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The Formulaic Constitution

Robert F. Nagel*

The Supreme Court's constitutional jurisprudence of late has been filled with formulae — tests that must be met, hurdles that must be overcome. This multi-pronged analytical technique is, according to Professor Nagel, distancing the Justices from both their audience, the American public, and their text, the Constitution. In an effort to retain the authority of that text, the Court is instead displacing it; in an effort to persuade that audience, the Court is instead excluding it. Furthermore, the Court's attempt to constrain judges has actually created an irresponsible judicial freedom, while its attempt to locate a middle ground between the fact-responsiveness of realism and the abstractness of conceptualism has in reality led to a regulatory, abstract, and adversarial perspective. The way the Court talks affects the society in which it wields power. If constitutional law is to educate and motivate the members of that society, it must, Professor Nagel submits, become more collaborative and less complete.

Introduction

During roughly the last thirty years a new style of opinion writing has emerged as the most common method of constitutional exegesis.¹ This style emphasizes formalized doctrine expressed in elaborately layered sets of "tests" or "prongs" or "requirements" or "standards" or "hurdles." The judicial opinions in which these "analytical devices"² appear tend to be characterized by tireless, detailed debate among the Justices. The apparently definitive formulations, standing amidst a welter of separate opinions and contentious footnotes, seem forlorn testaments to the ideals of clarity and consensus. But, taken together, the formulae and the extensive explanation comprise a consistent pattern of earnest argumentation.

The formulaic style is so familiar and so consonant with the times


that judges, academics, and lawyers take it for granted. This inattention, while not entirely surprising, is misguided. In the highly variable and fragmented world of constitutional interpretation the formulaic style is one of the few basic fixtures. The areas that it has been used to explicate include: freedom of speech, separation of church and state, state sovereignty, equal protection, due process (both substan-

3. Modern free speech cases are especially prone to formulae. A clear example is the "O'Brien test" for mixed speech and nonspeech. See note 52 infra and accompanying text. Other examples abound. The "test" for defining obscenity is:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). The standards for evaluating restrictions on "child pornography" are:

[The conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. ... [The state offense [must] be limited to words that visually depict sexual conduct by children below a specified age. The category of "sexual conduct" proscribed must also be suitably limited and described.


[first] whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. v. Public Serv. Commn., 447 U.S. 557, 566 (1980). "Time, place and manner" restrictions on speech are approved provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information.


4. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."


5. This test, now at least temporarily abandoned, was employed by the Court in a series of cases beginning in 1981 with Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264. See note 107 infra and accompanying text.

6. One version of the so-called "strict scrutiny" standard is:

In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary . . . to the accomplishment" of its purpose or the safeguarding of its interest.

In re Griffiths, 413 U.S. 717, 721-22 (1973) (footnotes omitted). The subtleties of phrasing are clearly presented in the variations on the "middle-level" of scrutiny used in sex discrimination cases. One formulation states:

To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

Craig v. Boren, 429 U.S. 190, 197 (1976). A more recent version is:

[The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. The burden is met only by showing at least that the classification serves "important
tive and procedural), the case and controversy requirement, the commerce power, the contract clause, the privileges and immunities.

7. The most well-known due process formulation is the trimester-based test for restrictions on the right to abortion:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Roe v. Wade, 410 U.S. 113, 164-65 (1973).

8. Resolution of the issue whether the administrative procedures... are constitutionally sufficient requires analysis of the governmental and private interests that are affected. More precisely, identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (citations omitted).

9. At an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant"... and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982) (citations and footnote omitted).

10. See, e.g., notes 53 & 171 infra and accompanying text. Another version of the correct "principles" in "dormant" commerce clause cases is:

(1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.

(2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by counsel.

(3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679-80 (1981) (Brennan, J., concurring). The test for state taxes on interstate activities sustains the taxes when evaluated according to "practical effect" rather than "formal language": [The Court has] sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

11. The threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."...

If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation....

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reason-
ties clause of article IV, the fifth amendment right against self-in-
crime,

and the cruel and unusual punishment clause. Its

influence can also be seen in cases interpreting the sixth amendment

(both the right to effective counsel and the right to conduct one's

own defense) and the fourth amendment (including cases defining

"reasonable" and "searches"). Moreover, although it is now cus-

able conditions and [is] of a character appropriate to the public purpose justifying [the legis-

lation's] adoption."


12. Application of the Privileges and Immunities Clause to a particular instance of dis-

crimination against out-of-state residents entails a two-step inquiry. As an initial matter, the

Court must decide whether the ordinance burdens one of those privileges and immunities

protected by the Clause. As a threshold matter, then, we must determine whether an

out-of-state resident's interest in employment on public works contracts in another State is

sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the

purview of the Privileges and Immunities Clause."

... The conclusion that [an] ordinance discriminates against a protected privilege does not,
of course, end the inquiry ... where there is a "substantial reason" for the difference in
treatment. "[T]he inquiry in each case must be concerned with whether such reasons do
exist and whether the degree of discrimination bears a close relation to them."

tions omitted).

13. The "two-step analysis" for waiver of the fifth amendment right to counsel is:

Before a suspect in custody can be subjected to further interrogation after he requests an

attorney there must be a showing that the "suspect himself initiates dialogue with the au-

thorities." ... Where reinterrogation follows, the burden remains upon the prosecution to show

that subsequent events indicated a waiver of the Fifth Amendment right to have counsel

present during the interrogation.


14. [A] court's proportionality analysis under the Eighth Amendment should be guided by

objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii)

the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences

imposed for commission of the same crime in other jurisdictions.


15. A convicted defendant's claim that counsel's assistance was so defective as to require

reversal of a conviction or death sentence has two components. First, the defendant must

show that counsel's performance was deficient. This requires showing that counsel made

errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant

by the Sixth Amendment. Second, the defendant must show that the deficient performance

prejudiced the defense. This requires showing that counsel's errors were so serious as to

deprive the defendant of a fair trial, a trial whose result is reliable.


16. First, the pro se defendant is entitled to preserve actual control over the case he

chooses to present to the jury. ... Second, participation by standby counsel without the defendant's consent should not be

allowed to destroy the jury's perception that the defendant is representing himself.


17. [I]n determining whether the seizure and search were "unreasonable" our inquiry is a
dual one — whether the officer's action was justified at its inception, and whether it was
reasonably related in scope to the circumstances which justified the interference in the first

place.


18. My understanding of the rule ... is that there is a twofold requirement, first that a

person have exhibited an actual (subjective) expectation of privacy and, second, that the

expectation be one that society is prepared to recognize as "reasonable."
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temporary, the style is not especially natural; it is obtrusively elaborate rather than economical or elegant. Why has the modern Supreme Court so persistently adopted this cumbersome expository device?

This essay explores the ways in which the formulaic style is different from other, older forms of constitutional doctrine. It argues that the modern style affects the content that the Court finds in the Constitution and that it illuminates the current interpretive functions of the judiciary. Perhaps most importantly, the formulaic style establishes an identifiable relationship between the Court and the public and thus constrains how the Court's version of the Constitution bears upon the larger political culture.

This subject matter might seem to put too much weight on the shape, as opposed to the substance, of opinions. Therefore, before turning to a detailed examination of the formulaic style, I address the relationship between form and substance in constitutional law.

I. FORM AND SUBSTANCE

In some ways it is certainly plausible to believe that only the substance of judicial opinions matters. To take the most significant example, no one doubts the profound importance of the Court's declaration that racial segregation in schools and other public arenas is unconstitutional. The great mass of the public, whose jobs do not require reading or dwelling on judicial opinions, was made to understand this result. But it is doubtful that the Court's reasoning, much less the manner of its presentation, filtered past a few elite groups. The Court's more prosaic efforts at constitutional interpretation are certainly understood even more dimly and basically; they are obscured by inattention and by layers of imprecise reports from newspapers, attorneys, word-of-mouth within bureaucracies, and so on. Thus even to say that the "result" is important — in the sense that police give Miranda warnings or school officials provide hearings before suspensions — is to overstate the case, for bottom-line constitutional requirements are frequently distorted in the public perception. In that perception the Court's results are converted into vague intuitions and diffuse values. Prison officials sometimes interpret as broad attacks on institutional authority judicial decisions that provide only limited protections for inmates' constitutional rights. 19 Many journalists apparently understand the "malice" requirement of New York Times Co. v. Sullivan


as being far more an absolute protection than it is. When even fundamental outcomes and reasoning are so imprecisely communicated, claiming an importance for expository style seems absurdly otherworldly.

Justice Cardozo, nevertheless, once dismissed lawyers' generally "amused or cynical indifference" to literary style as an indication of a failure of understanding. In judicial opinions, he asserted somewhat dogmatically, form and substance are inseparable: "The strength that is born of form and the feebleness that is born of the lack of form are in truth qualities of the substance. They are tokens of the thing's identity. They make it what it is." Form, perhaps, makes substance "what it is" for those few specialists who view Supreme Court opinions more as intellectual or aesthetic efforts than as coercive acts of the sovereign. For some academics and judges, form is inseparable from substance because they read opinions in order to be persuaded or moved or even inspired. Still, from the perspective of the general citizenry (and its lawyers), Cardozo's emphasis on style seems a precious irrelevancy. To the extent that the issue is identifying behavior that might have to be altered because of judicial decrees, form is important only to the extent that it renders essential information too unclear to be understood.

In at least two other respects, however, form is of real, general importance. First, because judicial decisions are coercive, the public has the strongest possible interest in the capacity of the Court to resolve constitutional issues. Both traditional justifications for judicial review (for example, enforcing the framers' intentions under current

20. The requirement of "knowing or reckless" disregard for the truth always contained the seeds of intrusive inquiries into the journalists' motivations, but, despite its precise content, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), quickly became a symbol of general immunization. These high hopes, perhaps, explain the outraged cries of betrayal that followed, for example, a rather predictable decision holding that political motivations (and "muckraking" styles) are relevant to "recklessness." See Nagel, How to Stop Libel Suits and Still Protect Individual Reputation, THE WASHINGTON MONTHLY, Nov. 1985, at 12.

21. Indeed, scholars sometimes describe the "meaning" of a decision in terms that have almost nothing to do with either holding or reasoning. See, e.g., P. BOBBITT, CONSTITUTIONAL FATE, THEORY OF THE CONSTITUTION 213-19 (1982) ("The holding in the Tapes Case [United States v. Nixon, 418 U.S. 683 (1974)] is not the preposterous one stated by the Court... The real holding is that a President... may not manipulate the instrumentalities of law enforcement both to prevent the law's enforcement and to acquit himself.").

22. Cardozo, Law and Literature, 14 YALE REV. 699, 700 (1925). This essay was reprinted in 39 COLUM. L. REV. 119, 120; 52 HARV. L. REV. 471, 472; and 48 YALE L.J. 489, 490, all in 1939 in special issues upon the occasion of Cardozo's death.

23. Id.

24. Some of the needs that scholars attempt to fulfill by attention to Supreme Court opinions are explored in Nagel, On Complaining About the Burger Court (Book Review), 84 COLUM. L. REV. 2068 (1984).
conditions) and disparate modern justifications (removing impediments to effective democratic accountability, protecting “personhood,” giving meaning to “public values,” and so on) require the Court to resolve issues of enormous difficulty.25 One need not believe that form and substance are identical to understand that ways of talking about the Constitution must influence patterns of thought. Because analysis and explanation are not entirely separate processes, the form of the opinion must be expressive of the intellectual habits that shape the Court’s conclusions. Therefore, to describe the Court’s expository style is to identify the idiom that not only expresses the Court’s version of the Constitution but also inclines the Court toward it. It is important to know, then, whether a formulaic constitution provides intellectual resources and instincts commensurate with the functions that are thought to legitimize the Court’s power to coerce.

