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VIRGINIA LAW REVIEW

VOLUME 110 MAY 2024 NUMBER 3

ARTICLES

CONSTITUTIONAL RIGHTS AND REMEDIAL CONSISTENCY

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When the Supreme Court declined definitively to block Texas's S.B. 8, which effectively eliminated pre-enforcement federal remedies for what was then a plainly unconstitutional restriction on abortion rights, a prominent criticism was that the majority would have never tolerated the similar treatment of preferred legal protections—like gun rights. This refrain reemerged when California enacted a copycat regime for firearms regulation. This theme sounds in the deep-rooted idea that judge-made law should adhere to generality and neutrality values requiring doctrines to derive justification from controlling a meaningful class of cases ascertained by objective legal criteria.

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This Article is about consistency, and inconsistency, in judicial decision-making—and more specifically, about the extent to which federal courts should provide similar opportunities to obtain relief for wrongs to discrete constitutional rights. The Article explores how a commitment to generality and neutrality values can translate into a paradigm promoting transsubstantivity (meaning consistent applicability across separate substantive concerns) for constitutional remedies (meaning rules for implementing and preventing or punishing the violation of constitutional rights)—and how the Supreme Court has deviated from this paradigm. Supported by an array of examples, the Article proposes a novel framework turning on the notion that remedial inconsistency can be transparent, translucent, or opaque given the clarity of doctrinal inconsistency. Prophylactic remedial doctrines (like the Miranda-*warning mandate and First Amendment overbreadth) are transparently inconsistent, for instance, because they apply differently to discrete rights on their faces. And indeterminate remedial standards (like the political question doctrine for justiciability and the "plan of the Convention" doctrine for state sovereign immunity) are opaquely inconsistent because discerning their variable character requires inductive analysis of actual applications.*

After these descriptive claims, the Article proceeds to a normative examination of how this framework could help improve judicial approaches to constitutional remedies—while recognizing that non-transsubstantive doctrines are desirable in many circumstances. Courts, for example, should work to make doctrines of opaque and translucent inconsistency more transparent so that appropriate institutional actors can more easily assess, affirm, alter, or abandon them. And judges should consider the risk of introducing unnecessary elements of opaque inconsistency before relying on overdeterminative reasoning to reach otherwise established results. Among additional contributions, by providing innovative tools for centering remedial consistency as an important—but not absolute—aspect of constitutional law, this Article offers a potential step toward decreasing perceptions of the Supreme Court's work as pervasively political, thereby reinforcing its legitimacy at this time of widespread skepticism.

INTRODUCTION 523
I. THE REMEDIAL CONSISTENCY PARADIGM 529
A. Current Salience 533

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B. Conceptual Observations 537
C. Remedial Context 541
II. A REMEDIAL INCONSISTENCY FRAMEWORK.............................547
A. Transparent Inconsistency 548
1. Prophylactic Doctrines..548
2. Legislative Doctrines...552
B. Translucent Inconsistency..555
1. Factual Sensitivity...555
2. Irregular Interactions..562
C. Opaque Inconsistency...566
1. Indeterminate Tests..566
2. Comparator Cases..572
III. IDEAS FOR IMPROVEMENT...579
A. Enhancing Attention..580
B. Increasing Transparency..584
C. Decreasing Overdetermination..589
D. Reconsidering Foundations 593
CONCLUSION..596

INTRODUCTION

What if the U.S. Supreme Court had decided *Dobbs v. Jackson Women's Health Organization*[1] differently, such that *Roe v. Wade*[2] (or some other set of abortion protections) remained the law of the land? It might not have mattered much in practice. For as those paying attention even before the *Dobbs* opinion leak will remember, Texas enacted a "heartbeat bill," S.B. 8 (Senate Bill 8), prohibiting abortion at a point in pregnancy long before prevailing precedent allowed—and long before many people would have known they were pregnant.[3] By confining the bill's enforcement to civil suits with private plaintiffs, Texas circumvented the usual system that enables regulated parties to challenge a law's constitutionality in federal court without running the risk of

[1] 142 S. Ct. 2228 (2022).
[2] 410 U.S. 113 (1973).
[3] See Shannon Najmabadi, Gov. Greg Abbott Signs into Law One of Nation's Strictest Abortion Measures, Banning Procedure as Early as Six Weeks into a Pregnancy, Tex. Trib. (May 19, 2021, 11:00 AM), https://www.texastribune.org/2021/05/18/texas-heartbeat-bill-abortions-law [https://perma.cc/MRV9-UFKW].

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violating it.[4] Separate and apart from *Dobbs*, that is, Texas avoided a crucial remedy for enforcing abortion rights and, in doing so, essentially eliminated abortion rights themselves. Other states soon followed suit.[5]

The Supreme Court refused to reject this scheme first on the shadow docket (by declining to prevent S.B. 8 from taking effect)[6] and then after merits briefing and oral argument (by holding that challengers could not sue state court judges, state court clerks, the state attorney general, or a potential private plaintiff).[7] The Court did permit the case to continue against a handful of Texas officials responsible for medical licensing.[8] But in response to a certified question on remand, the Supreme Court of Texas interpreted state law as withholding enforcement authority from those officials, effectively ending the attack on S.B. 8 more than three months before *Dobbs* came down.[9]

Critics condemned the Supreme Court for allowing this remedial end-run around abortion rights.[10] One prominent theme became that the majority would have never tolerated the similar treatment of some preferred legal protection—say, gun rights. "Imagine a world in which the DOJ was challenging a CA law that was identical to TX #SB8 but swap abortion for guns," Professor Amanda Hollis-Brusky posted on X, formerly Twitter.[11] "Gun sales have stopped," and "[g]un ownership is a de facto state crime despite 2nd A," she continued, referencing the Second Amendment right to keep and bear arms.[12] "Now ask yourself," she said

[4] See Charlie Savage, What is *Ex Parte Young*, Much-Discussed in the Texas Abortion Case?, N.Y. Times (Nov. 1, 2021), https://www.nytimes.com/2021/11/01/us/politics/what-is-ex-parte.html [https://perma.cc/ZB9F-ELTX].

[5] See Kate Zernike, Idaho Is First State to Pass Abortion Ban Based on Texas' Law, N.Y. Times (Mar. 14, 2022), https://www.nytimes.com/2022/03/14/us/idaho-abortion-bill-texas.html [https://perma.cc/9U98-2CTA].

[6] Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021).

[7] Whole Woman's Health v. Jackson, 142 S. Ct. 522, 539 (2021).

[8] Id.

[9] See Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022); see also Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (instructing the district court to "dismiss all challenges to the private enforcement provisions of the statute").

[10] See, e.g., Strict Scrutiny, A Uterus, If You Can Keep It, Crooked Media, at 27:00 (Dec. 10, 2021), https://castbox.fm/episode/A-Uterus%2C-If-You-Can-Keep-It-id2173578-id449696579? [https://perma.cc/LMQ9-WS9A] (podcast episode hosted by Professors Leah Litman, Melissa Murray, and Kate Shaw, with guest Professor Steve Vladeck).

[11] Amanda Hollis-Brusky (@HollisBrusky), X (Dec. 10, 2021, 11:00 AM), https://twitter.com/HollisBrusky/status/1469336195045814278?s=20 [https://perma.cc/NRH3-SCD3].

[12] Id.

