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THE STRUCTURAL CASE FOR VERTICAL MAXIMALISM

Tara Leigh Grove[†]

Many prominent jurists and scholars, including those with outlooks as diverse as Chief Justice John Roberts and Cass Sunstein, have recently advocated a “minimalist” approach to opinion writing at the Supreme Court. They assert that the Court should issue narrow, fact-bound decisions that do not resolve much beyond the case before it. I argue that minimalism, as employed by the current Supreme Court, is in tension with the structure of the Constitution. Article III and the Supremacy Clause, along with historical evidence from the Founding Era, suggest that the Constitution creates a hierarchical judiciary and gives the Court a “supreme” role in defining the content of federal law. But the Court today is limited in its capacity to perform that function because it can review only a fraction of the lower federal and state court cases involving federal law. I argue that the Court should therefore make the most of the cases it does hear by issuing broad decisions that govern a wide range of cases in the lower courts. I call this approach “vertical maximalism.” (Notably, I use the term vertical maximalism to emphasize that such broad decisions need not interfere with democratic processes, but could direct all lower courts to defer to the political branches.) Minimalism, by contrast, undermines the Court’s capacity to perform its “supreme” role in the judiciary. When the Court issues a minimalist opinion, it leaves much to be decided by the lower courts in future cases and thereby delegates its supreme law-declaration function to its judicial inferiors. Such delegation undermines the hierarchical judicial structure created by the Constitution.

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INTRODUCTION

At his confirmation hearing in September 2005, Chief Justice John Roberts famously declared: "Judges are like umpires. Umpires don't make the rules, they apply them."¹ He further stated that, as Chief Justice, he would "remember that [his] job [is] to call balls and strikes, and not to pitch or bat."²

The Chief Justice's image of judge-as-umpire has been widely criticized as a questionable conception of the judicial function. As various commentators have observed, judges frequently make rules of law in the course of adjudication.³ Indeed, it is not even clear that the Chief Justice accurately described the role of an umpire. An umpire also makes rules in the course of a baseball game. As one former major league umpire explains, in order to call balls and strikes, an um-

¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States) [hereinafter *Confirmation Hearing*].

² *Id.* at 56.

³ See, e.g., Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (stating that "it is hard to think of a less apt analogy"); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1646 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)) (questioning the comparison).

pire must first establish a strike zone, which he is expected to apply evenly to both teams throughout the course of a game.⁴

But the Chief Justice's description of judge-as-umpire does accord with his espoused judicial philosophy, one that seems to be winning support among legal academics and judges: minimalism.⁵ Even if a judge or a court must make a legal rule in the course of adjudication, the court can limit the impact of its rule by adopting a minimalist approach: defining the rule narrowly to encompass only the factual circumstances before it. Such a minimalist court does seem somewhat analogous to a baseball umpire. An umpire's strike zone in one game does not bind other umpires. Likewise, when a minimalist court establishes a narrow legal rule to govern its own case, it leaves other courts in other cases free to make their own rules of law.

I therefore am not sure that the Chief Justice's analogy between "judge" and "umpire" is inaccurate. But I do believe that such a minimalist approach is wrong for the current Supreme Court. The Court does not serve as the umpire of particular disputes but instead oversees a vast network of lower federal and state courts adjudicating federal questions. Drawing upon the structure of Article III and the Supremacy Clause, I suggest that the Constitution creates a hierarchical judiciary and gives the Court a "supreme" role in defining the content of federal law for the judiciary. I further argue that the current Court cannot effectively perform that constitutional responsibility unless it issues broad decisions that govern a wide range of cases in the lower courts. I call this approach "vertical maximalism."

I use the term *vertical* maximalism to emphasize that such broad decisions need not interfere with democratic processes. The Court may, under the approach offered here, issue rulings that require all lower courts to defer to the political branches (such as when it concludes that economic regulations are subject to rational basis scrutiny⁶ or that courts must defer to an agency's reasonable construction of an ambiguous statute).⁷ Such broad rulings not only offer leeway to the

⁴ See KEN KAISER & DAVID FISHER, *PLANET OF THE UMPS: A BASEBALL LIFE FROM BEHIND THE PLATE* 185–86 (2003) (stating that "[t]he strike zone as defined in the rule book . . . is a myth" because "[n]o two umpires have the same strike zone[]," and further explaining that "[t]he size of a man's strike zone doesn't really matter . . . what does matter is that it's exactly the same for both teams and that it's consistent from the first pitch to the last out").

⁵ See *infra* notes 14–26 and accompanying text.

⁶ See, e.g., *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 . . . carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. . . . This is a heavy burden . . .").

⁷ See, e.g., *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) ("If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.11 (1984))).

political branches but also provide considerable guidance to lower courts.

Notably, I do not claim that vertical maximalism inevitably follows from the hierarchical judicial structure. Instead, I argue that this approach is the only effective way for the Court to preserve its “supreme” role in our *current* judiciary. At the Founding and for several decades thereafter, the Court had no need to issue broad precedential decisions; indeed, because Supreme Court opinions were not widely distributed until at least the 1830s, such an approach would have been a rather ineffective means of supervising the lower courts.⁸ Moreover, during that period, the Court had the capacity to hear every appeal properly brought before it. Thus, the early Court could effectively communicate its views on federal law by, at least in part, issuing narrow decisions that corrected errors in specific lower court rulings.

By contrast, in our current judiciary, the Court can review only a fraction of the lower federal and state court cases raising federal questions. The Court must therefore make the most of the cases it does hear by issuing broad (maximal) decisions that guide the lower courts in the many cases that it lacks the capacity to review. When the current Court instead issues a narrow, fact-bound (minimalist) decision, it leaves a great deal to be decided by the lower courts in future cases and thereby delegates its supreme law-declaration function to its judicial inferiors. Such delegation undermines the hierarchical judicial structure created by the Constitution.

This structural argument for vertical maximalism, of course, implicates several recurring debates in structural constitutional law and federal jurisdiction. First, my contention that the Constitution creates a hierarchical judiciary, rendering the Court “supreme” in defining federal law, may have implications for the jurisdiction-stripping debate.⁹ My argument may also raise questions about the consistency between broad (maximal) Supreme Court decisions and Article III’s case-or-controversy requirement,¹⁰ and may seem to blur the distinction between holding and dicta in Supreme Court rulings.¹¹ Finally, my argument may implicate horizontal stare decisis—that is, the extent to which the Supreme Court itself should be bound by these

⁸ See *infra* notes 234–47 and accompanying text.

⁹ Indeed, much of the recent literature on the structure of the judiciary has focused on Congress’s authority to regulate Supreme Court jurisdiction. See *infra* note 217 and accompanying text.

¹⁰ Cf. David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) (noting that *Miranda v. Arizona*, 384 U.S. 436 (1966), was criticized as “illegitimate” because it established a broad prophylactic rule, but urging that such broad decisions “are not exceptional . . . but are a central and necessary feature of constitutional law”).

¹¹ For a brief discussion of the relationship between vertical maximalism and dicta, see *infra* note 138.

broad decisions. For now, I bracket these complex questions, leaving them for future work.

I lay out the argument for vertical maximalism as follows. In Part I, I contrast minimalism and vertical maximalism, offering examples from the case law to illuminate the distinction. I also explain the differences between this debate and the more familiar debate over rules and standards. In Part II, I discuss the hierarchical judicial structure. Finally, in Part III, I offer a historical account of the Supreme Court's role in the judicial hierarchy. I assert that, given its capacity constraints in our current judicial system, the Court cannot effectively perform its supreme law-declaration function unless it employs vertical maximalism. Thus, the Court should aim to issue broad decisions in every case to guide the lower federal and state courts on the meaning and implementation of federal law.

I

CONTRASTING MINIMALISM AND VERTICAL MAXIMALISM

A. The Theory

In issuing any decision, a court must decide how narrowly or broadly to write the opinion. Naturally, that choice is a matter of degree. Any decision might conceivably be written more narrowly (covering only the specific litigants in the case) or broadly (deciding every open statutory or constitutional question the court can envision).¹² But most lawyers and academics can distinguish between relatively narrow and broad opinions, and can identify a court's attempt to limit the reach—or to broaden the precedential scope—of its ruling.¹³

Recently, some scholars have urged the Supreme Court to follow an approach known as “minimalism,” a term coined by Cass Sunstein (minimalism's most prominent advocate).¹⁴ Although “minimalism” has been used to describe a variety of legal tasks (including statutory and constitutional interpretation),¹⁵ I am most interested in the con-

¹² See Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1907 (2006) (“[T]he difference between narrowness and width is one of degree rather than kind . . .”).

¹³ See *infra* Part I.B (discussing doctrines that have been criticized by jurists and scholars as unduly narrow).

¹⁴ See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

¹⁵ Professor Sunstein suggested early on that “minimalism” offers an alternative to what he describes as “maximalist” theories of statutory interpretation (textualism) and constitutional interpretation (originalism). See *id.* at 210–11, 234–35. More recently, he has contrasted minimalism with three other theories of constitutional interpretation, which he dubs perfectionism (an approach that offers broad protection of individual liberty), majoritarianism (judicial restraint), and fundamentalism (originalism). See SUNSTEIN, *supra* note 3, at 25–51; *id.* at 27–30, 50 (explaining that, in constitutional interpretation, minimalists not only favor narrow and undertheorized rulings but also respect precedent and generally

cept as applied to opinion writing. In this context, “minimalism” constitutes “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided.”¹⁶ Minimalist opinions are both “narrow,” in that they resolve only “the case at hand,”¹⁷ and “shallow,” in that they decline to offer a broad theoretical justification for that holding.¹⁸ Thus, minimalist decisions are fact-bound and undertheorized. Notably, although Professor Sunstein sometimes presents minimalism as a general theory of judicial decision making, he focuses primarily on the Supreme Court, and particularly on its constitutional rulings.

Professor Sunstein has eloquently articulated the potential advantages of minimalism. The approach, for example, allows the Supreme Court to reduce the costs of reaching a decision (“decision costs”) because it need only decide a narrow issue presented by the particular facts of the case before it.¹⁹ Minimalism can thus be quite beneficial to this multimember court, whose personnel are likely to disagree on many substantive issues but might be able to agree on the outcome of a given case.²⁰ Likewise, minimalism lowers the costs of an erroneous decision (“error costs”) because a narrow decision will have little impact on subsequent cases.²¹ Furthermore, minimalist decisions, at least those that decline to decide constitutional issues, leave room for democratic debate on those issues.²² Indeed, according to Professor Sunstein, minimalist rulings may even serve as catalysts for deliberative democracy by encouraging local, state, and national legislators to address important legal questions.²³ Professor Sunstein does not

“believe that judges should give the benefit of the doubt to the elected branches”). As discussed below, my theory of vertical maximalism is a theory of constitutional and statutory *implementation*. Accordingly, I do not advocate any particular form of interpretation. See *infra* note 42 and accompanying text.

¹⁶ SUNSTEIN, *supra* note 14, at 3–4 (using this definition for “decisional minimalism”).

¹⁷ *Id.* at 10.

¹⁸ *Id.* at 13; see SUNSTEIN, *supra* note 3, at 27 (“As a matter of principle, minimalists . . . favor shallow rulings over deep ones, in the sense that they seek to avoid taking stands on the biggest and most contested questions of constitutional law.”). For a brief discussion of the need for some theoretical depth, see *infra* note 44 and accompanying text.

¹⁹ See SUNSTEIN, *supra* note 14, at 47; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 364 (2006) (“For any official, it can be extremely burdensome to generate a broad rule in which it is possible to have much confidence. Narrow decisions might therefore reduce the costs of decision . . .”).

²⁰ See SUNSTEIN, *supra* note 14, at 47.

²¹ See *id.* at 49 (“If it is wrong, a wide ruling may have especially high error costs, because it will affect many subsequent cases.”).

²² See Sunstein, *supra* note 12, at 1915.

²³ See SUNSTEIN, *supra* note 14, at 118 (claiming, with respect to affirmative action, that the Court’s “complex, rule-free, highly particularistic opinions have had the salutary consequence of helping to stimulate public processes and directing the citizenry toward more open discussion of underlying questions of policy and principle”).

claim that minimalism is appropriate in every case,²⁴ but he urges that it is the preferred course in many contexts.²⁵

Several scholars and jurists, including Chief Justice Roberts and Judge Richard Posner, have embraced minimalism.²⁶ But others have expressed concerns about the approach. A number of scholars worry that a general preference for minimalism could undermine the judiciary's capacity to serve as the guardian of constitutional rights.²⁷ These scholars recognize that minimalism is not equivalent to judicial restraint; a minimalist decision may either uphold or invalidate government action.²⁸ But, these scholars argue, the courts (and particularly the Supreme Court) must, in some cases, issue more "maximal" decisions (such as *Miranda v. Arizona*²⁹ or *Reynolds v. Sims*³⁰) that broadly define the scope of constitutional protections and thereby significantly constrain government officials.³¹ Commentators have also

²⁴ See Sunstein, *supra* note 12, at 1903, 1917 (opposing "any general preference for narrow, case-by-case rulings" and instead advocating "a case-by-case inquiry into whether case-by-case decisions are desirable").

²⁵ See Sunstein, *supra* note 19, at 362 ("[A]mong reasonable alternatives, minimalists show a persistent preference for the narrower options, especially in cases at the frontiers of constitutional law.")

²⁶ See, e.g., Ashutosh Bhagwat, *Separate But Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 1000 (2000) (urging the Court to engage in "case-by-case formulation of narrow rules necessary to resolve particular disputes"); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1458–59 (2000) (criticizing minimalism insofar as it counsels deference to the political branches but expressly embracing the aspect of minimalism at issue here—"procedural minimalism"—which "counsels . . . limiting the binding impact of [each] decision as closely as possible to the particular facts of the case"); Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9 (1998) (stating that he "like[s] Sunstein's [minimalist] approach"); Dru Stevenson, *Judicial Incrementalism: A Reply to Professor Sunstein*, 34 OHIO N.U. L. REV. 191, 192–93 (2008) (advocating "Sunstein's gradualist approach" on economic free-market grounds). Although Chief Justice Roberts "resist[ed]" labeling himself as a "minimalist" during his confirmation hearing, see *Confirmation Hearing*, *supra* note 1, at 158, his public statements make clear that he favors narrow decisions, see *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16 [hereinafter *More Consensus on Court*] (reporting on Chief Justice Roberts's address to Georgetown University law graduates and quoting him as saying: "If it is not necessary to decide more to [dispose of] a case, then in my view it is necessary not to decide more"); *infra* note 315 and accompanying text.

²⁷ See JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY* 163–67 (2006); Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323, 353 (2005); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015–17 (2005) ("[M]inimalism . . . would eviscerate an essential part of the Supreme Court's role.")

²⁸ See SUNSTEIN, *supra* note 3, at 44 (stating that minimalists "are not systematic believers in [judicial] restraint" but are "willing to be [judicial] activists too").

²⁹ 384 U.S. 436, 444–45 (1966) (requiring police to give specific warnings before interrogating any suspect in custody).

³⁰ 377 U.S. 533, 568 (1964) (establishing the one-person/one-vote rule for legislative apportionment).

³¹ See FLEMING, *supra* note 27, at 163–67 (suggesting that "Sunstein's argument for judicial minimalism . . . amount[s] to a troubling withering away of the proper role . . . of

doubted Professor Sunstein's claim that minimalism can serve as a catalyst for democratic deliberation, questioning whether Supreme Court opinions can (or should) play this role.³²

Finally, a few scholars have suggested that minimalism may be inappropriate, as a policy matter, for the Supreme Court. When the Court issues a minimalist decision, it imposes costs on lower courts, which must adjudicate subsequent cases with little guidance.³³ Professor Sunstein does not deny this possibility.³⁴ Indeed, in order for minimalism to function as Professor Sunstein suggests, the Supreme Court must leave issues open for future courts.³⁵

In this Article, I articulate a related—but more fundamental—concern. I argue that minimalism, as employed by the current Supreme Court, is in tension with the structure of the Constitution. The Constitution (as discussed in Part II) establishes a hierarchical judicial system and thereby suggests that the Court has a “supreme” role in defining the content of federal law. To fulfill that constitutional role,

courts as vindicators of constitutional rights”); Devins & Meese, *supra* note 27, at 353 (asserting that minimalism “unduly limits the Court’s power to shape constitutional values”); Siegel, *supra* note 27, at 2015–16 (“[T]here are times when the Court should . . . insist that the Constitution’s protections be vindicated robustly, not narrowly and shallowly.”).

³² See FLEMING, *supra* note 27, at 167–68 (doubting that “judicial minimalism will promote democratic deliberation It may simply permit the political processes . . . to trample on or neglect basic principles of liberty and equality”); Siegel, *supra* note 27, at 2010 (doubting that “minimalism significantly advances [Sunstein’s] deliberative democratic project” because it may “simply postpone . . . questions . . . for future litigation”); Mark Tushnet, *How to Deny a Constitutional Right: Reflections on the Assisted-Suicide Cases*, 1 GREEN BAG 2D 55, 59–60 (1997) (criticizing minimalism to the extent that it “calls on judges to make precisely those judgments that its premises [about judicial modesty and institutional limitations] assert judges should not make”); Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1984–85 (1999) (reviewing SUNSTEIN, *supra* note 14) (noting that “[t]he Court’s power to alter the course of democratic deliberation is premised on the belief that people pay attention to” the reasoning of Court decisions and expressing doubt that the public or even legislators “pay much attention to court decisionmaking”).

³³ See Jeffrey Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1330 (1999) (“When faced with a narrow, shallow . . . decision . . . lower courts may literally be at a loss about what the opinion means.”); Siegel, *supra* note 27, at 2006 (doubting that minimalism will reduce “overall costs” because “[p]re-empirically, it appears . . . that whatever costs the Court saves . . . by taking a minimalist path will be outweighed by the costs incurred by litigants, lower courts, and political bodies”).

³⁴ See SUNSTEIN, *supra* note 3, at 29 (noting that “narrow rulings can create big problems for lower courts” but arguing that minimalism’s benefits often outweigh such costs).

³⁵ See Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2305 (2001) (reviewing SUNSTEIN, *supra* note 14) (asserting that minimalist decisions cannot simply be narrow but “must suggest—or at least . . . not contradict—the notion that other applications of a right remain candidates for recognition in future cases”); see also Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1779 (2004) (observing that minimalism requires shallowness because “[t]oo much principle would foreclose too many options” in future cases).

the Court must have some effective means of communicating its views on federal law to the lower courts—at least within its sphere of appellate jurisdiction. And (as discussed in Part III) the current Supreme Court cannot effectively maintain such control over the development of federal law unless it issues broad (maximal) decisions to guide the inferior courts on federal questions.