Second, neither the Court nor its many defenders believes that its authority over the public is exhausted by successful communication of specific behavioral norms. The Court should (it is said) teach a sophisticated theory of free speech to a recalcitrant public.26 The Court is supposed to lead alienated combatants “toward the pursuit of mutual accommodation.”27 It should provide a forum for the application of moral philosophy to public affairs.28 It should speak as a prophet, calling the nation back to its animating moral vision.29 It should be “the voice of the spirit, reminding us of our better selves.”30 The Constitution is said to be “our Mona Lisa, our Eiffel Tower, our Marseillaise,” and the Court should have a primary role “in establishing our aesthetic principles . . . .”31

Oddly, many of those who would assign such weighty, sometimes exotic, communicative functions to the Supreme Court do not dwell on the Court’s language. To a surprising extent, they speak as if morally uplifting results (if only the Court will produce them) are a suffi-

25. The difficulty of giving concrete meaning to such vague modern ideals as “personhood” and “public values” is self-evident. The complexities involved in serious efforts to accomplish the more traditional goals of deriving meaning from the framers’ intentions or from the document’s text are illustrated, respectively, in Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 786 and passim (1983), and in Laycock, Taking Constitutions Seriously: A Theory of Judicial Review (Book Review), 59 TEXAS L. REV. 343, 360 and passim (1981).


31. P. Bobbitt, supra note 21, at 185.
cient mechanism for achieving objectives like cultural or historical identity and moral growth. An exception is Professor James B. White, who writes:

The law . . . provides a place that is at once part of the larger culture and apart from it, a place in which we can think about a problematic story by retelling it in various ways and can ask in a new and self-conscious way what it is to mean. Law works by a process of argument that places one version of events against another and creates a tension between them (and between the endings appropriate to each); in doing so it makes our choice of language conscious rather than habitual and creates a moment at which controlled change of language and culture becomes possible. White describes the constitutional text as speaking both authoritatively and modestly — forcefully allocating responsibility and yet leaving much to be decided later. The document establishes "the fundamental terms of new kinds of conversation; for it creates a set of speakers, defines the occasions for and topics of their speech . . . ."

There is nothing magical or obscure about the claim that the Constitution (and decisions applying it) create a rhetorical "community" by which aspects of our culture are defined and redefined. The form of the Constitution is expressive, and the document's power is symbolic as well as behavioral. Consider the almost preternatural force of the Constitution in our political and legal culture. Judges (and others) have long employed religious terms in speaking of the Constitution. Serious scholars refer to constitutional interpretation as moral prophecy and as giving voice to the spirit. A Congresswoman stirs, not em-

32. For example, in places Professor Bobbitt writes as if the "expressive" function of the Court is independent of what it actually says in its opinions. See P. Bobbitt, supra note 21. Professor Perry refers almost exclusively to outcomes when making his claim that the Court helps society achieve moral progress. See, e.g., Perry, Noninterpretive Review in Human Rights Cases: A Functional Justification, 56 N.Y.U. L. Rev. 278, 314-15 (1981) [hereinafter cited as Perry, Noninterpretive Review]; see also Fiss, supra note 28, at 30 (arguing that adjudication gives "meaning to our public values" by enforcing or creating norms); Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 577 (1985) (claiming that case outcomes demonstrate that the Court builds the traditions of political community). Even Professor Tushnet, who emphasizes that constitutional interpretation is derivative from shared understandings within the community, shows little interest in the possibility that judicial review may be destructive of "shared system[s] of meanings." See Tushnet, supra note 25, at 824-27; Tushnet, A Note on The Revival of Textualism in Constitutional Theory, 58 S. Cal. L. Rev. 683, 683-92 (1985).


34. J. White, supra note 33, at 245.

35. Id. at 251 and passim.

barrassment, but deep admiration, when she declares that her faith in the Constitution is “whole. It is complete. It is total.”37 A prominent scholar, tight-lipped and angry, responds to skeptics by saying that their nihilism about constitutional interpretation “threatens our social existence and the nature of public life as we know it in America; and it demeans our lives.”38 Even those nihilists try to find in the Constitution a vindication of their morality and of themselves.39 What is it about the document that arouses such impassioned loyalty and such ceaselessly fervent hopes?

The great wisdom contained in its text notwithstanding, the emotive power of the Constitution does not result merely from the substance of the document. Some of that content is thought to be petty,40 wrongheaded,41 outdated,42 or even reprehensible.43 Moreover, one of the central problems of constitutional theory is that many of the most admirable values attributed to the Constitution are exceedingly difficult to trace convincingly to its text.44

37. B. JORDAN & S. HEARON, BARBARA JORDAN, A SELF-PORTRAIT 187 (1979) (recounting her address to the House Judiciary Committee during consideration of articles of impeachment against President Nixon).
38. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 763 (1982).
40. This phenomenon is given amusing treatment in Kaus, Constitutional Boo-Boos, AM. LAW., Mar. 1982, at 51. An example is art. II, § 2, cl. 2, which provides:

The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .

41. Many serious people would judge the second amendment’s right to keep and bear arms as fundamentally misguided (at least if it were enforced). Early experience with the requirement that the President seek “the advice and consent” of the Senate was a failure and has been consistently ignored. See H. HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION 104-05 (1925). There is a venerable tradition of criticizing the principle of separation of powers as a fundamental mistake. See, e.g., K. LOEWENSTEIN, POLITICAL POWER AND THE GOVERNMENTAL PROCESS 244-50 (1957); W. WILSON, CONGRESSIONAL GOVERNMENT (1885).
42. Professor Choper, among others, suggested that the principle of federalism has “outlived its usefulness.” J. COPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 255-56 (1980). Other examples include the third amendment (prohibition against quartering soldiers) and section 2 of the fourteenth amendment (number of representatives apportioned by excluding “Indians not taxed”).
43. See art. I, § 9, cl. 1:

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

See also art. IV, § 2, cl. 3:

No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

44. The central example, of course, is school desegregation. See, e.g., Bickel, The Original
Alternatively, the Constitution’s lure might be thought to rest, not on a complete reading of the text itself, but from American experience with interpretations of aspects of the text. The text, that is, might be thought to contain enough parts or hints of grand values that it has been susceptible to inspirational interpretations. It is this potential, revealed in the brilliant adaptations of American institutions throughout the nation’s history, that fascinates and attracts.

Although this explanation surely contains seeds of truth, it has much to overcome. After all, to a degree that is often underestimated, the most basic institutional successes — such as the regular relinquishment of the office of the Presidency, or the timely assembly of Congress each year, or the continued existence of the states as governments — have occurred without significant assistance from legal interpretation. Some successful adaptations, moreover, have consisted in emptying inconvenient provisions of any meaning.

Through much of our history parts of the document now thought to be especially inspirational were largely ignored by the judiciary. Parts that were not ignored were interpreted so as to help bring on the Civil War, to block the effort to achieve equal rights for blacks during Reconstruction, and to threaten the authority of the central government to deal with the Great Depression. For every truly inspirational interpretation, there are many failures: the chaotic efforts to define “obscenity,” the willingness to uphold convictions under the Espionage Act during World War I, and the failure to protect Japanese Americans from internment during World War II. Moreover, many decisions that for some count as “successes” in fact involve tawdry facts or painfully ambiguous moral dilemmas. If our deep attachment to the Constitution arises from its capacity to be interpreted to pro-


46. This occurred, for example, with the “advice and consent” clause. See note 41 supra. It has been the general history of the tenth amendment since 1937. See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 23-24 (1959) (arguing that the Court had virtually abandoned limits on federal commerce power); see also Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

47. The principle of freedom of speech, for example, was largely ignored or resisted for more than a century. See Rabban, The First Amendment in its Forgotten Years, 90 YALE L.J. 514 (1981).
hibit visual barriers around outdoor theaters or to sanction a nearly absolute personal prerogative to destroy fetal life, then our attachment comes from strange sources.

Only an exceedingly selective view of the history of constitutional interpretation can explain the fervor of the American fascination with "our Mona Lisa." The document, plainly, is able to represent our highest hopes despite much of its content and despite much of our historical experience. The emotional pull generated by the Constitution, no doubt, has many explanations. But some part of the document's power must result from the relative simplicity and authority of the language, as well as from its frequently inspirational generality.

In order to appreciate the significance of the Constitution's form, it is only necessary to imagine a radical proposal to amend the present text. The proposal might, for example, begin with two widely different provisions: the first amendment's flat injunction that "Congress shall make no law ... abridging the freedom of speech ..." and article I's simple declaration that "The Congress shall have power ... to regulate commerce ... among the several states ..." One provision withholds power, the other authorizes it. The unequivocal language in each promises that governmental affairs can be arranged properly and that the correct principles need not be complicated or compromised. These are powerfully attractive promises that still work their effect on those beguiled by the "possibility that there are right answers" and on those who fear for the republic whenever some putative constitutional principle is compromised.

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48. The Court viewed the issue as one of content discrimination against nudity. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

49. Although in Roe v. Wade, 410 U.S. 113, 153 (1977), the Court pointed to a number of serious concerns that might motivate an abortion, its formulation protects the right during the first two trimesters no matter how frivolous or odious the woman's motives might be.

50. Perry, Noninterpretive Review, supra note 32, at 295.

51. Although it is understandable that interest groups, such as journalists, would see disaster behind every interpretation they disapprove of, see e.g., Nagel, supra note 20, self-interest cannot explain similar kinds of reactions by scholars. The distinguished professor Archibald Cox, for example, went before Congress to oppose the Balanced Budget Amendment to the Constitution. He testified that the Amendment threatened "the ancient framework of American government and constitutional liberties of citizens." Constitutional Amendments Seeking to Balance the Budget and Limit Federal Spending: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 2nd Sess. 542, 545 (1982) (statement of Professor Archibald Cox, Chairman, Common Cause) [hereinafter cited as Hearings on Amendments]. Similarly, he testified that the proposed "Human Life Bill," which would have deemed fetal life to be human life for limited purposes under the due process clause, was a "radical and dangerously unprincipled attack upon the foundations of our constitutionalism." The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 331, 346 (1981) (statement of Professor Archibald Cox). The certitude that lies at the base of such fears was revealed in Professor Cox's assertion that "the Constitution is confined to those enduring fundamentals upon the essence of which we are all agreed." Hearings on Amendments, supra, at 542.
The absolutism of the language in both provisions, of course, is a matter of tone. In fact neither provision is absolute, because each is so general and cryptic — characteristics that allow many divergent groups to see their "truths" as authoritatively enshrined. While appearing to sanction only a single proper mechanism, the language permits many, various arrangements. It is a fundamental law that invites everyone to be right, that creates a culture of inclusive rectitude. 

Now, suppose that the free speech clause and the commerce clause were to be replaced by the kinds of formulae that the Court has used to implement them. The first amendment would become a forbiddingly complex set of tests, including:

When "speech" and "nonspeech" elements are combined in the same course of conduct . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.52

The commerce clause would also be a series of elaborate provisions, one of which would require inquiry into

(1) whether [a state] statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.53

If such judicial constructions were substituted for the present text, the importance of style would be sadly evident. The amended constitution would replace a simple authorization to the central government with a complex set of constraints on the States. It would change an absolute prohibition ("Congress shall make no law") into an equivocal authorization ("a governmental regulation is sufficiently justified if . . . "). It would substitute uncertain modifications and redundancies ("an important or substantial" and "either on its face or in practical effect") for self-confident simplicity ("no law" and "shall have"). The specific and the banal ("When speech and nonspeech elements are combined," and "promote this local purpose as well without discriminating") would replace the general and the cryptic. In short, the new constitution would be complicated, hesitant, specific yet confusing, and demanding yet without natural authority. It would be contrived rather than inspired. It could promise neither certitude nor inclusive-
ness. It could promote debate and litigation but not loyalty, passion, or faith.