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rhetorically: "[W]ould the conservative Justices have ruled differently?"[13] This refrain reemerged when California indeed enacted a copycat gun-control scheme[14]—which went into effect after a federal trial court held a tangential provision invalid.[15]

Stakeholders on the left are justified in feeling this anxiety. But they are not alone, for stakeholders on the right have repeatedly leveled a converse condemnation about the preceding era in judicial history. The majority in *Dobbs* itself contended that prior abortion jurisprudence "diluted the strict standard for facial constitutional challenges," "ignored the Court's third-party standing doctrine," "disregarded standard *res judicata* principles," "distorted First Amendment doctrines," and "flouted" both "the ordinary rules on the severability of unconstitutional provisions" and "the rule that statutes should be read where possible to avoid unconstitutionality."[16]

Comments like these arise from and attest to the idea that at the federal level, the United States has two Constitutions: what one could call the conservative Constitution and what one could call the liberal or progressive Constitution. The point is not only that different ideological groups interpret the Constitution using different methods and causing different effects. The point is also that different ideological groups value, invoke, and—in the case of judges—advance the law surrounding different constitutional provisions to the detriment or disregard of others. As Professor Zachary Price puts a similar point, while progressives "typically embrace a constitutional vision centered on advancing social

[13] Id.; see also, e.g., Jacob D. Charles, Are Gun Rights Safe After S.B. 8?, The Hill (Dec. 15, 2021, 9:31 AM), https://thehill.com/opinion/judiciary/585700-are-gun-rights-safe-after-sb8/ [https://perma.cc/LXW5-DPRB] (stating that "it would be hard to see the conservative justices reaching that same conclusion if gun rights were at stake").

[14] E.g., Evan Bernick (@evanbernick), X (July 23, 2022, 11:50 PM), https://perma.cc/VAQ4-4MPW ("If SCOTUS does take [the California gun control law] up, I doubt it will be treated similarly. Which is part of why the prospect of this getting struck down is not going to deter conservatives from modeling other stuff on SB 8."); see Cal. Code Civ. Proc. § 1021.11.

[15] See S. Bay Rod & Gun Club, Inc. v. Bonta, 646 F. Supp. 3d 1232, 1235 (S.D. Cal. 2022); Miller v. Bonta, 646 F. Supp. 3d 1218, 1222 (S.D. Cal. 2022); see Jon Healey, Californians Have a Green Light to Sue the Gun Industry. How Will That Work?, L.A. Times (Jan. 1, 2023, 3:36 PM), https://www.latimes.com/california/story/2023-01-01/californians-will-soon-have-their-chance-to-sue-the-gun-industry [https://perma.cc/XT7P-6A7Q] (explaining that a federal district court "nixed . . . the 'fee-shifting' provision that would have saddled gun-industry litigants with all or part of the court costs from any suit challenging the state's gun controls, even if they prevailed in court," but that "[t]he rest of [the law] remains in effect, including the private right of action").

[16] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2275–76 (2022).

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justice, protecting sexual and reproductive autonomy, and enabling expert administrative governance," conservatives "typically focus on protecting historic understandings of individual rights (including gun rights and religious freedom), leaving moral questions to the political process, and restoring a traditional view of separation of powers."[17]

This phenomenon comes into stark relief with respect to individual rights—those provisions, largely located in the Bill of Rights and the Reconstruction Amendments, that constrain government action to preserve spheres of personal freedom. A 2016 survey, for example, found that while "41% of Americans" identified the First Amendment as "the most important" part of the Bill of Rights, "Republicans (27%)" were "much more likely than Democrats (6%) to say that the Second Amendment is the most important," with Democrats putting the Fourth Amendment in second place.[18] And while the Roberts Court has recently elevated Second Amendment protections to unprecedented heights,[19] the Justices have not granted plenary review on a Fourth Amendment question for more than three years.[20]

That different ideological groups favor and disfavor separate sets of constitutional provisions undoubtedly contributes to declining confidence in the Supreme Court.[21] Knowing that members of the two major political parties and the predominant legal factions prefer discrete protections, it is not surprising that recent survey results indicate that when asked how well the Justices are "keeping their own political views out of how they decide major cases," 53% of all respondents answered "only fair" or "poor,"

[17] Zachary S. Price, Symmetric Constitutionalism: An Essay on *Masterpiece Cakeshop* and the Post-Kennedy Supreme Court, 70 Hastings L.J. 1273, 1280 (2019).

[18] Peter Moore, First Amendment Is the Most Important, and Well Known, Amendment, YouGov (Apr. 12, 2016, 3:15 PM), https://today.yougov.com/topics/politics/articles-reports/2016/04/12/bill-rights [https://perma.cc/Q73Y-5FDM].

[19] See generally Jacob D. Charles, The Dead Hand of a Silent Past: *Bruen*, Gun Rights, and the Shackles of History, 73 Duke L.J. 67 (2023) (outlining the unique development of, and some challenges within, Second Amendment jurisprudence).

[20] See Joel S. Johnson, Supreme Court Cases of Interest, Crim. Just., Fall 2023, at 44, 44–45 (noting that "[t]he Court has not granted certiorari on a Fourth Amendment issue since 2020").

[21] See Jodi Kantor & Jo Becker, Former Anti-Abortion Leader Alleges Another Supreme Court Breach, N.Y. Times (Nov. 19, 2022), https://www.nytimes.com/2022/11/19/us/supreme-court-leak-abortion-roe-wade.html [https://perma.cc/6VD6-GJF9] ("A majority of Americans are losing confidence in the institution, polls show, and its approval ratings are at a historic low. Critics charge that the court has become increasingly politicized, especially as a new conservative supermajority holds sway.").

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while just 18% answered "excellent" or "good."[22] Nor is it surprising, given the Court's changing composition, that Democrats expressed significantly more negative views, with 70% choosing "only fair" or "poor" and just 6% choosing "excellent" or "good."[23] Given these realities, one could reasonably feel pessimistic about how much could be done in the near future from a cross-ideological perspective to improve perceptions about the law of constitutional rights. A possible path to achieving a similar bridge-building objective, however, emerges with respect to how courts enforce such rights—with respect, that is, to the law of constitutional remedies.

This Article is about consistency, and inconsistency, in judicial decision-making—and more specifically, about the extent to which federal courts should provide similar opportunities to obtain relief for wrongs to discrete constitutional rights. Underlying both sets of abortion-related criticisms above is the idea that certain facets of the law—and especially the law of constitutional remedies, understood "broadly" (for thematic purposes here, but not everywhere) as including "rules for implementing constitutional rights and preventing or punishing their violation"[24]—should stay consistent across separate substantive areas. This idea, the *remedial consistency paradigm*, derives in part from the deeply rooted values of generality and neutrality in judicial decision-making. But the remedial consistency paradigm does not always control. With the Roberts Court repeatedly placing discrete rights guarantees on different remedial grounds, this topic deserves systematic scholarly scrutiny.

This Article advances in three parts. Part I explains how the remedial consistency paradigm arises from the concept of transsubstantivity, beginning by connecting the paradigm with generality and neutrality values and exploring transsubstantivity's current salience. This Part then offers several conceptual observations—including that while discussions about transsubstantivity usually relate to doctrinal consistency across discrete legal issues, transsubstantivity can also relate to doctrinal consistency across discrete interests or facts; that transsubstantivity

[22] Positive Views of Supreme Court Decline Sharply Following Abortion Ruling, Pew Rsch. Ctr. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/MXM3-8TP7].

[23] Id.

[24] Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 861 (1999).

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represents a matter of degree; and that transsubstantivity depends on the measure of evaluation. Finally, this Part discusses why transsubstantivity is especially important in the context of constitutional remedies as a species of process law and as a possible point of cross-ideological consensus. Critically, constitutional remedies are the focus of the analysis throughout. But before introducing that context, the explanatory sections rely on examples from other areas as well. The implication is not that considerations concerning transsubstantivity should look the same within and beyond constitutional remedies—just that one can gain a richer understanding of the concept without worrying about context-specific limitations.