I should, however, note some qualifications and clarifications about this argument. First, the notion of a superior role in defining federal law is not the only plausible understanding of what it means to be “supreme” in a judicial hierarchy. A court might, for example, be formally “supreme” if it had the power to reverse some number of lower court judgments (whether or not it exercised that power). Such a concept of “supremacy” would not entail any duty to provide guidance to inferior courts on the content of federal law.

But such an understanding would cast the Court’s “supreme” role as a rather empty formality and finds little support in our traditions. There is considerable evidence that we have long understood our Supreme Court to have a leading role in defining the content of federal law for the judiciary.³⁶ For example, the Court itself has declared that it has a “*responsibility* to say what a [federal] statute means” and that lower courts have a corresponding “duty . . . to respect [the Supreme Court’s] understanding of the governing rule of law.”³⁷ Although a complete defense of this position is beyond the scope of this Article, I assume (for purposes of this analysis) that this widely held view reflects the most plausible understanding of the Supreme Court’s role atop the judicial hierarchy. My goal here is to show how the Court can most effectively perform that role.

Furthermore, I advocate vertical maximalism as a constitutionally inspired (rather than a constitutionally required) norm.³⁸ Accord-

³⁶ See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 354 (2006) (stating that treaty interpretation under federal law “is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution” (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); THE FEDERALIST No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the Court as “that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decisions”); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 873 (1994) (urging that the Court’s “essential function” is to “provid[e] general leadership in defining federal law”); *infra* notes 248–82 and accompanying text (discussing the Judiciary Acts of 1925 and 1988, which gave the Court discretionary appellate review power, precisely so that it could better perform its role of defining the content of federal law).

³⁷ *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994) (emphasis added).

³⁸ Cf. Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–4 (1975) (“[A] surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as . . . a substructure of . . . rules drawing their inspiration and authority from, but not required by, various constitutional provisions . . .”).

ingly, I do not claim that a minimalist opinion “violates” the Constitution. Instead, I urge that the structure of the Constitution counsels against minimalism if the current Supreme Court is to fulfill its contemplated role as the “interpretive leader”³⁹ of the judiciary. Whether a maximal approach to opinion writing might be constitutionally obligatory is a matter for another day.

I also want to underscore that the distinction between minimalism and vertical maximalism is a matter of degree and not of kind. Neither approach to opinion writing can easily be reduced to precise definition. Instead, both constitute general approaches to decision making. Thus, Chief Justice Roberts has urged his colleagues to decide cases “as narrowly as possible,”⁴⁰ thereby advocating a general disposition for minimalism. But the Chief Justice likely recognizes (as Professor Sunstein has) that there is a point beyond which it would be absurd to further narrow the precedential impact of an opinion—for example, by limiting it to “people with the same names or initials as . . . the litigants before the Court.”⁴¹ Conversely, I urge the Court to adopt a general disposition for broad (maximal) opinions. But I believe we can safely assume that no Court majority will go so far as to write a treatise on a given area of law.

Indeed, the institutional realities of the Supreme Court tend to press against vertical maximalism. As Professor Sunstein observes, it is easier for such a multimember body to agree on a narrow ground of decision. It will often be challenging to assemble even a five-member majority for an expansive opinion (although the resistance might be lower if the decision broadly defers to the political branches). These institutional constraints establish the (very real) practical boundaries of maximalism. Accordingly, my argument for vertical maximalism is necessarily an aspirational concept. I assert that, on the opinion-writing spectrum, the Court should favor the more maximal—while still plausible—options.

Finally, I emphasize that vertical maximalism is *not* a theory of constitutional or statutory interpretation. It is a theory of constitutional and statutory implementation (at least to the extent the concepts are separable).⁴² Nor does this theory require the Court to issue

³⁹ Caminker, *supra* note 36, at 866.

⁴⁰ Jeffrey Rosen, *John Roberts, Centrist? Partial Solution*, THE NEW REPUBLIC, Dec. 11, 2006, at 8.

⁴¹ Sunstein, *supra* note 19, at 362.

⁴² One cannot, of course, entirely divorce the implementation of a legal principle from its interpretation. In some contexts, the Supreme Court’s interpretation of the legal principle may exclude certain “maximal” rulings. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (concluding that due process requires courts to engage in a balancing test to determine whether an individual is entitled to a hearing before the government terminates benefits, rather than adopting a bright-line rule that would require such hearings in all cases). This is another reason why vertical maximalism is an aspirational con-

specific rulings on the merits. I advocate a method of opinion writing for the Justices to use *after* they have decided to rule on the merits in a particular way, using whatever theory of interpretation they favor. This method of opinion writing is important, not because of what the Supreme Court holds in a particular case, but because of how its opinion distributes decision-making responsibility within the judiciary.

B. Applications

The Supreme Court has adopted a minimalist approach in a variety of contexts. In this section, I offer examples from diverse areas of the Court's jurisprudence: federal question jurisdiction, lethal injection as a method of capital punishment, and the recognition of claims based on customary international law under the Alien Tort Statute. In each area, I focus on what Kathleen Sullivan has described as the Court's "operative doctrines"—the "tests and levels of scrutiny that will guide the lower courts . . . in future cases."⁴³ Many of the structural arguments that follow may, of course, also have implications for the theoretical depth of an opinion.⁴⁴ But, to simplify the comparison between minimalism and vertical maximalism, I focus solely on the breadth (or narrowness) of the Court's operative doctrines. As the discussion below suggests, this aspect of Supreme Court opinion writing appears to have the most immediate impact on the lower federal and state courts.

Notably, although much can be (and, indeed, has been) said about the Court's jurisprudence in these three areas, I am interested only in the minimalism of the Court's operative doctrine, not the merits of its conclusion. Accordingly, I offer vertically maximal alternatives that would allow the Court to render assorted rulings on the merits. Furthermore, I do not mean to endorse any one of these maximal alternatives. Instead, I offer them as a focal point for comparison with the Court's more minimalist approach.

cept. The institutional constraints on the Court, as well as its views of the merits of the underlying issue, may rule out some maximal options. I nevertheless separate implementation from interpretation to underscore that my theory of vertical maximalism should be compatible with a variety of interpretive approaches.

⁴³ Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 69 (1992).

⁴⁴ For example, the structural arguments below may suggest that the Court should adopt what Heather Gerken has described as "intermediary theories" or "mediating principles," which help courts "figur[e] out what [broad constitutional protections] mean[] in a given context." Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411, 1414 (2002). The Court should perhaps articulate such "mediating principles" whenever such principles are needed to clarify the boundaries of the Court's operative doctrine for lower federal and state courts. For now, however, I bracket this issue.

A few final caveats: In offering these recent examples of minimalism, I do not seek to show that the current Supreme Court is clearly “minimalist” as a descriptive matter. As Neil Siegel has observed, concepts like minimalism and maximalism cannot easily be tested empirically.⁴⁵ Nor do I contend that the Supreme Court has, in any of these cases, taken the “most minimal” approach or that it necessarily should have taken the “most maximal” approach (even if we could discern with confidence what those approaches would look like). But I think we can nevertheless agree that these recent decisions fall on the minimalist end of the opinion-writing spectrum. Indeed, in each context, the Court’s operative doctrine has been criticized (by legal academics, other Justices, or both) for offering insufficient guidance to lower courts.

1. *Federal Question Jurisdiction over State Law Claims*

The Supreme Court has held that federal courts may have federal question jurisdiction under 28 U.S.C. § 1331 over state law claims when those claims raise federal issues. A state claim may involve a federal issue if, for example, a plaintiff brings a tort action, alleging that the defendant committed negligence per se by violating a federal regulation.⁴⁶

To determine when federal courts have jurisdiction over such claims, the Court has refrained “from stating a ‘single, precise, all-embracing’ test.”⁴⁷ Instead, as it recently reiterated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, the Court has instructed lower courts to examine, on a case-by-case basis, whether “a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.”⁴⁸ Accordingly, the Court in *Grable* was careful to confine its holding to the facts of the case, declaring that the lower federal court in that case had jurisdiction “over *Grable*’s quiet title action,” which rested on the construction of a federal tax provision.⁴⁹

⁴⁵ See Siegel, *supra* note 27, at 1956.

⁴⁶ See, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 805–06 (1986) (alleging that the defendant was negligent under state law because it had violated federal food and drug law); see also *id.* at 817 (finding no federal question jurisdiction over the claim).

⁴⁷ *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 314–15, 320 (upholding federal question jurisdiction over the state law claim because its validity depended on whether the Internal Revenue Service had provided the plaintiff with adequate notice of his tax delinquency).

A number of commentators have criticized the Court's ad hoc approach to federal jurisdiction. And there are more maximal alternatives. For example, some scholars have advocated a return to the bright-line rule first suggested by Justice Oliver Wendell Holmes in *American Well Works Co. v. Layne & Bowler Co.*⁵⁰ Under the Holmes formula, federal question jurisdiction depends on the law that creates the cause of action.⁵¹ Thus, courts always have federal question jurisdiction over federal claims but never over state claims (even those with embedded federal issues). Conversely, other commentators (along with Justice William Brennan) have urged the Court to adopt the opposite rule and find federal jurisdiction whenever a state claim involves a nonfrivolous federal issue.⁵²

Although these operative doctrines may not exhaust the range of vertically maximal possibilities, either one would resolve far more cases in the lower courts than the Court's current approach. Indeed, the lower courts have struggled to apply the existing test for federal question jurisdiction, with district courts and courts of appeals markedly disagreeing over which state law claims belong in federal court. One study reports that, while appellate courts reverse the bulk of district court decisions approximately 12 percent of the time, they have reversed district court rulings in this area at a far higher rate (65 percent).⁵³ These figures suggest that the Court's minimalist approach to

⁵⁰ 241 U.S. 257 (1916); see Linda R. Hirshman, *Whose Law Is It, Anyway? A Reconsideration of Federal Question Jurisdiction over Cases of Mixed State and Federal Law*, 60 IND. L.J. 17, 72 (1984) (advocating a "return[] to the straightforward analysis set forth by Justice Holmes"); Douglas D. McFarland, *The True Compass: No Federal Question in a State Law Claim*, 55 U. KAN. L. REV. 1, 58–59 (2006) (similarly advocating a "return to the powerful and predictable rule of *American Well Works*"); see also Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 NOTRE DAME L. REV. 1891, 1913–15 (2004) (questioning whether lower courts can apply the Court's standard and suggesting a possible return to the "bright-line rule . . . of Justice Holmes"). Justice Clarence Thomas recently expressed support for this approach. See *Grable*, 545 U.S. at 321 (Thomas, J., concurring).

⁵¹ See *Am. Well Works Co.*, 241 U.S. at 260.

⁵² See *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 819–20 (1986) (Brennan, J., dissenting) (asserting that federal courts should have jurisdiction when the plaintiff's claim "depends upon the construction or application of the Constitution or laws of the United States" as long as that federal issue "rests upon a reasonable foundation" (citation and internal quotation marks omitted)); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles"*, 78 VA. L. REV. 1769, 1794 (1992) (arguing that courts should have federal question jurisdiction when either "the cause of action is itself federally-created or the decision . . . may turn on the interpretation or application of federal law" (footnote omitted)). But see David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts"*, 78 VA. L. REV. 1839, 1841–42 (1992) (criticizing this rule and advocating a more standard-like approach to federal question jurisdiction).

⁵³ See Note, *Mr. Smith Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-Merrell Dow*, 115 HARV. L. REV. 2272, 2280 (2002).

federal jurisdiction has imposed considerable costs on the inferior federal courts.

2. *Lethal Injection*

In recent years, death row inmates across the country have challenged lethal injection as a method of execution, contending that (as administered) it constitutes cruel and unusual punishment in violation of the Eighth Amendment.⁵⁴ The Supreme Court took up one such challenge (involving Kentucky's lethal injection protocol) in *Baze v. Rees*.⁵⁵

In *Baze*, the inmates objected to a three-drug protocol used by Kentucky and virtually every state with a lethal injection procedure.⁵⁶ The first drug (sodium thiopental) is a sedative, which is intended to render the inmate unconscious and prevent him from feeling pain during the administration of the other two drugs.⁵⁷ The second drug (pancuronium bromide) is a paralytic agent, which stops the inmate from breathing and prevents sudden muscle movements that may disturb spectators (like family members of the victim).⁵⁸ The third drug (potassium chloride) induces cardiac arrest.⁵⁹ In the litigation leading up to *Baze*, the "most frequently cited complaint" was that the initial painkiller may not be administered properly (or at all), leading the inmate to experience "excruciating pain" upon the injection of the third drug, while the paralytic agent in the second drug would prevent him from notifying prison officials of his plight.⁶⁰ This was also the core challenge in the case before the Court.⁶¹

Baze did not produce a majority opinion. Chief Justice Roberts announced the judgment of the Court and wrote for a three-Justice plurality. The plurality noted that "[t]hirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution" and that thirty of those states, as well as the

⁵⁴ See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 107–16 & n.466 (2007) (describing challenges in California, Missouri, North Carolina, Florida, Tennessee, Kentucky, and Maryland, and noting that some state courts stayed executions).

⁵⁵ 128 S. Ct. 1520 (2008).

⁵⁶ See *id.* at 1525–27.

⁵⁷ See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 *OHIO ST. L.J.* 63, 97–98 (2002).

⁵⁸ See *Baze*, 128 S. Ct. at 1527, 1535; Denno, *supra* note 57, at 98.

⁵⁹ See Denno, *supra* note 57, at 98.

⁶⁰ Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 *HARV. L. REV.* 1301, 1302–03 (2007).

⁶¹ See Brief for Petitioners at 28, *Baze*, 128 S. Ct. 1520 (No. 07-5439).

federal government, use the same basic three-drug combination as Kentucky.⁶²

Despite the prevalence of this method, the plurality limited both its analysis and its holding to the case before it, declaring that Kentucky's protocol and procedures did not violate the Eighth Amendment.⁶³ The plurality thus did not foreclose future challenges to lethal injection protocols, even in those states using the same three-drug cocktail as Kentucky. Other litigants, the plurality explained, might be able to mount a successful challenge if they could identify an available "alternative procedure" that was "feasible, readily implemented, and in fact significantly reduce[d] a substantial risk of severe pain."⁶⁴ But the plurality also expressed doubt that many future litigants would be able to produce evidence of such an adequate alternative (even enough evidence to warrant a stay of execution).⁶⁵ The plurality opined that inmates would have particular difficulty bringing challenges in states whose protocols and procedures were "substantially similar" to those of Kentucky.⁶⁶

Concurring separately, Justice John Paul Stevens criticized the narrowness of the plurality decision. He stated:

When we granted certiorari in this case, I assumed that our decision would bring the debate about lethal injection . . . to a close. It now seems clear that it will not. The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.⁶⁷

Justice Thomas, in a separate concurrence, likewise criticized the indeterminacy of the plurality's approach, stating that "today's decision is sure to engender more litigation" in the lower courts.⁶⁸

The lower federal and state courts have already begun the difficult task of applying the plurality's minimalist decision in *Baze*. As Dean Erwin Chemerinsky has noted, the plurality decision does not provide "lower courts, legislators or lawyers [with] a clear sense of . . . the rule of law to be followed and applied."⁶⁹ Perhaps for that rea-

⁶² *Baze*, 128 S. Ct. at 1532.

⁶³ *See id.* at 1537–38.

⁶⁴ *Id.* at 1532.

⁶⁵ *See id.* at 1537 (stating that, to receive a stay of execution, an inmate must "establish[] that the State's lethal injection protocol creates a demonstrated risk of severe pain" and "that the risk is substantial when compared to the known and available alternatives" and suggesting that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard").

⁶⁶ *Id.*

⁶⁷ *Id.* at 1542 (Stevens, J., concurring in the judgment).

⁶⁸ *Id.* at 1562 (Thomas, J., concurring in the judgment).

⁶⁹ Mark Sherman, *Following Year of Division, Supreme Court Avoids 5–4 Splits*, ASSOCIATED PRESS, May 10, 2008, LexisNexis Academic (quoting Dean Chemerinsky).

son, much of the litigation thus far has focused on the extent to which another state's lethal injection protocol and procedures mirror—or differ from—those of Kentucky.⁷⁰

There were vertically maximal alternatives that would likely have resolved much of this lower court litigation. For example, the Court could have upheld the use of lethal injection as a method of execution (or at least have upheld the three-drug protocol used by Kentucky, twenty-nine other states, and the federal government). The Court might have adopted an operative doctrine that places a heavy burden on inmates who challenge execution methods by creating a strong presumption—rebuttable only by overwhelming evidence to the contrary—that state officials follow procedures designed to protect inmates from unreasonable pain.⁷¹

Alternatively, the Court could have invalidated the three-drug protocol, perhaps relying on a rationale suggested by Justice Stevens's concurrence (which he ultimately did not adopt).⁷² Under that approach, a protocol that raises the possibility of *any* unnecessary pain would be invalid. Thus, the three-drug protocol would be unconstitutional because it employs the second drug (the paralytic agent), which prevents inmates from notifying officials that they are still conscious and feeling considerable pain.⁷³

⁷⁰ For example, a Fourth Circuit panel issued a divided opinion applying *Baze* to Virginia's lethal injection protocol. See *Emmett v. Johnson*, 532 F.3d 291 (4th Cir. 2008). The majority concluded that "Virginia's protocol for lethal injection is substantially similar to that approved by the Supreme Court in Kentucky," *id.* at 308, while the dissent found significant factual distinctions, see *id.* at 309 (Gregory, J., dissenting) (emphasizing that, while Kentucky uses three grams of the initial painkiller, Virginia uses only two grams). Similar challenges have been raised in Delaware federal district court and Texas state court. See *Randall Chase, Attorneys Say Delaware Execution Went Bad*, ASSOCIATED PRESS, June 23, 2008, LexisNexis Academic (noting a federal class action involving "whether Delaware's lethal injection protocol is significantly different from Kentucky's"); Rosanna Ruiz, *AG Says Injection Question Settled; Supreme Court in April Upheld Execution Method Killer Is Contesting*, HOUSTON CHRON., June 7, 2008, LexisNexis Academic (observing that, in a case before the Texas Court of Criminal Appeals, counsel for Texas claimed that the validity of its lethal injection protocol was "fully disposed" of by *Baze*, while counsel for the inmate asserted that "[i]t's a misstatement that Kentucky's protocol is exactly like Texas' [protocol]").

