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WILLIAM & MARY LAW SCHOOL

TIERS OF SCRUTINY IN A HIERARCHICAL JUDICIARY

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Tiers of Scrutiny in a Hierarchical Judiciary

TARA LEIGH GROVE*

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INTRODUCTION

The standards of scrutiny governing judicial application of, for example, free speech, due process, or equal protection doctrine, are an integral feature of constitutional law. Every lawyer knows that certain regulations will be subject to “strict scrutiny,” while others will receive only “rational basis” review. Yet one striking—and puzzling—feature of these standards of scrutiny is their relatively recent vintage. The Supreme Court did not begin to develop these standards until the early-to-mid twentieth century—and even then, the Court did not settle on the rigid rules that we know today for several more decades.¹ Prior to that time, the Court generally subjected government regulations to a single “reasonableness” test, examining whether a given law was a reasonable means of fulfilling a legitimate government purpose.² This lack of historical pedigree

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1. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007) (“[T]he modern strict scrutiny test is of relatively recent origin, having developed only in the 1960s. Strikingly, however, when the modern formula began to evolve, it made nearly simultaneous appearances in multiple corners of constitutional law.”); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 161 (1984) (“[The] multi-level system of scrutiny is a relatively modern development”); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 356 (2006) (arguing that the strict scrutiny standard originated in “litigation over First Amendment freedoms . . . in the late 1950s and early 1960s”).

2. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 49–50, 72–73 (1993) (explaining that the early judiciary sought to ferret out “special legislation” that “advanced the interests of only part of the community” and stating that while the term “arbitrary was . . . used to characterize factional politics,” “reasonableness was the concept that embodied the system’s tolerance of class-neutral policies that advanced a public purpose”); Fallon, *supra* note 1, at 1286–87 (explaining that the judiciary applied a “reasonableness” test to determine valid exercises of the police power); Jeffrey D. Jackson, *Putting Rationality Back into the Rational*

might alone raise questions about the validity of the current tiers of scrutiny.³

In this essay, which forms part of a symposium entitled, “Is the Rational Basis Test Unconstitutional?”, I seek to offer an explanation—and partial justification—for the creation of the standards of scrutiny in the early-to-mid twentieth century. The Supreme Court established these standards in the wake of major changes to its structural relationship with the inferior federal and state courts. In the late nineteenth and early twentieth centuries, the Supreme Court faced a caseload crisis; it simply lacked the capacity to review every lower court decision that came before it. Accordingly, in a series of statutes—the most important of which was the Judiciary Act of 1925—Congress gave the Court discretionary certiorari review over a range of federal question cases from the lower courts. The purpose of this reform was to enable the Court to concentrate its limited resources on what the political branches perceived as the Court’s principal function: to provide a uniform resolution of important federal questions for the judiciary.⁴

In order to perform this settlement function, the Supreme Court had to modify its approach to deciding cases. The Court could no longer correct lower court errors on a case-by-case basis. Instead, the Court had to articulate broad doctrines that would not simply resolve the case before it but also guide the

Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment, 45 U. RICH. L. REV. 491, 507–08, 511–13 (2011) [hereinafter Jackson, *Putting Rationality Back*] (asserting that, in the late nineteenth and early twentieth centuries, the Supreme Court applied a “means-ends arbitrariness analysis,” examining whether the state or federal law was “reasonably related to the public welfare, or whether it was instead arbitrary”); see also G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 3–4 (2005) (footnotes omitted) (“During the period from *Marbury v. Madison*[, 5 U.S. (1 Cranch) 137, 178 (1803),] to *United States v. Carolene Products, Co.*, [304 U.S. 144 (1938),] the Court essentially subjected all challenged decisions of other branches to the same standard of review . . .”).

3. See, e.g., Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1484 (2008) (“It was not until 1955 . . . that the Warren Court moved from disparaging the other rights retained by the people to denying them altogether. This dubious honor belongs to *Williamson v. Lee Optical of Okla., Inc.*, [348 U.S. 483 (1955)] . . .”). A number of jurists and scholars have criticized the tiered system of scrutiny. See, e.g., Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (“I must once more voice my disagreement with the Court’s rigidified approach to equal protection analysis.”); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3097–98, 3152 (2015) [hereinafter Jackson, *Proportionality*] (advocating “a fresh look at proportionality,” an approach used by many foreign constitutional courts, “both as a general principle in constitutional analysis and as a structured doctrine of potential benefit to discrete areas of U.S. constitutional law”); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 799–801 (2011) (similarly arguing for greater use of “proportionality analysis,” as opposed to the American system of tiered review, which “limits the flexibility of judges . . . [and] falsely portrays adjudication as a mechanical exercise”); see also Richard A. Epstein, *Judicial Engagement with the Affordable Care Act: Why Rational Basis Analysis Falls Short*, 19 GEO. MASON L. REV. 931, 931, 957 (2012) (arguing that “[t]here is no place for rational basis review in evaluating any challenge to any government tax or regulation” under the Commerce Clause or the Spending Clause); *infra* note 8 and accompanying text (noting scholarship advocating a return to a single “reasonableness” standard).

4. See *infra* Part II.

lower federal and state courts in the many cases that the Court would not have the capacity to review. This new approach to decisionmaking helps explain the “prophylactic rules” that abound in modern constitutional law, including the standards of scrutiny.⁵ In our current judicial system, such broad doctrines enable the Supreme Court to maintain a meaningful supremacy over its judicial inferiors—and thereby serve the settlement function envisioned by Congress, the executive branch, and the Supreme Court itself.