Part II proposes a novel framework for understanding remedial inconsistency in constitutional adjudication. The framework provides a classification of different kinds of remedial inconsistency organized by the clarity of non-transsubstantivity, with concrete examples for each. Transparent inconsistency, which includes prophylactic and legislative remedial doctrines, refers to areas of law that treat discrete referents differently on their faces. Translucent inconsistency emerges through background knowledge about the legal landscape, including with respect to areas implicating fact-sensitive versus fact-insensitive claims and irregular interactions with external sources of law. Opaque inconsistency, which often surrounds doctrines involving indeterminate tests and comparator cases demonstrating uneven reliance on expansive principles, becomes apparent only with inductive analysis of actual applications.

This Part introduces, both conceptually and illustratively, a large body of constitutional remedies doctrines that treat discrete substantive concerns differently. The catalog is extensive but not exhaustive, and the borders between the categories of transparent, translucent, and opaque inconsistency can be cloudy and contestable. Someone may think, for instance, that a case described here as opaquely inconsistent is actually translucently inconsistent—or not inconsistent with other relevant areas at all. But that should not detract from the bigger-picture argument that non-transsubstantivity is present, prevalent, and patterned along analytically important lines throughout constitutional remedies law.

Courts, and especially the Supreme Court, can do better. Moving from the descriptive to the normative, Part III explores four ideas for improving judicial decision-making premised on the preceding analysis. The first revolves around enhancing attention on remedial consistency by spotlighting occasions for adherence and defending instances of

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divergence. One way to do so involves imagining a rebuttable presumption by which constitutional remedies should apply the same way to discrete referents unless circumstances warrant idiosyncratic treatment. The second idea for improvement entails increasing transparency. All non-transsubstantive doctrines involve variable ranges, but because they apply differently to discrete referents *on their faces*, transparently inconsistent doctrines involve variable rationales too. The latter characteristic facilitates holding courts accountable for departures from the remedial consistency paradigm at the time of decision and evaluating their continuing justifications into the future—such that judges should work to make inconsistent doctrines more transparent.

The third idea for improvement concerns decreasing the overdetermination endemic to judicial decision-making. Judges have a lawyerly habit of oversubstantiating their analyses with more lines of logic than necessary. This runs the risk of introducing inconsistent elements (and especially opaquely inconsistent elements) into diverse doctrinal areas, as the more reasoning an opinion includes, the more likely that it will conflict with the reasoning in other opinions. The fourth idea for improvement encourages reconsidering, though not necessarily rejecting, foundational doctrines that become inconsistent (or more inconsistent) across constitutional contexts through extensive exceptions or debatable distinctions. Rather than overruling precedent, courts often carve controversial case law into finer and finer, and sometimes more non-transsubstantive, fragments. Focusing on remedial consistency favors reevaluating such decisions in whole.

Among additional contributions, this Part argues that centering remedial consistency as an important, but not absolute, aspect of constitutional law could potentially help reinforce the Supreme Court's legitimacy at this time of widespread skepticism. For the Court loses legitimacy—whether conceptualized sociologically, morally, or legally—by acting in ways that people perceive as "political" rather than "legal." By reducing opportunities for favoritism and disfavoritism (and especially unacknowledged favoritism and disfavoritism) among constitutional claims, the ideas suggested here could help renew some faith in the Court as committed to deciding cases on appropriate bases.

I. THE REMEDIAL CONSISTENCY PARADIGM

The remedial consistency paradigm arises from the concept of transsubstantivity across constitutional areas. To some extent,

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transsubstantivity is a "shape-shifting" concept "that lacks a settled meaning in existing commentary."[25] Generally speaking, though, the idea "refers to doctrine that, in form and manner of application, does not vary from one substantive context to the next."[26] Previous transsubstantivity analyses have mainly trained on civil procedure, but the concept bears broader relevance.[27]

Transsubstantivity became an essential feature of civil procedure in the United States between the mid-nineteenth and mid-twentieth centuries in large part because of professed efficiency advantages.[28] By the turn of the millennium, however, transsubstantivity had fallen out of fashion among realist-influenced theorists, with certain assumptions underlying the principle's ascendancy subject to sustained attacks.[29] One challenged assumption involved the separability of procedure from substance, for "the line between them is shadowy at best."[30] Another challenged assumption involved the apolitical nature of universal doctrine-making, for "[i]f thwarted by a supposedly unchangeable substantive law doctrine, a judge aiming for a particular result could restate the problem as a procedural one and thereby expand his discretion, and thus power, to reach the desired answer."[31] Yet another challenged assumption involved the practical complexity of contemporary cases, for the preceding years saw the rise of "the asbestos leviathan, class actions with up to 100 million plaintiffs, [and] other enormously complicated fields of litigation that beg for specialized procedural treatment."[32] As part of the turn away from transsubstantivity, legislatures increasingly enacted substance-specific

[25] David Marcus, Trans-Substantivity and the Processes of American Law, 2013 BYU L. Rev. 1191, 1196 (2013).

[26] Id. at 1191.

[27] See id. at 1194 (stating that "with few exceptions, scholars have examined trans-substantivity exclusively as the principle influences the development and form of procedural doctrine" but that "[t]his focus is too narrow").

[28] See David Marcus, The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure, 59 DePaul L. Rev. 371, 372 (2010) (explaining that transsubstantivity was "one of the keys to the simplicity intended by" the Federal Rules of Civil Procedure's authors because transsubstantivity "reduces complexity," such that "[j]udges and lawyers do not need to relearn procedure every time they delve into a new field of substantive doctrine"); id. at 386–92 (tracing the history of transsubstantivity in American civil procedure).

[29] See id. at 399–403.

[30] Id. at 399 (quoting Charles E. Clark, History, Systems and Functions of Pleading, 11 Va. L. Rev. 517, 519 (1925)).

[31] Id. at 401.

[32] Id. at 372.

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litigation regimes, including in the securities, prisoner, and medical-malpractice contexts.[33]

Transsubstantivity has nevertheless persisted as a touchstone of judicially supervised rule creation and application in civil procedure.[34] And with a push from a handful of scholars, especially Professor David Marcus, the academic pendulum may be swinging a bit back toward transsubstantivity.[35] While recognizing the force of realist criticisms, recent commentary emphasizes that procedure is separable from substance to some extent[36] (and that transsubstantivity is important in other areas in any event[37]); that transsubstantivity "ensures at least a type of [apolitical decision-making] because it denies . . . the power to pursue directly substantive policy ends";[38] and that some kinds of litigation may well warrant substance-specific treatment without undermining the benefits of transsubstantivity more broadly.[39]

Instead of resting on ephemeral efficiency gains, support for transsubstantivity within and beyond the procedural domain appears today to rely on a more foundational tenet of judicial decision-making: that "similar cases should be decided similarly."[40] This idea derives from generality and neutrality values. Generality means that a decision

[33] Id. at 404–09.

[34] Id. at 410–15.

[35] See generally Marcus, supra note 25 (tracing the roots of transsubstantivity and defending its application and importance across different areas of process law). See also, e.g., Jeffrey C. Dobbins, Legislative Transsubstantivity, 12 Ne. U. L. Rev. 707, 709–12 (2020) (summarizing analysis discussing and defending transsubstantivity in both judicial and legislative procedural lawmaking); Margaret B. Kwoka, The Procedural Exceptionalism of National Security Secrecy, 97 B.U. L. Rev. 103, 110, 144 (2017) ("describ[ing] the character of transsubstantive process" by "documenting how the rules we have chosen reflect our commitment to maximum adversarialism with fallback inquisitorial methods when adversarialism fails," then arguing that courts' routine application of "exceptional procedures" to national security secrecy claims "creates problems both for the accuracy of the outcomes and the legitimacy of the legal process").

