instructing lower courts not to move that inquiry any further 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 no 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. The true import of the decision would have been easier to discern if the Court had either toned down its rhetoric regarding the "fluid" and "common sense" nature of probable cause review or refrained from giving such detailed guidance regarding future applications of the probable cause standard.

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 in 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 arguably engaging in rulification with the other. And the Court can also be 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. 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."[172] This language—along with other statements from the Court's personal jurisdiction case law[173]—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, have felt bound not only by the substance of the Court's minimum contacts precedents, but also by what they see as a clearly stated methodological preference for standards over rules.[174] But if you go back and peruse the relevant case law, you will not find the Court ever issuing a direct edict of the sort we encountered in Part II—an edict, in other words, that requires *lower courts* to 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

172. Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

173. *See* Burger King Corp. 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 of the place of contracting or of performance.'" (citations omitted) (quoting *Int'l Shoe*, 326 U.S. at 319; Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 316 (1943))); Kulko v. Superior Court of California, 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.'" (quoting Estin v. Estin, 334 U. S. 541, 545 (1948))). *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").

174. *See, e.g.*, Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1222 (11th Cir. 2009) ("[W]e 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." (quoting *Int'l Shoe*, 326 U.S. at 319)); 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 defendant's 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" (quoting *Int'l Shoe*, 326 U.S. at 319)); Core-Vent Corp. v. Nobel Indus. 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" (quoting *Burger King*, 471 U.S. at 478-79)).

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 reduces 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, adhering to such rules only when the Court has established them with crystal clarity. That preference derives in part, I admit, from my own pro-minimalist sympathies, which render me somewhat leery of the rigid methodological constraints that rules against rulification tend to impose on lower court judges. But apart from that point, there exists a further reason for presuming the nonexistence of anti-rulification rules in the face of doctrinal uncertainty, which relates to the information-forcing benefits that such a presumption will likely produce.[175] Simply put, the Supreme Court is more likely to offer clearer and more consistent methodological guidance when lower courts treat rules against rulification as absent-until-proven-present (rather than present-until-proven-absent).

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.[176] They would sometimes err in applying

175. *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").

176. Hard evidence of this phenomenon is difficult to obtain, in large part because the Court does not often make explicit its reasons for granting (or denying) certiorari with respect to the petitions it receives. But something along these lines may have been at work in the recent decision of *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Ninth Circuit had found that a German public stock company was subject to general personal jurisdiction in the state of California, owing largely to the activities of a corporate-owned subsidiary that conducted operations there. In so holding, the Ninth Circuit appeared to adopt for itself a sort of per se rule, according to which a corporation assumes all the jurisdictional "contacts" created by subsidiaries with which it has established an "agency" relationship. Though ultimately resting its holding on other grounds, the Court did express concern over the potential breadth

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 accompanying the courts' erroneous holdings. If, by contrast, the lower courts painted broadly—that is, they issued general 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 generate clarifying guidance as to whether a rule against rulification does in fact exist.

Put another way, no matter how one feels about rules against rulification as a normative matter, one should favor a default rule that permits rulification of a standard unless and until the practice has been expressly prohibited by the Court. Rulifying a standard in the face of Supreme Court uncertainty is more likely to flag the unresolved issue for the Court, at least as compared to the alternative approach of assuming that rulification is banned. That is not to say that lower courts should go about rulifying every standard they see just for the sake of getting the Supreme Court's attention. The direct merits and demerits of a potential rulification should obviously weigh most heavily in the lower court's decision. But where a lower court would *otherwise* be inclined to rulify a standard, it should not hold back simply because the Supreme Court has issued mixed signals regarding the permissibility of such a move. Refraining from rulifying increases the likelihood that the Supreme Court's guidance on the question will remain in a muddle, whereas rulifying the standard increases the likelihood that the muddle will be tidied up.

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of the Ninth Circuit's proposed agency rule, which, among other things, "did not advert to th[e] prospect" that "[a]gencies . . . come in many sizes and shapes," appeared "to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate," and had been formulated in a way that "will always yield a pro-jurisdiction answer." *Id.* at 759-60. That language, while by no means establishing a rule against rulification, did at least convey skepticism regarding the general project of embedding bright-line rules within the framework of general jurisdiction analysis. That is useful information for the Ninth Circuit to have going forward. And it is information that the Ninth Circuit would have been less likely to receive if it had resolved the original case in a more standard-dependent (and hence less cert-worthy) manner. *See id.* at 766 (Sotomayor, J., concurring in the judgment) (noting that the Court had granted certiorari on the question "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation *based solely on the fact* that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State") (emphasis added) (quoting Petition for Writ of Certiorari at 1, *Daimler*, 134 S. Ct. 746 (No. 11-965))); *see also* Reply Brief for Petitioners at 2, *Daimler*, 134 S. Ct. 746 (No. 11-965) ("[T]he Ninth Circuit's decision has implications that extend well beyond this case.").