Although much of the "constitution" conveyed in modern Supreme Court opinions is this formulaic constitution, the Court has not, of course, exactly amended the Constitution. The formulaic opinions supplement rather than replace the original text. Moreover, the form appropriate for the original document is not necessarily appropriate for its application. Nevertheless, the Court's opinions are the most authoritative way in which the original text is explained to the public. There is a yawning gap between the Court's preferred style of communication and its functions. Those functions require that the Court's style of expression, although perhaps different from that of the original text, be capable of great subtlety and force. The debate over the Court's role, however, proceeds for the most part with a strange disregard for the capacities and limitations suggested by the idiom with which the Court so often intervenes in the culture.

II. FORM AND FUNCTION

The formulaic style does not inspire, but what functions does it serve? Why does the Court often use language so different from that of the document that it is interpreting? To what audience and with what voice is the Court speaking? Reliance on the formulaic style begins to become understandable if its vaguely familiar outlines are filled in. The style is an amalgam of the bureaucratic and the academic.

Although the Court's formulae are not as long or involved as many administrative rules and guidelines, some of the same characteristics are plainly evident. Both are complex, layered, and equivocal. Both employ words in a puzzlingly artificial way. (What, for instance, is a "nonspeech element"? Why does the Court say that a regulation must further an "important and substantial" governmental interest?) Typically both attempt to cover all contingencies. (A state law may not discriminate against interstate commerce "either on its face or in practical effect.") In both an air of authority is established by illusory precision. (The abridgment of speech can be no greater than is "essential" to furtherance of the governmental interest. But, if inquiry is directed at how "furthered" the governmental interest must be and at what cost, the apparent decisiveness in the word "essential" evaporates.)

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54. For a description of common characteristics of Legal English, see Danet, Language in the Legal Process, 14 LAW & SOCY. REV. 445, 469-82 (1980).
55. For another example, see notes 129-31 infra and accompanying text.
Bureaucratic language is characteristically ridiculed as awkward and ineffective when read directly by the general public, but it can be useful when used to achieve cohesion within a profession or control within official hierarchies. Within organizations, the complexity and completeness is aimed at preventing predictable efforts at evasion; the stilted use of words quickly seems normal, as those sharing expertise and a common working milieu are socialized to understand the words as terms of art. Delegation of responsibility through the organization and across time requires systematic delineation and standardization.

The use of bureaucratic style by the Supreme Court is an effort to achieve similar purposes. To the extent that clerks have substantial drafting responsibilities and rotate frequently, it saves time to have established frameworks or recipes for various classes of opinions. Moreover, in a field where stare decisis is of limited significance and at a time when there is intense intellectual and ideological diversity at all levels of the judiciary, the elaborateness and detail of the formulae are an obvious effort to achieve control and consistency. The Court, in short, has adopted the formulaic style in part because its primary audience is not the general public. It is addressing itself, its clerks, and the lower courts. The language sounds bureaucratic because the objectives are organizational.

The formulaic style is not, however, fully or only bureaucratic. It is also academic. The opinions look like law review articles. They have the same pattern of laborious footnoting and detailed argumentation. They have the same formalized organization — introductions, major divisions, subdivisions, conclusions. More importantly, like academic writing, opinions analyze endlessly. Ideas, especially as expressed in the formulae, are treated with deadly seriousness: How, precisely, should a given formula be phrased? Should it be applied

57. Cf. id. at 467 (noting the view that while Legal English may be valuable to the legal profession, it should be avoided when talking with clients).
58. For an arresting account of how Justice Brennan designed doctrine ("[l]ike a diagram with footprints and arrows") to achieve long-term objectives among other members of the Court, see Fiss, Dombrowski, 86 YALE L.J. 1103 (1977).
59. It has taken, for example, many opinions and years of reflection for the Court to decide whether in sex discrimination cases the government must show a justification that is "compelling" or "important" or (as it seems now to have decided) "exceedingly persuasive." Compare Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion applying "strict scrutiny" standard), with Craig v. Boren, 429 U.S. 190, 197 (1976) (requiring that gender based classifications serve "important" governmental objectives), and Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (requiring "exceedingly persuasive justification" to sustain state's gender based classification). Or, to use a different kind of example, when the Court assesses state regulations that affect interstate commerce, the "appropriate analysis" requires a "strong presumption" of validity and a "sensitive consideration" of the local safety purpose in relation to the
more generally, be restricted, or perhaps even be abandoned? Should a single prong (or subprong) be dropped? Should analysis under one “prong” be merged with analysis under another or kept separate? Are apparently different formulations “really” different? Indeed, the Court sometimes debates whether a long-used test actually means anything at all. Only academics, one would have thought, could have such patience for explanation or could so objectify ideas. One reason the formulaic style is little noticed by commentators is that it so resembles the voice of the academy.

It is no wonder that opinions have begun to look like legal scholarship, for legal scholars have removed the available alternatives. Formalistic explanations, whether expressed in a short statement of a rule accompanied by a string of citations or in a mechanical restatement

burden on interstate commerce. Much analysis now goes into accommodating “sensitive consideration” with “strong presumptions.” See notes 171-73 infra and accompanying text.

60. A debate flourished for a while about whether “strict scrutiny” should be extended to areas in which “fundamental” interests are affected by limitations on governmental expenditure programs. Compare Shapiro v. Thompson, 394 U.S. 618 (1969) (applying “strict scrutiny” to denial of welfare assistance to new state residents), with Dandridge v. Williams, 397 U.S. 471 (1970) (refusing to apply “strict scrutiny” to a statutory ceiling on welfare assistance). Professor Gunther called this “The Fundamental Rights and Interests’ Strand of Strict Scrutiny.” G. GUNThER, CONSTITUTIONAL LAW 787 (11th ed. 1985). Other well-known debates about the appropriate scope of “strict scrutiny” have involved discrimination on the basis of sex, alienage, and race when used for compensatory purposes. See notes 178-79 infra. Recently, the Court virtually abandoned any effort to limit the federal commerce power by tenth amendment principles because it was persuaded that the applicable tests were unworkable. Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985). Currently, there is considerable debate about whether the establishment clause tests are only “useful” guidelines that ought sometimes be ignored or are a “settled” and obligatory method of analysis. Compare Lynch v. Donnelly, 465 U.S. 668, 674-75 (1984) (opinion by Burger, C.J., enunciating “unwillingness to be confined to any single test or criterion”), with Lynch, 465 U.S. at 694-96 (Brennan, J., dissenting, treating the establishment clause tests as firmly settled).


64. Compare Trimble v. Gordon, 430 U.S. 762, 766-67 (1977) (opinion by Powell, J., stating that the scrutiny involved in the minimum rationality test as applied to classifications based on illegitimacy is not “toothless”), with Trimble, 430 U.S. at 780-82 (Rehnquist, J., dissenting, suggesting that the scrutiny applied to classifications based on illegitimacy has been defined insufficiently by the Court).

of the relevant text, have long been discredited as aridly conceptualistic and hopelessly literalistic. But realistic explanations, exemplified in daringly moralistic *ipse dixit* or by bald “balancing” tests that seek to maximize some set of interests, too obviously separate the Court from its sources of legitimacy. In this age of intellectual anxiety, when judicial power is extended but its bases are more problematic than ever, it is only natural that the Court should imitate its most skeptical and demanding audience. And, despite vigorous debate within the academy, the Court has been able to identify among scholars disparate elements of a working consensus on appropriate constitutional explanations. This consensus, which at its best might be thought to contain the beginnings of a sophisticated instrumentalism, is reflected in several aspects of the formulaic style.

First, the formulae are framed as complex explications of the Constitution. In insisting that its “tests” have the Constitution as their ultimate referent the Court seeks to avoid the threat to its legitimacy inherent in some of the radically subjectivist proposals of the realists and other skeptics. However, by using multifaceted formulations, the Court also attempts to avoid some of the familiar critiques of naive textualism or historicism. The multiple layers of explanation implicitly acknowledge that the task of interpretation is difficult and must proceed in a way that allows for the simultaneous utilization of various sources.

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66. For an example, see notes 83-86 infra and accompanying text.
67. Llewellyn said that decisions in the grand style tended to be written simply and with “pungency.” See K. LLEWELLYN, supra note 65, at 37.
68. See R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 48, 277 (1982).
69. With both great legal traditions — formalism and realism — having been found wanting, legal decisions are now made without any settled tradition or philosophical basis. For discussions, see G. GILMORE, supra note 65, ch. 4; Goetsch, *The Future of Legal Formalism*, 24 AM. J.L. Hist. 221, 256 (1980); Hutchinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209, 212 (1984). For a critique of the realists and a tentative prescription for refinement, see R. SUMMERS, supra note 68.
70. See R. SUMMERS, supra note 68.
71. Although some formulae are related to the Constitution in only the most superficial way, e.g., Roe v. Wade, 410 U.S. 113, 164 (1973), and although formulae tend quickly to substitute themselves for external constitutional authority, see notes 98-111 infra and accompanying text, the Court still does generally claim that its doctrines implement values found in the Constitution. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 678-79 (1984) (relating three-part Lemon test to “real object” of the first amendment). In light of current intellectual ferment over the extent to which a document can impose constraints on interpretation, this is not as small a point as it might seem. See, e.g., Essays on "The Politics of Legal Interpretation" in THE POLITICS OF INTERPRETATION 249-320 (W. Mitchell ed. 1982); Symposium, Law and Literature, 60 TEXAS L. REV. 373 passim (1982).
72. For example, the standard for evaluating “time, place, and manner” restrictions on speech involves a principle (content discriminations are prohibited), a utilitarian calculus (the restriction must serve a significant interest), and an instrumental rule (alternative channels of communications must be available). See note 3 supra.
Second, the complexity and detail of formulaic opinions reflect the Court's felt responsibility to convince. Constitutional answers can no longer be thought certain and, thus, it is not enough that they simply be announced. One or more of the prongs is usually openly cast as instrumental — a concession that the meaning of the Constitution will vary according to the vagaries of social and political experimentation. The Court labors under a heavy burden of explanation because it knows it is exercising choice.

Third, the layered "standards" are an effort to create impersonal, formal rules that can constrain the Court itself. Precisely because the difficulty of following the rules laid down is now well-known, the Court resorts to multiple, tentative, self-imposed restrictions. The aspiration is that these rules, once established, are sufficiently clear and external to the judges to allow for objectivity.

Fourth, the formulae apparently allow for moderate fact-responsivenes. The opinions are typically divided into two major sections — the first discussing the "prongs" in the abstract and the second applying them to the facts of the case. Moreover, different formulae are established for fairly narrow classes of cases. The more extreme realists' proposals that only facts are relevant to the outcome of cases could never be assimilated into more general notions of lawfulness, but the Court cannot ignore the power of the attack on abstract, general legal principles. The form of modern decisions suggests an effort to moderate (but not abandon) conceptualism by using complex sets of principles that apply to relevant classes of cases.

In short, the formulaic style reflects a view, aspects of which are shared among influential legal scholars, that as a practical matter the advantages of realism can be successfully combined with elements of formalism. The result is more conceptualistic than the "grand style" admired by the realists but more elaborate and sophisticated than the

73. See note 72 supra. Other examples include: the requirement that obscenity lack "serious literary, artistic, political, or scientific value," see note 3 supra; the rule that statutes must not foster "excessive government entanglement" with religion, see note 4 supra; and the calculus for procedural due process claims, which focuses attention on "the risk of erroneous deprivation of [the individual's] interest . . . and the probable value . . . of additional or substitute procedural safeguards . . . and the . . . burdens that the additional or substitute procedural requirement would entail," see note 8 supra.


75. See notes 179-81 infra and accompanying text.

76. Formulae are specific to resident aliens who are denied economic benefits, as opposed to those who are denied membership in the political community, Cabell v. Chavez-Salido, 454 U.S. 432 (1982); to restrictions on "child pornography," as opposed to obscenity, see note 3 supra; to restrictions on "commercial speech," see note 3 supra; and so on.