⁷¹ Justice Thomas suggested an even broader rule: any method of execution is constitutional unless a state "deliberately designed [it] to inflict pain." *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring in the judgment).

⁷² See *id.* at 1543–44 (Stevens, J., concurring in the judgment). Justice Stevens stated that, in an appropriate case, he would vote that capital punishment itself violates the Eighth Amendment. See *id.* at 1551. He nevertheless concurred in the judgment because he believed that, under the Court's precedents, "the evidence adduced by petitioners fail[ed] to prove that Kentucky's lethal injection protocol violates the Eighth Amendment." *Id.* at 1552.

⁷³ In Justice Stevens's view, the State had failed to provide a legitimate basis for using the paralytic agent. See *id.* at 1544 ("Whatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable . . . is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect.").

The Court also could have adopted the approach suggested by Justice Ruth Bader Ginsburg's dissent, which focused on the administration of the three-drug protocol. The Court could have required all states to establish safeguards to ensure that an inmate was unconscious before the paralytic agent was applied. For example, as Justice Ginsburg explained, in a few states, prison officials verify that the inmate is unconscious "by touching [his] eyelashes, calling his name, and shaking him," thereby "provid[ing] a degree of assurance . . . that the [initial painkiller] has been properly administered."⁷⁴ In future cases, lower courts could have required all states to demonstrate that they had such procedures in place.

Any of these alternatives would have provided litigants and lower courts with a "clear[er] sense of . . . the rule of law to be followed and applied."⁷⁵ And there are undoubtedly other possible approaches that would offer as much, if not more, guidance. At a minimum, it seems that the Court could have ruled on more than the execution method of a single state.

3. *Claims Based on International Norms*

The Alien Tort Statute (ATS) gives federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁷⁶ Although the ATS (which was originally enacted as part of the Judiciary Act of 1789) lay dormant for many years, the Second Circuit breathed new life into it in 1980.⁷⁷ In *Filartiga v. Pena-Irala*,⁷⁸ the court of appeals held that an alien could bring an action under the ATS for certain violations of customary international law, such as torture.⁷⁹

Following *Filartiga*, the lower federal courts struggled to determine what other human rights violations were actionable under the ATS. Indeed, as early as 1984, Judge Harry Edwards declared that, given the "broad and novel questions about the definition and application of the 'law of nations,'" this "area of the law . . . cries out for clarification by the Supreme Court."⁸⁰

Twenty years later, the Court took up a case involving the ATS. In *Sosa v. Alvarez-Machain*,⁸¹ the plaintiff, a Mexican physician, brought

⁷⁴ *Id.* at 1570–71 (Ginsburg, J., dissenting).

⁷⁵ *Supra* note 69 and accompanying text.

⁷⁶ 28 U.S.C. § 1350 (2006).

⁷⁷ See Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 465–66 (1997).

⁷⁸ 630 F.2d 876 (2d Cir. 1980).

⁷⁹ See *id.* at 880, 887–88.

⁸⁰ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

⁸¹ 542 U.S. 692 (2004).

suit against several Mexican civilians, alleging that they subjected him to arbitrary detention in violation of international law.⁸² The plaintiff claimed that the defendants, acting at the behest of the U.S. Drug Enforcement Administration (DEA), kidnapped him, held him overnight at a motel in Mexico, and then transported him to the United States to stand trial for his alleged involvement in the torture and death of a DEA agent.⁸³

The *Sosa* Court held that federal courts could recognize some claims under the ATS for violations of customary international law.⁸⁴ But it expressly declined to articulate the “ultimate criteria for accepting [such] a cause of action.”⁸⁵ The majority declared that courts “should not recognize private claims . . . for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted” in 1789.⁸⁶ But “[t]his requirement of clear definition [was] *not meant to be the only principle* limiting [future ATS suits], though it dispose[d]” of plaintiff Alvarez’s claim.⁸⁷

The Court did not identify those other limiting principles, but it did urge lower courts to exercise “great caution” and “restraint” in recognizing new claims under the ATS.⁸⁸ The majority counseled lower courts to be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁸⁹ It stated that one “possible limitation [on future claims] that we need not apply here is a policy of case-specific deference to the political branches.”⁹⁰ The Court pointed to several pending class actions against corporations that did business in South Africa during the apartheid era.⁹¹ The governments of both South Africa and the United States had urged dismissal of those suits, stating that they interfered with the efforts of South Africa’s Truth and Reconciliation Commission. The Court suggested that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”⁹²

⁸² See *id.* at 698–99, 736.

⁸³ See *id.* at 697–98. The plaintiff was acquitted of the criminal charges before filing suit. *Id.* at 698.

⁸⁴ See *id.* at 729.

⁸⁵ *Id.* at 732.

⁸⁶ *Id.* These historical paradigms were piracy, violations of safe conducts, and harms to ambassadors. *Id.*

⁸⁷ *Id.* at 733 n.21 (emphasis added).

⁸⁸ See *id.* at 725, 727–28.

⁸⁹ *Id.* at 727.

⁹⁰ *Id.* at 733 n.21.

⁹¹ *Id.* The suits allege that the corporations “participated in [] or abetted” the apartheid regime. *Id.* For a discussion of the apartheid litigation, see *infra* notes 145–49 and accompanying text.

⁹² *Sosa*, 542 U.S. at 733 n.21.

The *Sosa* Court, however, was careful to confine its holding to the specific facts before it. And, to decide that case, it was “enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁹³

Concurring, Justice Antonin Scalia emphasized, among other things, the impact that the Court’s decision would have on the lower courts. He predicted that, in identifying new causes of action under the ATS, “the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions.”⁹⁴ Thus, although the *Sosa* decision, rejecting the plaintiff’s ATS claim, did “not itself precipitate a direct confrontation” with the political branches, “it invite[d] precisely that action by the lower courts.”⁹⁵

Sosa has generated a great deal of academic commentary. And, although scholars strongly dispute the degree to which the Court endorsed the recognition of new claims under the ATS,⁹⁶ they do appear to agree on one thing: *Sosa* left a great deal undecided.⁹⁷ Indeed, the Court’s decision was openly minimalist, expressly declining to estab-

⁹³ *Id.* at 738.

⁹⁴ *Id.* at 750–51 (Scalia, J., concurring in part and concurring in the judgment).

⁹⁵ *Id.* at 747; *see id.* at 748 (similarly predicting a “direct[] . . . confrontation with the political branches”).

⁹⁶ Compare Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS., Autumn 2004, at 169, 173 (urging that “[d]espite an excess of cautionary rhetoric,” the Court “guaranteed that the federal judiciary’s duty to engage with international legal standards in ATS suits would continue”), and Pamela J. Stephens, *Spinning Sosa: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT’L L.J. 1, 3 (2007) (“[W]hile the Court employs language of judicial restraint . . . , its actual holding and the test it adopted foretell a less restrained use of customary international law”), with Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 891–92 (2007) (“[T]he Court in *Sosa* strongly suggested that . . . courts should discern and apply [customary international law] more carefully and cautiously than many lower courts did prior to *Sosa*.”), and Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 115, 156–57 (2004) (asserting that, given the Court’s demand for specificity in *Sosa*, human rights violations—including war crimes, genocide, and torture—are not actionable under the ATS).

⁹⁷ See Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289, 295 (2005) (noting “the Court’s failure to articulate clear standards to guide litigants and the lower courts”); William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 672 (2007) (observing that *Sosa* “has left us with more questions than answers”); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT’L L.J. 507, 535 (2006) (asserting that *Sosa* did not provide “much guidance to lower courts”); *see also* Bradley, Goldsmith & Moore, *supra* note 96, at 898, 900–01 (noting the “lack of clarity” in various parts of the Court’s decision).

lish the “ultimate criteria” for a new claim under the ATS and emphasizing that its holding was limited to the facts of the case before it.⁹⁸

There were, however, vertically maximal alternatives available to the Court. Justice Scalia suggested one possibility in his concurrence: an operative doctrine providing that no new claims were actionable under the ATS since it was only a grant of federal jurisdiction and did not itself create any cause of action.⁹⁹

Alternatively, the Court might have articulated a broad substantive standard to guide future ATS litigation. For example, the Court might have said that a widely recognized violation of customary international law would be actionable,¹⁰⁰ if the tortfeasor intentionally or knowingly caused the victim extreme physical or mental pain and suffering. Such a standard would encompass many of the claims that lower courts had found actionable, such as torture,¹⁰¹ genocide,¹⁰² sexual enslavement,¹⁰³ and war crimes.¹⁰⁴ But this standard would exclude claims that courts had often (albeit not universally) rejected, including financial misconduct,¹⁰⁵ censorship,¹⁰⁶ and negligence resulting in personal injury or death.¹⁰⁷

⁹⁸ See text accompanying notes 85 and 93 *supra*.

⁹⁹ See *Sosa*, 542 U.S. at 743–44 (Scalia, J., concurring in part and concurring in the judgment). The majority agreed that the ATS was only a grant of jurisdiction and seemed to agree that most jurisdictional statutes do not permit federal courts to create common law causes of action. See *id.* at 713–14, 731 n.19 (majority opinion) (stating that its decision did not “imply that every grant of [federal] jurisdiction . . . carries with it an opportunity to develop common law”). The majority nevertheless found that courts could do so under the ATS. See *id.*

¹⁰⁰ In using the phrase “widely recognized violation,” I mean to incorporate (as a threshold requirement) the Court’s demand that the norm be “accepted” and “specific[].” *Sosa*, 542 U.S. at 725.

¹⁰¹ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 845, 847–48 (11th Cir. 1996). Courts had also accepted claims of summary execution. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995). Both claims are now expressly covered by the Torture Victim Protection Act of 1991, which allows citizens and aliens to bring suit. See Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2006)).

¹⁰² See, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 241–42 (2d Cir. 1995).

¹⁰³ See, e.g., *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5–6, 8 (D.D.C. 1998).

¹⁰⁴ See, e.g., *Kadic*, 70 F.3d at 242–43; see also *Goodman & Jinks*, *supra* note 77, at 498 (observing that it is “settled beyond question” that conduct such as torture and genocide violates customary international law).

¹⁰⁵ See, e.g., *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Cohen v. Hartman*, 634 F.2d 318, 319–20 (5th Cir. Unit B Jan. 1981).

¹⁰⁶ See, e.g., *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that “a violation of the First Amendment right of free speech” is not actionable under the ATS). But see *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1262–64 (N.D. Ala. 2003) (finding that interference with the “rights to associate and organize” may be actionable).

¹⁰⁷ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 n.23 (2d Cir. 1980) (noting that even “wilful” negligence[] does not constitute a law of nations violation” (quoting *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978))); *Goodman & Jinks*, *supra* note 77, at 509 (observing that certain claims “fall outside the well-accepted scope of

Moreover, the Court could have supplemented this broad standard with rules to guide lower courts in adjudicating ATS cases. (As noted below, the Court has adopted this approach in other contexts, when a particular area of law seems less compatible with bright-line rules.)¹⁰⁸ For example, given the Court's stated concerns about interference with the political branches, it could have clarified the extent to which lower courts should defer to the Executive Branch in ATS cases. The Court might have created a presumption in favor of deference whenever the Executive Branch claims that a particular suit would interfere with a preexisting foreign policy concern, such as the United States' support for South Africa's Truth and Reconciliation Commission. A plaintiff could rebut that presumption by demonstrating that the Executive Branch has no established policy on the issue but is merely asserting a litigation position.

I do not mean to suggest that the above standard or the accompanying deference rule constituted the Court's only (or its best) options once it concluded that some human rights claims were actionable under the ATS. I seek only to illustrate that the Court could have done far more than decide the case before it. But, as Judge William Fletcher aptly observed, even after *Sosa*, this "area of law . . . still cries out for clarification from the Supreme Court."¹⁰⁹

C. Institutional Considerations

Minimalism has been defended in large measure on institutional grounds, particularly as a means of reducing judicial decision costs and error costs.¹¹⁰ As the above examples suggest, however, once we take the entire judiciary into account, it is doubtful that minimalism can be justified on this basis. Indeed, these institutional considerations do not appear to clearly support either minimalism or vertical maximalism.

When the Supreme Court issues a minimalist opinion, it transfers decision costs to the lower courts. For example, lower federal courts have struggled to apply the Court's minimalist test for federal question jurisdiction over state law claims (most recently articulated in *Grable*).¹¹¹ As noted, appellate courts have reportedly reversed district court applications of this standard at a far higher rate (65 percent) than they have reversed other lower court decisions (12 percent).¹¹²

federal [customary international law],” including “expropriation of property, fraud, . . . free speech, libel, child custody law, and financial misconduct” (footnotes omitted).

¹⁰⁸ See *infra* notes 160–62 and accompanying text.

¹⁰⁹ Fletcher, *supra* note 97, at 671.

¹¹⁰ See *supra* notes 19–21 and accompanying text (discussing institutional justifications for minimalism).

¹¹¹ See *supra* notes 47–49 and accompanying text.

¹¹² See Note, *supra* note 53.

Although these figures may be imperfect,¹¹³ they do suggest that the Court's minimalist approach has increased overall decision costs for the inferior federal courts. The Court's approach may have also increased total error costs, at least if the lower courts issue more "erroneous" than "correct" rulings (a measure that depends on how one defines an "error" in this context).¹¹⁴

Likewise, the lower federal and state courts have struggled with the minimalist plurality decision in *Baze*. As Justice Stevens observed, the plurality decision leaves "open" the validity of "a similar three-drug protocol . . . in other States."¹¹⁵ For example, challenges have been raised in federal and state courts in Virginia, Texas, and Delaware. In each case, while the State has contended that its lethal injection protocol mirrors that of Kentucky, death row inmates have vigorously highlighted the differences, urging that the state's procedures lack the safeguards the plurality noted in Kentucky.¹¹⁶ Clearly, the *Baze* decision has increased decision costs—particularly litigation costs—for the lower courts.¹¹⁷ And it may also increase error costs, depending on the direction of the lower court decisions and on whether "error" is defined as a victory for the inmate or as a victory for the State that leads to the inmate's execution.

Notably, the Supreme Court has various institutional advantages over the inferior federal and state courts that may make it more efficient for the Court to incur these decision costs itself. Because the Court has almost complete control over its docket, it can spend more time on each case than a court of appeals with mandatory appellate jurisdiction¹¹⁸ or a single district court judge, who may process several hundred cases in a given year.¹¹⁹

¹¹³ See Meltzer, *supra* note 50, at 1913 (noting that the study examined only "reported appeals").

¹¹⁴ In institutional terms, an "error" depends on a given individual's jurisprudential theory or set of values. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 77 (2006) (observing that "people might dispute" what constitutes a "mistake[]" or an "injustice[]," given that "[o]ne person's error might be another's fidelity to law").

¹¹⁵ *Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (Stevens, J., concurring in the judgment).

¹¹⁶ See *supra* note 70 and accompanying text.

¹¹⁷ Cf. VERMEULE, *supra* note 114, at 166–67 (noting that "'[d]ecision costs' is a broad rubric that might encompass the direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy" as well as "the costs to lower courts of implementing and applying doctrines developed at higher levels").

¹¹⁸ Compare 28 U.S.C. § 1254(1) (2006) (providing the Supreme Court with discretionary certiorari jurisdiction), with 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.").

¹¹⁹ See *infra* note 306 (providing statistics on the large caseload in the federal district courts).

Furthermore, the Supreme Court has informational advantages over the lower federal and state courts. As many commentators have observed, the Court (like all judicial bodies) lacks the fact-finding and information-gathering capacities of a legislature.¹²⁰ The Court cannot hold hearings and consult those who may be affected by a particular legal rule, as can Congress.¹²¹ But, as compared to the lower courts, the Supreme Court has substantial informational advantages. First, the Court is less dependent on the parties to frame the issues in the case. The Court can (and often does) modify the questions presented in a certiorari petition, directing the parties to address an issue of law that it has decided to consider.¹²² The Court can also rely on lower court decisions that have analyzed a legal issue, particularly if it declines to grant certiorari until the issue has “percolated” among a number of lower courts.¹²³ And, in most cases, the Court receives amicus briefs that supplement the information provided by the parties.¹²⁴ *Sosa* offers an example: the Court did not take up an ATS case until twenty-four years after the *Filartiga* decision. When it did intervene, it received multiple briefs from amici supporting each side of the litigation.¹²⁵

These informational advantages may help the Court overcome what scholars have described as the potentially distorting effects of litigation. A growing literature, drawing in large part on the behav-

¹²⁰ See, e.g., Devins & Meese, *supra* note 27, at 327 (noting that “[u]nlike legislators, who can . . . hold[] hearings, tak[e] polls, . . . and visit[] constituents,” “judges are confined to ‘the record’” in the case).

¹²¹ See A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 385–87 (2001) (discussing congressional fact-finding methods); *supra* note 120.

¹²² See, e.g., *Pearson v. Callahan*, 128 S. Ct. 1702, 1702–03 (2008) (directing the parties to brief and argue “[i]n addition to the questions presented by the petition . . . ‘Whether the Court’s decision in *Saucier v. Katz*, [533 U.S. 194 (2001)], which governed consideration of qualified immunity claims] should be overruled?’”).

¹²³ See Devins & Meese, *supra* note 27, at 354 (asserting that, by allowing issues to percolate in the lower courts, the Court can help ensure that when it takes up an issue, “it will do so at a time when it is better positioned both to speak clearly and to make an informed decision”); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 915 (2006) (stating that the Court can “delay[]” ruling on an issue “until there is a fair amount of lower court experience”).

¹²⁴ See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 744, 750 (2000) (reporting, based on their study of Supreme Court cases from 1946 to 1995, that “[i]n recent years, one or more amicus briefs have been filed in 85% of the Court’s argued cases” and noting the claim that amicus briefs provide “valuable new information” to the Court).