At the outset, I want to clarify the scope of this argument. First, I do not claim that this structural concern about judicial hierarchy was the only reason that the Supreme Court created standards of scrutiny in the early-to-mid twentieth century.⁶ But I do assert that the change in the judicial system is an important factor that has largely been overlooked by prior discussions of the tiers of scrutiny. Second, this structural account is not a defense of the specific lines drawn by the Supreme Court. That is, I do not seek here to explain why the Court subjects certain legislation (such as that implicating designated fundamental rights) to strict scrutiny, while upholding other laws (such as those dealing with economic activity) if they have a rational basis.⁷

5. See *infra* Part III. In an important article, David Strauss argued that prophylactic rules are “ubiquitous” in Supreme Court jurisprudence. See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); see also *id.* at 204–06 (identifying the standards of scrutiny employed under the Equal Protection Clause as an example of prophylactic rules). Other scholars have likewise argued that the Supreme Court seeks in large part to craft doctrines that implement the more generalized commands of the Constitution. See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 4–5 (2001) (asserting that “the Justices have an obligation to produce clear, workable law” by crafting doctrines and tests that implement constitutional principles); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9, 12 (2004) (“Much of existing constitutional doctrine is better understood not as judicial statements of constitutional meaning (*i.e.*, as constitutional operative propositions) but rather as judicial directions regarding how courts should decide whether such operative propositions have been satisfied (*i.e.*, as constitutional decision rules).”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1213, 1227 (1978) (distinguishing statements of constitutional ideals from “attempts to translate such an ideal into a workable standard for the decision of concrete issues”).

6. Thus, I do not mean to rule out other explanations. As Richard Fallon and Vicki Jackson have pointed out, the Supreme Court was likely reacting in part to the “ghost of *Lochner*” when it crafted the standards of scrutiny and to concerns that balancing tests might insufficiently protect rights. See Fallon, *supra* note 1, at 1293–94 (stating that “[t]here can be little doubt that the ghost of *Lochner* overhung constitutional law during the period in which strict scrutiny developed”); Jackson, *Proportionality*, *supra* note 3, at 3126, 3128 (asserting that the Court responded to *Lochner* by “committing” itself to two discrete standards of review that would curb judicial discretion, and that the Court was also likely influenced by “the perceived failure of balancing to provide appropriate protection to First Amendment interests”). But I do think the changes in the judicial structure help explain why the Supreme Court was motivated to establish (relatively) categorical presumptions in so many different areas of constitutional law at around the same time. See *supra* note 1 (citing sources describing the similar timing of the standards of scrutiny).

7. See *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981) (“Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld . . . when the legislative means are rationally related to a legitimate governmental purpose.”). These classifications rest in part on the (contestable) assumption that the political process can protect the constitutional issues relegated to rational basis review but is less able to protect other interests. See *FCC v. Beach*

Nevertheless, this structural perspective does help to explain and justify the creation of *some* standards of scrutiny by the mid-twentieth century. These standards create strong presumptions that guide lower courts in evaluating the constitutionality of legislation. Relatedly, and perhaps more importantly, this analysis also raises concerns about recent proposals to return to the “reasonableness” standard favored by the Court in the late nineteenth and early twentieth centuries.⁸ Although such a standard may have been workable in a regime where the Supreme Court could review all federal question cases from the lower courts, such an approach today could undermine the Court’s capacity to settle the content of federal law for the judiciary.⁹

I. A NEW JUDICIAL STRUCTURE

From 1789 until the late nineteenth century, the jurisdiction of the Supreme Court was governed, with few modifications, by the Judiciary Act of 1789.¹⁰ This statute reflected political actors’ early (and rather limited) understanding of the Supreme Court’s constitutional role. The first Congress seemed to view the Court primarily as a forum for resolving disputes among the states and ensuring state court compliance with federal law.¹¹ The Court’s appellate jurisdiction was

Commc’ns, Inc., 508 U.S. 307, 314 (1993); *see also infra* notes 68–71 and accompanying text (noting scholarship that contests this assumption as to various issues currently subject to rational basis review).

8. *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 484, 491–92 (2004) (advocating a “single standard of review” that would ferret out arbitrary “class legislation,” as in the pre-*Lochner* era); Jackson, *Putting Rationality Back*, *supra* note 2, at 493 (arguing for “the adoption of a strengthened rational basis test that would allow courts to scrutinize the actual purpose behind legislation and demand that the legislation actually be reasonably related to its valid legislative purpose”). Randy Barnett has advocated what appears to be a more stringent test. *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 339, 345–48 (rev. ed. 2014) (arguing that courts should eschew the standards of scrutiny and require the government in all contexts to show that “there is a sufficient ‘fit’ between the liberty-restricting means it chose and the proper purposes it was seeking to attain” and that “there were no less restrictive alternatives to the means chosen”). But he suggests that many laws would survive that standard. *See id.* at 347 (“One reason to avoid [the tiers of scrutiny] is that a standard that no statute can pass is as hypocritical as a standard that every statute can pass.”); *see also infra* note 73 and accompanying text. Thus, like other scholars, Professor Barnett seems to call for a balancing test.

9. Although I do not focus on the point, this structural perspective also reinforces the claims of other scholars that the Court should not treat its standards of scrutiny as binding on the political branches when, for example, Congress seeks to exercise its enforcement power under Section 5 of the Fourteenth Amendment. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947 (2003) (arguing that Congress should have the power under Section 5 of the Fourteenth Amendment to enact laws “premised on an understanding of the Constitution that differs from the Court’s”). The Supreme Court may have strong structural and institutional reasons to create prophylactic rules to guide the lower federal and state courts, but those same institutional concerns do not carry over to the political branches.

10. *See* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 131 (1923).

11. Under the 1789 Act, the Court had the power to review all state court decisions denying federal rights but no authority over other state court rulings on federal questions. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85–87. Congress modified this rule in 1914, largely to ensure that the Supreme Court

accordingly fairly limited, particularly its jurisdiction over the inferior federal courts.¹²

However, as I have detailed in earlier work, in the late nineteenth and early twentieth centuries, legislators and executive officials began to develop a more expansive conception of the Supreme Court's role.¹³ The Court was increasingly viewed as an institution that should establish definitive and uniform rules of federal law in all arenas, and its appellate jurisdiction was accordingly expanded.¹⁴ During this era, politicians often described the Court as “the final tribunal which should pass upon the meaning of the Constitution, treaties, and statutes of the United States”¹⁵ in order to “enforc[e]” “[the] uniformity of decision . . . throughout the entire judicial system.”¹⁶ Notably, scholars today also overwhelmingly agree that the Constitution establishes a hierarchical judiciary¹⁷ and gives the Court a supreme role in defining the content of federal law for the judiciary—both the inferior federal courts and the state courts.¹⁸

could provide a uniform resolution of all federal questions from the state courts. *See* Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790; H.R. REP. NO. 63-1222, at 2 (1914) (asserting that the reform would enable the Court to preserve “the uniformity of the Federal laws in their practical application to . . . the several States”).