77. For a summary, see R. Summers, supra note 68, at 144-47.
formalism that they discredited. Having seen the judiciary's traditional intellectual habits undercut by decades of legal scholarship, the Justices have turned to scholarship for substitutes. The academics' analytic style — more explanation, finer distinctions, greater clarity — does not inspire but is taken seriously, at least by those whose style is being imitated. As the Court seeks intellectual legitimacy, the voice of the judge and the voice of the legal scholar converge.

The elements of this attempted synthesis of formalism and realism will be evaluated serially in the following sections, which will argue that the modern style is a superficial and unsatisfactory response to (admittedly) serious problems. It achieves organizational control and intellectual respectability, to the extent it does so, by excluding the general public from the Court's audience and by impoverishing the Court's thought. A successful accommodation of realism and formalism, if it is possible, would require a style of communication far different from the formulaic style. Perversely, the task would sometimes require imperfection — evocation, incompleteness, tentativeness, and even a willingness not to explain. Much may be wrong with older forms of constitutional doctrine, but in some important respects they are all superior to the style now so prevalent.

III. THE EFFORT TO RETAIN THE AUTHORITY OF THE TEXT

Because the modern effort to combine realism and formalism rejects radically subjectivist approaches to interpretation, its constitutional explanations all have a referent outside themselves. Whether the authority of constitutional law is thought to be grounded in specific text, in the document's history, in the relationship among provisions, or somewhere else, judicial decisions are an effort to approximate a standard external to the opinion itself. Although all types of doctrine have the natural effect of substituting themselves for primary constitutional meaning,78 formulaic explanations are especially incompatible with maintaining the authority of the original text.

In part, this incompatibility arises because of the formulae's characteristic elaborateness, which reflects an intention to make meaning clear and certain, but which quickly becomes an end in itself. Words, for example, are piled on; the repetition, with its own reassuring cadence, is an effort at completion. Thus, the "principal or primary" effect of a statute must "neither advance nor inhibit" religion; a state must show that its "purpose or interest" is constitutionally "permissi-

78. "Doctrine" (in the general sense of reasoning from rules) has the effect, of course, of focusing attention on itself and thus, as Professor Bobbitt noted, can easily be "severed from the animating text." P. BOBBITT, supra note 21, at 54-55.
ble and substantial” or “significant and legitimate”; the means must be necessary to the “accomplishment of its purpose or the safeguarding of its interest”; a court must examine “additional or substitute” procedural safeguards. Extra words are so essential to the rhetorical force of the formulae that they are used, as in the case of the prohibition against “advancing or inhibiting” religion, even when plainly irrelevant to the constitutional text being interpreted. Occasionally, an entire clause is added to a formula more for the satisfactory sense of rounding out that the extra words give than for the addition of any substantive meaning. Formulae sometimes exist in order to explicate words in other formulae, doctrine to explain doctrine, so the reader is removed by formal stages from the animating text. Strange phrasing, like elaborateness and complexity, fascinates and centers attention narcissistically around itself. The Justice who argued that the “minimal scrutiny prong of this two-tiered approach has led to an unfortunate diminution of First Amendment protection” was struggling against the dead weight of words to get back to the Constitution.

The self-absorption associated with formulae is not an unfortunate by-product of unnecessary prolixity or complexity. It is a distinctive purpose of the formulae and is implicit in the basic design. Compare, for example, naive literalism, which in its most notorious formulation requires that courts “lay the article of the Constitution... beside the statute... [and] decide whether the latter squares with the former.”

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79. Although the phrasing is repeated frequently, no one thinks that inhibiting a religion can cause its establishment. See Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373, 1380 (1981). Such phrases have much in common with the general phenomenon of “doublets” (the combination of words like “break and enter” or “rules and regulations”). See Danet, supra note 54, at 469. Doublets originally repeated a thought with a word of a different linguistic origin so that the phrase could be understood in cultures with multiple languages. Id. The combinations found in modern formulae, whatever their derivation, serve a roughly similar purpose; they are an attempt to assure understanding by repetition.

80. For example, the Court has removed the possibility of any real significance from the fourth prong of the test for assessing state taxes on natural resources (that the tax be “fairly related to the services provided by the State”). See Williams, Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies, 53 U. COLO. L. REV. 281, 287-89 (1981). It still is carried as part of the formula and has a nice ring to it.

81. See, for example, the “two-part test” for defining the “political function exception” (to the “strict scrutiny” standard for assessing discrimination against aliens). Cabell v. Chavez-Salido, 454 U.S. 432, 440-41 (1982). See also the “two requirements” used to implement a part of the middle level of review used in illegitimacy cases. Mills v. Habluetzel, 456 U.S. 91, 99-100 (1982). There is also a formula used to define “excessive sentence,” a phrase that is itself part of a doctrine used to define “cruel and unusual punishment.” Solem v. Helm, 463 U.S. 277, 290-92 (1983).


There is no reason here to review the many difficulties that stand in the way of comparing words as if they were physical objects. Justice Roberts' prescription for the judicial role may be impossible but it is nevertheless helpful. Because under Roberts' apparent assumptions simple examination of the words is sufficient to determine the issue, his approach requires the Court to rely on its readers' attention to the relevant external authority. The decision in which the prescription was urged, *United States v. Butler*, held that a system of expenditures for farm price supports was a regulation of agriculture rather than an expenditure for the general welfare under article I, section 8, and therefore exceeded congressional power. Because the words "regulation" and "expenditure" are not objects with precise contours, the *Butler* opinion could not conclusively — nor did it even persuasively — demonstrate why the Agricultural Adjustment Act was one rather than the other. But the opinion did ask the reader to grapple with the meaning of words that appear in the Constitution. If the Court's comparison was necessarily incomplete, it was at least palpably incomplete; the deficiencies were there to see for anyone with a common claim to the English language. Indeed, Justice Roberts did not think that a conclusive demonstration was possible. He wrote, "All the Court does, or can do, is to announce its considered judgment upon the question." The simple announcement of a judgment (no matter how unsatisfactory in other respects) is generous to the reader, for it allows room for other judgments.

Some such modesty is necessary in any real appeal to external authority. If in the end a court can do no more than announce its judgment about the meaning of the constitutional text (or other external authority), that text remains separate from the court's opinion about it. When a court claims something more ambitious — when it seeks to demonstrate rather than to announce — there is correspondingly less reason to distinguish the external authority from the court's opinion. When the issue is certain and the reader is disallowed an opinion, the judicial construction comes to be interchangeable with the original text. Interpretation can then stand in place of the original text.

The disappearance of the external authority is a matter of degree. To some extent it occurs with any style of explanation. It depends not so much on the number or strength of the reasons given for a judicial construction as on the tenor of the rhetorical claims of certainty and

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84. 297 U.S. 1 (1936).
85. 297 U.S. at 78-88 (Stone, J., dissenting).
86. 297 U.S. at 62-63.
The closure made by the court. *McCulloch v. Maryland* 87 illustrates both the varied ways in which these claims can be made and the special quality of the claim made by use of the formulaic style. In *McCulloch* Chief Justice Marshall made a sophisticated literalistic argument that largely obliterated the original text. 88 The issue was whether the word "necessary" in the necessary and proper clause of article I, section 8 was to mean something closer to "merely convenient" than to "absolutely essential." 89 Marshall's argument advanced like an avalanche. He began by asserting that "nothing is more common than to use words in a figurative sense." 90 Indeed, "[a]lmost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended." 91 Having characterized the use of a word in its simplest and plainest sense as exceedingly unlikely, Marshall asserted that the figurative meaning "is essential to just construction." 92

Marshall then proceeded to draw from a range of sources. In an audacious argument made to seem entirely obvious, he suggested that it is logically impossible for a constitution to constrain power narrowly. "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument ... ." 93 As if this were not enough, Marshall repeatedly described the "baneful influence" of the narrower construction on the operations of government. He invoked "the absolute impracticability of maintaining [the narrower meaning] without rendering the government incompetent to its great objects ... ." 94 Finally, he claimed that to have used the word "necessary" in a sense other than "convenient" would have been "an extraordinary departure from the usual course of the human mind." 95

The force of Marshall's argument was created in part by the cumulation of different arguments and in part by the dramatic exaggeration in his choice of words. He buried the doubting reader under appeals to common understanding, analogies to the wording of other constitutional provisions, claims about the nature of constitutions, prudential

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88. Professor White made a similar observation about Marshall's argument but explained it quite differently. See J. White, supra note 33, at 263.
89. 17 U.S. (4 Wheat.) at 413.
95. 17 U.S. (4 Wheat.) at 419.
arguments about the capacities of legislatures to avail themselves of experience, and assurances about the drafters' intent. The doubter also had to stand against Marshall's barrage of words: "nothing," "almost all," "obviously," "essential," "impossible," "compelled," "absolute," "conclusively," "extraordinary," and so on. Justice Marshall's opinion is far more forceful than Justice Roberts'; it is not, however, more true that "necessary" means "convenient" than that a complex system of acreage controls is a "regulation" rather than an "expenditure." Marshall's task was not to announce a judgment. His purpose was to create a fact. To the extent that he was successful — if "necessary" is the same as "convenient" — there is no further reason for the reader's eye to wander back to the words of the necessary and proper clause.

Even powerful arguments about particular words, however, can fail to replace the external text completely. The mere substitution of a single word for another is precarious; the recalcitrant reader is still left room to note that the word "convenient" is different from the word "necessary." Marshall summarized, therefore, not with an argument but with a complex pronouncement:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.\(^96\)

Almost nothing in *McCulloch* presaged the complexity and ambiguity of this passage. The thrust of all the arguments had been that the necessary and proper clause enlarged Congress' power and permitted the use of any means it thought useful. The pronunciation, however, suggested that courts should decide whether the means chosen are "appropriate" and whether they are "plainly adapted" to their ends. These words seem to reintroduce the narrower (and emphatically rejected) meaning of "necessary," and the restriction that the means must be consistent with "the letter and spirit of the constitution" is potentially a broad one indeed.

Despite the equivocation, the reader remains untroubled, carried along by the uncompromising power of the preceding arguments. In fact, the passage successfully completed the process of substitution for the original text because it had a substantive, finished quality. One word was not replaced by another. One word was replaced by a systematic inquiry, a series of standards that seem complete and authoritative. In the end the force of *McCulloch* does not lie in its persuasive interpretation of an external authority. It lies in its obliteration of its

\(^{96}\) 17 U.S. (4 Wheat.) at 421.
reader’s attention to external authority and in its substitution of promised, announced judicial inquiries for that authority.

Chief Justice Marshall’s summarizing passage is an eerie precursor of the modern formulaic style. Today the passage would be written without the magisterial tone but otherwise would be little changed. It might look like this:

Legislation under the necessary and proper clause is sufficiently justified if: (1) the purpose is legitimate and within the scope of the constitution; (2) the means chosen are appropriate or plainly adapted to that purpose; (3) the means are not specifically or impliedly prohibited.

The changes suggest increased formalization. Each “prong” is numbered, and it is both necessary and sufficient to satisfy all three. Each of Marshall’s clauses has become more emphatically a hurdle in its own right. Together they are more woodenly but more plainly what Marshall intended them to be: a doctrine, a legally effective text rather than an imperfect description of something else.

The rhetorical end point of the *McCulloch* opinion - the replacement of external authority - has in recent years become the customary beginning point of constitutional decisions. The prevalence of the formulaic style makes routine what Marshall’s opinion worked so hard toward. Indeed, today the problematic opinion is the one that does not stand in the place of the Constitution. Modern dissatisfaction with incomplete closure is illustrated by the sad history of the Court’s effort to define state sovereignty as an affirmative limitation on the commerce power.