¹²⁵ The filings on Westlaw suggest that, at the merits stage in *Sosa*, the Court received twelve amicus briefs supporting the respondent Alvarez (and thus asserting that new claims should be allowed under the ATS). The Court received four private amicus briefs, as well as a brief from the United States, supporting the petitioner (and thus taking the opposite position). Notably, Joseph Kearney and Tom Merrill’s study suggests that the United States is particularly influential when it files an amicus brief in the Supreme Court. See *id.* at 749–50.

ioral sciences, has pointed out that judges are significantly affected by the facts of the particular dispute before them.¹²⁶ Such a tendency can be problematic: in our common law system, any court decision may serve as a precedent in a future case, and the particular facts before the court may be unrepresentative of the larger group of cases that its decision could affect.¹²⁷ Some scholars, however, have argued that the Supreme Court is less likely than lower courts to be driven by the facts of the case before it (and thus less inclined to make this type of “error”). The Supreme Court can consider the various factual scenarios that have arisen in the lower courts as well as any hypotheticals offered by the parties and amici and should thus be more able to focus on abstract legal questions.¹²⁸

Once we take into account the institutional differences between the Supreme Court and the lower courts, it is not clear that minimalism can be justified on institutional grounds (that is, as a means of reducing overall decision costs and error costs). But I also do not claim that such considerations necessarily support vertical maximalism. First, although the Supreme Court may be less subject than lower courts to the distorting effects of litigation, it is hardly immune from those effects.¹²⁹ The above behavioral science research may simply suggest that all courts should be wary of issuing broad decisions that extend beyond the facts of a particular case. Alternatively, this research might suggest that the Supreme Court should issue such decisions only when it requires all lower courts to defer to democratic institutions (which are less subject to these cognitive biases).¹³⁰ Although few scholars have asserted that the Court should never issue

¹²⁶ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (finding, based on their study of 167 federal magistrates, that cognitive biases “influenced [those judges’] decision-making processes”); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 941 (2006) (noting that “[a]spects of an individual case that . . . invoke sympathy” may affect judicial decisions).

¹²⁷ See Schauer, *supra* note 123, at 884 (arguing that this psychological research calls into question “the entire ‘merit’ of lawmaking in common law fashion”).

¹²⁸ See, e.g., Devins & Meese, *supra* note 27, at 354–55 (noting that the Court can, to some degree, compensate for the distorting effects of litigation by letting issues percolate and then relying on information in lower court rulings).

¹²⁹ See *id.* at 336–51 (urging that the Court’s affirmative action and Establishment Clause cases reflect these cognitive biases); Schauer, *supra* note 123, at 903 (asserting that “the problem exists even in the Supreme Court”).

¹³⁰ See VERMEULE, *supra* note 114, at 4 (arguing in favor of majoritarianism largely on institutional grounds). Legislatures are less subject to the case-centered cognitive biases that affect courts because, in enacting statutes, they do not typically have before them only a single factual scenario. Cf. Jeffrey J. Rachlinski, *Rulemaking Versus Adjudication: A Psychological Perspective*, 32 FLA. ST. U. L. REV. 529, 538 (2005) (“[A]djudication necessarily entails a single-case perspective, which might blind the decisionmaker to the broader policy implications.”).

broad rulings that restrain legislatures,¹³¹ that is arguably the implication of this research.

Second, vertical maximalism could, overtime, impair some of the Supreme Court's current informational advantages over the lower federal and state courts. If the Court adopted a presumption in favor of maximalism, its broad decisions should govern a number of cases in the lower courts. But that very process might also (at least in some contexts) inhibit development of new legal theories in the lower courts and thereby undermine their capacity to serve as informational resources for the Supreme Court.¹³²

Finally, it is not at all clear that concentrating decision-making authority in the Supreme Court would reduce overall error costs. Because a Supreme Court decision binds all lower federal and state courts, any "incorrect" decision would have a dramatic, national impact. And those error costs would be particularly pronounced in the context of a maximal decision, which is designed to govern a large number of cases in the lower courts. Thus, while a minimalist opinion might lead to a larger *number* of "errors" (given the potential for error in the lower courts), an error in a vertically maximal decision would be far more severe.

It is difficult to say in the abstract (that is, absent empirical findings) whether these institutional considerations, on balance, favor vertical maximalism or minimalism. In my view, however, we do not need to rely solely on conjecture about institutional capacities or about the ways in which these decision costs and error costs might—if we could find a way of empirically measuring these effects—ultimately play out.¹³³ None of these institutional considerations casts doubt upon the central claim here: the scope (that is, breadth or narrowness) of Supreme Court opinions serves, in different ways, to allocate decision-making authority within the judiciary.¹³⁴ Nor do these considerations cast doubt upon my claim that, to ensure the proper distri-

¹³¹ As discussed, some scholars have criticized minimalism, precisely because it discourages the Court from issuing broad decisions on important questions of constitutional law. See *supra* notes 27–31 and accompanying text.

¹³² Indeed, Justice Samuel Alito recently noted the (potentially) endogenous effects of the Court's capital punishment jurisprudence. See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665–66 (2008) (Alito, J., dissenting) (asserting that *Coker v. Georgia*, 433 U.S. 584 (1977), which invalidated the death penalty for the rape of an adult woman, "stunted legislative consideration of the question whether the death penalty" might be valid for the "targeted offense" of child rape, in part because many state courts had construed *Coker* to preclude the death penalty for all rape crimes).

¹³³ Cf. John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999) ("[I]t is perhaps premature to pronounce that the only, or even the most important, remaining assessment of formalism is factual.").

¹³⁴ Cf. VERMEULE, *supra* note 114, at 68 ("The choice of legal form has important effects on the allocation of decisionmaking authority.").

bution of authority in our current judiciary, the Court should employ vertical maximalism.

D. Precedent as a Means of Allocating Decision-Making Responsibility

As Fred Schauer has persuasively argued, judicial precedents serve to allocate authority among judicial institutions.¹³⁵ Although Professor Schauer applies this theory temporally (noting the ways in which past judicial decisions can bind future courts),¹³⁶ his analysis also applies to the allocation of decision-making responsibility among courts within a judicial hierarchy.¹³⁷

The binding effect of any judicial precedent depends principally on two (related) factors.¹³⁸ First, it depends on the breadth of the precedent. As Professor Schauer explains, “[a]lthough it will always be *possible* to distinguish a precedent, this becomes comparatively harder if” the precedent is characterized “in general terms.”¹³⁹ “[T]he breadth of the description in the first case substantially limits

¹³⁵ See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 182–83 (1991).

¹³⁶ See *id.*; Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 576 (1987).

¹³⁷ The effectiveness of 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). 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.”).

¹³⁸ As noted, I do not seek to determine what constitutes the “holding” versus “dicta” in a judicial precedent. See *supra* note 11 and accompanying text. But a presumption in favor of vertical maximalism should not require the Supreme Court to dispense with the distinction. When the Court declares a broad principle to decide a case, such as the trimester framework in *Roe v. Wade*, 410 U.S. 113, 164–65 (1973), that broad (maximal) principle is generally viewed as part of the holding of the case. But that does not mean there is no distinction between holding and dicta. For example, if the Court heard an antitrust case involving horizontal price fixing, it might issue a broad (maximal) holding prohibiting all such conduct. But if the Court went on in that case to opine about the validity of vertical resale price maintenance agreements, that discussion would be dicta because the latter issue would be in no way presented by the case. For discussions of the distinction between holding and dicta, see Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) (“A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.”); Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 1998 (1994) (advocating “a view of the holding/dictum distinction that attributes special significance to the *rationales* of prior cases, rather than just their *facts and outcomes*”).

¹³⁹ Schauer, *supra* note 136, at 594.

possible distinguishing factors in subsequent cases.”¹⁴⁰ Thus, for example, if the Court adopted the Holmes test for federal question jurisdiction, its breadth (precluding federal question jurisdiction over *all* state law claims) would make it difficult for lower federal courts to deviate from that rule, and thereby ensure its status as binding precedent.

Second, the constraining effect of a precedent depends on *which court* determines the scope of the precedent. In other words, the precedent-setting court must itself define its precedent as broad. But if the Supreme Court establishes “no [such] generalization,” then lower federal and state courts must do their best to make sense of the Court’s decision.¹⁴¹ The lower courts thus have substantial discretion to apply the Supreme Court’s decision as they see fit.¹⁴²

Lower court litigation in the wake of *Sosa* illustrates this point. As discussed, the Supreme Court in *Sosa* admonished lower courts to be “wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs,” suggesting that it might make sense at some point to adopt “a policy of case-specific deference to the political branches.”¹⁴³ The Court noted in particular the federal government’s opposition to several ATS suits against corporations that operated in apartheid-era South Africa, stating that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”¹⁴⁴

Following *Sosa*, the district court overseeing the apartheid-era litigation dismissed the ATS claims, relying in large part on the Supreme Court’s stated concerns about deference to the Executive Branch.¹⁴⁵ A divided appellate panel, however, vacated and remanded.¹⁴⁶ On the deference question, the majority stated that it “[took] the Supreme Court’s language in footnote 21 of *Sosa* at face value, as simply observing that there is a strong argument that the [foreign policy] views of the Executive Branch . . . should be given ‘serious weight.’”¹⁴⁷

¹⁴⁰ *Id.* at 594–95.

¹⁴¹ See SCHAUER, *supra* note 135, at 184 (noting that, if “the first (precedent) case contains no generalization, the decision-maker in the second (instant) case creates the generalization *at that time*”).

¹⁴² See *id.* (stating that a process that allows the second court to determine the meaning of the first court’s precedent “is substantially non-constraining”).

¹⁴³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727, 733 n.21 (2004).

¹⁴⁴ *Id.* at 733 n.21.

¹⁴⁵ See *Ntsebeza v. Daimler AG (In re S. African Apartheid Litig.)*, 346 F. Supp. 2d 538, 553–54 (S.D.N.Y. 2004) (noting the federal government’s claim that the suit would cause “tension” with South Africa and stating that “[a]s the *Sosa* Court made clear, these opinions as to the foreign relations consequences of this action certainly deserve great weight”).

¹⁴⁶ See *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 264 (2d Cir. 2007).

¹⁴⁷ *Id.* at 261 n.9 (quoting *Sosa*, 542 U.S. at 733 n.21).

But, the majority concluded, “summary dismissal at the behest of a footnote [would be] premature.”¹⁴⁸ The Court denied certiorari.¹⁴⁹

The Supreme Court’s commentary on deference in *Sosa* had little binding force as precedent because the Court did not purport to decide the question. Indeed, the Court stated (in minimalist fashion) that a policy of deference was just one “possible limitation [on future claims] that we need not apply here.”¹⁵⁰ The lower federal courts accordingly had to do their best to make sense of the Supreme Court’s opinion and, as it turned out, disagreed sharply over what the Court had in mind. By contrast, if the Court had adopted the rule suggested above (a presumption in favor of deference to any preexisting Executive Branch policy), both lower courts would likely have agreed on the resolution of the case: dismissal of the apartheid-era litigation. I do not mean to suggest that the Supreme Court should have adopted that particular rule of deference. But any such maximal approach would have offered far more guidance to the lower courts. The Court’s minimalist opinion, by contrast, delegated its law-declaration function on the deference question to the inferior federal courts.

This discussion suggests a fundamental distinction between a minimalist and a vertically maximal approach to opinion writing. When the Court issues a minimalist decision, it leaves much to be decided by the lower federal and state courts. Vertical maximalism, by contrast, is specifically designed to create broad and binding precedents that concentrate decision-making responsibility in the Supreme Court.

Of course, the practical impact of the Court’s approach to opinion writing depends on its capacity to review lower court decisions. If the Court served as a “court of error” that could review all (or even most) lower court applications of its precedents, then it would make far less difference how broadly or narrowly it wrote the initial opinion. If a lower court misread a Supreme Court precedent or otherwise erred in a determination of federal law, the Court could correct that mistake on subsequent review (as long as it had appellate jurisdiction over the matter). As discussed in Part III, however, the Supreme Court no longer has the capacity to conduct such case-by-case error correction. Accordingly, in our current judiciary, a minimalist Su-

¹⁴⁸ *Id.*

¹⁴⁹ The Court stated that, after four Justices recused themselves, it lacked a quorum to rule on the matter. See *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424, 2424 (2008) (mem.). On remand, the district court permitted several claims against the corporations to go forward, noting in part the court of appeals’ admonition that “footnote 21 [in *Sosa*] merely provides guidance concerning the need for deference with regard to foreign policy matters” and “does not mandate summary dismissal of this case.” *Ntsebeza v. Daimler AG (In re S. African Apartheid Litig.)*, 617 F. Supp. 2d 228, 281 (S.D.N.Y. 2009).

¹⁵⁰ *Sosa*, 542 U.S. at 733 n.21.

preme Court opinion serves to delegate substantial decision-making responsibility to the Court's judicial inferiors.

E. Not an Old Debate in a New Package

The debate between vertical maximalism and minimalism may resemble, in some respects, the familiar debate over rules and standards.¹⁵¹ Indeed, several policy arguments from the rules/standards debate do appear to carry over. For example, because maximal decisions are designed to resolve a range of cases, they tend (much like legal rules) to make the law more certain and predictable.¹⁵² By contrast, minimalist decisions (like legal standards) provide far less clarity, but precisely for that reason, they permit lower courts to fashion an outcome that is arguably more suited to a particular case.¹⁵³

Moreover, the rules/standards debate also implicates the specific issue of concern here: the allocation of authority among institutions. As Professor Schauer has argued, a "lawmaker" can constrain the discretion of a "law-applier" by formulating a legal directive as a rule.¹⁵⁴ Professor Schauer has applied this argument to the allocation of power between legislatures and courts.¹⁵⁵ As Adrian Vermeule has observed, however, the analysis also applies to the allocation of authority within a judicial hierarchy.¹⁵⁶ Thus, under this theory, the Supreme Court can retain its decision-making authority over a broader range of cases by issuing decisions in the form of rules.

But, for several reasons, a preference for vertical maximalism is not (and cannot be) simply a preference for rules over standards. First, rules and standards differ in scope.¹⁵⁷ A legal rule may be quite narrow, perhaps limited to specific facts. For example, the Court's holding in *Grable* could be recast as a narrow legal rule: a federal court has federal question jurisdiction over a state quiet-title action that de-

¹⁵¹ For a sample of the vast literature on the debate over rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562–63 (1992) (contending that rules impose more costs *ex ante*, while standards require more effort *ex post*); Sullivan, *supra* note 43, at 95–96 (asserting that the choice between rules and standards "resembles . . . that between legal codes and the common law").

¹⁵² See SCHAUER, *supra* note 135, at 137–38 (noting that rules make it easier for people to plan their activities).

¹⁵³ See Sullivan, *supra* note 43, at 62–63, 66 (observing that "[s]tandards produce uncertainty" and can thus "chill[] socially productive behavior," but can also "allow decisionmakers to treat like cases that are substantively alike").

¹⁵⁴ See SCHAUER, *supra* note 135, at 159 (urging that rules "operate as tools for the allocation of power").

¹⁵⁵ See Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645, 686–88 (1991).

¹⁵⁶ See VERMEULE, *supra* note 114, at 68 ("Rules and standards allocate decisionmaking authority in different ways . . . between different levels of a hierarchical institution . . .").

¹⁵⁷ See *id.* at 69 (noting that "[b]oth rules and standards can be broad or narrow").

depends on the meaning of federal tax law.¹⁵⁸ Likewise, much of the Court's Establishment Clause jurisprudence consists of fact-bound decisions that could be characterized as narrow rules.¹⁵⁹ Such narrow decisions offer little guidance to lower courts in future cases with even marginally different facts and thus clearly fall on the minimalist end of the opinion-writing spectrum.

Conversely, the Court can provide far more guidance to lower courts—as demanded by maximalism—by employing a broad operative standard. Indeed, in some contexts, that may be the only vertically maximal option. Some areas of the law are not conducive to bright-line rules.¹⁶⁰ The Court can nevertheless provide guidance to lower courts by crafting a broad substantive standard (as suggested for ATS cases) or a burden-shifting framework (as the Court has done in the employment-discrimination context) to govern a wide range of cases.¹⁶¹ Notably, the Court can supplement such a framework with procedural rules akin to the deference rule suggested for ATS cases. For example, in the employment-discrimination context, the Court has created a strong presumption in favor of attorney's fees for successful plaintiffs.¹⁶²

Moreover, the rules/standards terminology may tend to obscure other methods that the Court can employ to render its opinion more or less minimalist. Whether the Supreme Court chooses a rule or a standard, the Court can limit the precedential impact of that opera-

¹⁵⁸ See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314–15, 320 (2005).

¹⁵⁹ See, e.g., *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 850, 881 (2005) (invalidating a Ten Commandments display at a county courthouse); *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (upholding a Ten Commandments display on state capitol grounds); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 614, 621 (1989) (invalidating a crèche display at a county courthouse but upholding the display of a menorah near a Christmas tree); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (upholding a crèche display). Notably, in this context, there are more maximal alternatives. Compare *Van Orden*, 545 U.S. at 708 (Stevens, J., dissenting) (urging that, “at the very least, the Establishment Clause has created a strong presumption against the display of religious symbols on public property”), with *McCreary County*, 545 U.S. at 889, 893–94 & n.4 (Scalia, J., dissenting) (suggesting that religious displays are generally constitutional, as long as they do not favor a specific religious sect).

¹⁶⁰ Cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (recognizing that legal standards cannot “be entirely avoided” but “urg[ing] . . . that [they] be avoided where possible”).

¹⁶¹ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981) (stating that, in an employment-discrimination action under Title VII of the Civil Rights Act, the plaintiff must first show a “prima facie case of discrimination. Second, if the plaintiff succeeds . . . , the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the [adverse action].’ Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove . . . that the legitimate reasons offered . . . were a pretext for discrimination” (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973))).

¹⁶² See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).

tive doctrine by sending mixed messages about how it should apply. For example, in *Sosa*, the Court announced that lower courts could recognize new claims under the ATS if the claims met a certain level of specificity but then declared that “[t]his requirement of clear definition” was not “the only principle limiting” new claims.¹⁶³ Likewise, in *Baze*, the plurality stated that litigants could challenge other lethal injection protocols by offering evidence of a reasonable alternative but also suggested that few inmates would ever produce enough such evidence to obtain a stay of execution.¹⁶⁴ Such internal inconsistencies undermine the constraining effect of any Supreme Court precedent because they allow a lower court interpreting that precedent to decide which statement to treat as binding. In other words, the lower court—rather than the Supreme Court itself—has the authority to determine the scope of the Court’s precedent. Such equivocation thereby undercuts the constraining effect of any operative doctrine, whether formulated as a rule or as a standard. It may therefore be more useful to consider the overall precedential impact of a decision—a concept that is better captured by the terms minimalism and maximalism.

Admittedly, there is an affinity between vertical maximalism and rules. The Court can provide lower federal and state courts with more guidance by issuing decisions in the form of broad rules. Accordingly, when the Court has a choice between articulating its operative doctrine as a broad rule versus a standard, it should favor the more rule-like formulation.

But, for the reasons noted above, a rigid focus on rules would obscure the central point. The principal issue is not whether the Court has chosen a rule or a standard but rather the extent to which its precedent serves to bind—and thus to guide—the lower courts. Such guidance is necessary, not to ensure rule-like clarity in the law, but to ensure the proper distribution of decision-making responsibility within our hierarchical judiciary.