12. *See* Judiciary Act of 1789, ch. 20, §§ 13–14, 22, 1 Stat. at 80–82, 84–85 (allowing Supreme Court review only when, for example, the amount in controversy exceeded \$2000, or through the exercise of supervisory writs).

13. *See* Tara Leigh Grove, *The Exceptions Clause as a Structural Safeguard*, 113 COLUM. L. REV. 929, 948–78 (2013).

14. *See id.* at 951, 962–63 (discussing the expansion of federal jurisdiction in the late nineteenth and early twentieth centuries).

15. 52 CONG. REC. 276 (1914) (statement of Rep. Edwin Webb).

16. 21 CONG. REC. 3405 (1890) (statement of Rep. David Culberson).

17. I have articulated the textual, structural, and historical foundations for this view in earlier work. *See* Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 31–40 (2009); *accord* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 362 (2006) (concluding that the hierarchical view is “more plausible”); Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1007 (2007) (arguing that “the weight of textual, intratextual, and structural arguments points toward a hierarchical federal judiciary”); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1453 (2000) (urging that the Court is “the hierarchical leader of the judicial department”). For a contrary view, *see* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 503–04 (1991) (contending that the Constitution does not require a hierarchical judiciary).

18. *See, e.g.,* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 503 (2008) (agreeing with the widely held view that “state courts must abide Supreme Court doctrine on questions of federal law”); Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992) (urging that state courts have an “obligation to follow Supreme Court precedent in *all* cases”); Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155, 189–90 (“The Supreme Court has the hierarchical authority to set the law for lower courts.”); James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 199 (2007) (asserting that state courts “must remain subordinate to the Supreme Court” on federal issues). For a more nuanced view, *see* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 838, 873 (1994) (arguing that lower federal courts, but not necessarily state courts, must “obey Supreme Court federal law precedents”). For a dissenting position, *see* Michael Stokes Paulsen, *Accusing Justice: Some Variations on*

One question that has arisen throughout much of our history is how to ensure that the “one supreme Court” created by the Constitution can perform this settlement function in a growing judicial system.¹⁹ By the late nineteenth century, the Supreme Court faced a caseload crisis. Under the (then-governing) 1789 Judiciary Act, the Court was required to review every case properly before it on appeal.²⁰ Such a mandatory appellate review scheme was sustainable during the Court’s early years, when it heard at most 250 cases per year.²¹ But by 1890, the Court’s mandatory appellate docket had swelled to over 1800 cases,²² only four or five hundred of which it could dispose of in a given year.²³ The Justices called upon Congress for relief, and Congress responded by granting the Court discretionary certiorari review over certain classes of cases, including diversity disputes from the lower federal courts.²⁴

The creation of certiorari review in 1891 marked a dramatic change in the Supreme Court’s appellate review scheme. But even after the 1891 Act, the Court still had mandatory appellate jurisdiction over most federal question cases.²⁵ That changed in 1925. After the Court’s docket continued to swell throughout the early twentieth century, the Justices—led by Chief Justice William Howard Taft—argued that the “one supreme Court” “cannot attend to everything that can be brought up to us under the form of a Federal question; it cannot be done.”²⁶ The Justices thus argued for the expansion of certiorari

the Themes of Robert M. Cover’s Justice Accused, 7 J.L. & RELIGION 33, 82–88 (1989) (urging that lower courts can initially disregard “clearly erroneous” constitutional interpretations).

19. See U.S. CONST. art. III, § 1.

20. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81; Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979) (“From 1789 to 1891 the Court was under congressional mandate to take jurisdiction over every case that properly came before it, to consider the briefs, to hear the oral argument, and to resolve the merits of each case by written opinions or otherwise.”).

21. See DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 160 (9th ed. 2011) (providing a chart showing that the Court’s docket from 1800 until 1850 generally included 250 cases or fewer).

22. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 60 (Transaction Publishers 2007) (1928) (noting that, from 1850 to 1890, the Court’s docket grew from 253 to 1,816 cases).

23. See H.R. REP. NO. 51-1295, at 3 (1890) (referring to Justice Harlan’s statement that, in 1886, the Court disposed of only 451 out of the 1396 cases on its docket).

24. The 1891 Act also established the federal courts of appeals. See Grove, *Exceptions Clause*, *supra* note 13, at 952–59 (describing the background of the 1891 Judiciary Act). Under the Act, the Supreme Court still had mandatory appellate jurisdiction over most federal question cases from the lower federal courts and only discretionary review power (through certiorari or certification) over other classes of cases. See Circuit Court of Appeals Act, §§ 5–6, 26 Stat. 826, 827–28 (1891) (providing for mandatory review in federal cases when the amount in controversy exceeded \$1000); *id.* §§ 1, 2, 6, 26 Stat. at 826, 828 (authorizing discretionary review from the newly-created appellate courts over cases involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty).

25. See *supra* note 24.

26. *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing Before the H. Comm. on the Judiciary*, 68th Cong. 21 (1924) (statement of James Clark McReynolds, Associate Justice of the Supreme Court of the United States) [hereinafter *Jurisdiction of the Supreme Court Hearing*] (“We simply cannot attend to everything that can be brought up to us under the form of

review, so that the Court could concentrate its limited resources on its primary functions: resolving important issues of federal law and settling conflicts among the lower courts.²⁷

Chief Justice Taft emphasized that “[t]he real work . . . the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it.”²⁸ Accordingly, the Court should no longer serve as a court of error, reversing flawed lower court decisions on a case-by-case basis.²⁹ Instead, the Court should focus on “expounding and stabilizing principles of law . . . for the public benefit.”³⁰

Notably, Chief Justice Taft seemed to recognize that this “law declaration” function would entail changes in the Court’s written opinions—and, ultimately, in its doctrines.³¹ He declared:

The chief duty in a court of last resort is not to dispose of the case but it is sufficiently to elaborate the principles, the importance of which justify the bringing of the case here at all, to make the discussion of those principles and the conclusion reached useful to the country and to the Bar in clarifying doubtful questions of constitutional and fundamental law.³²

Congress and the executive branch responded with the Judiciary Act of 1925, which granted the Supreme Court discretionary certiorari review over a range of federal questions.³³ The debates over that law underscore the political branches’ agreement with Chief Justice Taft that the Court’s principal function was to

a Federal question; it cannot be done. So we are face-to-face with a practical question, and there is no relief except through Congress.”); see also Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1660–1704 (2000) (describing Chief Justice Taft’s efforts).