[36] See Marcus, supra note 28, at 420–21.

[37] See Marcus, supra note 25, at 1197–203.

[38] Marcus, supra note 28, at 419. To be clear, "[a] choice of one trans-substantive procedural rule over another, even if made for reasons totally disconnected from any particular substantive policy preference, can significantly impact the enjoyment of rights and the discharge of duties." Id. at 379. And "the claim that procedural rules should serve all doctrinal categories equally itself involves a value choice." Id. at 380.

[39] See Marcus, supra note 25, at 1220–22; see also Marcus, supra note 28, at 416–17 (acknowledging that transsubstantivity can involve both costs and benefits).

[40] Kent Greenawalt, The Enduring Significance of Neutral Principles, 78 Colum. L. Rev. 982, 998 (1978).

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"reach[es] out beyond the narrow circumstances" of the case at bar to claim justification in a coherent approach to "a more inclusive class of cases."[41] Neutrality means that a judge "would be willing to follow" the same reasoning "in other situations to which it applies."[42] As to transsubstantivity, the point is that discrete legal areas may be similar in relevant ways, thus warranting parallel doctrinal treatment.

While generality and neutrality are often associated with the legal process school of thought—and especially with the late Professor Herbert Wechsler[43]—these values have deeper roots and hold wider sway.[44] The

[41] Id. at 987 (quoting M. P. Golding, Principled Decision-Making and the Supreme Court, 63 Colum. L. Rev. 35, 40 (1963)); see also Frederick Schauer, Thinking Like a Lawyer 176 (2009) (stating that "when a court provides a reason for a decision, it gives a justification necessarily broader than that decision").

[42] Greenwalt, supra note 40, at 985; see also Schauer, supra note 41, at 177 (stating that "[i]t is an important consequence of the generality of reasons that a person (or a court) who gives a reason for a decision is typically committed to that reason on future occasions").

[43] See generally Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (situating the values of generality and neutrality in the context of judicial review). Some of the applications Professor Wechsler drew—especially those regarding *Brown v. Board of Education*, 347 U.S. 483 (1954)—are appropriately regarded as anticanonical. E.g., Wechsler, supra, at 32–34 (inter alia, expressing doubts about how "the separate-but-equal formula . . . was held to have 'no place' in public education on the ground that segregated schools are 'inherently unequal,' with deleterious effects upon the colored children in implying their inferiority"—and stating that "the heart of the issue involved," which was "a conflict in human claims of high dimension," was that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant"); see Pamela S. Karlan, Lecture, What Can *Brown*® Do for You?: Neutral Principles and the Struggle over the Equal Protection Clause, 58 Duke L.J. 1049, 1050 (2009).

[44] As many scholars have noted, the concepts of generality and neutrality did not require Wechsler's applications. See Dan M. Kahan, The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 Harv. L. Rev. 1, 11 (2011) (stating that commentators have been "only too happy to help Wechsler find a principle for *Brown* that could satisfy his undemanding test"); see also Derrick A. Bell, Jr., Comment, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 522–23 (1980) (contending that "[o]n a normative level," "Professor Charles Black . . . correctly viewed racial equality"—and in particular the idea that "the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states"—"as the neutral principle which underlay the *Brown* opinion" but that "on a positivistic level . . . it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites" (quoting Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421 (1960))). Professor Dan Kahan asserts that "Wechsler recognized that various neutral principles . . . could have supported" *Brown* but says "his complaint was that the Court had failed to articulate any of them" and instead "decided to emphasize an empirically grounded claim of harm . . . so that

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idea that "like cases should be decided alike" traces far back in history.[45] Dean Eugene Rostow, "one of Wechsler's sharper critics,"[46] called it a "basic moral principle, acknowledged by every legal system we know anything about," with "[t]he art of generalization" constituting "an indispensable feature of law as an institution of order."[47]

Transsubstantivity-related consistency grounded in generality and neutrality values has emerged as a significant theme both for the Roberts Court and, especially in the years since former President Donald Trump's appointees took the bench, for the Roberts Court's critics. Contemplating this idea's current salience thus proves worthwhile before making further conceptual observations. Prior to introducing the constitutional remedies context, on which this project focuses, the explanatory sections rely on examples from other areas as well. The implication is not that considerations concerning transsubstantivity should look the same within and beyond constitutional remedies—just that one can gain a richer understanding of the concept without worrying about context-specific limitations.

A. Current Salience

Roberts Court Justices regularly appeal to the generality- and neutrality-promoting aspects of transsubstantive judicial practices. Especially on the "conservative" side, Justices endorse transsubstantive decision-making by expressly invoking the importance of "neutral principles."[48] In a more abstract sense, they also reject what they see as

it would not be bound to apply its undisclosed principle" more broadly. Kahan, supra, at 11–12.

[45] Some commentators trace the idea all the way "back to antiquity," locating "some of its earliest formulations in the works of Aristotle." The Supreme Court, 2020 Term—Leading Cases: *Edwards v. Vannoy*, 135 Harv. L. Rev. 401, 401 n.1 (2021).

[46] Greenawalt, supra note 40, at 1001 n.65.

[47] Eugene V. Rostow, The Sovereign Prerogative: The Supreme Court and the Quest for Law 8 (1962). And while Wechsler's comments about judicial decision-making gave rise to a wave of "grand constitutional theorizing" that, in turn, sparked significant resistance, generality and neutrality at the level of principle application need not entail any particular approach (or any particular kind of approach, grand or not) to principle derivation or definition. See Kahan, supra note 44, at 9–19.

[48] See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1432 (2020) (Alito, J., dissenting, joined by Roberts, C.J. & Kagan, J.) (arguing that "the Court should have a body of neutral principles on the question of overruling precedent" because "[t]he doctrine should not be transformed into a tool that favors particular outcomes" (emphasis omitted)); McDonald v. City of Chicago, 561 U.S. 742, 788 (2010) (opinion of Alito, J., joined by Roberts, C.J., & Scalia &

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attempts to consign certain rights to so-called second-class status. For example, in the 2022 case *New York State Rifle & Pistol Ass'n v. Bruen*,[49] the majority wrote that "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'"[50] And just a few years earlier, by overturning a doctrine it said "relegate[d] the Takings Clause 'to the status of a poor relation' among the provisions of the Bill of Rights" in *Knick v. Township of Scott*,[51] the Court professed to "restor[e] takings claims to the full-fledged constitutional status the Framers envisioned."[52] Some separate opinions are even sharper. In 2016, for instance, Justice Thomas accused the majority in *Whole Woman's Health v. Hellerstedt*[53] of "simultaneously transform[ing] judicially created rights like the right to abortion into preferred constitutional rights, while disfavoring many of the rights actually enumerated in the Constitution."[54] If the Court refuses to "abide[] by one set of rules to adjudicate constitutional rights," he warned, "it will continue reducing constitutional law to policy-driven value judgments until the last shreds of its legitimacy disappear."[55]

But calls among current Justices for transsubstantive reasoning premised on the importance of generality and neutrality recur across the ideological spectrum. Arguments accusing others of making distinctions without differences sometimes rest on this logic.[56] *Nance v. Ward*,[57] another 2022 case, provides a more particular example. Nance concerned

Kennedy, JJ.) (asserting that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle").

[49] 142 S. Ct. 2111 (2022) (Thomas, J., joined by Roberts, C.J., & Alito, Gorsuch, Kavanaugh & Barrett, JJ.).

[50] Id. at 2156 (quoting *McDonald*, 561 U.S. at 780 (plurality opinion)).