II

A HIERARCHICAL JUDICIARY

The Supreme Court’s constitutional relationship with the lower federal and state courts has increasingly become an area of scholarly interest. Scholars have not, however, reached a consensus. Although many commentators assert that Article III creates a hierarchical federal judiciary,¹⁶⁵ others contend that the Constitution does not man-

¹⁶³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 733 n.21 (2004).

¹⁶⁴ See *Baze v. Rees*, 128 S. Ct. 1520, 1532, 1537 (2008).

¹⁶⁵ See, e.g., Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 668–69 & n.92 (1996) (asserting that the Constitution creates a hierarchical judiciary);

date any particular federal judicial structure.¹⁶⁶ There is also some (albeit less) disagreement over the Supreme Court's role vis-à-vis state courts. Most scholars conclude that the Supreme Court may instruct state courts on the interpretation and implementation of federal law.¹⁶⁷ But a few commentators have expressed doubt that state courts are constitutionally required to abide by Supreme Court decisions.¹⁶⁸

As discussed below, I believe that the Constitution's text and structure (buttressed, to some degree, by historical evidence) support the hierarchical construction.¹⁶⁹ Notably, this position appears to be gaining strength among legal scholars. But I wish to focus on an implication of that hierarchical structure that scholars have thus far failed to appreciate. While many commentators have examined what

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"); Caminker, *supra* note 36, at 829 n.49, 832–34 ("[T]he proposition that Article III commands all inferior courts to obey Supreme Court precedent appears quite powerful."); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 70–71 (2007) (agreeing with the hierarchical view); 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, *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").

¹⁶⁶ See, e.g., Bhagwat, *supra* note 26, at 982–85 (contending that the Constitution does not require a hierarchical federal judiciary); William S. Dodge, Note, *Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original Jurisdiction Clause Suggests an "Essential Role"*, 100 YALE L.J. 1013, 1029–30 (1991) (same); David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 503–04 (1991) (same); see also Michael Stokes Paulsen, *Accusing Justice: Some Variations on 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).

¹⁶⁷ 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"); Fried, *supra* note 165; 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); see also Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 390 (contending that the Court's constitutional decisions "are at least a form of federal common law" and "are binding federal law under the supremacy clause").

¹⁶⁸ See, e.g., Caminker, *supra* note 36, at 837–38 (doubting that "state courts [must] obey Supreme Court federal law precedents"); see also Paulsen, *supra* note 166, at 84–88 (urging that state courts can initially disregard "clearly erroneous" constitutional interpretations).

¹⁶⁹ For a discussion of the widely accepted practice of making inferences from constitutional structure, see CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7–32 (1969).

this structure might mean for lower courts or for Congress (particularly with respect to its authority to regulate Supreme Court jurisdiction), few have considered the implications of this scheme for the Court itself. I assert that this hierarchical structure gives the Court a “supreme” role in defining the content of federal law for the judiciary and that the current Supreme Court cannot effectively perform this constitutional responsibility unless it issues vertically maximal decisions.

A. Text and Structure

Article III vests the “judicial Power of the United States” in “one supreme Court[] and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁷⁰ Article I, in turn, authorizes Congress “[t]o constitute Tribunals *inferior to* the supreme Court,”¹⁷¹ thereby indicating that any such “inferior” courts are “inferior” in relation to the “supreme” Court.¹⁷²

These two provisions, taken together, suggest that the terms “supreme” and “inferior” establish some sort of constitutional relationship between the Supreme Court and the inferior federal courts. Standing alone, however, these provisions do not tell us what type of relationship. At the Founding, the terms “inferior” and “supreme” could convey two possible meanings: the “inferior” was either “subordinate to” or (in some other respect) lesser in rank or importance than the “supreme” tribunal.¹⁷³ An inferior court might be “less important” if, for example, it had a less extensive geographic or subject matter jurisdiction than the “supreme” court.¹⁷⁴

Notably, these definitions are not incompatible. The inferior federal courts could be both “subordinate to” and “less important” than the Supreme Court. But only the former construction conveys a hierarchical relationship. Thus, as Amy Barrett has observed, the question

¹⁷⁰ U.S. CONST. art. III, § 1.

¹⁷¹ U.S. CONST. art. I, § 8, cl. 9 (emphasis added).

¹⁷² Notably, as Dean Evan Caminker has explained, the designation of one court as “supreme” and others as “inferior” also suggests that these courts exercise the “judicial Power” in different ways. See Evan Caminker, *Allocating the Judicial Power in a “Unified Judiciary”*, 78 TEX. L. REV. 1513, 1515 (2000) (urging that courts “enjoy somewhat different packages of judicial power . . . depending on their . . . placement” in the “hierarchical Article III system”).

¹⁷³ See 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1756) (defining “inferiour” to mean “1. Lower in place. 2. Lower in station or rank of life . . . 3. Lower in value or excellency . . . 4. Subordinate”); 2 JOHNSON, *supra* (defining “supreme” as “1. Highest in dignity; highest in authority . . . 2. Highest; most excellent”).

¹⁷⁴ See Engdahl, *supra* note 166, at 475 n.95 (asserting that it was “common” in eighteenth-century England and the states “to describe one tribunal as inferior” to another for various reasons, including “lesser subject matter or geographic competence”).

is whether Article III uses the term “inferior”—in conjunction with “supreme”—at least in part to denote a subordinate.¹⁷⁵

The constitutional structure appears to answer that question. The Constitution uses the term “supreme” in only one other context: the Supremacy Clause of Article VI.¹⁷⁶ There seems to be little doubt that this provision establishes a hierarchical relationship between federal law and state law. Indeed, the Court has declared that the Supremacy Clause “unambiguously provides” that federal law is “superior to that of the States”¹⁷⁷ and that state law is “subordinate.”¹⁷⁸ The Supremacy Clause thus offers considerable support for the hierarchical construction of “supreme” and “inferior” in Article III.

The Constitution likewise uses the term “inferior” in only one other context: the Appointments Clause of Article II, which establishes the process by which “principal” and “inferior” officers are appointed to the Executive Branch.¹⁷⁹ Although the Court has not consistently construed the term “inferior” for purposes of this provision,¹⁸⁰ its most recent articulation supports the hierarchical construction of Article III. In *Edmond v. United States*,¹⁸¹ the Court stated that, “[g]enerally speaking, the term ‘inferior officer’ connotes a relation-

¹⁷⁵ See Barrett, *supra* note 165, at 346–47 (noting that the alternative definition based on “relative rank” “is important . . . only insofar as it permits one to [reject the hierarchical view] without depriving the terms of content”).

¹⁷⁶ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

¹⁷⁷ *Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (internal quotation marks omitted).

¹⁷⁸ *Pub. Utils. Comm’n of Cal. v. United States*, 355 U.S. 534, 544 (1958) (“It is of the very essence of supremacy . . . to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.” (quoting *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819))).

¹⁷⁹ See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”). The Court has distinguished “principal” and “inferior” officers, holding that the latter need not be appointed by the President (with the approval of the Senate) pursuant to the Appointments Clause. See *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

¹⁸⁰ In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court upheld the Ethics in Government Act of 1978, which authorized the appointment of an independent counsel, based in part on its conclusion that the independent counsel was an “inferior” officer under the Appointments Clause. See *id.* at 670–71, 696–97. The Court reasoned that, “[a]lthough [an independent counsel] may not be ‘subordinate’ to the Attorney General (and the President) insofar as she possesses a degree of independent discretion . . . , the fact that she can be removed by the Attorney General indicates that she is to some degree ‘inferior’ in rank and authority.” *Id.* at 671. The Court thereby suggested that an officer can be “inferior” under the Appointments Clause even if she is not “subordinate” to the President or any other higher-ranking executive official. For further discussion of *Morrison*, see *infra* note 182.

¹⁸¹ 520 U.S. 651 (1997).

ship with some higher ranking officer or officers below the President: Whether one is an ‘inferior’ officer depends on whether he has a superior.”¹⁸²

Furthermore, the constitutional text and structure suggest that the Court is “supreme” not only with respect to lower federal courts but also in relation to state courts (on matters of federal law). The Supremacy Clause provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”¹⁸³ The Clause further requires “the Judges in every State” to abide by such federal law “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁸⁴ This provision seems to suggest that there should be some mechanism for ensuring that state courts adhere to federal law.

Article III’s Appellate Jurisdiction Clause provides one mechanism. Article III gives the Supreme Court original jurisdiction over certain types of cases, but states that, “[i]n all . . . other Cases” covered by the federal “judicial Power,” the Court “shall have appellate Jurisdiction.”¹⁸⁵ Notably, in defining those “other cases,” Article III mirrors the text of the Supremacy Clause, stating that “[t]he judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.”¹⁸⁶ Article III accordingly seems to authorize Supreme Court review of state court decisions to ensure that they comply with federal law.

The Supremacy Clause and the Appellate Jurisdiction Clause, taken together, offer “good evidence” that the Supreme Court has hierarchical authority over state courts on matters of federal law.¹⁸⁷

¹⁸² *Id.* at 662; *see also id.* at 666 (holding that the judges of the Coast Guard Court of Criminal Appeals were inferior officers and thus upholding a statute that provided for their appointment by the Secretary of Transportation). Although some scholars have suggested that *Edmond* superseded *Morrison*, *see* Calabresi & Lawson, *supra* note 165, at 1018, *Edmond* did not expressly overrule *Morrison*. In any event, I need not resolve the precise meaning of the term “inferior” in the Appointments Clause. It seems reasonable, given the consistent construction of the Supremacy Clause and the Court’s recent acknowledgement that “inferior” “generally” refers to a subordinate, that, when used together, the terms “supreme” and “inferior” connote a hierarchical relationship.

¹⁸³ U.S. CONST. art. VI, cl. 2.

¹⁸⁴ *Id.*

¹⁸⁵ U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

¹⁸⁶ U.S. CONST. art. III, § 2, cl. 1. Article III, of course, also authorizes federal courts to hear admiralty matters as well as various party-based cases and controversies. *See id.*

¹⁸⁷ *See* Barrett, *supra* note 165, at 354, 362 (observing that the Appellate Jurisdiction Clause offers “good evidence that Article III envisions some sort of hierarchy,” given that it

Moreover, the Appellate Jurisdiction Clause further supports the hierarchical view of the federal judiciary since it authorizes Supreme Court review of inferior federal court decisions as well.

To be sure, Article III provides that Congress may make “[e]xceptions” to the Supreme Court’s appellate jurisdiction.¹⁸⁸ And, as many scholars have observed, this provision has significant implications for Congress’s power to regulate federal jurisdiction.¹⁸⁹ But, whatever the implications for the jurisdiction-stripping debate (an issue I bracket for now),¹⁹⁰ the Appellate Jurisdiction Clause does offer insight into the relationship between the Supreme Court and the lower courts. This Clause strongly suggests that the Court is “supreme” in determining the content of federal law, at least to the extent that it has appellate jurisdiction over a given area of federal law (as it currently has over virtually every, if not every, federal question).

B. The Historical Record

The historical evidence from the Founding Era also provides some support for the hierarchical construction. The evidence pertaining to state courts is fairly strong. The historical record suggests that the Supreme Court was created in part to ensure that state courts complied with federal law. For example, the records from the Constitutional Convention indicate that the delegates debated the Supremacy Clause and the Appellate Jurisdiction Clause around the same time and specifically “tailored [Article III] to facilitate Supreme Court enforcement of the supremacy clause.”¹⁹¹ Likewise, in *The Fed-*

“directly vests the Supreme Court with the jurisdiction to review the judgments of inferior federal courts (and state courts)”).

¹⁸⁸ U.S. CONST. art. III, § 2, cl. 2.

¹⁸⁹ Many federal courts scholars have concluded that the Exceptions Clause gives Congress plenary power to remove cases from the Court’s appellate jurisdiction. See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1569 (1990) (citing this as “the traditional view of article III”). Some scholars have, however, suggested limits. Henry Hart and Leonard Ratner have focused on preserving the Supreme Court’s “essential role” or “essential functions.” See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953); Leonard G. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157, 161 (1960) (urging that the Court must have the power to ensure the uniformity and supremacy of federal law). Other commentators have asserted that the Exceptions Clause only allows Congress to move cases between the Court’s original and appellate jurisdiction (a position that, they acknowledge, is at odds with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). See, e.g., Calabresi & Lawson, *supra* note 165, at 1036–43; Claus, *supra* note 165, at 77–80, 107.

¹⁹⁰ See *supra* note 9 and accompanying text; see also Caminker, *supra* note 36, at 834 (noting that the Court’s constitutional relationship with lower courts is conceptually distinct from Congress’s power to regulate jurisdiction).

¹⁹¹ Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 48–49 (1981) (summarizing the debates over the provisions); see Ratner, *supra* note 189, at 161–65 (same); see also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTION-*

eralist, Alexander Hamilton and James Madison both asserted that the Supreme Court would perform this function.¹⁹² Indeed, one scholar has argued that the Court was designed to be “the principal instrumentality for implementing the supremacy clause.”¹⁹³

The historical evidence pertaining to the Supreme Court’s relationship with inferior federal courts is more limited. The records from the Constitutional Convention say very little about the lower federal courts, undoubtedly in part because it was not clear that there would be any such courts. The Constitution expressly left it up to Congress to determine whether to establish any inferior federal courts.¹⁹⁴

Nevertheless, there is historical evidence supporting the hierarchical construction. As discussed, at the Founding, the terms “inferior” and “supreme” could suggest that the “inferior” courts were either “subordinate to” or (in some other respect) lesser in rank or importance than the Supreme Court.¹⁹⁵ Some contemporaneous evidence suggests that the Framers used the terms in the former sense.¹⁹⁶ For example, in *Federalist* 81, Hamilton asserted that Congress’s authority to establish “tribunals INFERIOR TO THE ‘SUPREME COURT’”

ALISM AND JUDICIAL REVIEW 75 (2004) (noting that the Convention delegates “include[d] the Supremacy Clause as a way to ensure judicial review of state laws”).

¹⁹² See THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 36, at 150 (“To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent [state] judicatories,” it was “necessary to establish one court paramount to the rest . . . and authorized to settle and declare in the last resort a uniform rule of civil justice”); THE FEDERALIST NO. 39 (James Madison), *supra* note 36, at 245–46 (contending that the “tribunal” created by the Constitution would determine “the boundary between” the national and state governments); THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 36, at 493–94 (“[T]he national and State systems are to be regarded as ONE WHOLE. The courts of the latter will . . . be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal [the Supreme Court] which is destined to unite and assimilate the principles of national justice and the rules of national decisions.”).

¹⁹³ Ratner, *supra* note 189, at 165; see also Caminker, *supra* note 36, at 833 n.65 (“Even ardent states-rights advocates at the Constitutional Convention conceded the propriety of allowing Supreme Court review of state court decisions interpreting federal law.”).

¹⁹⁴ See U.S. CONST. art. III, § 1; Sager, *supra* note 191, at 48.

¹⁹⁵ See *supra* notes 173–74 and accompanying text.

¹⁹⁶ See, e.g., THE FEDERALIST NO. 82 (Alexander Hamilton), *supra* note 36, at 492 (reading the Article III Vesting Clause as meaning that “the organs of the national judiciary should be one Supreme Court, and as many subordinate courts as Congress should think proper to appoint”); *id.* at 494 (discussing appeals “to the Supreme Court . . . from the subordinate federal courts” and the state courts); John Jay, Draft of Letter from Justices of the Supreme Court to George Washington (Sept. 15, 1790), *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 161, 162 (Philip B. Kurland & Ralph Lerner eds., 1987) (describing the lower federal courts as “inferior and subordinate”); see also Letter from the Federal Farmer (XV) (Jan. 18, 1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 315, 319–20 (Herbert J. Storing ed., 1981) (indicating, in his discussion of “all civil causes carried up the supreme court by appeals,” an assumption that Article III places the Supreme Court atop a hierarchical federal judiciary).

would “enable the institution of local courts, *subordinate to the Supreme*, either in States or larger districts.”¹⁹⁷

A few scholars (most notably, David Engdahl) have, however, amassed a good deal of historical evidence to dispute the hierarchical position.¹⁹⁸ Professor Engdahl emphasizes that, at the Founding, it was “common to describe one tribunal as inferior ‘to’ another . . . despite [the] lack of . . . appellate or supervisory lines.”¹⁹⁹ For example, in his influential *Commentaries*, William Blackstone referred to English courts as “inferior” and “supreme,” “without reference to hierarchy.”²⁰⁰ Likewise, Professor Engdahl observes, colonial and early state courts were often called “inferior” if they had a limited geographic or subject matter jurisdiction and “supreme” if their jurisdiction was broader in scope.²⁰¹ In fact, some states, including Virginia, had multiple “supreme” courts.²⁰²

Professor Engdahl convincingly demonstrates that the terms “supreme” and “inferior” do not, standing alone, necessarily denote a hierarchical structure. But his evidence does not, in my view, clearly refute the hierarchical construction. As discussed, the Supreme Court could be both “supreme” in the hierarchical sense (atop a judicial pyramid) and in the jurisdictional sense (with the largest geographic and/or subject matter jurisdiction). Indeed, the Court has long been “supreme” in both respects.

I do not mean to suggest that the historical evidence conclusively establishes the hierarchical position. The founding-era evidence per-

¹⁹⁷ THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 36, at 485 n.* (emphasis added).

¹⁹⁸ Notably, Professor Engdahl focused on the Supreme Court’s relationship with the lower federal courts, but his historical arguments about the meaning of “supreme” may apply to the Court’s constitutional role more generally.

¹⁹⁹ Engdahl, *supra* note 166, at 475 n.95.

²⁰⁰ *Id.* at 466 (“Americans’ best source of information about English law and practice was Blackstone’s *Commentaries*. It is significant, therefore, that Blackstone called courts ‘inferior’ and ‘supreme’ without reference to hierarchy.” (footnote omitted)). Of course, it is not clear how much we can rely on the English judicial system in determining the meaning of Article III. See John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 8 (2001) (“Our constitutional structure certainly drew upon prior English practice in some respects, but it also departed from that practice in important respects.”). According to Wilfred Ritz, the Framers sought to create a different judicial structure. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 41 (Wythe Holt & L.H. LaRue eds., 1990) (“The English judicial system, with its plethora of courts, obscure jurisdictions, and unclear hierarchical arrangements, was patently unsatisfactory, and was a model rather to be avoided than emulated.”).