27. See, e.g., 66 CONG. REC. 2920 (1925) (letter from Chief Justice William Howard Taft to Sen. Royal Samuel Copeland) (asserting that “the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only . . . questions of importance”); *Jurisdiction of the Supreme Court Hearing*, *supra* note 26, at 17 (statement of Willis Van Devanter, Associate Justice of the Supreme Court of the United States) (asserting that the Court would grant review only if “the applicant shows [that the case] really involves questions of general importance or the decision by the Supreme Court is necessary to produce needed uniformity of action elsewhere”).

28. William Howard Taft, Address to the New York County Bar Association 6–7 (Feb. 18, 1922), *microformed on* William H. Taft Papers, Reel 590 (Library of Congress) [hereinafter Taft Papers].

29. Letter from William Howard Taft to Clyde B. Aitchison (Dec. 4, 1925), *in* Taft Papers, *supra* note 28, at Reel 278 (“[The Court’s] chief function [in writing opinions] is not to get rid of cases, it is to clarify the law and to be helpful in other cases. It is not a discharge of that function to be cryptical and leave the reader still guessing.”).

30. *Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary*, 67th Cong. 2 (1922) (statement of William Howard Taft, Chief Justice of the United States).

31. See *supra* note 29.

32. Letter from William Howard Taft to Charles P. Taft 3 (Nov. 1, 1925), *in* Taft Papers, *supra* note 28, at Reel 277.

33. See Pub. L. No. 68-415, 43 Stat. 936 (1925). The Act left in place mandatory appellate jurisdiction over: (1) state court decisions invalidating a federal statute or treaty; (2) state court decisions upholding state law against a constitutional challenge; (3) certain decisions by three-judge

provide a uniform resolution of important federal questions. Thus, a Senate report explained: “The central thought [behind the reform] is this, that . . . ordinary litigation should end [in the lower courts] and that the cases should not go to the Supreme Court . . . unless the questions involved are of grave public concern or unless” there is a “conflict in the rulings of [the lower federal or state] courts.”³⁴ Likewise, a House of Representatives report declared that the Court should concentrate its limited resources on its “highest duty” of “interpreting the Constitution and preserving uniformity of decision” on federal law.³⁵

Throughout the remainder of the twentieth century, as the Supreme Court’s workload continued to rise, Congress expanded the scope of certiorari review—ultimately, to encompass virtually every federal question case.³⁶ The debates over these measures further underscore political actors’ assumption that the Supreme Court should serve as the ultimate expositor of federal law for the judiciary. Executive officials from both Democratic and Republican administrations argued that the expansion of certiorari review was essential to allow the “one supreme Court” created by the Constitution to decide “cases . . . in which the public interest requires an authoritative resolution.”³⁷ Members of Congress agreed that mandatory appellate review “impair[ed] the Court’s ability” to provide a “definitive resolution” of disputed federal questions.³⁸ Accordingly, reform was needed to enable the Court to focus on its two “principal functions”: (1) “resolv[ing]” important issues of federal law, and (2) “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts.³⁹

district courts; (4) certain criminal appeals by the United States; and (5) federal appellate court decisions invalidating a state law. *See id.* § 1, 43 Stat. at 937–39.

34. S. REP. NO. 68-362, at 3 (1924); *see also* Second Annual Message of President Calvin Coolidge (Dec. 3, 1924), in 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790–1966, at 2662 (Fred L. Israel ed., 1966) (asserting that discretionary review would allow the Court to focus on cases “of public moment”).

35. H.R. REP. NO. 68-1075, at 2 (1925) (stating that the Court should devote its “time and attention and energy . . . to matters of large public concern” and to “preserving uniformity of decision by the intermediate courts of appeals”).

36. *See* Pub. L. No. 100-352, 102 Stat. 662 (1988); Grove, *Exceptions Clause*, *supra* note 13, at 970 (discussing other certiorari statutes passed by Congress during the period between the 1925 and the 1988 Judiciary Acts).

37. *Supreme Court Jurisdiction Act of 1978: Hearing on S. 3100 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 95th Cong. 7 (1978) (statement of Daniel Meador, Ass’t Att’y Gen. for the Office for Improvements in Judicial Admin.); *see id.* at 2 (statement of Wade McCree, Solicitor Gen. of the United States) (arguing that discretionary review was needed to “maintain the viability of this constitutional concept of a single Supreme Court as the population . . . has grown enormously and the volume of litigation has correspondingly burgeoned”); *Court Improvements Act of 1983: Hearings Before the Subcomm. on Courts of the S. Comm. on the Judiciary*, 98th Cong. 15 (1983) (statement of Jonathan Rose, Ass’t Att’y Gen., U.S. Dep’t of Justice) (“[T]he current system hinders the resolution of . . . questions of public importance.”); *see also* Grove, *Exceptions Clause*, *supra* note 13, at 968–78 (discussing the bipartisan support for the expansion of certiorari jurisdiction).

38. 125 CONG. REC. 7633 (1979) (statement of Sen. Dennis DeConcini).

39. H.R. REP. NO. 100-660, at 14 (1988); S. REP. NO. 68-362, at 3 (1924) (“[C]ases should not go to the Supreme Court . . . unless the questions involved are of grave public concern” or there is a conflict among the lower courts).