[51] 139 S. Ct. 2162, 2169 (2019) (Roberts, C.J., joined by Thomas, Alito, Gorsuch & Kavanaugh, JJ.) (quoting Dolan v. City of Tigard, 512 U.S. 374, 392 (1994)).

[52] Id. at 2170.

[53] 136 S. Ct. 2292 (2016).

[54] Id. at 2329 (Thomas, J., dissenting).

[55] Id. at 2330.

[56] See, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 581–82 & n.5 (2010) (Sotomayor, J., joined by Roberts, C.J., & Stevens, Thomas, Ginsburg & Breyer, JJ.) ("The dissent discounts the relevance of the principle [that ignorance of the law will not excuse any person], on grounds that this case involves the scope of a statutory exception to liability, rather than a provision 'delineat[ing] a category of prohibited conduct.' That is a distinction without a difference . . . ." (second alteration in original) (quoting id. at 625 (Kennedy, J., dissenting))).

[57] 142 S. Ct. 2214 (2022).

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whether a challenge to a state's execution methods could proceed under the main federal civil rights statute applicable to state officials, 42 U.S.C. § 1983, or was instead required to run the gauntlet of habeas procedure.[58] The majority opinion, written by Justice Kagan and joined by Chief Justice Roberts and Justices Breyer, Sotomayor, and Kavanaugh, pointed to precedent indicating that "[o]ne of the 'main aims' of § 1983 is to 'override'—and thus compel change of—state laws when necessary to vindicate federal constitutional rights."[59] Citing a recent property rights case, the opinion insisted that "[a] prisoner, no less than any other § 1983 litigant, can bring a suit of that ilk."[60] And citing recent religious freedom cases, the opinion insisted that challenges to states' execution methods were no less cognizable than challenges to prisons' chaplaincy policies.[61]

Academic critics of the Roberts Court also endorse consistency through transsubstantive adjudication because of its relation to generality and neutrality values. Commentary on recent First Amendment case law in a wide range of sources—from traditional media to X to academic journals—provides a snapshot. The very title of a September 2021 op-ed by Professor Steve Vladeck argued that the Court not only "abuse[s] its shadow docket," but "does so inconsistently."[62] Vladeck asserted that the Court's initial "nonintervention over abortion" in the S.B. 8 context "differed blatantly from its aggressive interventions in the past year in religious liberty cases."[63] In the S.B. 8 case, Vladeck recounted, "[t]he majority justified its nonintervention by flagging procedural questions that would have to be resolved before a court could decide whether the law . . . violate[d] *Roe*, even though no party before the Supreme Court was arguing that it did not."[64] "But," Vladeck wrote, "the very same 5-4 majority" just a few months before "reached out to block California's [COVID-related] in-home gathering restrictions" based on "a new interpretation of the Constitution's Free Exercise Clause," notwithstanding precedent limiting the relevant relief to cases involving

[58] Id. at 2219.
[59] Id. at 2217–18 (quoting Monroe v. Pape, 365 U.S. 167, 173 (1961)).
[60] Id. at 2224 (citing Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2067 (2021)).
[61] See id. (citing, e.g., Ramirez v. Collier, 142 S. Ct. 1264 (2022)).
[62] Steve Vladeck, The Supreme Court Doesn't Just Abuse Its Shadow Docket. It Does So Inconsistently., Wash. Post (Sept. 3, 2021, 10:43 AM), https://www.washingtonpost.com/outlook/2021/09/03/shadow-docket-elena-kagan-abortion/ [https://perma.cc/E5GU-GDR8].
[63] Id.
[64] Id.

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"rights that are 'indisputably clear.'"[65] Vladeck concluded that "if the court was justified in intervening in [the California case] to protect a *new* understanding of constitutional rights, it was surely justified in intervening [in the Texas case] to protect an old one."[66]

In a September 2022 X thread, Professor Laura Portuondo wrote that "the key inference in [a recent] 5th Circuit decision upholding Texas's [internet] platform regulation law is that the law doesn't regulate 'speech'"—but that this inference was "hard to square with the growing body of cases holding that antidiscrimination laws do regulate speech."[67] The platforms, she contended, were "making the same argument that religious objectors to antidiscrimination law make"—that "requiring them to host an unwanted message compels their speech."[68] These judges' "hostility to antidiscrimination laws that ensure [access to services]" was "highly selective," Portuondo concluded.[69] For "when religious objectors don't want to host a message, they are being 'compelled to speak' against their conscience," but "[w]hen others make similar arguments, they are 'censoring' others."[70]

A recent *Harvard Law Review* piece by Professor Nelson Tebbe is also illustrative. Tebbe argues that "the Roberts Court is increasing its own power" by fortifying the Free Exercise Clause while weakening the Establishment Clause.[71] And Tebbe contends that this "transformation . . . is generating multiple contradictions" in more granular doctrinal areas.[72] As an example, he cites the so-called ministerial exception—"a constitutional doctrine that protects the ability of congregations to employ religious leaders in ways that otherwise would violate civil rights law."[73] In attempting to explain how the ministerial exception is consistent with the overarching rule "that the right of free exercise does not relieve an individual of the obligation to comply with a

[65] Id.
[66] Id.
[67] Laura Portuondo (@LauraPortuondo), X (Sept. 17, 2022, 1:22 PM), https://twitter.com/LauraPortuondo/status/1571187826401677312 [https://perma.cc/8WG6-99PX] (discussing NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted in part*, NetChoice, LLC v. Paxton, 144 S. Ct. 477 (2023)).
[68] Id.
[69] Id.
[70] Id.
[71] Nelson Tebbe, The Supreme Court, 2020 Term—Comment, The Principle and Politics of Liberty of Conscience, 135 Harv. L. Rev. 267, 296 (2021).
[72] Id. at 297.
[73] Id. at 304.

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'valid and neutral law of general applicability,' "[74] a recent decision stated that while a previous case "involved government regulation of only outward physical acts," the case at bar concerned "government interference with an internal church decision."[75] This distinction is "unconvincing," Tebbe contends, because "[n]one of the values driving free exercise requires differentiation between regulation of outward physical acts and employment decisions."[76]

"[I]nconsistent rulings . . . drive home the perception, if not the reality, that the court is advancing a partisan political agenda and not a legal one," Vladeck asserted—"a charge" he described as "go[ing] straight to the court's legitimacy."[77] These concerns transcend any single analysis of the Supreme Court's work. Yet this Article aims to gain some modest but meaningful traction on them. Starting from the premise that transsubstantivity represents an important, but not absolute, aspect of judicial decision-making, the Article sets out to identify and draw insights from patterns of cases displaying doctrinal inconsistency in the law of constitutional remedies. But some conceptual observations are in order first.

B. Conceptual Observations

The enduring question surrounding how to determine "which similarities are important" in judicial decision-making "and which are not" falls beyond this project's scope.[78] It should suffice to say, though, that just as cases can include "relevant . . . similarities," they can also include "irrelevant differences"—and that (all else being equal) court rulings should be consistent across such characteristics.[79] Especially when considering whether the law should vary between classes of cases rather than whether analogical reasoning holds in some isolated instance, consistency can involve carrying doctrines across discrete substantive concerns through transsubstantive adjudication.

[74] Emp. Div. v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in judgment)).

[75] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

[76] Tebbe, supra note 71, at 305.

[77] Vladeck, supra note 62 (emphasis omitted).

[78] Frederick Schauer & Barbara A. Spellman, Analogy, Expertise, and Experience, 84 U. Chi. L. Rev. 249, 254 (2017) (stating that "determinations of similarity . . . require some metric enabling the analogizer to assess which similarities are important and which are not" because "any two items are similar in some respects and different in others").

[79] Id. at 257.