²⁰¹ See Engdahl, *supra* note 166, at 468–72. Professor Ritz has questioned the extent to which the Founders sought to mimic the colonial and early state judiciaries. See RITZ, *supra* note 200, at 35 (“[C]ontrary to what may be generally thought, the national judiciary was not modeled on the then-existing judicial systems of the states . . .”).

²⁰² See Engdahl, *supra* note 166, at 469–72 (noting that Virginia had four “supreme” courts in 1787).

taining to the judiciary, particularly the federal judiciary, is sparse and may not definitively support any position. But, at the very least, the historical record is mixed and does not negate the conclusion suggested by the text and structure: the Constitution creates a hierarchical judiciary.

C. The Supreme Court's Recognition of Its Constitutional Role

To the extent the Supreme Court has addressed the issue, it has consistently reaffirmed that it sits atop a judicial hierarchy, with the authority and the responsibility to guide lower courts on the content of federal law. Although the Court's declarations about its constitutional role may seem beside the point (and perhaps a bit self-serving) in any discussion of Congress's power over the judiciary, or in an examination of lower court obligation, these statements seem quite relevant in an analysis of the Court's own constitutional duties. In Part III, I discuss how the Court can most effectively fulfill its own conception of its "supreme" role.

The Court early on asserted its authority to issue binding constructions of federal law to state courts. In *Martin v. Hunter's Lessee*,²⁰³ the Court considered a claim by Virginia's highest court that it had no obligation to enforce a Supreme Court decision.²⁰⁴ The Court made clear that it had the constitutional authority to "revis[e] the decisions of state tribunals" and that the court below had erred in "declin[ing] to obey the mandate of the supreme court."²⁰⁵ The Court reiterated this theme in *Cohens v. Virginia*,²⁰⁶ emphasizing that its "exercise of the appellate power over . . . State tribunals" was "essential" to ensuring the supremacy of federal law.²⁰⁷

The Supreme Court has likewise repeatedly recognized its role as the hierarchical leader of the federal judiciary. The Court has declared that "Article III creates[] not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'"²⁰⁸ "Within that hierarchy,"²⁰⁹ the Court has emphasized, it has the authority and the responsibility to define the content of federal law for the "subordinate" federal courts.

Thus, in *Rivers v. Roadway Express, Inc.*,²¹⁰ the Court declared that, under "the rules that necessarily govern our hierarchical federal court system," "[i]t is this Court's responsibility to say what a statute means,

²⁰³ 14 U.S. (1 Wheat.) 304 (1816).

²⁰⁴ *See id.* at 323–24.

²⁰⁵ *See id.* at 345–46, 351–52, 362.

²⁰⁶ 19 U.S. (6 Wheat.) 264 (1821).

²⁰⁷ *Id.* at 414–15.

²⁰⁸ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227 (1995).

²⁰⁹ *Id.*

²¹⁰ 511 U.S. 298 (1994).

and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.”²¹¹ And, in *Hutto v. Davis*,²¹² the Court stated even more emphatically that, “unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”²¹³

The Court most recently summed up this position in *Sanchez-Llamas v. Oregon*,²¹⁴ where it declined to give decisive weight to an international tribunal’s construction of a treaty.²¹⁵ The Court declared that, “[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department,’ headed by the ‘one supreme Court’ established by the Constitution.”²¹⁶

III

ENSURING THE SUPREME COURT’S ROLE IN THE JUDICIAL HIERARCHY

Though the matter is not free from doubt, I conclude that the Constitution creates a hierarchical judiciary and renders the Court “supreme” in defining the content of federal law. Although many scholars appear to have accepted this hierarchical vision, they have not realized all of its implications. A number of scholars have argued that the Court’s constitutional “supremacy” places limits on Congress’s power to regulate Supreme Court jurisdiction.²¹⁷ Scholars

²¹¹ *Id.* at 312; *see id.* (“[The lower court decisions] were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system.”).

²¹² 454 U.S. 370 (1982).

²¹³ *Id.* at 375; *see id.* at 374–75 (admonishing the court of appeals for “having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress”).

²¹⁴ 548 U.S. 331 (2006).

²¹⁵ *See id.* at 353–55.

²¹⁶ *Id.* at 353–54 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (emphasis added).

²¹⁷ *See* Calabresi & Lawson, *supra* note 165, at 1023, 1030 (asserting that “any exercise of authority by” inferior federal courts, and any construction of federal law by state courts, must be subject to Supreme Court review); Caminker, *supra* note 36, at 835–37 (contending that the Court must have “jurisdiction sufficiently broad to provide general leadership in defining federal law”); Claus, *supra* note 165, at 64 (urging that “Congress can never . . . remove from the Supreme Court the ability to have ultimate judgment of Article III matters”); Pfander, *supra* note 165, at 1500–01 (asserting that it would raise “serious constitutional questions” if Congress sought to eliminate both the Court’s appellate jurisdiction and its authority to supervise lower federal courts by issuing discretionary writs, such as mandamus); Pfander, *supra* note 167, at 236 (making a similar claim with respect to state courts). *But see* Edward A. Hartnett, *Not the King’s Bench*, 20 CONST. COMMENT. 283, 314–15 (2003) (arguing that, “even if th[e] constitutional requirement of inferiority refers to” a

have also focused on what the hierarchical structure means for the lower courts, generally concluding that inferior federal and state courts have a constitutional duty to abide by Supreme Court precedents.²¹⁸

Scholars have not, however, considered that the Supreme Court may itself need to take action to preserve its “supreme” position in the judicial hierarchy. I explore that question here. In our current judicial system, the Court has few mechanisms at its disposal to communicate its views on federal law to the “subordinate” federal and state courts. The Court lacks the power to directly reward or sanction lower federal or state court judges. Indeed, under our constitutional structure, the Court’s appellate review authority appears to constitute its only means of overseeing the lower courts. And I argue that the current Supreme Court cannot effectively supervise those judicial inferiors unless it uses that appellate review power to issue vertically maximal decisions.

A. Direct Rewards and Sanctions

The Supreme Court’s lack of control over the lower federal and state courts is striking when contrasted with the oversight mechanisms available to the President, Congress, and high courts in many foreign jurisdictions. Each of those entities has some control over the selection, advancement, and/or dismissal of its subordinates. The Supreme Court, by contrast, has no such tools available to ensure its status in the judicial hierarchy.

The political branches of the federal government have various mechanisms at their disposal to supervise and control subordinate officials. Notably, I focus on each branch’s authority to supervise officials within its own branch because that offers the closest analogy to the Supreme Court’s relationship with lower federal and state courts. For example, Article II gives the President broad authority to nomi-

hierarchical relationship, Congress would still have considerable authority to regulate the Court’s jurisdiction).

²¹⁸ See Calabresi & Lawson, *supra* note 167, at 276 n.106 (contending that lower federal courts and state courts have an “obligation to follow Supreme Court precedent”); Caminker, *supra* note 36, at 834 (arguing that “Article III commands all inferior federal courts to obey Supreme Court precedent”); Claus, *supra* note 165, at 71 (agreeing that the Constitution “subordinates all other courts’ conclusions on Article III issues to those of the one [Supreme] Court”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 649 (2004) (asserting that lower federal courts “must respect the decisions of their judicial superiors as controlling authority”); Pfander, *supra* note 167, at 202 (arguing that state courts must “give effect to federal law as pronounced by the Supreme Court”); Judge Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the Harris Case*, 102 YALE L.J. 205, 206 (1992) (asserting that lower federal courts have a “constitutional obligation” “to apply whatever decisions the [Supreme] Court issues”).

nate and, with the advice and consent of the Senate, appoint the principal officers in federal agencies.²¹⁹ Article II further states that he may “require” those principal officers to provide him with an “Opinion, in writing, . . . upon any Subject relating to the Duties of their respective Offices.”²²⁰ The President may also use his appointment authority to promote subordinates to more prestigious or more lucrative positions within the Executive Branch. Finally, the President has considerable authority to remove subordinate executive officials.²²¹ These tools enable the President to ensure, to some degree, that lower-ranking federal officials faithfully implement his preferred policies.

Likewise, Congress, as a body, has some authority to exert control over its members. The House and Senate do not, of course, select their members (who are popularly elected),²²² but they can promote their members to more influential positions within the chamber. Article I provides that the “House of Representatives shall chuse their Speaker and other Officers”²²³ and further states that, although the Vice President is by default the President of the Senate, “[t]he Senate shall chuse their other Officers, and also a President pro tempore” who presides over the chamber in the Vice President’s absence.²²⁴ Congress also has the authority to sanction and remove its members. Under Article I, each “House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”²²⁵

Superior courts in many foreign jurisdictions also have various ways (other than appellate review) of exerting influence over judges

²¹⁹ See U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 132 (1976).

²²⁰ U.S. CONST. art. II, § 2, cl. 1.

²²¹ The President has almost unlimited authority to remove high-level officials in executive agencies. See *Myers v. United States*, 272 U.S. 52, 176–77 (1926) (invalidating a statute that failed to give the President “the unrestricted power of removal” of certain executive officers). The President also has some authority to remove officials in independent agencies. See *Morrison v. Olson*, 487 U.S. 654, 691–93, 696–97 (1988) (upholding the independent counsel statute, in part because it permitted the Executive Branch to remove an independent counsel “for cause”); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110 (1994) (arguing that “for cause” removal provisions may give the President “a large degree of removal . . . power”). Some scholars contend that the President should have unlimited authority to remove subordinate executive officials. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992) (noting the argument of some unitary executive theorists that “the President has total power to remove [subordinate] officers who make [executive] policy decisions with which he disagrees”).

²²² See U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

²²³ U.S. CONST. art. I, § 2, cl. 5.

²²⁴ U.S. CONST. art. I, § 3, cl. 5; see *id.* cl. 4 (“The Vice President . . . shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

²²⁵ U.S. CONST. art. I, § 5, cl. 2.

on subordinate courts. The highest court in some jurisdictions controls the appointment and/or advancement of lower court judges.²²⁶ For example, the Chief Justice of the Japanese Supreme Court heads the Secretariat (the administrative wing of the judiciary), which determines whether to promote lower court judges to higher, and higher-paying, judicial office.²²⁷

The Supreme Court of the United States can use none of these oversight mechanisms. The Constitution does not give the Court any authority to select or promote lower federal court judges. Instead, they are appointed and elevated to higher office by the President, with the advice and consent of the Senate.²²⁸ Nor can the Supreme Court remove, or otherwise sanction, an inferior federal or state court judge for disobeying its mandate or failing to abide by one of its precedents. Inferior federal court judges enjoy the same life tenure and salary protections as Supreme Court Justices²²⁹ and may be removed only through impeachment by the House and conviction by the Senate.²³⁰ State court judges, of course, are subject to (and thus protected by) the appointment, promotion, and removal processes established by their respective states.²³¹ The constitutional structure thus seems to foreclose many avenues of oversight that might otherwise enable the Supreme Court to retain control over the content of federal law.

²²⁶ See Lydia Brashear Tiede, *Judicial Independence: Often Cited, Rarely Understood*, 15 J. CONTEMP. LEGAL ISSUES 129, 152 (2006) (“In many countries, such as Chile, Supreme Court justices rank all lower court justices based on their decisions and performance as judges. This ranking in turn affects lower court judges’ pay and promotion possibilities.” (footnote omitted)); James M. West & Dae-Kyu Yoon, *The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?*, 40 AM. J. COMP. L. 73, 81 (1992) (noting that the Korean Supreme Court “control[s] . . . promotions and transfers of judges at the lower levels”); Bruce M. Wilson, *Claiming Individual Rights Through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT’L J. CONST. L. 242, 248 (2007) (observing that in Costa Rica, Supreme Court magistrates “appoint all lower court judges”).

²²⁷ See J. MARK RAMSEYER & ERIC B. RASMUSEN, *MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN* 10–12 (2003).

²²⁸ The Constitution does not expressly state that inferior federal court judges are “principal” officers who must be appointed in this manner. But that has been our practice to date. In any event, the important point (for my purposes) is that the Constitution clearly does not require that those judges be selected by the Supreme Court.

²²⁹ See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

²³⁰ See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives . . . shall have the sole Power of Impeachment.”); U.S. CONST. art. I, § 3, cl. 6 (“The Senate shall have the sole Power to try all Impeachments.”).

²³¹ For the most current information on the selection and removal procedures in the various states, see American Judicature Society: Judicial Selection in the states, <http://www.judicialselection.us> (last visited Oct. 3, 2009).

B. Appellate Review

The constitutional structure appears to offer the Court only one mechanism to preserve its “supreme” role in the judicial hierarchy: appellate review. The Court can ensure its supremacy over the content of federal law by examining the legal determinations of subordinate courts. Congress may, of course, make “exceptions” to the Court’s appellate jurisdiction. But I am interested in how the Court can use its appellate review authority to preserve its hierarchical status in those areas over which it has jurisdiction (as it currently has over most federal law).

To ensure its supremacy over federal law, the Court can exercise its appellate review power in essentially two ways. First, it can employ what I refer to as “error correction”: reversing specific lower federal and state court decisions with which it disagrees (with or without providing instructions on how the law should apply to the facts of those cases).²³² Second, the Court can employ what I refer to as “precedent setting”: articulating legal rules in written opinions that will serve as precedents for lower courts in that case and future cases. The Supreme Court may of course (and indeed often does) perform both functions in the same case. But, for purposes of this analysis, it is useful to distinguish between these two basic forms of appellate review because they roughly correspond to the two approaches to opinion writing examined here: minimalism and vertical maximalism. When the Court issues a minimalist opinion, carefully tailored to the facts of a given dispute, it engages in a kind of error correction. Indeed, a minimalist opinion is designed to resolve only “the case at hand”²³³ and thus to have little precedential impact in future cases. By contrast, when the Court issues a more vertically maximal opinion, it necessarily establishes a precedent for lower courts to apply in future cases.

I do not claim that the constitutional structure, in the abstract, favors either error correction or precedent setting as a mode of appellate review. I thus also do not claim that the Constitution inherently prefers either minimalism or vertical maximalism. In theory, either approach could be consistent with the Court’s “supreme” role in the judicial hierarchy. Instead, I assert that the Court should use the mode of appellate review that will best preserve its hierarchical position, given the practical constraints on the judiciary in a given historical period. Thus, I argue that, at the Founding, error correction may

²³² The Court does not, of course, need to explain how the law should apply even in the particular case. If, on remand, the lower court erred again, the Court could (in theory) simply reverse again. The Court might, however, be inclined to simplify the process by explaining how the lower court erred in the particular case.

²³³ SUNSTEIN, *supra* note 14, at 10.

have been the Court's only effective means of performing its "supreme" constitutional role. By contrast, in our current judiciary, the Court can effectively preserve its role in the judicial hierarchy only by employing vertical maximalism.

1. *Error Correction in the Early Court*

In the earliest years of the republic, the Supreme Court had few ways of communicating its views on federal law to the lower federal and state courts. Although the Court held its first session in February 1790,²³⁴ the first comprehensive Supreme Court reporters were not published until 1804.²³⁵ Thus, during its first decade, the Court could not maintain its supreme status by issuing precedential decisions via written opinion.²³⁶ Instead, the Court could ensure its role in the judicial hierarchy only by correcting errors in the individual lower court decisions that came before it on appeal. Nor did the Court make an effort to issue precedential decisions in its first decade. Instead, the Justices often wrote seriatim, issuing separate opinions reflecting their individual views on the legal issue before the Court.²³⁷

²³⁴ See Appointment of Justices, 2 U.S. 399 (1790). It took a few years, however, for any appeals to reach the Court. See 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: 1789–1800, at 3 (Maeva Marcus ed., 1998) [hereinafter DOCUMENTARY HISTORY] (noting that "there was a lag before the Supreme Court's docket began to fill up," in part because federal cases had to first cycle through the lower federal courts, and in part because litigants in the early 1790s only twice sought review of state court decisions). The Court thus spent its first few terms dealing with internal business and did not hear cases until August 1791. See *id.* at 1. The Court issued its first written decision in 1792. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 55 n.116 (8th ed. 2002) ("On August 11, 1792, the Supreme Court rendered its first written decision: *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792).").

²³⁵ See RITZ, *supra* note 200, at 46–47; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 288 (1922) (noting that, "after the close of [the] 1804 Term . . . William Cranch, the Chief Justice of the Circuit Court of the District of Columbia, issued the first volume of his [Supreme Court] *Reports*"). Alexander Dallas, a prominent lawyer who published state court reports in Pennsylvania, see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 118, 158 (1971), began to publish Supreme Court opinions in 1798, see 6 DOCUMENTARY HISTORY, *supra* note 234, at 648 n.2 (observing that Dallas's second volume was published in 1798); J.M. SOSIN, THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA 284–85 (1989) (noting that the second volume was the first to contain Supreme Court opinions). But his reports were apparently incomplete. See 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES: 1789–1800, at xlii, xlv (Maeva Marcus & James R. Perry eds., 1985) (stating that *The Documentary History* constitutes "the first accurate record of all cases heard by the Supreme Court between 1790 and 1800," including "cases . . . not reported by Alexander James Dallas").

²³⁶ See SOSIN, *supra* note 235, at 203–04, 284–85 (noting the limited availability of law reports in the early republic).

²³⁷ See DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 45–46 (1954) ("[N]early one-fifth of the adjudications [before 1801] found all the justices expressing their individual convictions . . .").

Two developments in the nineteenth century were necessary before the Court could supervise lower federal and state courts by issuing precedential opinions: First, the Court had to begin writing joint opinions. Second, those written opinions had to be accessible to lawyers and lower federal and state court judges. The first change came in 1801, when newly appointed Chief Justice John Marshall convinced the other Justices to begin issuing joint Opinions of the Court.²³⁸ But the second development (the availability of Supreme Court decisions) was more gradual. Although the first Supreme Court reporters were published in 1804, they were not widely circulated, at least not to all regions of the country.²³⁹ Lawyers and lower court judges in those regions could still obtain information about certain important Supreme Court precedents, such as *Marbury v. Madison*,²⁴⁰ because such decisions were reported in newspapers and other periodicals during that period.²⁴¹ Less salient precedents, however, were less likely to reach lower courts. Indeed, it does not appear that Supreme Court decisions were widely circulated until at least the 1830s.²⁴² Accordingly, during its early years, the Supreme Court had to rely at least in part on error correction to ensure its status in the judicial hierarchy.