II. CHANGES IN SUPREME COURT DECISIONMAKING

The 1925 Judiciary Act signaled a change in the Supreme Court's institutional role and, specifically, in its hierarchical relationship with the lower federal and state courts. The Court could no longer oversee the lower courts by reviewing their decisions on a case-by-case basis. Instead, to maintain its "supreme" status in the judicial hierarchy, the Court increasingly had to establish broad precedents for lower courts to apply in the many cases that it lacked the capacity to review. And, as several scholars have observed, that is precisely what the Court began to do in the wake of the 1925 Act. "From Taft onward, the justices . . . emphasized that the function of the Supreme Court is not to correct errors in the lower courts, but to 'secur[e] harmony of decision and the appropriate settlement of questions of general importance.'"⁴⁰

This transformation in the Court's institutional role also led to changes in its written opinions. When the Court's job was simply to correct errors in specific lower court rulings, it could issue narrow decisions that were tailored to the circumstances of the particular dispute. By contrast, throughout the twentieth century, the Supreme Court focused increasingly on law declaration. Robert Post has recounted this transformation in a detailed historical analysis of the Court's opinion-writing practices from the 1920s to the 1990s.⁴¹ As he explains, "[b]y empowering the Court to choose its own jurisdiction, the [1925 Judiciary] Act shifted the Court's emphasis away from opinions addressed to private litigants, and toward opinions" more focused on "the development of American law."⁴² Henry Monaghan and Peter Strauss have likewise noted that the modern Court has over time altered its "manner of speaking" to "emphasize[] the enunciation of doctrine over the resolution of disputes."⁴³

40. Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28, 30–31 (1983) (quoting Address of Chief Justice Charles Evans Hughes at the American Law Institute Meeting, in 20 A.B.A. J. 341, 341 (1934)); see *infra* notes 41–52 and accompanying text.

41. See Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1287 (2001) (observing that, in the 1920s, "a full Supreme Court opinion was a routine method of deciding a large proportion of the Court's [mandatory] appellate docket," and was "relatively short and succinct," but "[b]y the 1990s," a full opinion "had become the Court's way of addressing the very few cases on its docket of exceptional importance. Each opinion accordingly received fuller and more extensive attention, manifested both by its relative length and by the full complement of concurring and dissenting opinions that was likely to accompany it").

42. *Id.* at 1306.

43. Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1094–95 (1987); see *id.* at 1095 ("[F]aced with a controversy over a subject it is likely to see but once or twice a decade, the Court will tend to write an essay on that subject—hoping to put that part of the law's house in order—rather than simply decide the case in the most direct manner possible."); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668–69 (2012) ("While still formally disclaiming any general superintendence over the conduct of other organs of government, the Court seeks to ensure and expand its hierarchical superiority in our judicial system.").

Most importantly for present purposes, the Supreme Court's new institutional role also impacted the doctrine that it articulated. As some scholars have recognized,⁴⁴ in order to provide meaningful leadership in this new judicial system, the Court had to craft doctrines that would cabin the discretion of the lower courts.⁴⁵ Professor Strauss offers this theory as perhaps the best way of explaining the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁴⁶ which directs lower courts to defer to a federal agency's reasonable construction of an ambiguous federal statute.⁴⁷ The decision, which cuts across all substantive areas of administrative law, constitutes a broad doctrine of deference to the executive branch. But Professor Strauss has urged that *Chevron* should not be viewed simply "as a rule about agency discretion."⁴⁸ *Chevron* can also "be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy."⁴⁹

44. See Grove, *supra* note 17, at 3 (arguing that "the current Court cannot effectively perform [its] constitutional responsibility" to serve as the hierarchical leader of the judiciary "unless it issues broad decisions that govern a wide range of cases in the lower courts"); Toby J. Heytens, *Doctrine Formulation and Distrust*, 83 NOTRE DAME L. REV. 2045, 2046–47 (2008) (emphasizing, without defending on normative grounds, the Supreme Court's "need to craft rules that can and will be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of litigated cases"); Strauss, *supra* note 43, at 1095, 1135 (asserting, again without defending normatively, that "[t]he Court's opinions on the merits may be influenced by its management dilemmas. It may choose outcomes that tend to make its control over the appellate courts more effective [or] that tend to reduce the opportunities those courts might enjoy for adventurism free of close supervision by the Court"); see also Tonja Jacobi & Emerson H. Tiller, *Legal Doctrine and Political Control*, J.L. ECON. & ORG. 326, 339 (2007) (asserting that legal doctrine can serve as an "instrument of political control by higher courts over lower courts" and explaining that a rational reviewing court would choose between determinate rules and flexible standards depending on the degree of alignment between its policy preferences and those of lower courts).

45. The effectiveness of such precedent setting, of course, depends on the willingness of lower courts to comply with Supreme Court decisions. For purposes of this analysis, I assume that lower courts do endeavor to abide by the Court's rulings—an assumption that is supported by some empirical evidence. See, e.g., John Gruhl, *The Supreme Court's Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 W. POL. Q. 502, 517–19 (1980) (finding substantial lower court compliance with the Court's libel decisions); Donald R. Songer, *The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals*, 49 J. POL. 830, 838–39 (1987) (finding compliance with labor and antitrust decisions); see also David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2025–26 (2013) (concluding, based on an empirical study, that lower courts generally follow higher court dicta). This assumption also accords with the observations of other scholars. See, e.g., Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 847 (1993) ("'Inferior' judges know their place, as it were, which is the enforcement of the decisions of superiors, whatever their own views.").

46. 467 U.S. 837 (1984).

47. See *id.* at 842–44.

48. Strauss, *supra* note 43, at 1121–22.

49. *Id.* at 1121 ("Rather than see *Chevron* just as a rule about agency discretion, . . . it can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy.").

Along the same lines, Toby Heytens has emphasized the Supreme Court's need to craft doctrines that "can and will be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of litigated cases."⁵⁰ He argues that certain rule-like doctrines, such as the single-digit ratio governing punitive damage awards, help to constrain lower court judges.⁵¹ By contrast, "complicated or open-ended standards increase the risk of good faith misunderstandings and create opportunities for disguising deliberate noncompliance."⁵²

This background helps explain why the Supreme Court established and solidified "standards of scrutiny" in the decades after the 1925 Judiciary Act.⁵³ When the Court had mandatory appellate jurisdiction over most federal question cases, it could apply—and direct lower courts to apply—a "reasonableness" standard for constitutional claims.⁵⁴ If a lower court erred in assessing the reasonableness of particular legislation, the Supreme Court could correct that error on appeal. But with the creation and expansion of certiorari review for federal claims, the Court could no longer review each lower court decision. Accordingly, the Court needed to dispense with the relatively indeterminate "reasonableness" standard and instead articulate doctrines that would guide the lower federal and state courts in the many cases that it could not review.⁵⁵

The standards of scrutiny served nicely as mechanisms to guide the lower courts. As Kathleen Sullivan has pointed out, "[t]he key move in litigation under a two-tier system is steering the case onto the preferred track. The genius

50. Heytens, *supra* note 44, at 2046 ("[E]ven scholars who emphasize the need to consider the more pragmatic process of translating first-order legal meaning into second-order legal doctrine have tended to neglect one critically important consideration: the need to craft rules that can and will be faithfully implemented by the lower court judges who have the last word in the overwhelming majority of litigated cases.").