In a much discredited, and now formally overruled decision, the Court in *National League of Cities v. Usery* struck down the extension of the Fair Labor Standards Act (FLSA) to most state and local employees. The decision, notable for its tentative and uncompleted quality, was an unusual departure from the formulaic style. It began by identifying its external referents as a general principle (“our federal system of government”) and a specific text (the tenth amendment). The rest of the opinion consisted of unstructured but suggestive examples, analogies, contrasts, and phrases. This groping discussion began with the sensible but limited assertion that Congress may not impair a state’s “ability to function effectively in a federal system.” The Court proceeded to analogize the FLSA to taxes on a state’s capitol,

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99. 426 U.S. at 842.
100. 426 U.S. at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).
101. 426 U.S. at 843.
without explaining how such taxes might impair this “ability.” It then referred to “the essential role of the States in our federal system,” and proceeded quickly to distinguish federal regulation of private persons from regulation of “States as States.” In the remainder of the opinion, the Court repeated and supplemented the illustrations (again distinguishing private behavior and adding an analogy to the states’ power to locate their own capitals). And without especially building on them, it piled on more phrases: an “undoubted attribute of state sovereignty,” functions that are “essential to [the states’] separate and independent existence,” “a coordinate element in the system established by the Framers,” “traditional aspects of state sovereignty,” interference “with the integral governmental functions,” and so on.

While more functional than literal, the argument in National League of Cities has much in common with Justice Roberts’ opinion in United States v. Butler. Just as Butler did not attempt a definitive description of a “regulation,” National League of Cities began but did not at all complete a description of “state sovereignty.” Both decisions are a series of gestures that leave the reader with the ultimate judgment about an authority that remains distinct from the Court’s opinion. Although annoying to scholars, the unclosed and tentative quality in National League of Cities itself attests to the effort in the opinion to get at an external constitutional standard. The phrases and examples indicate — point to — but do not replace.

Within a few years, what was unformed and indicative in National League of Cities became formulaic and self-referenced:

In order to succeed, a claim that congressional commerce power legislation is invalid must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the “States as States.” Second, the federal regulation must address matters that are indisputably “attribute[s] of state sovereignty.” And third, it must be apparent that the States’ compliance with the federal law would directly impair their ability “to structure integral operations in areas of traditional governmental functions.”

Despite superficial similarities between this formula and the phrases that appear in National League of Cities, systemization utterly changed the nature of the constitutional interpretation. What had

102. 426 U.S. at 844.
103. 426 U.S. at 845.
104. 426 U.S. at 847.
105. 426 U.S. at 845 (citing Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).
106. 426 U.S. at 845, 849, 851.
been an effort to explain the principle of federalism became a substitute for it. Under the formula, a statute that failed to satisfy any one of the prongs would be constitutional. Under National League of Cities, because the phrases are proxies for the external idea of the states' capacity to function effectively in the federal system, a devastating blow to any factor relevant to that standard might render the statute in question unconstitutional. The illustrations used in National League of Cities clearly demonstrate this, for they do not involve violations of all the elements later extracted from the opinion. For example, the Court noted that the national government may not control the placement of a state capital.\(^{108}\) Controlling this location does involve the state "as a State"; perhaps, but not "indisputably," this decision (like the adoption of legislation) is an attribute of state sovereignty; once the capital is located, the ability of a state to structure integral operations, whether in traditional or nontraditional areas, is not necessarily affected.

It is logically possible and not inconsistent with National League of Cities that a now unimagined federal statute might violate none of the three requirements of the subsequently developed formula and yet present a serious threat to the capacity of the states to function as governments. For example, suppose a federal statute preempted all state regulatory power over any issue susceptible to regulation under the commerce power except for state activities themselves.\(^{109}\) This statute would not violate any of the requirements;\(^{110}\) yet such a broad-scale withdrawal of regulatory power from the states might seriously threaten their capacity to govern.\(^{111}\) The interposition of formal doctrine would block serious consideration of this issue. The analogies, comparisons, and aphorisms of National League of Cities, on the other hand, while intellectually unfashionable, would permit analysis of the unexpected variation because they do not substitute themselves for the external constitutional issue.

Although cases that use formulae sometimes state that the doctrine is only a starting point for resolving the ultimate issue,\(^{112}\) the rhetori-

\(^{108}\) 426 U.S. at 845 (citing Coyle v. Oklahoma, 221 U.S. 559, 565 (1911)).

\(^{109}\) This is a position similar to one that Chief Justice Marshall once considered reading into the Constitution itself, although at a time when the commerce power seemed more confined. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

\(^{110}\) See note 107 supra and cases cited therein.

\(^{111}\) In the Federalists' theory, general regulatory power was essential to a state's capacity to act as a governmental "counterpoise" to the national government. See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 102-05.

\(^{112}\) See, for example, the discussion of Lynch v. Donnelly in note 60 supra. See also Solem v. Helm, 463 U.S. 277, 291 (1983) (factors "may be helpful" or "useful").
cal force of the formulae — their systematic, finished quality — is inconsistent with such assurances. If unexpected facts in new cases do not seem sensibly resolvable under an established formula, attention does not easily shift back to the external constitutional issue. At the extreme, a wholly different formula (also self-contained and completed) might be established for a class of cases or, as occurred with efforts to define state sovereignty, the ultimate constitutional inquiry might simply be abandoned. When doctrine becomes an end in itself, either some perfected formula must stand in place of external authority or that authority must be nullified.

IV. THE EFFORT TO PERSUADE

Modern judicial opinions aim somewhere between the revealed certainties of formalism and the highly personalized flats of extreme realism. If in part the Constitution means what judges want it to mean, the Court is obliged to attempt to convince others that its choices are desirable. Thus the formulaic style seems designed to clarify and convince. Each issue is given wholly separate formulation and discussion. Every shading of understanding is given explicit treatment in separate opinions. Nearly any criticism or doubt is sufficiently important to deserve a reply, if only in a footnote. The modern Court's burden is neither simply to reveal nor even to explain; it is to enlist the volition of others. Persuasion in this sense requires an unconstrained audience and a responsible speaker, for common volition is impossible without both. Unfortunately, the rhetorical force of the formulaic style is consistent with neither.

Persuasion is always an effort to make the listener feel compelled to a certain conclusion. However, most forms of persuasion create a sense of constraint by first addressing an independent audience; such arguments begin in the readers' terrain and move from there, always acknowledging the importance of their understanding and assent. Accordingly, most forms of judicial explanation depend for their force on the communicative power of common language. Even highly formalistic opinions depend, in their literalism, upon conventional understanding. That is why such opinions frequently rely heavily on

113. As has happened, for example, several times with sex discrimination cases. Compare Reed v. Reed, 404 U.S. 71 (1971) ("rational relationship" standard for gender based classifications), with note 59 supra and cases cited therein ("strict scrutiny" and "intermediate scrutiny" applied to gender based classifications in different cases).

114. See Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985); see also note 5 supra.

115. See Danet, supra note 54, at 508-09.

116. At one time an effort was made to link creativity in the common law to custom and
synonyms and antonyms. In *Carter v. Carter Coal Co.*, for instance, the Court tried to explain the difference between "direct" and "indirect" effects on commerce in this way: "The word 'direct' implies that the activity or condition . . . shall operate proximately — not medially, remotely, or collaterally — to produce the effect." The additional words can help persuade if they match some existing understanding. Similarly, analogies are used to make the unintuitive seem familiar. Thus in *Butler* the Court tried to explain how an expenditure could be a regulation by emphasizing the similarity between the binding quality of a contractual "obligation" and the authoritative quality of a regulation. Metaphors like the "throat" of commerce and the "current" of commerce are also efforts to appeal to common experience and perceptions. Despite their reputation for sterility, formalistic opinions appeal to the linguistic community as authority.

In different degrees, the same is true of other forms of explanation. The modern "balancing test," for example, typically involves the specification of a series of factors and the announcement that, after weighing them, the Court has reached a certain conclusion. Whatever its deficiencies and despite its different parentage, this form of explanation appeals to common experience in almost the same way that formalism does. The listing of various considerations, like the use of synonyms or metaphors, calls upon everyday experience. Like the recitation of plain words, the recitation of the factors in the balance can convince a reader whose experiences and understandings are coordinate with the judges'. Both forms stop short of demonstration because both assume that little need be said when much is shared.

To a lesser extent, Chief Justice Marshall's grand pronouncements,
described earlier, depend in part on the warrant of common usage. Justice Holmes' famous aphorism allowing restriction of only that speech that involves a "clear and present danger" has had enduring influence largely because it came paired with its famous example from ordinary life. Justice Brandeis' lyrical concurrence in *Whitney v. California* was, despite its reference to the opinions of "those who won our independence," transparently an appeal to his readers' impulses toward courage and tolerance. The most persuasive passage in *Brown v. Board of Education*, a decision notable for its simplicity, called up what was already commonly known and felt: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone."

The form of explanation that least appeals to the audience as an independent authority is the formulaic style, which does not so much move its readers as disqualify them. The phrasing of the formulae

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122. See notes 87-96 *supra* and accompanying text.

123. This theme is fully developed in J. WHITE, *supra* note 33, at 247-63.

124. But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger . . .

125. Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . .

. . . .

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.


126. 347 U.S. 483, 494 (1954). The Court also referred to social science evidence concerning detrimental educational effects, thus illustrating the unfortunate modern compulsion to rely on *something* other than common experience and understanding. It is this compulsion that finds its current expression in the artificial language of the formulaic style.
often creates a specious sense of certainty. There are no “indisputable” attributes of state sovereignty\textsuperscript{127} nor is any particular method ever “essential” to furthering a state’s interest.\textsuperscript{128} Similarly, words common in the formulae — “directly,” “apparent,” “incidental,” “sufficiently,” “substantial,” “excessive,” and so on — promise clarity or measurement where only judgment is possible. The second “prong” of the establishment clause test, for instance, asks whether the statute’s “principal or primary” effect is to advance religion. The Court in \textit{Meek v. Pittenger} found that the loan of secular instructional aids to religious schools violated this standard, despite the existence of the secular legislative purpose of developing children’s intellectual capacities.\textsuperscript{129} Of course, any aid to parochial schools has the effect of advancing religion, but what does it mean to say that the principal effect of providing maps and laboratory equipment is religious? As the Court acknowledged, a school does not cease to be educational because it instills religious values, and a map does not “change in use” to a religious tract.\textsuperscript{130} The Court’s answer was to emphasize the degree to which parochial schools integrate secular and religious education, so that educational assistance “inescapably” advanced religion.\textsuperscript{131} This answer only emphasized the problematic nature of the Court’s announced inquiry. If a school were to achieve perfect identity between its religious and educational functions, aid of any kind could not — by definition — be said to advance one aspect more than the other. The use of the words “principal or primary,” then, lent the Court’s discussion the authority of measurement but not its substance. Indeed, nothing in the opinion explained why the measured effect of the aid was greater on the religious function than on the educational function. Nor would this measurement have been of much relevance, since an aid program could be dangerous to constitutional values whether or not its educative effects were marginally greater than its tendency to advance religion. Words like “principal or primary” must be read as efforts to explain why the religious effects were especially important or threatening. The metaphor of measurement added only deceptive pre-

\textsuperscript{127} See note 107 \textit{supra} and accompanying text. It is almost indisputable that states should continue to exist. \textit{But see} Tushnet, \textit{supra} note 25, at 800 n.54.

\textsuperscript{128} See note 52 \textit{supra} and accompanying text. In \textit{United States v. O'Brien} itself the Court described the prohibition against burning draft cards as essential to certain governmental interests, 391 U.S. 367, 381-82 (1968), but these interests might have been satisfied as well by a requirement that draft boards be notified promptly upon destruction and that a self-addressed, stamped envelope be enclosed to assure prompt replacement.

\textsuperscript{129} 421 U.S. 349, 363 (1975).

\textsuperscript{130} 421 U.S. at 365-66.

\textsuperscript{131} 421 U.S. at 365-66.
cision, preventing the reader from participating fully in the matter of judgment that was actually at issue.