Moreover, even after precedent setting became one way of supervising the lower federal and state courts, error correction still likely served as an effective oversight mechanism. The early Court had mandatory (and limited) appellate jurisdiction²⁴³ and had the capacity to decide every case that came before it on appeal. In its entire

²³⁸ See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 123 (1990) (“[U]nder Marshall’s leadership . . . the Court abandoned the practice of seriatim opinion writing and united behind a single opinion.”).

²³⁹ See 1 WARREN, *supra* note 235, at 455–56. Indeed, Daniel Webster commented in 1818 that “[t]he sale [of Supreme Court reports] is not very rapid. The number of law libraries which contain a complete set is comparatively small.” *Id.* at 456 n.1.

²⁴⁰ 5 U.S. (1 Cranch) 137 (1803).

²⁴¹ See 1 WARREN, *supra* note 235, at 288 (observing that a summary of *Marbury* was “widely published and commented upon in the newspapers”); see also SOSIN, *supra* note 235, at 204 (noting that, at the Founding, “judicial precedents existed” mostly in “pamphlets and newspaper accounts and the recollections of lawyers and judges”).

²⁴² See 1 WARREN, *supra* note 235, at 455 (“Many years elapsed before the Supreme Court Reports obtained any wide sale or circulation among lawyers. Even as late as 1830, [Supreme Court Reporter] Richard Peters[] stated that ‘few copies were found in many large districts of the country.’”). Moreover, in its first few decades, the Court did not play a direct role in the publication of its decisions. Instead, Supreme Court reports were “private ventures.” SOSIN, *supra* note 235, at 204. The Court did not appoint its own official reporter until 1817. See *id.*

²⁴³ See Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87 (authorizing review over state court decisions that denied a federal right and over federal circuit court decisions in civil matters when the amount in controversy exceeded \$2000); Engdahl, *supra* note 166, at 497 (noting that “\$2,000 was a great deal of money in those days”); Eugene Gressman, *Requiem for the Supreme Court’s Obligatory Jurisdiction*, 65 A.B.A. J. 1325, 1327 (1979) (observing that appellate review was mandatory from 1789 to 1891).

first decade, the Court heard fewer than 100 cases,²⁴⁴ and its docket remained quite manageable through the first few decades of the nineteenth century.²⁴⁵ Indeed, for this reason, the Court held only two sessions each year;²⁴⁶ the Justices spent the bulk of their time riding circuit.²⁴⁷ It seems likely that, in this environment, the Court could effectively supervise the inferior federal and state courts by (at least in part) correcting errors in specific lower court decisions.

2. *Capacity Constraints and the 1925 Judiciary Act*

The Supreme Court's caseload began to increase dramatically in the late nineteenth and early twentieth centuries.²⁴⁸ This development was largely due to a rise in federal legislation (as the government stepped in to regulate more sectors of the economy),²⁴⁹ but also resulted from Congress's expansion of the Court's jurisdiction.²⁵⁰ By the 1920s, the Court was unable to keep up with its caseload. As a result, Chief Justice William Howard Taft sought legislation to ease the burden on the Court and to give it more discretion to choose the

²⁴⁴ See STERN ET AL., *supra* note 234, at 55.

²⁴⁵ See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 156 (8th ed. 2008) (providing a chart showing that the Court's docket from 1800 until 1850 generally included 250 cases or fewer).

²⁴⁶ See David M. O'Brien, *Managing the Business of the Supreme Court*, 45 PUB. ADMIN. REV. 667, 671 (1985) (stating that the Court's February and August terms lasted no more than two or three weeks). The Court later switched to a short annual term. See *id.*

²⁴⁷ The Justices rode circuit from 1789 until 1911. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1390 (2006).

²⁴⁸ See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS* 63 tbl.2-2 (4th ed. 2007) (showing the rise in the Court's caseload from 1116 in 1910 to 1316 in 1924); 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, in 1850, the Supreme Court's docket included 253 cases while, by 1890, its docket had swelled to 1816).

²⁴⁹ See FRANKFURTER & LANDIS, *supra* note 248, at 57–60, 206–08, 230 (observing that the increased workload during this period was partly due to “the extension of the field of federal activity”).

²⁵⁰ See Act of Mar. 3, 1875, ch. 127, § 1, 18 Stat. 470, 470 (conferring general federal question jurisdiction in any case in which the amount in controversy exceeded \$500); Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, 790 (extending the Court's appellate jurisdiction to include all federal question cases from state courts, not only those denying a federal right); FRANKFURTER & LANDIS, *supra* note 248, at 65, 198 (noting that these statutes contributed to the rise in the Court's caseload). Congress provided some relief in 1891, when it created the federal courts of appeals and gave the Court discretionary certiorari review over certain appeals from those courts. See Circuit Court of Appeals Act of 1891, ch. 517, § 6, 26 Stat. 826, 828 (authorizing discretionary review over cases involving diversity, revenue laws, patent laws, federal criminal laws, and admiralty). This legislation led to a temporary decline in the Court's workload. See EPSTEIN ET AL., *supra* note 248, at 62 tbl.2-2 (showing a decline from 1816 in 1890 to 723 in 1900); FRANKFURTER & LANDIS, *supra* note 248, at 101–02. But its workload rose again at the turn of the century. See EPSTEIN ET AL., *supra* note 248, at 62–63 tbl.2-2 (showing an increase from 723 in 1900 to 1316 in 1924).

cases that it would hear.²⁵¹ Congress responded with the Judiciary Act of 1925, which reduced the Court's mandatory appellate docket and substantially replaced it with discretionary review via writs of certiorari.²⁵²

The Justices and legislators understood that this conferral of discretionary review power was a necessary result of the Court's capacity constraints.²⁵³ As Chief Justice Taft stated, "[w]hen one court could attend to all appellate business, as was the case early in the history of our court . . . [t]here was no objection . . . to making . . . appeal [to the Supreme Court] a matter of right."²⁵⁴ But, he emphasized, "[w]hen . . . the business has accumulated so that one court can not take care of all the appellate business, intermediate courts are introduced, and the office of the Supreme Court has ceased to be that of a tribunal to afford everybody a review of his case."²⁵⁵

Instead, the Justices and legislators agreed, the Supreme Court should concentrate its limited resources on "important" cases.²⁵⁶ And what is striking is the way that these participants defined "important." A case was "significant" or "important" enough for resolution by the Supreme Court if it had implications beyond the narrow circumstances of that dispute. The case had to present broad legal questions that would impact not only the litigants before the Court but also the

²⁵¹ For an in-depth discussion of the Chief Justice's efforts, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1660-1704 (2000).

²⁵² See Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. The Act did, however, leave in place mandatory jurisdiction over (1) state court decisions invalidating federal statutes or treaties; (2) state court decisions upholding state law against federal constitutional challenge; (3) certain decisions by three-judge district courts; (4) certain criminal appeals by the United States; and (5) federal appellate court decisions invalidating state laws. See § 1, 43 Stat. at 937-39.

²⁵³ See *Procedure in Federal Courts: Hearing on S. 2060 and S. 2061 Before the Subcomm. of the S. Comm. on the Judiciary*, 68th Cong. 47 (1924) [hereinafter *Procedure Hearing*] (statement of J. James C. McReynolds) ("[T]he number of possible Federal questions has become so large that we simply cannot pass upon all of them."); H.R. REP. NO. 68-1075, at 2 (1925) ("The bill is designed to lessen the number of cases which under existing law reach the Supreme Court."); STAFF OF S. COMM. ON THE JUDICIARY, 68th Cong., REPORT ON THE JUDICIAL CODE 2 (Comm. Print 1925) ("The primary object of the bill is to relieve the congestion resulting from the present overcrowded docket of the Supreme Court . . .").

²⁵⁴ William Howard Taft, Address to the New York County Bar Association 6 (Feb. 18, 1922), *microformed on* William H. Taft Papers, Reel 590 (Library of Congress) [hereinafter Taft Papers] (discussing the proposed legislation).

²⁵⁵ *Id.*

²⁵⁶ See H.R. REP. NO. 68-1075, at 2 (stating that the bill would eliminate "cases of trivial character" and give the Court time to "determin[e] more important cases"); STAFF OF S. COMM. ON THE JUDICIARY, 68th Cong., REPORT ON JUDICIAL CODE, at 2 ("[The bill] puts within the ability of the court the means of confining its jurisdiction to important cases . . ."); see also FRANKFURTER & LANDIS, *supra* note 248, at 260 ("At the heart of the [1925 legislation] was the conservation of the Supreme Court as the arbiter of legal issues of national significance.").

general public.²⁵⁷ Thus, as Justice Willis Van Devanter²⁵⁸ explained during congressional hearings on the measure, one of the central considerations in granting a petition for certiorari was “whether the questions presented in the case are of wide or public importance or concern only the parties to the particular case.”²⁵⁸ Likewise, Justice James McReynolds stated that the lower federal and state courts should be the principal fora for dispute resolution.²⁵⁹ “But if the cause involves [a] matter of general importance, some statute to be construed, some constitutional provision, it should come to us for final disposition.”²⁶⁰ He declared that “the chief purpose of the Supreme Court should be to decide questions of law so that lawyers will know how to advise their clients and trial courts can dispose of their cases.”²⁶¹

Chief Justice Taft also emphasized the unique role of the Supreme Court. He described the Court as “the head of the Federal Judiciary, and, in a constitutional sense, the head of the Judiciary of the Nation.”²⁶² When a case goes beyond the lower courts to that high court, “it is not primarily to preserve the rights of the litigants. The Supreme Court’s function is for the purpose of expounding and stabilizing principles of law . . . for the public benefit.”²⁶³ The Court should accordingly hear a case only when “the principle involved is such that it is important to have a general exposition of it for the

²⁵⁷ See H.R. REP. NO. 68-1075, at 2 (“The problem is whether the time and attention and energy of the [Supreme] court shall be devoted to matters of large public concern, or whether they shall be consumed by matters of less concern, without especial general interest, and only because the litigant wants to have the court of last resort pass upon his right.”); S. REP. NO. 68-362, at 3 (1924) (“The central thought [behind the legislation] 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 serious uncertainty attends the decision of the . . . circuit court of appeals by reason of conflict in the rulings of these courts or the courts of the States.”); 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 2655, 2662 (Fred L. Israel ed., 1966) (supporting the legislation because it would empower the Court to “dispos[e] of those [cases] which are not of public moment”); *infra* notes 258–65 and accompanying text.

²⁵⁸ *Procedure Hearing*, *supra* note 253, at 29–30 (statement of J. Willis Van Devanter). Justice Van Devanter was reportedly the principal draftsman of the 1925 Judiciary Act. See FRANKFURTER & LANDIS, *supra* note 248, at 260.

²⁵⁹ See *Procedure Hearing*, *supra* note 253, at 45 (statement of J. McReynolds).

²⁶⁰ *Id.*

²⁶¹ *Id.* at 47.

²⁶² Letter from William Howard Taft to Senator Reed Smoot 2 (July 3, 1925), Taft Papers, *supra* note 254, at Reel 275.

²⁶³ *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) [hereinafter *Jurisdiction Hearing*] (statement of C.J. Taft).

benefit of the lawyers, for the benefit of the inferior courts, and for the benefit of the public at large.”²⁶⁴ He stated:

The real work which the Supreme Court has to do is for the public at large, as distinguished from the particular litigants before it. Its main purpose [is] to lay down . . . important principles of law . . . and thus to help the people at large to a knowledge of their rights and duties, and to make the law clearer.²⁶⁵

The 1925 Judiciary Act thus marked a turning point in the institutional role of the Supreme Court. The Court could no longer serve as a court of error but instead had to rely increasingly on precedent setting to oversee its judicial inferiors.²⁶⁶ Indeed, Chief Justice Taft stated that, in considering applications for certiorari, “whether the case was rightly decided in the court below” would now be a “[question] of minor consideration.”²⁶⁷

3. *Expansion of Discretionary Review in the 1988 Judiciary Act*

The 1925 Judiciary Act provided temporary relief but did not solve the Court’s workload problems. In the latter half of the twentieth century, the Court’s docket grew further,²⁶⁸ in part because of the expanding federal administrative state²⁶⁹ and also because of changes in the Court’s own doctrine, which recognized a string of new consti-

²⁶⁴ *Id.* at 3; see also William Howard Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2 (1925) [hereinafter Taft, *Jurisdiction of the Supreme Court*] (stating that the Supreme Court should hear cases involving “principles, the application of which are of wide public or governmental interest, and which should be authoritatively declared by the final court”).

²⁶⁵ Taft, *supra* note 254, at 6–7.

²⁶⁶ Notably, the Court’s certiorari rules have, since 1925, reflected this increasing emphasis on law declaration over dispute resolution. See Taft, *Jurisdiction of the Supreme Court*, *supra* note 264, at 3 n.4 (quoting the Court’s certiorari rules, which, beginning in 1925, provided that certiorari would be “granted only where there are special and important reasons,” including when “a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court,” or in the event of a conflict among the lower courts); SUP. CT. R. 10 (Considerations Governing Review on Certiorari). There have been only two notable changes in the Court’s certiorari rules since 1925. First, following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court stopped reviewing “important question[s] of local law.” Cf. Taft, *Jurisdiction of the Supreme Court*, *supra* note 264, at 3 n.4 (noting that the Court previously considered such matters). Second, the Court has further underscored that it will resolve a conflict in the lower courts only if the matter involves an “important” federal question. See STERN ET AL., *supra* note 234, at 225 (noting that the Court amended its rules in 1995 to make this requirement explicit).

²⁶⁷ *Jurisdiction Hearing*, *supra* note 263, at 3 (statement of C.J. Taft).

²⁶⁸ See EPSTEIN ET AL., *supra* note 248, at 65–67 tbl.2-2 (showing that the Supreme Court’s caseload rose from 1321 in 1950, to 4761 in 1975, and to 8965 in 2000).

²⁶⁹ See O’Brien, *supra* note 246, at 667 (“[B]y and large, the docket reflects the course of legislation and broad socioeconomic change in the country.”).

tutional rights (particularly in the area of criminal procedure).²⁷⁰ The Court also faced increasing challenges in overseeing the lower courts because of a sharp increase in their workload. For example, between 1960 and 1983, the number of filings in federal district courts rose from approximately 80,000 to 280,000 cases per year, and those in the courts of appeals grew in similar proportion (from approximately 3800 to nearly 30,000 cases per year).²⁷¹ These figures, of course, do not even include all filings in bankruptcy court, nor do they encompass the many state cases raising issues of federal law.²⁷²

Accordingly, beginning in the 1970s, the Supreme Court—this time led by Chief Justice Warren Burger—once again called upon Congress to address the Court’s caseload.²⁷³ In 1988, Congress responded by largely eliminating the Court’s remaining mandatory appellate jurisdiction so that the Court could hear virtually every appeal by way of discretionary certiorari review.²⁷⁴

The 1988 Judiciary Act reflected the same vision of the Supreme Court’s role as the 1925 statute. The modern Court did not have the capacity to serve as a court of error, focusing on mistakes in specific lower court rulings. Instead, the Court should concentrate its limited resources on developing legal principles with a broader impact.²⁷⁵

²⁷⁰ See *id.* at 667, 669 (suggesting that “[d]ecisions expanding the constitutional rights of indigents . . . contributed to an increase in filings” in the post–World War II period).

²⁷¹ See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 61 tbl.3.1, 64 tbl.3.2 (1985) (reporting that, from 1960 to 1983, filings in district court rose from 79,200 to 277,031 and those in appellate courts rose from 3765 to 29,580).

²⁷² There do not appear to be statistics on precisely how many federal claims are heard in state court. See Pfander, *supra* note 167, at 233 n.184.

²⁷³ There were various suggestions for how the Court could best address its capacity constraints. Much of the debate focused on the possible creation of a national court of appeals to assist the Court, particularly in resolving lower court conflicts. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 590–95 (1972) (recommending a National Court of Appeals to take on part of the Court’s workload); Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 199 (1975) (recommending a National Court of Appeals to hear cases referred by the Supreme Court or transferred from a federal court of appeals). This proposal was, however, criticized by some Justices and scholars, and “ultimately the idea withered away.” Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 741–42 (2001).

²⁷⁴ See Pub. L. No. 100-352, 102 Stat. 662 (1988).

²⁷⁵ See, e.g., H.R. REP. NO. 100-660, at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 779 (stating that “[t]he Supreme Court—which of course sits at the apex of the Federal judicial system—can devote plenary consideration only to about 150 cases a year” and should thus concentrate its limited resources on “cases involving principles the application of which are of wide public importance or governmental interest”); S. REP. NO. 100-300, at 4 (1988) (“History has shown that imposing . . . mandatory functions on the Supreme Court tends to weaken the Court’s capacity both to control its own docket and to confine its labors to those cases of national importance.”).

Indeed, as the Court emphasized in successive letters to Congress (endorsing the 1988 reforms),²⁷⁶ this “law enunciation” vision of its institutional role was the motivating force behind the 1925 Judiciary Act. The premise of that legislation was that the Court should not spend “its limited time and resources on cases which do *not*, in Chief Justice Taft’s words, ‘involve principles . . . of wide public importance or governmental interest.’”²⁷⁷ The Court stated that its case-management concerns had only grown more acute since the 1920s: “Because the volume of complex and difficult cases continues to grow, it is even more important that the Court not be burdened by . . . cases that are of significance only to the individual litigants but of no ‘wide public importance.’”²⁷⁸

Notably, the Court also emphasized the impact of its capacity constraints on the lower federal and state courts. The Court explained that it was “impossible . . . to give plenary consideration [to] all the mandatory appeals it receive[d],” and it therefore had to “dispose of many cases summarily, often without written opinion.”²⁷⁹ This approach, however, was a “generally unsatisfactory” solution to its workload concerns because of the effect of such decisions on the lower courts.²⁸⁰ Such rulings were “decisions on the merits” and thus were “binding on state courts and other federal courts.”²⁸¹ But such terse rulings “often . . . provide[d] uncertain guidelines for the courts that

²⁷⁶ See S. REP. NO. 100-300, at 2 (noting “the unanimous view of the Supreme Court endorsing elimination of the Court’s mandatory jurisdiction” (quoting Letter from C.J. William Rehnquist to Sen. Heflin (Nov. 17, 1987))); H.R. REP. NO. 100-660, at 27, 1988 U.S.C.C.A.N. at 781 (Letter from Supreme Court to Rep. Kastenmeier (June 17, 1982)); Letter from Supreme Court to Sen. DeConcini (June 22, 1978), *reprinted in* Gressman, *supra* note 243, at 1328.