51. *See* *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("declin[ing] . . . to impose a bright-line ratio," but stating that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process"); Heytens, *supra* note 44, at 2073, 2079 (arguing that punitive damages constitutes one area in which "the Supreme Court's recent actions suggest an attempt to exert greater control over all lower courts" by "mov[ing] the underlying constitutional test . . . in the direction of a rule . . . by pointedly suggesting that ratios above 9:1 are presumptively suspect").

52. Heytens, *supra* note 44, at 2048, 2059 (making this point, although also recognizing that the Supreme Court cannot rely exclusively on rules and must use other control mechanisms, like presumptions). Although he does not focus on the standards of scrutiny, Professor Heytens recognizes that such legal presumptions can increase the Supreme Court's control over lower courts. *See id.* at 2048, 2065 (noting that "the Court can nudge trial courts towards a favored result or away from a disfavored one by adjusting the background legal baseline (such as whether a particular type of law is presumed unconstitutional)").

53. As discussed, I do not mean to rule out other explanations. *See supra* note 6 and accompanying text.

54. *See supra* note 2 and accompanying text (noting that through the *Lochner* era, the judiciary generally applied a "reasonableness" test to government action).

55. *Cf.* Fallon, *supra* note 1, at 1287 (observing that "the demands of reasonableness can be—and were—understood more or less stringently, even by different judges or Justices in the same case. Results were far from predictable . . .").

of this tracking device is that outcomes can be determined at the threshold without the need for messy balancing.”⁵⁶ Although the tiers of scrutiny are not bright-line rules, they do create strong presumptions that instruct the inferior federal and state courts on how to approach a range of cases. Lower courts know that they must carefully scrutinize certain legislation (for example, that which implicates designated fundamental rights, classifies individuals on the basis of race, or regulates the content of speech),⁵⁷ while giving little to no scrutiny to other government actions (such as regulations of economic activity).⁵⁸ Such broad doctrines can therefore, much like *Chevron*, “be seen as . . . device[s] for managing the [inferior courts] that can reduce . . . the Supreme Court’s need to police their decisions for accuracy.”⁵⁹

I do not mean to suggest that the Supreme Court’s constitutional doctrine is a model of clarity.⁶⁰ The Court has at times departed from its standards of scrutiny (by, for example, applying rational basis scrutiny “with bite”)⁶¹ or failed to articulate any standard of scrutiny at all (as with Second Amendment

56. Kathleen Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992) (“[S]uch a two-tier system functions as a de facto categorical mode of analysis despite its nominal use of balancing rhetoric If the standard is rationality, the government is supposed to win—and any lawyer who hires expert witnesses to dispute the empirical basis for legislation under this standard of review is wasting the client’s money. If strict scrutiny is applied, the challenged law is never supposed to survive—well, hardly ever . . .”).

57. See *City of Cleburne v. Cleburne Living Cr.*, 473 U.S. 432, 440 (1985) (noting that laws that classify “by race, alienage, or national origin,” as well as those that “impinge on personal rights protected by the Constitution,” are “subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”).

58. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (explaining that most social and economic regulations that do not implicate fundamental rights or suspect classes must be “upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification”).

59. Strauss, *supra* note 43, at 1121.

60. See *infra* notes 61–64 and accompanying text. Nevertheless, I agree with Richard Fallon that it would be a mistake to treat the standards of scrutiny as completely malleable. See Fallon, *supra* note 1, at 1301 (“[O]ne can be a bit of a realist, as I think one ought to be, while also taking doctrinal formulas such as the narrowly-tailored-to-a-compelling-interest test seriously, as I think that one who wants to understand Supreme Court decisionmaking ought to do . . .”).

61. As many scholars have observed, the Supreme Court’s application of strict scrutiny is not always “strict,” and the Court has sometimes applied a kind of rational basis scrutiny “with bite,” rather than extremely deferential review. See, e.g., Goldberg, *supra* note 8, at 482 (asserting that the Court has been inconsistent about “the strictness of strict scrutiny” and has occasionally insisted on “meaningful [rational basis] review”); Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 12 (1972) (exploring cases where the Court applied rational basis review with “considerable bite”); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–96 (2006) (asserting, based on an empirical study, that approximately “30 percent of all applications of strict scrutiny . . . result in the challenged law being upheld”). The situation is further complicated by the introduction of intermediate scrutiny, which appears to be more of a balancing test. See Sullivan, *supra* note 56, at 297–98 (“Where intermediate scrutiny governs, the outcome is no longer foreordained at the threshold.”).

claims or classifications on the basis of sexual orientation).⁶² But importantly, in these arenas, the Court has often faced criticism—from scholars, lower court judges, and its own members—for failing to clarify constitutional law and provide guidance to lower courts.⁶³ Like the political branches that enacted the Judiciary Act of 1925 and other certiorari laws, many observers today expect the Supreme Court to use its limited resources to “pronounce uniform and authoritative rules of federal law” for the judiciary.⁶⁴

III. IMPLICATIONS FOR CHALLENGES TO THE TIERS OF SCRUTINY

In recent years, scholars have severely criticized the tiers of scrutiny established by the Supreme Court.⁶⁵ Scholars complain, for example, that this scheme is “overly rigid”⁶⁶ and “falsely portrays adjudication as a mechanical exercise.”⁶⁷ Commentators further worry that the category of rational basis scrutiny, which applies to most legislation, leaves certain important rights underenforced. Vicki Jackson, for example, points to the lack of review of laws

62. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (striking down state bans on same-sex marriage without articulating a standard of review); *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (striking down a provision of the Defense of Marriage Act, which provided that the federal government would not recognize state-sanctioned same-sex marriages, without articulating a standard of review); *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008) (“[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights” a prohibition on handguns in the home “would fail constitutional muster”).