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 "holding." The dicta/holding distinction defies easy definition,[177] 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 with the force of 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 in which 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 definition of the term. But more difficult questions emerge in cases of the sort we examined in Part II; in these cases, 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. The Court's 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. More generally, the argument goes, globally applicable anti-rulification rules will always count as dicta as long as they prove broader than

177. *See, e.g.*, Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1071 (2005) ("[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 proposition 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.").

necessary to justify the Court's invalidation of one and only one attempt to rulify a standard.

This line of reasoning proves too much. It suggests 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 lower courts routinely treat the *Miranda* requirements as binding Supreme Court precedent,[178] and the Supreme Court has itself suggested that the requirements are intended to apply as such.[179] This 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 goes, 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. For instance, even if the Supreme Court has eschewed reliance on legislative history when interpreting a section of the U.S. Code, lower courts may still consult legislative history in interpreting that same section in a future case.[180] If that is true regarding methods of statutory interpretation, should it not also be true regarding methods of law application?

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

178. *See, e.g.*, United States v. Faulkingham, 295 F.3d 85, 92 (1st Cir. 2002) (characterizing *Miranda* as a "constitutional rule binding on the federal and state governments").

179. *Cf.* Dickerson v. United States, 530 U.S. 428, 439 (2000) (characterizing the *Miranda* warning as a "constitutional rule" that Congress could not abrogate by statute).

180. *See* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1875 (2008) ("[T]he Court has strongly suggested that doctrines of statutory interpretation do not get stare decisis effect but has not explicitly and conclusively so established."); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1909 (2011) (noting that the Supreme Court "does not treat its interpretive pronouncements as law").

would be powerless to create binding rules of interpretive methodology if it so desired. In fact, as Abbe Gluck has pointed out, the Court has assigned binding precedential status to a wide range of methodological instructions on matters other than statutory interpretation, 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."[181] 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—setting aside the unusual case of statutory interpretation—the methodological character of anti-rulification rules is not likely to deprive them of binding effect.[182]

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181. Gluck, *supra* note 180, at 1918; *see also* Foster, *supra* note 179, 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."); 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) ("[T]he Supreme Court already treats many, but not all, subdecisions based on statutory interpretation as binding precedent without explicitly saying so."). 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*, 119 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) (examining divergent legislative preferences toward methods of interpretation). A related line of investigation—bracketed for purposes of my inquiry here—concerns the question whether Congress may require courts to favor one set of interpretive methodologies over another. *Compare* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002) (yes), *with* Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003) (no).

182. Common practice, however, could be wrong. Perhaps there really is something different about the Court's methodological directives that render them something other than "law" and hence not subject to stare decisis. 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 181, 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."); Connors, *supra* note 181, at 684 ("[T]he 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 Supreme Court purports to make them binding on the courts below. This fact, coupled with the equally unremarkable fact that the Court can always reverse lower court judgments that run afoul of its commands, provides reason enough for lower courts to resist rulification when the Supreme Court has expressly instructed them

V. VARIATIONS ON THE THEME

Rules against rulification represent an important means by which the Supreme Court constrains the method of applying and implementing its standards in subsequent cases. Might there be other means of imposing such methodological constraints? I now 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 a variety of related 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 would discourage but not prohibit lower court rulification of standards. 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 several 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 spur lower court experimentation, perhaps it should do more than simply *not prohibit* lower courts from rulifying. Maybe, that is, the court should affirmatively *require* lower courts to rulify.

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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 an empirical study, that "lower courts very rarely invoke the holding-dictum distinction to reach decisions at odds with higher court dicta"). As a descriptive matter, and perhaps also as a normative matter, the Court's virtually unchecked power to reverse lower court judgments whenever it so desires seems sufficient to support the proposition that anti-rulification rules, once clearly reflective of the Court's desires, carry binding precedential force. *See id.* at 2049 ("[T]here 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.").

For a rough analogue to this idea, consider the Court's discussion of Article III standing doctrine in *Allen v. Wright*.[183] There, in discussing various components of the standing inquiry, the Court conceded that Article III standing "cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise."[184] At the same time, the Court went on to note that "[t]he absence of precise definitions . . . hardly leaves courts at sea in applying the law of standing."[185] 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 powers."[186] 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."[187] 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."[188] 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."[189]

To be sure, this language hardly obligated lower courts to start developing clarifying rules regarding the scope of Article III's limits on standing. Perhaps the Court intended merely to assuage fears that a vaguely formulated set of Article III standing requirements presaged eternal doctrinal confusion. But one at least sees within the passage the seeds of 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 obligate) the lower courts to develop rules about the

183. 468 U.S. 737 (1984). For similar examples, see *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012) ("Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion."); and *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (noting that, to safeguard the fairness of trials against undue publicity, "[t]he courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences"). I am grateful to John Rappaport for bringing these passages to my attention.

184. *Allen*, 468 U.S. at 751.

185. *Id.*

186. *Id.* at 752.