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In theory, at least three types of substantive concerns may qualify for such treatment: the issues, the interests, and the facts of the cases in question. The academic critiques discussed above demonstrate these concerns. Vladeck focused on variation between constitutional issues.[80] Portuondo addressed variation between stakeholder interests.[81] And Tebbe's argument about the ministerial exception highlights variation between factual considerations.[82] In reality, though, when legal commentators discuss transsubstantivity, they usually mean across issues. After a brief introduction to transsubstantivity in each context, the rest of this project follows suit by focusing on transsubstantivity with respect to issues unless the discussion makes a connection to interests or facts clear.

Legal decision-making is transsubstantive across issues if it controls classes of cases implicating discrete legal areas. A classic example from the civil procedure context inheres in the mid-nineteenth-century shift to code pleading, where "a single combined system of law and equity administered through the form of the one civil action was substituted for the two separate law and equity systems previously existing."[83] Since 1938, the Federal Rules of Civil Procedure have advanced this centripetal movement by uniting "the procedure in all civil actions and proceedings in the United States district courts" (save for a handful of relatively small carveouts).[84] Judicial decision-making has followed suit. In *Ashcroft v. Iqbal*,[85] for instance, the Supreme Court made short work of the argument that *Bell Atlantic Corp. v. Twombly*[86]—which held that "[t]o survive a

[80] See Vladeck, supra note 62 (arguing that the Supreme Court's "nonintervention over abortion" in the S.B. 8 context "differed blatantly from its aggressive interventions in the past year in religious liberty cases").

[81] See Portuondo, supra note 67 (arguing that a recent decision from the U.S. Court of Appeals for the Fifth Circuit essentially endorsed the paradoxical propositions that "when religious objectors don't want to host a message, they are being 'compelled to speak' against their conscience" but that "[w]hen others make similar arguments, they are 'censoring' others").

[82] See Tebbe, supra note 71, at 305 (arguing that "[n]one of the values driving free exercise requires differentiation between regulation of outward physical acts and employment decisions" like the Supreme Court did in *Hosanna-Tabor*, a 2012 case).

[83] Charles E. Clark, Handbook of the Law of Code Pleading 21 (2d ed. 1947); see also Marcus, supra note 25, at 1209, 1213 (describing New York's famous 1848 civil procedure code as having a "trans-substantive design").

[84] Fed. R. Civ. P. 1; see also Fed. R. Civ. P. 81 (specifying areas where the Rules may not control in all respects); Marcus, supra note 28, at 376 ("The vast majority of the Federal Rules are trans-substantive, with a few minor exceptions.").

[85] 556 U.S. 662 (2009).

[86] 550 U.S. 544 (2007).

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motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face' "—"should be limited to pleadings made in the context of an antitrust dispute."[87] Quoting the Rules, *Iqbal* declared that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."[88]

Legal decision-making is transsubstantive across interests if it controls classes of cases affecting discrete stakeholder groups (whose members are often, but not always, parties to the litigation). The central precept that "similar cases should be decided similarly" includes the corollary that "the outcome of legal disputes should not depend on the personal characteristics of particular litigants."[89] It is for this reason that Professor Wechsler criticized the turn-of-the-century Court for "sustaining . . . national authority when it impinged adversely upon labor . . . but not when it was sought to be employed in labor's aid."[90] The duty of impartiality is so central to the judicial role that since 1789, Congress has required all judges to swear to "administer justice without respect to persons" and to "do equal right to the poor and to the rich."[91]

Legal decision-making, finally, is transsubstantive across facts if it controls classes of cases presenting discrete real-world circumstances. "[T]ort law arguably qualifies" in that "[n]egligence purports to cover many varieties of unintended interactions, ranging from surgical mishaps to car crashes."[92] Pushed to the extreme, Professor Lon Fuller identified the prospect that every case "must be decided on an ad hoc basis" as "[t]he first and most obvious" way in which "the attempt to create and maintain a system of legal rules may miscarry."[93]

A couple additional notes on the nature of transsubstantivity: Transsubstantivity occurs as "a matter of degree."[94] At least in theory, for instance, the doctrine of vertical stare decisis (which controls to what

[87] *Iqbal*, 556 U.S. at 678, 684 (quoting *Twombly*, 550 U.S. at 570 (Stevens, J., dissenting)).
[88] Id. at 684 (quoting Fed. R. Civ. P. 1).
[89] Greenawalt, supra note 40, at 998.
[90] Wechsler, supra note 43, at 23.
[91] 28 U.S.C. § 453; see also Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76 (similarly requiring all judges and justices to swear or affirm to "administer justice without respect to persons, and do equal right to the poor and to the rich").
[92] Marcus, supra note 25, at 1197.
[93] Lon L. Fuller, The Morality of Law 38–39 (rev. ed. 1969).
[94] Marcus, supra note 25, at 1204; see also Marcus, supra note 28, at 378 (stating that "trans-substantivity and substance-specificity are ideal types at two ends of a spectrum").

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extent "lower" courts must follow "higher" courts' pronouncements) applies in the same way regardless of the legal area in question. As Justice Barrett described during her academic days, "[v]ertical stare decisis is an inflexible rule that admits of no exception."[95] The doctrine of horizontal stare decisis (which controls to what extent courts must follow their own prior pronouncements) is transsubstantive to a lesser degree. For its "strength . . . varies" according to "subject matter."[96] The Supreme Court purports to adhere to a system under which "[s]tatutory precedents receive 'super-strong' stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule."[97] The tiers of scrutiny underlying much judicial review are also transsubstantive across many constitutional claims, ranging from free speech to equal protection challenges.[98] But they are not transsubstantive across *all* constitutional claims, including the gun-rights area where *Bruen* recently adopted a text-and-tradition approach.[99]

The extent of transsubstantivity also depends on the measure of evaluation. For example, the exclusionary rule, which restrains the government from introducing evidence obtained in violation of the Constitution, is transsubstantive across various (but not all) rights infringements.[100] It is non-transsubstantive, however, across types of proceedings.[101] And it is non-transsubstantive across facts because of the good-faith exception, under which "the Court has declined to suppress

[95] Amy Coney Barrett, Precedent and Jurisprudential Disagreement, 91 Tex. L. Rev. 1711, 1712 (2013).

[96] Id. at 1713.

[97] Id.

[98] See Aziz Z. Huq, Tiers of Scrutiny in Enumerated Powers Jurisprudence, 80 U. Chi. L. Rev. 575, 577 (2013).

[99] See N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (rejecting "any means-end test such as strict or intermediate scrutiny" and holding that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," such that "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation").

[100] See Richard M. Re, The Due Process Exclusionary Rule, 127 Harv. L. Rev. 1885, 1938 (2014) ("Illustrating the exclusionary rule's applicability across constitutional rights, the impeachment exception applies in the event of a Fourth Amendment violation, a Fifth Amendment *Miranda* violation, or a Sixth Amendment Counsel Clause violation.").

[101] See id. at 1936, 1938 (explaining that "[t]he Court allows use of unconstitutionally collected evidence in grand jury proceedings" and "has declined to exclude unconstitutionally obtained evidence in several civil contexts, including tax cases"); see also id. at 1937 (noting that "the Court overlooks exclusionary-rule violations when raised in habeas corpus proceedings").

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evidence where the police acted in objectively reasonable or 'good-faith' reliance on an incorrect assumption."[102]

In sum, judicial decision-making can be transsubstantive across case issues, interests, and facts, but most commentary concerns issues. Transsubstantivity in judicial decision-making also varies by degree and depends on the measure of evaluation. As the ensuing discussion explores, a paradigm promoting consistency through transsubstantive adjudication can be especially important in the constitutional remedies context.