The prongs themselves are frequently impervious to common understanding — a specialized code directed at the initiated rather than an explanation directed to the governed. The first part of the test for enforcing the establishment clause, for example, assumes the possibility of a unitary legislative intention, which is a possibility that anyone passingly familiar with even one person’s motivational structure would think so unlikely as to be unworthy of inquiry. The same test’s second prong involves identifying the primary effect of legislation; but the Court, while openly acknowledging that the consequences are the same, has enforced the rule by differentiating between direct subsidies to parents and tax deductions. Whatever the Court means by “primary effect,” it is not what most people would expect. Under the third prong, which asks whether there is “excessive government entanglement with religion,” the Court puzzlingly inquires about the amount of political debate engendered by a statute. The “rational basis test” states that a statute is void if it serves no legitimate purpose at all, a possibility that would only occur to someone in a fever (or to a judge who in fact meant something else). For many years now the Court, apparently using the phrase “potential life” to mean “actual life,” has insisted that the state’s interest in the potential life of the fetus is somehow less in the second trimester than in the third. The requirement that a state tax “be fairly related to the services provided by the State” does not, as a normal reader would expect, measure the amount of the tax in relation to the value of the services actually provided by the tax; instead it requires merely that the tax be related to the extent of the contact of the taxed party with the state.

132. The Court found that a city’s creche served the secular functions of celebrating the Christmas holiday and depicting its origins. Lynch v. Donnelly, 465 U.S. 668, 681 (1984). As to the possibility that the city might have had other purposes, the Court commented that “all that Lemon requires” is that there be “a secular purpose.” 465 U.S. at 681 n.6 (citation omitted). Thus, only a wholly religious purpose would violate the “secular purpose” test.


135. See note 64 supra.


cause the language is legalistic or technical but simply because the Court uses words in an unusual and often wholly unrealistic way.

In other instances, the artificiality is less obvious but still undermines the capacity of the Court's doctrines to serve as vehicles of communication. It is not possible to know, for example, whether "alternative means" might equally well promote a valid local purpose "without discriminating against interstate commerce."138 The failure in a particular instance to imagine the alternative that satisfies this requirement is no proof that further effort might not yield one. Nor is it possible to know whether a governmental interest is "unrelated to the suppression of free expression."139 In every case in which expression is restricted, that restriction is the means by which the valid governmental objective is achieved; thus it would always be strange to say that the objective is "unrelated" to the suppression. The use of tests that cannot mean what they say does not necessarily foreclose useful judicial inquiry, but it does involve indirection and artificiality that exclude the reader.

As important as the words is the shape of the formulae. Their design suggests that all the relevant issues have been identified, separated, and answered. The doctrine is comprehensive and definitive. Only one answer can emerge from the machine. The vitriolic exchanges among the Justices that are becoming customary140 are not merely evidence of ideological cleavages. They result from the same excessive pursuit of certainty that is reflected in the form of modern doctrine. When only one answer is possible, disagreement even among members of the Court is treated as a sign of irresponsibility or obduracy. A fortiori, the formulaic style forecloses independent judgment by the wider publics that are affected by the decisions but that have no special claims to understanding or authority.

To establish common volition, the Court must not only permit the participation of the reader but also must acknowledge the responsibility of the speaker. Because legal traditions generally deny the creative component of the choices made by judges, most forms of explanation obscure the speaker at least as a matter of appearances. Legal author-

138. See note 53 supra and accompanying text.
139. See note 52 supra and accompanying text.
140. Examples, of course, are legion, but this one serves to illustrate the point: In a dissenting opinion, Justice Rehnquist argued that an alienage classification was not "suspect" and should be tested only by the rationality standard. Under this standard, the state's purpose was "surely" legitimate and the classification's rationality "evident." Toll v. Moreno, 458 U.S. 1, 39, 47 (1982). In a concurring opinion, Justice Blackmun labeled Justice Rehnquist's argument on suspect classifications "simplistic to the point of caricature" and "preposterous." 458 U.S. at 20, 23. Justice Blackmun thought that all alienage cases had been decided consistently with a single principle. 458 U.S. at 21.
ity — whether a case, a principle, rule, or the words of a test — always describes the judge's felt sense of constraint. Even the modern balancing test, in which the judge most plainly relies on private assessments and values, is expressed by the metaphor of weighing, as if the judge were a set of scales rather than a person actively deciding. But the judge's own voice can often break through from beneath the surface. It can be heard in Justice Roberts' tired admission that all a court can do is "announce its considered judgment."\textsuperscript{141} Most frequently it is heard in the urgency and emotion that a judge allows into the opinion — in the power of the words, in the cadence, in the massing of arguments. Whether the tone is that of prophet, royalty, accountant, or weary soul, judicial opinions traditionally permit glimmers of the judges' view of themselves and of their responsibility.

The tone of the formulaic style, however, is distinctively mechanical.\textsuperscript{142} Its operative metaphor is the observer. The opinions describe the performance of contestants, not the judgment of the Court. One side's position does not "pass muster,"\textsuperscript{143} "fail[s]" a test,\textsuperscript{144} "fare[s]" badly,\textsuperscript{145} "runs afoul" of a standard,\textsuperscript{146} or does not get over a hurdle.\textsuperscript{147} The words of the doctrines are so carefully selected\textsuperscript{148} because they will "yield"\textsuperscript{149} the results in case after case. Everything turns on whether the state's interest must be "legitimate," or "important," or "compelling." Worlds evolve around the difference between a "reasonable relationship" and a "substantial relationship," or between "pure" speech and "mixed" speech. Such words are divided neatly into separate sections, and the relationship among the sections is explicitly established. All this precision is an attempt to achieve one effect: that the words, once in place, will do the work as the judges watch, recording the score.

\textsuperscript{141} United States v. Butler, 297 U.S. 1, 62 (1936); see note 86 supra and accompanying text.

\textsuperscript{142} Although an extreme example, here is an entire discussion of whether an ad valorem personal property tax on imported goods being stored for shipment violated the "dormant" commerce clause:

Nor do I find merit in appellant's constitutional arguments. Appellees' taxes do not violate the Commerce Clause, as they are "applied to an activity with a substantial nexus with the taxing State, [are] fairly apportioned, [do] not discriminate against interstate commerce, and [are] fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Xerox Corp. v. County of Harris, Tex., 459 U.S. 145, 157 (1982) (Powell, J., dissenting).

\textsuperscript{143} The phrase is from Larkin v. Grendel's Den, 459 U.S. 116, 123 (1982).


\textsuperscript{148} See note 59 supra.

The formulaic style strains hard, too hard, to convince. By disqualifying the reader and by reducing the judge to observer, it achieves a false definiteness rather than persuasive power.

V. THE EFFORT TO CONSTRAIN

It has become increasingly common to justify judicial enforcement of constitutional norms on the surprising ground that judges are at least somewhat constrained by impersonal standards.\textsuperscript{150} The argument is surprising because it is so modest. It divorces authoritative-ness from legitimacy. A precedent that misconstrues the constitutional text but is nevertheless capable of constraining future judges is impersonal and, therefore, is thought to legitimize judicial power.\textsuperscript{151} Moreover, objectivity is compatible with some amount of unconstrained choice; it contemplates only some "boundary" on choice and thus is vague as to the amount of judicial discretion that is acceptable.\textsuperscript{152} Since the behavior of most, if not all, government officials is responsive (in some degree) to external constraints, the emphasis on objectivity as a justification for judicial power hardly distinguishes judges from anyone other than the pure tyrant who is able to govern by personal whim.

Despite its weakness as a justification, the idea of objectivity is essential to the modern effort to accommodate realism and formalism. Current practice is too sophisticated to rely on the capacity of the judge to find a single, authoritative interpretation of constitutional text, yet it is too wedded to the ideal of the rule of law to permit judges to operate beyond legal constraint. Therefore, the formulaic style is designed to extract the maximum possible force from objectivity. In modern decisions, judges are bound not merely by simple and undefined maxims nor by the mysterious flux of prior cases, but by rules that are specific and multiple. The doctrines that in fact largely supplant constitutional text must be sufficiently detailed and schematic to bind judges who otherwise might seem beyond the law.

The apparent definiteness of the formulae does help to convey a promise of impersonal constraint. This is so, however, only because precision involves (or seems to involve) the possibility of checking a court's judgment against some identifiable, agreed-upon standard

\textsuperscript{150.} See, e.g., Bennett, supra note 74; Dworkin, Law as Interpretation and My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More, in \textit{The Politics of Interpretation} 249, 287, supra note 71; Fiss, \textit{supra} note 38.

\textsuperscript{151.} Bennett, \textit{supra} note 74, at 447; Fiss, \textit{supra} note 38, at 773.

\textsuperscript{152.} Bennett, \textit{supra} note 74, at 458; Dworkin, \textit{supra} note 150, at 304; Fiss, \textit{supra} note 38, at 744.
other than the judge's own inclinations. Most forms of constitutional explanation have this capacity not because of their internally systematic character, but because of their persuasiveness as an interpretation of constitutional text. That text provides an appeal against which any later change in construction can be measured. For example, in his famous treatment of the question whether a state could tax an activity of a federal bank, Chief Justice Marshall wrote that the issue could be resolved by a principle "blended with . . . [the] texture" of the Constitution: "This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." This pronouncement purports to be a direct explanation, almost a restatement, of constitutional provisions. The passage speaks with enormous authority, not so much because it states a rule that is itself capable of constraining judges, but because it is a forceful statement of what the text requires. It is the persuasiveness of the interpretation that promises constraint in the future.

Even a decision that uses no principles or rules — a decision that depends upon argument from the facts of the case rather than any formal, encapsulated statements — can convey the possibility of some objectivity if it is the external text to which the opinion appeals. Burton v. Wilmington Parking Authority is a well-known and extreme illustration. The case involved the question whether the actions of a privately owned coffee shop located within a public parking garage were actions of the "state" for purposes of applying the strictures of the fourteenth amendment. The decision relied on a detailed recitation of facts: the public purposes of the garage were subsidized by renting to the restaurant; in some respects the conduct of the restaurant was controlled by a lease; the garage had signs and flags indicating its public character; the building's acquisition and maintenance costs were paid out of public funds. Having massed these and other facts, the Court concluded:

The State has so far insinuated itself into a position of interdependence with [the coffee shop] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

155. 365 U.S. at 717-20.
156. 365 U.S. at 725.
By modern standards, the extraordinary aspect of the Court's opinion was its refusal to formalize its reasoning into principles:

Because readily applicable formulae may not be fashioned, the conclusions drawn from . . . this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. . . . [A] multitude of relationships might appear to some to fall within the Amendment's embrace, but that . . . can be determined only in the framework of the peculiar facts or circumstances present.\textsuperscript{157}

The Court's unwillingness to state explicit formulations was criticized as a failure of objectivity; the absence of rules was seen as a refusal to constrain future decisions.\textsuperscript{158} And, indeed, the Court's own summation of what it had decided in \textit{Burton} appeared to promise only that future cases with identical facts would be decided in the same way.\textsuperscript{159}

The failure to formalize a rule in \textit{Burton}, however, did not fatally undermine the capacity of the decision to constrain judges in future cases. To the extent that the Court's arguments persuasively related the facts of the case to the "state action" requirement, \textit{Burton} was, as later cases demonstrate,\textsuperscript{160} pregnant with possibilities for influencing the Justices in subsequent decisions. After all, the \textit{Burton} Court did not merely list facts; it used facts to argue about constitutional meaning. It argued that the state ought not benefit financially or programmatically from discriminatory policies;\textsuperscript{161} it suggested that the purposes of the fourteenth amendment were implicated when private actions were perceived by the public as state action;\textsuperscript{162} it claimed a practical policy against permitting easy evasion by the state of its constitutional obligations.\textsuperscript{163} To the extent that \textit{Burton} was persuasive in these respects, its attention to particularized facts was rich and emphatic, certainly more so than a mechanically stated rule. In short, in \textit{Burton} objectivity (or the capacity to constrain) did not depend on the precision of verbal formulations but on the continuing persuasive power of the complex marshaling of facts.