²⁷⁷ H.R. REP. NO. 100-660, at 27, 1988 U.S.C.C.A.N. at 781–82 (Letter from Supreme Court to Rep. Kastenmeier); see Letter from Supreme Court to Sen. DeConcini (June 22, 1978), *reprinted in* Gressman, *supra* note 243, at 1328.

²⁷⁸ H.R. REP. NO. 100-660, at 27, 1988 U.S.C.C.A.N. at 781–82 (Letter from Supreme Court to Rep. Kastenmeier).

²⁷⁹ *Id.* at 28, 1988 U.S.C.C.A.N. at 782. Indeed, the Court often appeared to use its certiorari standards in adjudicating mandatory appeals, when it dismissed state appeals for want of a substantial federal question or summarily affirmed lower federal court decisions. See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 104–06 (1991); see also H.R. REP. NO. 98-986, at 9–10 (1984) (listing, as one reason for “eliminating” much of the Court’s mandatory appellate jurisdiction, the fact that “the Supreme Court has necessarily come to treat cases that require review as the functional equivalent of . . . cases that are reviewed on a discretionary basis”).

²⁸⁰ Letter from Supreme Court to Sen. DeConcini (June 22, 1978), *reprinted in* Gressman, *supra* note 243, at 1328.

²⁸¹ H.R. REP. NO. 100-660, at 28, 1988 U.S.C.C.A.N. at 782 (Letter from Supreme Court to Rep. Kastenmeier); see *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975). But such decisions had an uncertain precedential status, see *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (stating that summary affirmances “are not of the same precedential value” as an opinion on the merits), and did not necessarily apply at all in different factual circumstances, see *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). By contrast, the denial of certiorari is clearly not a decision on the merits. See *Teague v. Lane*, 489 U.S. 288, 296 (1989).

[were] bound to follow them and, not surprisingly, . . . sometimes create[d] more confusion than they [sought] to resolve.”²⁸²

4. *The Trend Toward Precedent Setting in the Modern Court*

The 1925 and 1988 Judiciary Acts 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 rely on its authority to correct errors in specific lower court decisions. Instead, to maintain its “supreme” status in the judicial hierarchy, the Court increasingly had to establish written 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.’”²⁸³

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, as the Court focused increasingly on law declaration, its opinions grew in length and in breadth. There was, in short, a gradual transition in the Court’s opinion writing away from minimalism and toward a more vertically maximal approach.

Robert Post has recounted this transformation in a detailed historical analysis of the Court’s opinion-writing practices from the 1920s to the 1990s.²⁸⁴ Professor Post explains that the 1925 Judiciary Act

²⁸² H.R. REP. NO. 100-660, at 28, 1988 U.S.C.C.A.N. at 782 (Letter from Supreme Court to Rep. Kastenmeier).

²⁸³ Arthur D. Hellman, *Caseload, Conflicts, and Decisional Capacity: Does the Supreme Court Need Help?*, 67 JUDICATURE 28, 30–31 (1983) (quoting Address of C.J. Hughes at the American Law Institute Meeting, in 20 A.B.A. J. 341, 341 (1934)); see 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, 1096 (1987) (stating that “the enormity of the Court’s potential docket prohibits it from serving [as] . . . a court of errors”); see also SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT’S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* 95 (1986) (arguing that the Court “*should not* intervene simply to undo error below” (emphasis added)).

²⁸⁴ 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”).

marked the beginning of a significant evolution in the Court's written opinions. "By empowering the Court to choose its own jurisdiction, the Act shifted the Court's emphasis away from opinions addressed to private litigants, and toward opinions" more focused on "the development of American law."²⁸⁵

Indeed, as we have seen, that shift (from dispute resolution to law declaration) was a central premise of the 1925 statute. Chief Justice Taft and others 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."²⁸⁶ The Supreme Court should thus hear a case only when "the principle involved is such that it is important to have a general exposition of it for the benefit of the lawyers, for the benefit of the inferior courts, and for the benefit of the public at large."²⁸⁷ Chief Justice Taft appeared to recognize that this new role would entail changes in the Court's written opinions. He asserted that the "chief function" of a Supreme Court opinion was not to resolve a specific dispute but to "clarify the law" in a way that would "be helpful in *other* cases."²⁸⁸ He thus 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.²⁸⁹

Notably, to serve this new function, the Court's opinions could not be tailored to the facts of a specific dispute. Instead, as Professor Post explains, "[c]rafting an opinion in order to influence the administration and development of the law . . . requires reaching out beyond particular parties and addressing the entire community of legal actors."²⁹⁰

Peter Strauss has 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."²⁹¹ Professor Strauss observes that this development was a direct result of the Court's capacity constraints. "That is, faced with a controversy over a subject it is

²⁸⁵ *Id.* at 1306.

²⁸⁶ Taft, *supra* note 254.

²⁸⁷ *Jurisdiction Hearing*, *supra* note 263, at 3 (statement of C.J. Taft).

²⁸⁸ Letter from William Howard Taft to Clyde B. Aitchison (Dec. 4, 1925), Taft Papers, *supra* note 254, 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." (emphasis added)).

²⁸⁹ Letter from William Howard Taft to Charles P. Taft 3 (Nov. 1, 1925), Taft Papers, *supra* note 254, at Reel 277.

²⁹⁰ Post, *supra* note 284, at 1308 (emphasis added).

²⁹¹ See Strauss, *supra* note 283, at 1094-95.

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.”²⁹²

Professor Strauss has further recognized that, precisely because of these capacity constraints, broad precedent setting may be the only way that the Supreme Court can oversee lower courts in the judicial hierarchy.²⁹³ He offers this theory as perhaps the best way of explaining the Court’s decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁹⁴ *Chevron*, of course, directs all lower courts to defer to an agency’s reasonable construction of an ambiguous federal statute.²⁹⁵ The decision, which cuts across all substantive areas of administrative law, constitutes a broad operative 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.”²⁹⁶ *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.”²⁹⁷ *Chevron* thus serves as a prime example of vertical maximalism—a broad decision that governs a number of future cases in the lower courts and thereby serves to concentrate decision-making authority in the Supreme Court.

David Strauss (although not focused on judicial hierarchy) has, in an influential article, identified several examples of equally broad decisions in modern constitutional law. His insights further suggest that the modern Court has increasingly relied on precedent setting to perform its role in the judicial hierarchy. David Strauss’s piece responds to claims that *Miranda v. Arizona*²⁹⁸ was an “illegitimate” decision because it created a broad prophylactic rule to protect the Fifth Amendment right against self-incrimination.²⁹⁹ He persuasively argues that such prophylactic rules are “ubiquit[ous]” in modern constitutional law.³⁰⁰ As examples, he identifies the broad presumption against content-based restrictions on free speech (which are subject to strict

²⁹² *Id.* at 1095.

²⁹³ *See id.* (“[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 . . .”).

²⁹⁴ 467 U.S. 837 (1984).

²⁹⁵ *See id.* at 842–44.

²⁹⁶ Strauss, *supra* note 283, at 1121.

²⁹⁷ *Id.*

²⁹⁸ 384 U.S. 436 (1966).

²⁹⁹ *See* Strauss, *supra* note 10, at 190 (internal quotation marks omitted).

³⁰⁰ *Id.* (“[C]onstitutional law consists, to a significant degree, in the elaboration of doctrines that are universally accepted as legitimate, but that have the same ‘prophylactic’ character as the *Miranda* rule.”).

scrutiny),³⁰¹ as well as the presumed validity of economic regulations (which are subject to only rational basis scrutiny).³⁰² Such operative doctrines govern a large number of cases in the lower courts and thus, much like *Chevron*, can “be seen as . . . device[s] for managing the [inferior courts] that can reduce . . . the Supreme Court’s need to police their decisions for accuracy.”³⁰³

These changes in the Court’s approach to opinion writing suggest that it has, at least to some degree, recognized the implications of its capacity constraints in the modern judiciary. In an era of increasing docket pressures, the Court cannot effectively perform its “supreme” role in the judicial hierarchy by issuing narrow, fact-bound (minimalist) decisions that correct errors in specific lower court rulings. Instead, as Professor Post suggests, “[c]rafting an opinion in order to influence the administration and development of the law” in the modern judiciary “requires reaching out beyond particular parties” and issuing broad (maximal) precedents that “address[] the entire community of legal actors.”³⁰⁴

5. *The Need for Vertical Maximalism in the Current Supreme Court*

The Supreme Court’s challenges in overseeing the lower courts have only increased in the two decades since the 1988 Judiciary Act. The workload of the inferior federal courts has continued to rise during this period. For example, while the federal appellate courts in the mid-1980s heard approximately 30,000 appeals per year,³⁰⁵ they now review around 60,000 cases each year.³⁰⁶ The number of requests for

³⁰¹ See *id.* at 198–204; see, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”). Notably, this broad rule against content-based restrictions was a creation of the post-1925 Court. See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

³⁰² See Strauss, *supra* note 10, at 205–07; see also, e.g., *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981) (stating that “economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights” is presumptively valid).

³⁰³ Strauss, *supra* note 283, at 1121.

³⁰⁴ Post, *supra* note 284, at 1308 (emphasis added); see also *id.* (“Fashioning an opinion . . . to resolve a dispute between parties . . . is rooted in the conception of the Supreme Court as a tribunal of last resort that predominated during the first 150 years of [its] existence.”).

³⁰⁵ See POSNER, *supra* note 271, at 64 tbl.3.2.

³⁰⁶ See FEDERAL COURT MANAGEMENT STATISTICS: U.S. COURT OF APPEALS – JUDICIAL CASELOAD PROFILE (2008), available at <http://www.uscourts.gov/cgi-bin/cmsa2008.pl> (reporting that, in 2006, 66,618 appeals were filed and 67,582 were terminated; in 2007, 58,410 appeals were filed and 62,846 were terminated; and, in 2008, 61,104 appeals were filed and 59,096 were terminated). For statistics on the federal district courts, see FEDERAL COURT MANAGEMENT STATISTICS: U.S. DISTRICT COURT – JUDICIAL CASELOAD PROFILE (2008), available at <http://www.uscourts.gov/cgi-bin/cmsd2008.pl> (stating that, in 2006, 335,868 cases were filed and 350,807 were terminated; in 2007, 335,655 cases were filed and 317,277 were terminated; and, in 2008, 349,969 cases were filed and 317,056 were terminated).

Supreme Court review has likewise risen dramatically. In the 1980s, the Court had approximately 5,000 cases on its annual docket,³⁰⁷ and it decided around 150 of those cases (3 percent).³⁰⁸ By contrast, the Court's docket today includes about 9,000 cases, and it decides fewer than 90 cases (less than 1 percent).³⁰⁹ There have, of course, been calls in recent years for the Court to issue more rulings on the merits.³¹⁰ But even if the Court decided 150 or 200 cases per year (as some have suggested),³¹¹ it would dispose of only a fraction of its 9,000-case docket and could not possibly correct every error in lower court interpretations of federal law.

In this judicial hierarchy, it would seem to be even more imperative that the Court adhere to the institutional vision that inspired the 1925 and 1988 Judiciary Acts. Both pieces of legislation were built upon a conception of the Court as "the head of the Judiciary of the Nation,"³¹² which should hear cases only when "the principle involved is such that it is important to have a general exposition of it for the benefit of the lawyers, for the benefit of the inferior courts, and for the benefit of the public at large."³¹³ As Chief Justice Taft recognized, in order to perform that function, the Court cannot simply issue narrow decisions that resolve specific disputes. The Court must "clarify the law" in a way that will "be helpful in *other* cases."³¹⁴ To fulfill its "supreme" role in this judicial hierarchy, the Court must focus on establishing broad precedents, not on correcting isolated errors in lower court decisions.

Chief Justice Roberts's call for minimalism thus comes at a rather surprising time in the Court's institutional history. The Chief Justice

³⁰⁷ See EPSTEIN ET AL., *supra* note 248, at 66 tbl.2-2 (showing a docket of 5,144 cases in 1980; 5,100 cases in 1983; 5,158 cases in 1985; and 5,746 cases in 1989).

³⁰⁸ See *id.* at 74 tbl.2-6 (showing that the Court granted review in 184 cases in 1980; 149 cases in 1983; 186 cases in 1985; and 122 cases in 1989).

³⁰⁹ See 2008 ANNUAL REPORT: JUDICIAL BUSINESS OF UNITED STATES COURTS 84 tbl.A-1, available at <http://www.uscourts.gov/judbus2008/contents.cfm> (reporting that, in 2007, the Court had 9,602 cases on its docket and issued 74 decisions on the merits, 72 with a full opinion, 2 per curiam; in 2006, the Court had 10,256 cases on its docket and issued 78 decisions on the merits, 74 with a full opinion, 4 per curiam; and, in 2005, the Court had 9,608 cases on its docket and issued 87 decisions on the merits, 82 with a full opinion, 5 per curiam).

³¹⁰ See, e.g., Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1383 (2006) (asserting that "the [Supreme] Court should decide more cases").

³¹¹ See VERMEULE, *supra* note 114, at 268 ("The Court's peak capacity runs to about 200 cases per year . . ."); Strauss, *supra* note 283, at 1100 (doubting that the Court could decide more than 150 cases per year).

³¹² Letter from William Howard Taft to Senator Reed Smoot 2 (July 3, 1925), Taft Papers, *supra* note 254, at Reel 275.

³¹³ *Jurisdiction Hearing*, *supra* note 263, at 3 (statement of C.J. Taft).

³¹⁴ Letter from William Howard Taft to Clyde B. Aitchison (Dec. 4, 1925), Taft Papers, *supra* note 254, at Reel 278 (emphasis added).

has urged his colleagues to decide cases “as narrowly as possible.”³¹⁵ Indeed, in a recent speech at Georgetown University Law Center, he declared that “[i]f it is not necessary to decide more to [dispose of] a case, then in my view it is necessary not to decide more.”³¹⁶

The Chief Justice’s plurality opinion in *Baze* illustrates this approach. The decision was confined to Kentucky’s lethal injection protocol³¹⁷ and thus failed to provide lower courts with “‘a clear sense of . . . the rule of law to be followed and applied’” in any other lethal injection challenge.³¹⁸ Likewise, the Court in *Sosa* declined to establish a principle to govern future ATS litigation. Instead, the Court corrected what it found to be the “error” in the court of appeals’ decision below, which had allowed the plaintiff’s arbitrary detention claim. And, to correct that mistake, it was “enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”³¹⁹

Such an emphasis on dispute resolution “reflects a familiar view of [the] judicial function.”³²⁰ Courts (particularly federal courts) are often said to resolve cases, not broad legal questions.³²¹ But such a vision of the *Supreme* Court’s function is at odds with the premises underlying the 1925 and 1988 Judiciary Acts and is inconsistent with the Court’s role in our current judicial hierarchy. Minimalist decisions, much like the Court’s “unsatisfactory” summary dispositions,³²² “provide uncertain guidelines for the courts that are bound to follow them.”³²³ And, unlike its predecessor in the early nineteenth century, the current Supreme Court lacks the capacity to provide the needed guidance on subsequent review. Accordingly, when the current Court

³¹⁵ Rosen, *supra* note 40. The Chief Justice has explained that his goal is to promote unanimity on the Supreme Court. *Id.* (reporting that Chief Justice Roberts seeks “to promote unanimity and collegiality on the Court, encouraging his colleagues to decide cases as narrowly as possible so that liberal and conservative justices [can] converge on common results”).

³¹⁶ See *More Consensus on Court*, *supra* note 26 (quoting Chief Justice Roberts).

³¹⁷ See *Baze v. Rees*, 128 S. Ct. 1520, 1537–38 (2008).

³¹⁸ Sherman, *supra* note 69 (quoting Dean Chemerinsky).

³¹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004).

³²⁰ Strauss, *supra* note 283, at 1101.

³²¹ Article III’s case-or-controversy requirement allows a federal court to decide legal questions only in the context of a specific case and thus (arguably) demands that the court tailor each legal pronouncement to the circumstances before it. As noted, I have bracketed for now the possible tension between the case-or-controversy requirement and a Supreme Court presumption in favor of vertical maximalism. See *supra* note 10 and accompanying text.

³²² Letter from Supreme Court to Sen. DeConcini (June 22, 1978), *reprinted in* Gressman, *supra* note 243, at 1328.

³²³ H.R. REP. NO. 100-660, at 28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 782 (Letter from Supreme Court to Rep. Kastenmeier (June 17, 1982)).

issues a minimalist opinion, it leaves much to be decided by the lower courts and thereby delegates its supreme law-declaration function to its judicial inferiors.

The above historical survey reveals an interesting twist on the Court's role in the judicial hierarchy. In the late eighteenth century (and for several decades thereafter), the Court's principal means of ensuring its "supreme" role was error correction. In that era, because Supreme Court reports were unavailable in some regions, the Court could not simply issue written decisions and expect its precedents to be obeyed. Today, however, the situation is reversed. Although I do not seek to identify the precise moment in history at which error correction ceased to be a viable means of overseeing the lower federal and state courts, I do claim that it is not an effective oversight mechanism today.

To perform its "supreme" role in the current judicial hierarchy, the Court should aim to issue broad precedents that "clarify the law" and provide guidance "in [the many] *other* cases" that it lacks the capacity to review.³²⁴ Thus, "faced with a controversy over a subject it is likely to see but once or twice a decade," the modern Court should not "simply decide the case in the most direct manner possible," but should (to the extent possible) issue broad decisions that "put that part of the law's house in order."³²⁵ To serve its constitutional role in *this* judicial hierarchy, the Court should aim in every case to issue a vertically maximal decision.

CONCLUSION

There are undoubtedly many areas of federal law that "cr[y] out for clarification from the Supreme Court."³²⁶ And, as the supreme leader of the judiciary, the Court has an obligation to provide such clarification. But, given the vast size of the current judicial system, the Court is considerably limited in its capacity to perform that law-declaration function. Accordingly, the Court must make the most of the cases it does hear by issuing broad decisions that govern a number of future cases in the lower federal and state courts. The Supreme Court should, in short, adopt a presumption in favor of vertical maximalism.

Thus, contrary to Chief Justice Roberts's suggestion, the modern Court should not serve as an "umpire," calling balls and strikes in particular disputes. The Supreme Court has a constitutional responsibility to establish the "strike zone" for the entire judiciary.

³²⁴ Letter from William Howard Taft to Clyde B. Aitchison (Dec. 4, 1925), (Taft Papers, *supra* note 254, at Reel 278 (emphasis added)).

³²⁵ Strauss, *supra* note 283, at 1095.

³²⁶ Fletcher, *supra* note 97, at 671.