C. Remedial Context

Legal process theorists have long argued that because of the counter-majoritarian difficulty inherent in federal judicial review (by which unelected judges can invalidate representative officials' actions), generality and neutrality are particularly important when courts decide constitutional challenges.[103] In some ways, however, questions of constitutional remedies—conceptualized "broadly" for thematic purposes here as concerning "rules for implementing constitutional rights and preventing or punishing their violation," to borrow from Professor Daryl J. Levinson[104]—enjoy an even more compelling claim to consistency through transsubstantive adjudication than questions of constitutional merits do.

Professor Marcus pitches transsubstantivity as "a phenomenon of process [law]," which he defines as comprising bodies of rules that

[102] Id. at 1942.

[103] See, e.g., Wechsler, supra note 43, at 19 (stating that, in exercising their "duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions," courts "are obliged to be . . . entirely principled," meaning that their decisions "rest[] on reasons . . . that in their generality and their neutrality transcend any immediate result that is involved").

[104] Levinson, supra note 24, at 861. This idea includes not only doctrines determining the availability of forms of relief—like the law surrounding "damages, restitution, injunctions, mandamus, ejectment, declaratory judgments, exclusion of evidence, remand for retrial or reconsideration untainted by constitutional error, and writs of habeas corpus." Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1778 (1991). It also includes doctrines determining the availability of claims to relief—like justiciability, waiver, immunity, and whether a cause of action exists. See, e.g., Levinson, supra note 24, at 882–84 (discussing the political question doctrine); id. at 889–90 (discussing the retroactivity of constitutional rulings); id. at 901 (discussing the *Miranda*-warning requirement); id. at 908–09 (discussing harmless error doctrine); id. at 910–11 (discussing so-called Fourth Amendment standing); id. at 915 (discussing qualified immunity).

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mediate "antecedent legal regime[s]" and that are either "incontestably procedural" or create rights or responsibilities that depend on the antecedent legal regimes themselves.[105] Marcus has worked to expand debates about the desirability of transsubstantive process law from the classic civil procedure context to areas like administrative and interpretive law.[106]

One can understand process law as including constitutional remedies too. Constitutional remedies both mediate constitutional rights and depend on their contours. For just as "a court cannot determine whether a [securities] plaintiff has met the [pleading] obligations" of the Private Securities Litigation Reform Act "without reference to federal securities laws,"[107] a court cannot determine whether a civil rights plaintiff has met the redressability obligations of standing doctrine without reference to the alleged constitutional infringement.[108] Consider *California v. Texas*,[109] which rejected the individual plaintiffs' claims on redressability grounds because the only remedy they sought (a declaratory judgment) for the constitutional violation they alleged (that the Obamacare individual mandate exceeded federal authority when Congress zeroed out the penalty) would have been ineffectual because the law was already unenforceable.[110] The injunction the plaintiffs requested against enforcing the remainder of the Affordable Care Act on an inseverability theory was insufficient, the Supreme Court made clear, because they did not assert any independent problem with those provisions.[111]

It makes sense, therefore, that the Supreme Court characterizes constitutional remedies as pervasively transsubstantive. As a general matter, the Court describes justiciability law using overarching language applicable to all manner of constitutional claims.[112] The Court likewise describes *Ex parte Young*[113]—the doctrine at issue in the S.B. 8 case[114]—

[105] Marcus, supra note 25, at 1194, 1197–200.
[106] Id. at 1201.
[107] Id. at 1200.
[108] See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) (explaining that redressability requires "a likelihood that the requested relief will redress the alleged injury").
[109] 141 S. Ct. 2104 (2021).
[110] See id. at 2115–16.
[111] See id.
[112] See, e.g., Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (pronouncing injury, causation, and redressability to be "the irreducible constitutional minimum of standing" whenever a "party invok[es] federal jurisdiction").
[113] 209 U.S. 123 (1908).
[114] See supra note 4 and accompanying text.

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as authorizing pre-enforcement injunctive relief against unconstitutional state action regardless of the theory of unlawfulness.[115] The list could go on: Multiple areas identified above as reflecting a commitment to transsubstantive decision-making concerned constitutional remedies, from the third-party standing principle Justice Thomas opposed in *Hellerstedt*, to the boundary between Section 1983 and habeas claims in *Nance*, to the contexts in which the exclusionary rule operates.[116]

More significant than meeting some technical definition of process law, constitutional remedies also exhibit features that make the case for transsubstantive treatment especially strong. Marcus contends that transsubstantive approaches to process law can "ameliorate[] . . . deficits" in courts' "legitimacy, competency, and effectiveness as lawmakers."[117] A look at problems surrounding qualified immunity, a defense that renders civil rights relief non-transsubstantive in multiple ways, helps illustrate this tendency.

As for legitimacy, transsubstantive process law can reduce the prospect that judicial choices about how to implement antecedent regimes will further courts' own goals rather than respecting the prerogatives of the political representatives who authored them.[118] Critics often condemn qualified immunity, which absolves from damages liability conduct by executive officials that does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known,"[119] on this ground. As Justice Thomas has stated, rather than "interpret[ing] the intent of Congress in enacting" the legislation that produced Section 1983, the Supreme Court's qualified immunity rulings have come to "represent precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make."[120]

As for competency, "judges may not be particularly competent to make" responsible determinations about real-word problems and

[115] See, e.g., Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 254–55 (2011) (stating that this doctrine "rests on the premise . . . that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes").

[116] See supra Sections I.A–B.

[117] Marcus, supra note 25, at 1220.

[118] Id. at 1228–29.

[119] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[120] Ziglar v. Abbasi, 582 U.S. 129, 159–60 (2017) (Thomas, J., concurring in part and concurring in judgment) (first quoting Malley v. Briggs, 475 U.S. 335, 342 (1986); and then quoting Rehberg v. Paulk, 566 U.S. 356, 363 (2012)).

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potential solutions.[121] Litigation, after all, does not readily yield the empirical "data, expertise with their analysis, and metrics to evaluate outcomes" needed to craft "aggregate-level policy" about complex social issues.[122] To this point, judges have been unable or unwilling to adjust qualified immunity in light of powerful evidence undermining the doctrine's foundational assumptions. Professor Joanna Schwartz reports, for example, that while the "stringent qualified immunity standard rests in part on the concern that individual officers will be overdeterred by the threat of financial liability, actual practice suggests that" government entities almost always pay for (or insure against) their employees' damages judgments.[123]

As for effectiveness, departures from transsubstantive schemes beget more departures, which can produce a "[c]acophony" if pursued in multiple ways by multiple courts.[124] Circuit splits around qualified immunity demonstrate this danger. As Professor Jennifer Laurin recounts, the Supreme Court has repeatedly "singled out Fourth Amendment claims as requiring an especially high level of factual specificity" to overcome qualified immunity.[125] Some "[l]ower courts have echoed and amplified this sentiment, suggesting that the need for greater factual specificity applies to any rights that are defined by reference to a balancing of interests," including First Amendment claims regarding public contract administration and prisoners' religious freedom.[126] Other lower court decisions "have stated that particular rights might be clearly established with a *lower* standard of factual particularity than what other claims might require, especially where the test to establish a constitutional violation includes an element of intention, as is the case for many (though not all) Eighth Amendment claims."[127]

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[121] Marcus, supra note 25, at 1230.

[122] Id.

[123] Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 890 (2014).

[124] Marcus, supra note 25, at 1233.

[125] Jennifer E. Laurin, Reading *Taylor*'s Tea Leaves: The Future of Qualified Immunity, 17 Duke J. Const. L. & Pub. Pol'y 241, 269 (2022).