\textsuperscript{157} 365 U.S. at 725-26.
\textsuperscript{159} 365 U.S. at 726.
\textsuperscript{161} 365 U.S. at 724-25.
\textsuperscript{162} 365 U.S. at 725.
\textsuperscript{163} 365 U.S. at 725.
In constrast, the formulaic constitution is a series of judicial demands. The Court refers to the subparts of its formulations as "tests," "requirements," and even "hurdles." One side "must satisfy" each of three requirements; a party "must show"; or "it must be apparent that . . ." The possibility of impersonal constraint is belied by the explicit and reiterated demand that the judge be addressed and satisfied. Occasionally discretionary power is openly acknowledged. The burden on the government in sex discrimination cases is to show "at least that the classification serves 'important . . . objectives and that the . . . means employed' are 'substantially related to the achievement of those objectives.'" Fulfilling the announced requirements might, the test itself announces, not always be sufficient. The Court sometimes describes apparently definitive formulae as "helpful" or as mere "guidelines." Although the careful design and elaborate structure of the formulae assign to the words the responsibility for the outcome, in various ways the phrasing emphasizes that the judge has the power to give (or not to give) the words meaning.

Even the structured and finished quality of the formulae work against their capacity to communicate constraint to either judge or reader. Like the language itself, the complex structure of the formulae emphasizes the need to persuade the judge and, therefore, subtly highlights the power inherent in applying or altering the hurdles. For example, because they are designed to be complete and precise, formulae often separate issues that are roughly similar. Thus the formulations are characterized by a redundant or, at least, overlapping quality. The systemizations of state sovereignty that followed National League of Cities, for instance, demanded that the state demonstrate both regulation of the states "as states" and impairment of states' "ability to structure integral operations in areas of traditional governmental functions." To the uninitiated the impairment of integral operations would necessarily involve regulation of the states "as states." The two prongs are not, however, identical: "to regulate" is not necessarily "to

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164. See note 107 supra and accompanying text.
166. See note 107 supra and accompanying text.
169. For a description of one example of redundancy, see Williams, supra note 80, at 288.
The Formulaic Constitution

and the state could be regulated "as a state" in a nontraditional area. Nevertheless, the complete separation of two such closely related sets of issues emphasizes their cumulative, hurdle-like quality. The litigant must jump and then jump again.

Formal separation of overlapping rules communicates discretionary power in other ways as well. Systematic formulation of doctrine makes the Court's use of inconsistent propositions stand out, and compartmentalized analysis provides abundant opportunities for the Court to exploit such inconsistencies. In applying the "dormant" commerce clause in Kassel v. Consolidated Freightways Corp. to state truck-length regulations, for instance, a plurality of the Court summarized the relevant "general principles" as follows:

[A] State's power to regulate commerce is never greater than in matters traditionally of local concern. . . . [R]egulations that touch upon safety — especially highway safety — are those that "the Court has been most reluctant to invalidate." . . . Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with . . . burdens on interstate commerce." . . .

But [the Court will weigh] "... the asserted safety purpose against the degree of interference with interstate commerce" . . . [by means of] "a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."171

The reader is thus put on notice that the Court retains the option either to defer to or to second-guess the legislative judgment. The remainder of the plurality opinion insisted on appearing to exercise both these choices. In one section, it found that the state's safety interest was inadequate, despite acknowledging evidence demonstrating at least some safety considerations behind the statute.172 Dismissing this evidence, of course, could be read as "second-guessing" the legislative judgment. This possibility seems confirmed by a later, separate section, where the plurality argued that "special deference" to the state's safety judgment was inappropriate because the local regulation placed disproportionate burdens on out-of-state businesses.173 However, the language of the section that discussed the safety rationale purported to be the language of deference. The state had "failed to present any persuasive evidence," and its safety interest was "illusory."174 Moreover, the question whether the burdens on commerce were dispropro-

172. 450 U.S. at 671.
173. 450 U.S. at 675-76.
174. 450 U.S. at 671 (emphasis added).
tionate to the safety benefits was the legislative judgment that the plurality had asserted would not be second-guessed unless the safety interests were essentially nonexistent. So, one might think, an exacting inquiry into safety considerations could not have been triggered by a balancing process that itself was triggered by the finding that safety interests were illusory. The justification for discounting the evidence on safety, then, remains somewhat mysterious despite the later discussion on the inappropriateness of special deference. Perhaps some Talmudic distinction could resolve the confusion, but rhetorically at least the opinion blithely insisted on having it both ways: it did and did not second-guess the legislative judgment.

In offering the Court opportunities to treat related issues repetitively, multiple "prongs" permit the Court to treat closely related issues differently under different headings. Consider again the cases in which the Court has found that state aid to private schools was motivated by the secular legislative purpose of improving education but had the primary effect of advancing religion. While to most people this combination of findings would be surprising, it is not formally inconsistent. The intended purpose of the program need not turn out to be its main consequence. Nevertheless, the issues of institutional motivation and primary effect are closely related, if only because intent is normally inferred from consequences. Compartmentalizing the discussions of motive and effect allowed the Court to characterize the program both benignly and harshly. The effect of, at once, exculpating the legislators and condemning the program is to drive home to the reader the extent to which the nature of the program can be viewed in different ways, thus emphasizing the range of choices available to the Court.

Despite their superficial precision, neither the content nor the shape of modern formulae communicates clarity and constraint. The formulae are demands — multiple, repetitive, shifting, and sometimes inconsistent demands. The style reflects intellectual embarrassment about the existence of judicial discretion but is designed to assure plentiful opportunities for its exercise. In combination with the mechanical tone of formulaic opinions, the palpable range of choice inherent

176. Compare Meek v. Pittenger, 421 U.S. 349, 363 (1975) (Court accepts "legislative findings that the welfare of the Commonwealth requires that present and future generations of schoolchildren be assured ample opportunity to develop their intellectual capacities" and that the statute was intended to extend "the benefits of free educational aids to every schoolchild"), with Meek, 421 U.S. at 365-66 ("[M]assive aid provided the church-related nonpublic schools . . . is neither indirect nor incidental . . . [and] inescapably results in the direct and substantial advancement of religious activity . . . ").
177. See notes 127-49 supra and accompanying text.
in the formulae communicates, not objectivity, but power without responsibility. Rather than binding, the formulaic style frees the Court, like some lumbering bully, to disrupt social norms and practices at its pleasure.

VI. THE EFFORT TO MODERATE CONCEPTUALISM

The modern style uses intermediate principles in an attempt to combine conceptualism with fact-responsiveness. Despite the arguments of the realists, abstract constitutional principles cannot be reduced to circumstantial factual judgments. But the dangers of conceptualism are now too well understood to permit decisions by reference to a few abstract legal principles. The Court’s middle ground is to emphasize analysis of how subclasses of cases should be resolved. Overarching principles like equal protection are broken down into three or more sets of formulae, and the Court expends large parts of its effort and creativity in deciding which formula should govern a moderately specific category of fact situations. More than a decade of opinions has been spent on many of these issues. In particular cases, the contrast between the space and energy devoted to selecting doctrine and that devoted to applying doctrine is frequently striking.

Throughout modern constitutional law — from first amendment questions about obscenity to commerce clause issues arising from state regulation of truck lengths — much of the Justices’ intellectual energy is not directed at the actual resolution of cases at hand.


180. See note 178 supra.

It is directed at the difficult, complex, but preliminary issue of determining the proper test to be applied in a defined class of cases. This painstaking and self-conscious attention to preliminary and moderately abstract questions reflects and enhances a perspective that is regulatory, abstract, and adversarial.

A. The Regulatory Perspective

The first of the consequences arises because the vigor and seriousness of the argumentation about choice of doctrine stands in such distinct contrast to the mechanical tone of judicial application of doctrine. This contrast emphasizes the personal responsibility of judges at the level of policy determination. Although the doctrine determines the outcome (as the judges watch), the Justices do take responsibility for the precise wording and relationships within the formulae. What is communicated, then, is that the important part of the modern Justice's task is deciding how sets of problems should be handled. This acceptance of responsibility for choosing the words casts the Court as a regulator rather than as an adjudicator. Thus the shape of the opinions emphasizes a relocation of the judges' moral responsibility and a redefinition of their institutional role.

Paradoxically, more general legal pronouncements — such as Justice Marshall's maxim that the federal rule must never be controlled by the state rule, or Justice Holmes' principle that all free speech questions can be resolved by reference to the "clear and present danger" test — are so broad that necessarily they channel judicial effort to an assessment of the particularities of the case. Similarly, the analogical thinking characteristic of case analysis forces comparison and evaluation of relevant facts in cases. Balancing, too, explains so little that its major consequence is judicial discussion of the specifics of the case. Whatever their deficiencies, then, conventional forms of legal explanation are either so general or so free of content that the judge's job is primarily to think about a manageably specific set of circumstances. Thus in the past inattention to questions of intermediate generality has been consistent with the traditional view that the important part of the Court's role is the resolution of specific controversies. The

182. See notes 142-49 supra and accompanying text.
183. See notes 59-64 supra and accompanying text.
185. See generally E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948).
186. See notes 160-63 supra and accompanying text.
modern Court's emphasis on doctrine selection expresses and consolidates a radical shift in role from adjudicator to regulator.

This shift affects the quality of judicial opinions in important and dismaying ways. Because the broad issue of how a class of cases ought to be treated is a regulatory matter, general social facts seem naturally relevant. Therefore modern opinions tend to convert moral choices into social or political description. In the plurality opinion in *Frontiero v. Richardson*, for example, four members of the Court argued that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Most of the justification for this determination was an interpretation of American social and political history. The plurality said that the nation's experience with sex discrimination was "long and unfortunate"; women were "put . . . not on a pedestal, but in a cage"; throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes"; "women still face pervasive . . . discrimination in our . . . institutions"; and, finally, "the sex characteristic frequently bears no relation to ability to perform or contribute to society."

This sweeping discussion is dismaying in part because the level of the rhetoric was inappropriate to the facts of the case. The statute struck down in *Frontiero* required that female members of the armed services prove that their husbands were financially dependent, but permitted the wives of male members of the services to be treated as dependent regardless of their actual financial situations. The complexity here, as in so many sex discrimination cases, is that a discrimination against a female member of the service also (inevitably) is to the disadvantage of her husband, and a discrimination in favor of a male member of the service also (inevitably) is to the advantage of his wife — a complexity with special relevance to a "dependency benefit" program. General analogies between sex and race ring hollow in the context of a

188. *411 U.S. at 682* (footnotes omitted).
189. *411 U.S. at 684.
190. *411 U.S. at 684.
case that clearly illustrates one concrete respect in which the history of sex discrimination is highly and specially ambiguous: the lives of men and women are so closely tied together that harm and benefit cannot be cleanly divided.

There may be good reasons for deciding to view the discrimination involved in *Frontiero* as a disadvantage to women. Such reasons, however, would have to reply to the marginally employed wife who, because she did not have to risk her dependency benefits, was not discouraged from remaining in the work force. Broad historical or social descriptions are of little use here, for the ambiguity of the situation lies in the fact that both the servicewomen and the working women married to servicemen have interests. So severe is the Court's shift from adjudicator to regulator in cases like *Frontiero* that the dispute is merely an occasion for social theorizing. As the plurality's opinion demonstrates, in such instances the force of grand pronouncements can be critically undercut by the (largely ignored) circumstances of the case.