63. See, e.g., *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting) (asserting that “if this is meant to be an equal-protection opinion, it is a confusing one,” because it “does not even mention” a standard of scrutiny); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 253–54 (2d Cir. 2015) (stating that, by failing to articulate a standard of scrutiny, “*Heller* offered little guidance for resolving future Second Amendment challenges”); *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013) (“[T]he Court has provided precious little guidance with respect to the standard by which restrictions on the possession of firearms should be assessed.”); Stacey L. Sobel, *When Windsor Isn’t Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL’Y 493, 495 (2015) (“Lower courts still face significant hurdles in analyzing federal Equal Protection Clause claims related to sexual orientation classifications [in areas such as employment and housing discrimination] because the Supreme Court has not yet determined what standard of review should be applied.”).

64. Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1039 (1982) (asserting that the Constitution “contemplate[s] . . . a federal Supreme Court with the power to pronounce uniform and authoritative rules of federal law”); see also Monaghan, *supra* note 43, at 730 (“Insofar as the Court has expanded its ability to have the final say on any constitutional question capable of judicial resolution, the result seems to be consistent with its current place in our constitutional order, and with popular expectations, as well as what the ‘reasoning class’ would expect.”).

65. See sources cited *supra* notes 3, 8.

66. Shaman, *supra* note 1, at 182 (arguing that the tiered system “always has been and always will be an overly rigid structure that retards constitutional analysis by diverting thought away from the merits of cases and by constricting thought through a priori categories”).

67. Mathews & Sweet, *supra* note 3, at 799–801 (arguing that the American system of tiered review “limits the flexibility of judges in the face of complexity, falsely portrays adjudication as a mechanical exercise in applying law that is akin to a ‘constitutional code,’ and creates unnecessary inconsistency and arbitrariness”).

that have a disparate impact on minority groups.⁶⁸ “[D]isproportionality in the effects of laws,” Professor Jackson argues, “may be a signal of process failures tainted by prejudices”; courts should therefore closely examine such laws to ensure that they were enacted for a proper purpose.⁶⁹ Randy Barnett and others take aim at the Supreme Court’s current test for economic regulations, which directs lower courts to uphold a law “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”⁷⁰ Professor Barnett argues that this approach amounts to “a judicial abdication of its function to police the Constitution’s limits on legislative power.”⁷¹

Notably, these scholars do not urge the judiciary to extend “strict scrutiny” to additional categories of private rights; they recognize that a legal system cannot function if every government regulation is likely to be struck down.⁷² Instead, commentators critical of the tiers of scrutiny favor balancing tests that will “hold legislatures accountable without invalidating most legislation.”⁷³ Thus, a number of scholars have argued for a return to the “reasonableness” test applied by the Supreme Court in the late nineteenth and early twentieth centuries.⁷⁴ In the same spirit, Professor Jackson and others urge the Court to adopt a “proportionality” analysis similar to that used by constitutional courts in other countries.⁷⁵ Under that approach, the judiciary would in each case balance the relative interests of the private individual and the government, “[r]ather than

68. See *Washington v. Davis*, 426 U.S. 229, 239–42 (1976); Jackson, *Proportionality*, *supra* note 3, at 3175 (advocating greater judicial scrutiny of laws that have a disparate impact on historically disadvantaged groups).

69. Jackson, *Proportionality*, *supra* note 3, at 3175; see also *id.* at 3178 (“A more flexible standard for reviewing equal protection claims could treat disparate impacts differently from overt or intentional uses of race, without suggesting that disparate impact on a racial minority group, or other historically discriminated-against group, creates no greater constitutional concern than distinctions between businesses for tax purposes . . .”).

70. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993); see *infra* note 71.

71. Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 *GEO. MASON L. REV.* 845, 859–60 (2012); see also Mathews & Sweet, *supra* note 3, at 838 (arguing that “as presently deployed, rational basis review leads American judges to abdicate their duty to protect rights, including property rights, that are expressly provided for by the Constitution”). For an argument suggesting that economic interests *should* receive less protection than personal interests, see Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 *HARV. L. REV.* 1452, 1468–76 & n.93 (2015) (reviewing Richard A. Epstein, *The Classical Liberal Constitution* (2014)); Suzanna Sherry, *Selective Judicial Activism: Defending Carolene Products*, 14 *GEO. J.L. & PUB. POL’Y* 559 (2016).

72. See *infra* note 73 and accompanying text.

73. Jackson, *Proportionality*, *supra* note 3, at 3178 (“A standard focused not only on the nature of the classification but also on the relative nature of the harm complained of and its relationship to the particular government interests at stake would allow courts the flexibility to hold legislatures accountable without invalidating most legislation.”); see also Barnett, *Scrutiny Land*, *supra* note 3, at 1498 (arguing that a “presumption of liberty” would not mean that the exercise of a right could not “be regulated or restricted in any way Otherwise, all lawmaking powers of government would be completely overridden by individual rights, which is obviously not a mandate of the Constitution”).

74. See *supra* note 8 and accompanying text.

75. See *supra* note 3 (citing, among other things, scholarship that favors proportionality).

relying on tiers of review as on-off switches.”⁷⁶

Although this call for balancing tests is understandable, my goal in this essay is to sound a note of caution. As Richard Fallon has observed, when the judiciary evaluated most constitutional claims under a “reasonableness” test, the “[r]esults were far from predictable.”⁷⁷ “[T]he demands of reasonableness can be—and were—understood more or less stringently, even by different judges or Justices in the same case.”⁷⁸ Such a scheme may nevertheless have been workable, when the Supreme Court had—and could exercise—appellate jurisdiction over virtually every federal question case from the lower courts. Through the mandatory review scheme that predominated prior to 1925, the Supreme Court could provide a definitive resolution of important federal questions and thereby serve as the hierarchical leader of the judiciary—one case at a time.

Today, by contrast, it would be impossible for the Court to oversee every lower court decision involving a federal question. Although the Court could expand its docket beyond the seventy to eighty cases per year that it currently hears,⁷⁹ no scholar (to my knowledge) believes that the Court could decide more than 150 or 200 cases per year⁸⁰—a mere fraction of the 7,500 cases that are now brought before the Court (and an even smaller fraction of the hundreds of thousands of cases heard by the lower federal and state courts each year).⁸¹

Accordingly, in order to provide meaningful leadership to the modern judiciary, the Supreme Court cannot function as a court of error; instead, it must articulate broad doctrines that guide the lower courts in the many cases that it cannot review. The standards of scrutiny—in large part because of their rigidity—enable the Court to instruct the inferior federal and state courts on how to approach a range of constitutional cases.⁸² Accordingly, these broad doctrines

76. Jackson, *Proportionality*, *supra* note 3, at 3097–98, 3175. Notably, Professor Jackson is careful not to advocate proportionality for all constitutional claims. *See id.* at 3103 (disagreeing with scholars who “view case-by-case application of proportionality analysis as almost always normatively superior” and citing free speech doctrine as one area that benefits from categorical rules).