187. *Id.*

188. *Id.*

189. *Id.*

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 rule 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 could 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." The idea, in short, would be to place a thumb on the scale against rulification without banning the practice altogether.[190]

Again, I am unaware of any holdings that follow directly along these lines.[191] In practice, though, a standard against rulification might not operate much differently from Supreme Court doctrines that leave the existence of an anti-rulification rule unclear.[192] These sorts of doctrines, as we saw in the pre-

190. This is consistent with Neal Katyal's general observation that the Justices can sometimes provide beneficial "guidance and flexibility to lower courts" by offering them non-binding advice as an occasional alternative to firm doctrinal instructions. *See* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1801 (1998).

191. Perhaps one could identify such an anti-rulification standard as implicit in the recent Fourth Amendment case of *City of Ontario v. Quon*, 560 U.S. 746 (2010). There, in declining to adopt a "broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment," the Court pointed to "[r]apid changes in the dynamics of communication and information transmission" and uncertain predictions as to "how workplace norms . . . will evolve." *Id.* at 759; *see also id.* at 760 ("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.

192. *See supra* Part IV.A.

vious 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 rulifying discretion in the courts below. Rather, the issue is whether, in justifying its own decision to adopt a standard over a rule, 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 an anti-rulification rule, lower courts may feel some, but not total, pressure to avoid rulifying the standard, much as they would 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, 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 of a standard may continue to 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 in a manner that steers 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 desires.

C. Anti-Publication Rules

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 would likely deter rulification even more drastically than would anti-rulification rules themselves. My aim, to be clear, is not to advocate for or against this particular variation on the theme, which I here refer to as "rules against publication." Rather, it is merely to identify such rules as a theoretical possibility and to use them as a means of further highlighting the tradeoffs implicated by the anti-rulification endeavor.

As we have previously seen,[193] even with anti-rulification rules in place, the accretion of precedents over time tends to increase the specificity of legal doc-

193. *See supra* Part I.C.

trine. 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. With enough precedents on the books, application of even mandatory standards may eventually become more constrained and less holistic than the Court might wish it to be.

Would the Court be able to stave off even these very gradual processes of rulification that anti-rulification rules seem 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 the issuance of precedential opinions altogether. Many federal courts of appeals regularly issue unpublished opinions, which carry minimal, if any, precedential weight. This practice is controversial: scholars have criticized nonprecedential opinions (also called "summary orders") as, among other things, unconstitutional,[194] unwise,[195] and unfair to the parties they bind.[196] But whatever their flaws, unpublished opinions do provide a means of resolving cases in the present without constraining the resolution of cases in the future.[197] Therefore, if the Court were really serious about guaranteeing that each case arising under a standard enjoyed holistic and commonsensical review, then prohibiting the publication of opinions about the standard might prove to be an especially potent means of achieving that result.

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194. *See, e.g.*, Anastasoff v. United States, 223 F.3d 898, 899 (8th Cir. 2000) (holding that a circuit rule according nonprecedential effect to unpublished opinions violates Article III "because it purports to confer on the federal 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 potentially violate procedural due process).

195. *See, e.g.*, Richard B. Cappalli, *The Common Law's Case Against Non-Precedential Opinions*, 76 S. CAL. L. REV. 755, 788 (2003) ("There is cause to doubt that those 400,000 nonprecedential cases decided in the past two decades received [full consideration].").

196. *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.").

197. 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 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").

Many readers, I suspect, will blanch at this proposal. Wholly apart from its arguable unlawfulness,[198] the issuance of anti-publication rules might 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 unnecessarily restrict the ability of lower courts to develop and elaborate on Supreme Court precedents in useful and beneficial ways?

In this Article, I have tried to suggest that rules against rulification raise an analogous set of concerns. Anti-publication rules, after all, amount to nothing more than anti-rulification rules in super-strong form, pursuing more aggressively and achieving more effectively the same overarching goal. The only real difference is one of degree—where an anti-rulification rule limits the ability of lower courts to rulify standards, an anti-publication rule would limit that ability to an even greater extent. In that sense, then, the hypothetical possibility of anti-publication rules may shed some useful light on the non-hypothetical tradeoffs that anti-rulification rules actually present. Anti-publication rules showcase in especially stark and crystallized terms the basic but important insight that safeguarding a standard against subsequent rulification necessarily means encroaching on the methodological discretion of lower-court actors. That may well be a tradeoff worth making in a particular set of cases. But as I hope this Article has helped to illustrate, it is at least a tradeoff worth taking seriously.

CONCLUSION

Any system of adjudication must reconcile two basic tasks: resolving individual disputes and enunciating legal norms. 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 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 disagreements over the judge's role boil down to this basic tradeoff: to what extent should courts act as mere resolvers of disputes, and to what extent should they act as active shapers of the law?[199]

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198. *See supra* note 194.

199. *See, e.g.*, Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (contrasting the dispute resolution model with the norm articulation model, while suggesting that the latter has become ascendant); Owen M. Fiss, *Against Settlement*, 93 YALE

The questions examined in this Article implicate the 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 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. This 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, 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. This situation 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 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 that these rules 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.

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"); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 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").