*Frontiero* illustrates another respect in which reliance on social facts is dismaying. The analogy of women to blacks is a highly controversial one. Some of the same facts pointed to by the plurality can be used to emphasize the ways in which women have been favored, protected, and loved. Arguments about the analogy between sex and race are not simply historical arguments that can be finally resolved by more or better information. They are arguments for a moral vision; they are depictions of ourselves and our history and our future. Such visions change vocabulary and self-perception. The cultural decision to view American history as invidious against women or to view gender as irrelevant to capacity is only partly responsive to facts. It is also responsive to moral goals — to the changes people want to make in each other. The *Frontiero* plurality is strikingly silent about matters of will and vision. The fixation on historical, social, and physical facts that tends to characterize debates about moral choice when cast at the level of social policy impoverishes the plurality's opinion. Words that "make and remake the world" require an "attitude of looking away from... principles, 'categories'... towards... consequences,

195. The long and unsuccessful effort to add the equal rights amendment to the Constitution is some evidence that, despite the plurality's certitude, a substantial part of the population prefers to view its history in a more benign or, perhaps, a more complicated way. For academic considerations of related issues, see J. Elshtain, *Public Man, Private Woman* (1981); C. McMillan, *Women, Reason and Nature* (1982).

196. See B. Barber, *supra* note 33, at 177.

197. This phrase is from B. Barber, *supra* note 33, at 177.
facts.\textsuperscript{198} If, as Professor White says,\textsuperscript{199} a people creates its culture in part through constitutional controversies, attention to the specifics of a case is a small guarantee that this process of self-definition will not be debased by the simplifications and false determinism evoked by "scientific" descriptions of social or historical facts.

B. The Abstract Perspective

The second general consequence of emphasizing the choice of intermediate principles is that doctrine selection is separated from doctrine application. This separation results naturally because the importance attached to doctrine selection calls for separate and self-conscious treatment. The effect of the separation is to permit the decision as to choice of doctrine to be couched in cerebral tones, the intricacy and fullness of the actual dispute having been reserved for a subsequent section of the opinion. It is largely this bifurcation of fact and formula that makes the task of doctrine selection seem a practical endeavor. That task, after all, requires a Court to choose in advance three or four specific questions that will properly resolve myriads of possible cases in areas as broad and unpredictable as "mixed speech and nonspeech." Such endeavors do not seem quixotic at first, because complexity and variety are acknowledged only after the doctrine is selected. As cases continue to arise, however, the variety of possible fact configurations gradually becomes more and more difficult to ignore. In several areas, such as separation of church and state,\textsuperscript{200} probable cause,\textsuperscript{201} state sovereignty,\textsuperscript{202} and abortion regulation,\textsuperscript{203} the incessant pressure of this variety eventually has begun to force the Justices to acknowledge what should have been immediately obvious: the formulae are too simple and specific for the range of issues they are designed to resolve.

\textsuperscript{198} W. JAMES, PRAGMATISM, in PRAGMATISM AND THE MEANING OF TRUTH 32 (1978) (emphasis deleted), quoted and discussed in B. BARBER, supra note 33, at 177-78.
\textsuperscript{199} J. WHITE, supra note 33, at 264.
\textsuperscript{203} [N]either sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs. \ldots

Our recent cases indicate that a regulation imposed on "a lawful abortion is not unconstitutional unless it unduly burdens the right to seek an abortion." In my view, this "unduly burdensome" standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular "stage" of pregnancy involved. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 452-53 (1983) (O'Connor, J., dissenting) (citations omitted).
Because the facts of the case tend not to affect doctrine selection, decisions often contain painful incongruities, direct confrontation of which would reveal the problematic nature of the moral premises underlying the doctrine selection decision. In *Bakke*, for instance, Justice Brennan’s opinion contained (in section III) an almost philosophical comparison of gender discrimination and remedial race discrimination.204 Pointing to similar potential for stigmatizing “powerless segments of society” and the immutability of both gender and race, the opinion concluded that such classifications must be struck down when a “searching” (but not “‘strict’ in theory and fatal in fact”) judicial inquiry indicates that the program stigmatizes the politically powerless.205 The need for this extended discussion arose because early in section III the opinion had rejected the possibility that the university’s purposes themselves contravened the “cardinal principle that racial classifications that stigmatize — because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred . . . — are invalid without more.”206 Having established the Court’s proper “role,”207 the opinion moved in section IV to a more particularized assessment of the preferential admissions program under review. Here Justice Brennan wrote:

If it was reasonable to conclude — as we hold that it was — that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis’ special admissions program.208

This extraordinary passage suggests that a particular white applicant would have had worse credentials than unnamed minority applicants if American history had been entirely different. It purports to be a claim about social causality. Its complexity is masked by simple-minded reciprocity: if past discrimination can reasonably be said to have reduced the qualifications of minorities, then there is a “reasonable likelihood” that Bakke’s qualifications are artificially inflated. In fact, of course, it is not clear how racial configurations in general would have been affected by a different social and political history.209

205. 438 U.S. at 362 (quoting Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972)).
206. 438 U.S. at 357-58.
207. 438 U.S. at 356.
208. 438 U.S. at 365-66.
209. It is possible, for example, that discrimination by whites hurts both whites and minori-
and it is entirely uncertain how a changed history would have affected Bakke's fortunes even had that changed history led to a larger number of qualified minorities.

The passage, then, cannot be read as a serious statement about social causality. It does, nevertheless, communicate the moral judgment that white people have benefited unfairly from racial injustices. Although adorned with specious assumptions about social causality, the force of the argument is not about hypothetical qualifications but about moral entitlements. White people in general and Bakke in particular, having benefited unfairly from racial injustices, are less worthy than competing minority applicants.

A fundamental objection to remedial racial discrimination, of course, is precisely that it inevitably involves the government in conscious decisionmaking about how much various races deserve. This course is feared because it requires judgments about the relative moral worth of the races and, more pragmatically, because it might fuel racial competition and hatred. In Justice Brennan's opinion, these concerns were reflected in the word "stigma," defined in section III as resulting from racial classifications that draw "on the presumption that one race is inferior to another or [that] put the weight of the government behind racial hatred. . . ."210 The crucial step in doctrine selection was the dismissal of the possibility that the purposes of remedial racial discrimination might be inherently stigmatizing.211 However, the specific justifications for the Davis program in the doctrine application section plainly undercut this dismissal, for these justifications themselves are painful illustrations of racially based moral judgments and competition. A mind attuned to the sounds being made in section IV would have been far less certain of the moral issues decided with such self-confidence in section III. The compartmentalization so characteristic of the formulaic style impoverishes the Court's moral discourse by allowing relatively abstract moral arguments to be uninformed by the richness and difficulty suggested by the case itself.

Cf. G. Becker, The Economics of Discrimination ch. 2 (1971) (discrimination results in decrease in net income of both blacks and whites). Under certain circumstances, it is possible that disfavored groups might respond to forms of discrimination in ways that improve their economic and social standing. See T. Sowell, Ethnic America, A History 273 and passim (1981). It is not inconceivable that favored groups might in some instances respond to their circumstances by losing skills and, accordingly, status. "[T]he extent to which one group's poverty [and, it might be added, social or professional standing] is caused by another group's bigotry is a causal question, not a foregone conclusion because of the moral repugnancy of bigotry." Id. at 273-74.


211. 438 U.S. at 357-58.
C. The Adversarial Perspective

A third consequence of independent emphasis on doctrine selection is that the judiciary's adversarial relationship with the general culture is encouraged yet made to seem more natural and acceptable. Formulae are calibrated judicial demands for justification of classes of decisions made by others. One might expect that self-conscious concern about selection of formulae — about how closely the courts should review decisions made by others — might sometimes lead to a less adversarial relationship with other decisionmakers. Because of this reassurance, the full and separate discussion of the Court's proper role does tend to legitimize extension of judicial power. However, the bases for reassurance are largely illusory. One reason is that doctrine selection is couched as a preliminary issue, and therefore, like standing or ripeness, is made to seem somehow a technical matter of special concern to the judiciary. In a category of cases should judges have to be convinced of a compelling state interest or of an important one or merely of a legitimate one? Should judges accept post hoc rationalizations for a statute or should they demand to be shown the actual motives of the legislators? The perspective implicit in such questions emphasizes the judiciary's capacities, and thus questions of power allocation tend to revolve narrow-mindedly around the courts. To justify partial insulation from judicial oversight, the advocate must argue against judges' self-respect and institutional self-interest. Moreover, those representing other decisionmakers are put in the awkward position of arguing to judges that judges ought not be "conscientious," that they ought not examine a set of decisions closely. Cases begin, in short, with the Court's prestige, self-importance, and power set against the diffuse interests of other decisionmakers.

The interests of these other decisionmakers are assessed, at least as a formal matter, independently of and prior to the resolution of the case itself. Thus the need for judicial oversight is established in an antiseptic setting. No matter what the Court decides about the issue of doctrine selection, the competing decisionmaker might still prevail in the doctrine application section. The concerns of the myriad unrepresented decisionmakers seem less immediate and less pressing because the discussion of greatest relevance to them contains no announcement of consequences. On the other hand, the emphasis on highly specific considerations in the doctrine application section distances the eventual announcement of real consequences from those nonparties who may eventually be affected but who do not share all the parties' peculiarities.

During doctrine selection, the Court is not judging the case as a set
of identifiable transactions or events. Instead it is demanding that political and social institutions justify their insulation from judicial oversight. This puts the culture itself — its language, its stereotypes, and its institutions — on trial. The issue that opens nearly every major constitutional decision is the extent to which some aspect of the culture can be trusted. The Justices’ first duty in constitutional cases is to set themselves apart from the larger culture. The law that emerges from decisions structured in this way cannot build from or participate in the traditions, understandings, and behaviors commonly shared outside the nation’s courtrooms.

CONCLUSION

This essay began by asking why the modern Court has so persistently adopted the cumbersome formulaic style. The immediate reasons were not hard to locate: the style is a conscientious effort to maintain intellectual respectability while attempting to formulate and implement complex policies through institutional layers and across time. The “constitution” has become an ambitious political and social agenda; the courts have become a kind of elevated bureaucracy, busily crafting formulae that will bend the nation’s affairs toward various visions dignified by constitutional status. The difficulty is, as Professor Barber said in a larger context, that those who “have been set on securing rights, realizing purposes, protecting interests, and in general getting things done . . . have had a difficult time making sense of conversation as a political art.”212 The less immediate, but more basic question, then, is why Justices and scholars have not been more dissatisfied with the awkward and degraded way of talking that has developed naturally along with the Court’s instrumentalist role. Why are those who want the Court to intervene with wisdom and effectiveness in the culture not dismayed by a communicative style that isolates the Court from the governed and from their ordinary experiences and understandings?

Here I can offer only a speculation. The single most significant event for present-day judges and scholars was the federal judiciary’s extended and often heroic assault on racial segregation in the South.213 The profound formative influence of this struggle has shaped as has nothing else law, role, and aspiration. The operative image has been of the courts attacking a pernicious and deeply engrained part of popular

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212. B. Barber, supra note 33, at 183.
213. For a discussion of current attitudes toward the Warren Court, see Nagel, supra note 24.
culture. By degrees, I believe, this image of the judiciary as antagonist to the popular culture has consolidated and grown, so that the courts’ basic function has become critic and reformer of the general culture. No more than the arrogant modern painter or composer, whose roles also are to uplift an unappreciative and uncomprehending mass sensibility, need the judiciary employ an idiom that draws on and is understandable to ordinary people.

It was one thing for the Warren Court to attack an aspect of a largely regional culture. In doing so, it could draw on a more broadly shared set of beliefs and attitudes. It is another thing for the current Court persistently to isolate itself from the general culture, retaining ties of language and intellectual approach only to an academic elite. Unlike many, I am not sure what the Court’s roles ought to be or even how it should write its opinions. But if its roles require sensitive moral judgments and the capacity to educate and move the people who provide continuing consent to the authority of the Constitution, the Court must learn other ways of talking. It could learn something from reconsidering the idioms of past Courts. Constitutional law, certainly, helps to shape the culture, but it cannot routinely assault that culture. Law must begin somewhere, and it must shape by participating.