77. Fallon, *supra* note 1, at 1287.

78. *Id.*

79. *See* JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 13 (2015), <http://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> (reporting that the Supreme Court decided seventy-five cases in the 2014 term and seventy-seven in the 2013 term).

80. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 268 (2006) (“The Court’s peak capacity runs to about 200 cases per year . . .”); Strauss, *supra* note 43, at 1100 (doubting that the Court could decide more than 150 cases per year).

81. One can get a sense of the size of the lower federal courts’ caseload from Chief Justice John Roberts’ annual report. But notably, the report does not include filings in state court. *See* ROBERTS, *supra* note 79, at 14–15 (reporting that, in 2015, 52,698 cases were filed in the federal courts of appeals, 279,036 cases were filed in the federal district courts, and 860,182 bankruptcy petitions were filed in bankruptcy court).

82. As discussed, although the Supreme Court has not always applied the standards of scrutiny with perfect consistency, these doctrines do have a significant impact on the outcome of cases. *See supra* notes 56–64. Accordingly, I believe that jurists and scholars are right to characterize the standards as “rigid.” *See* sources cited *supra* notes 3, 66. My goal is to offer some reasons why this very “rigidity” can be seen as a good thing.

allow the Court to perform what Congress and the executive branch have described as its principal function: providing a uniform resolution of important federal questions.⁸³ The federal Constitution, legislators have long asserted, should not “mean one thing in one State and the reverse in another.”⁸⁴

Some readers may respond that it is better to have a system in which some courts protect rights some of the time, even if that leads to disuniformity and inconsistency in the application of federal constitutional law and undermines the Supreme Court’s capacity to maintain a meaningful supremacy over its judicial inferiors. That is preferable, the argument would go, to a system in which some rights (those currently subject to rational basis scrutiny) go largely unprotected nationwide. There is certainly room to debate the value of uniformity,⁸⁵ as well as the importance of securing the Supreme Court’s structural role in the judiciary.⁸⁶ My goal here is not to resolve that debate.

Instead, I seek only to point out one significant and, to my mind, troubling consequence of a return to the balancing tests of an earlier era. For over a century, congressional regulations of Supreme Court jurisdiction have been driven by the assumption that the Court should provide a uniform resolution of important federal questions. This conception of the Court’s role also, as Henry Monaghan recently suggested, seems to accord with “popular expectations”: “Having the final say [on any constitutional question capable of judicial resolution] entrenches the Court’s role of helping to ensure stability, coherence, and unity in the legal system [I]f we were to design a constitutional system today, surely our conception of a supreme Court would at least start from a ‘final say’ default position.”⁸⁷

83. See *supra* Part II; e.g., H.R. REP. NO. 100-660, at 14 (1988), reprinted in 1988 U.S.C.C.A.N. 766, 779 (asserting that the expansion of certiorari review would enable the Court to perform its two “principal functions” of “resolv[ing] cases involving principles . . . of wide public importance” and “ensur[ing] uniformity and consistency in the law by resolving conflicts” among the lower courts).

84. H.R. REP. NO. 63-1222, at 2 (1914) (advocating the expansion of the Supreme Court’s appellate jurisdiction over federal question cases from the state courts in order to ensure “the uniformity of the Federal laws in their practical application to the numerous questions that would arise in the several States. Under existing laws the Federal Constitution may mean one thing in one State and the reverse in another”); see also *supra* note 11 (discussing this legislation).

85. Compare, e.g., Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161, 161–65 (1960) (arguing that the Court’s “essential appellate functions” are to preserve the uniformity and supremacy of federal law), with Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1578 & n.27 (2008) (noting that “many . . . disagree with the claim that uniformity is constitutionally prescribed” and citing legal scholars who argue that any claim that uniformity is constitutionally required lacks textual support).

86. The vast majority of scholars have, like myself, concluded that the Constitution creates a hierarchical judiciary and gives the Supreme Court a “supreme” role in defining the content of federal law for the judiciary. See *supra* notes 17–18 and accompanying text. But not all scholars agree with that position. See *id.* In any event, for some, the interest in protecting individual constitutional rights, in at least some parts of the country some of the time, would outweigh this structural concern.

87. Monaghan, *supra* note 43, at 730 (“Insofar as the Court has expanded its ability to have the final say on any constitutional question capable of judicial resolution, the result seems to be consistent with its current place in our constitutional order, and with popular expectations, as well as what the

The broad prophylactic rules that abound in modern constitutional law, including the standards of scrutiny, help ensure that the Supreme Court can define the content of federal law for the judiciary—and thereby have the “final say” on legal questions that reach the judiciary. An alternative approach could undermine the Court’s capacity to perform what the 1925 Congress described as its “highest duty” of “interpreting the Constitution and preserving uniformity of decision” on federal law.⁸⁸

CONCLUSION

Many scholars in recent years have criticized the tiers of scrutiny that govern much of constitutional law as overly rigid and lacking any historical foundation. But I contend that the Supreme Court had good reason to adopt these standards beginning in the early-to-mid twentieth century. Around that time, it became clear that the Court no longer had the capacity to hear every federal question case from the inferior federal and state courts. Accordingly, in a series of statutes, Congress and the executive branch permitted the Court to review lower court decisions through a discretionary certiorari scheme. In order to provide meaningful leadership in this judicial system, the modern Supreme Court cannot simply correct lower court errors on a case-by-case basis. Instead, the Court must articulate broad doctrines that guide the lower courts in the many cases that it cannot review. The tiers of scrutiny, like the other prophylactic rules that abound in modern constitutional law, enable the Supreme Court to provide guidance to the lower federal and state courts on the content of federal law—and thereby to help ensure stability and uniformity in the judicial system.

‘reasoning class’ would expect.”); *see also supra* notes 62–64 and accompanying text (noting that the Supreme Court is often criticized when it fails to provide guidance on the content of federal law).

88. H.R. REP. NO. 68-1075, at 2 (1925).