[126] Id. at 270 (citing, e.g., Comsys, Inc. v. Pacetti, 893 F.3d 468, 472–73 (7th Cir. 2018) (in a case involving public contract administration, stating that "case-specific balancing of interests" was "essential"); Kemp v. Liebel, 877 F.3d 346, 352–53 (7th Cir. 2017) (in a case involving a prisoner's religious freedom claim, stating that the law required the court to perform "a multi-factor reasonableness" inquiry)).

[127] Id. (citing Dean v. Jones, 984 F.3d 295, 310 (4th Cir. 2021); Lipman v. Budish, 974 F.3d 726, 750 (6th Cir. 2020); Castro v. County of Los Angeles, 797 F.3d 654, 664 (9th Cir. 2015), *aff'd en banc*, 833 F.3d 1060 (9th Cir. 2016)).

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Professor Marcus says his definition of process law "excludes remedies law" because rather than "regulat[ing] legal processes," remedial doctrines "in some fashion" represent "the concrete actualization of substantive law."[128] But one could perhaps say something similar about other areas that Marcus identifies as process law, like statutory interpretation. To be sure, "rights and remedies are inextricably intertwined."[129] That does not render remedies *qua* remedies conceptually incoherent, though. Instead, the hydraulic relationship between rights and remedies represents a prime example of how substance and process can travel together, a phenomenon that Marcus notes transsubstantive decision-making can help discipline.[130] In any event, this caveat may not be entirely applicable here, as Marcus relies on a comparatively narrow conception of remedies law. For instance, he appears to identify process law as including "a whole range of justiciability doctrines,"[131] which this project groups with remedies. And other scholars have written favorably about viewing remedies law as transsubstantive in the same way procedural rules are.[132]

Beyond the process-oriented nature of constitutional remedies, a strong reason for promoting the remedial consistency paradigm concerns the possibility of consensus. Ideological inflections are part and parcel of how

[128] Marcus, supra note 25, at 1197–98 n.22.

[129] Levinson, supra note 24, at 858; see also Richard H. Fallon, Jr., Bidding Farewell to Constitutional Torts, 107 Calif. L. Rev. 933, 963 (2019) (arguing that "substantive constitutional rights, causes of action to enforce those rights, and immunity doctrines form a package").

[130] See Marcus, supra note 25, at 1228–29 (stating that "[p]rocess doctrines offer decision-makers ways to alter how a legal process realizes an antecedent regime's policy objectives" and arguing that transsubstantivity "constrains a judge's policymaking flexibility and thus protects against encroachments on legislative terrain").

[131] Id. at 1236 ("Problems of legitimacy, competency, and coordination are hardly unique to . . . process law. All law that requires judicial elaboration suffers from these deficits. But responses abound in process law. They include, for example, the *Erie* Doctrine, the *Chevron* Doctrine, and a whole range of justiciability doctrines.").

[132] See, e.g., David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 Minn. L. Rev. 627, 632 (1988) (stating that "[t]he compartmentalization of remedial law stands in stark contrast to civil procedure or conflicts of law, each of which provides a set of 'trans-substantive' principles to guide decisions regardless of the subject matter of the case" and arguing that "[t]his compartmentalized approach is inadequate" (footnotes omitted)); Tracy A. Thomas, The Prophylactic Remedy: Normative Principles and Definitional Parameters of Broad Injunctive Relief, 52 Buff. L. Rev. 301, 307–08 (2004) ("[W]hat has become apparent is that there are in fact common remedial rules that apply in all cases just as there are common procedural rules that apply regardless of the nature of the claim.").

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the public sees the Supreme Court's work on the inevitably divided merits side of constitutional adjudication. Neither the Justices themselves nor the American people are likely to agree about the proper scope of, say, Second or Fourth Amendment protections in any meaningful way at any foreseeable time. But because the considerations underlying constitutional remedies questions seem one step removed from the contested values at stake in constitutional merits matters, they may provoke less intense sorting.[133] And that could provide space for the Justices to adopt more evenhanded decision-making techniques. There is reason to believe, moreover, that the public would actually notice certain shifts in this area. For while the constitutional remedies context may seem one step removed from the constitutional merits domain, some remedial issues attract considerable attention. People care about the so-called bounty system set up by S.B. 8 even beyond the abortion area.[134] People care about how qualified immunity keeps individuals from vindicating their constitutional rights.[135] And so forth.

While accepting that "judicial ideology influences [constitutional remedies] determinations in some cases in sometimes unavoidable ways," a core assumption of this project is that "doctrine is worth taking seriously"[136]—and that judges usually make good-faith efforts to do so.[137] With some conceptual observations about consistency through

[133] See Levinson, supra note 24, at 857–58 (opposing normatively but recognizing descriptively that "[c]onstitutional discourse" adopts a narrative in which "[r]ights occupy an exalted sphere of principle, while remedies are consigned to the banausic sphere of policy, pragmatism, and politics").

[134] See, e.g., Reva Lalwani, Opinion, The Future of 'Bounty Hunting' Laws, Mich. Daily (Apr. 19, 2022), https://www.michigandaily.com/opinion/columns/the-future-of-bounty-hunting-laws/ [https://perma.cc/G25U-29Y9] (stating that "the allure of a bounty system has spread beyond" the abortion context, including to the gun-rights context in California and to disputes surrounding the teaching of controversial subjects in Florida—and criticizing how "[a] future for bounty systems almost guarantees other such instances of . . . the ability to bypass the court system").

[135] See Hailey Fuchs, Qualified Immunity Protection for Police Emerges as Flash Point Amid Protests, N.Y. Times (Oct. 18, 2021), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/DS96-6RAZ] ("Once a little-known rule, qualified immunity has emerged as a flash point in the protests spurred by [George] Floyd's killing and galvanized calls for police reform.").

[136] Richard H. Fallon, Jr., The Fragmentation of Standing, 93 Tex. L. Rev. 1061, 1069 (2015).

[137] See id. at 1094, 1099 (stating that "judges and Justices have an obligation, which they normally attempt to satisfy, to decide cases in accordance with applicable law" but hypothesizing that "a Justice's ideological predispositions may shape her good-faith views of which distinctions are well justified and which are legally untenable").

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transsubstantive adjudication and a brief examination of the remedial context complete, a closer look at doctrinal patterns becomes meaningful.

II. A REMEDIAL INCONSISTENCY FRAMEWORK

The Supreme Court often appeals to consistency through transsubstantive adjudication, but the concept does not always control. This Part offers a novel framework for understanding inconsistency in judicial decision-making about constitutional remedies.

The framework divides inconsistent reasoning into three different—but not entirely distinct—categories. Just as objects can be transparent, translucent, or opaque depending on how clear they are (meaning how much light they let through), legal doctrines can be, too. Transparently inconsistent doctrines are obviously non-transsubstantive: they apply differently to discrete referents on their faces. Translucently inconsistent doctrines reveal themselves as non-transsubstantive based on background knowledge about the legal landscape. Opaquely inconsistent doctrines are completely concealed: one can discern their non-transsubstantive nature only by inspecting a range of actual applications. The following figure summarizes these categories by listing the respective clarity of non-transsubstantivity, the definition of each, and examples from the constitutional remedies context, as discussed below:

Remedial Inconsistency Framework

Category	Clarity of Non-Transsubstantivity	Definition	Examples
Transparent inconsistency	*Clear*	*Non-transsubstantivity is facially apparent*	*Prophylactic doctrines; legislative doctrines*
Translucent inconsistency	*Kind of clear*	*Non-transsubstantivity becomes apparent with background information about landscape*	*Factual sensitivity; irregular interactions*
Opaque inconsistency	*Not clear*	*Non-transsubstantivity becomes apparent with inductive analysis of applications*	*Indeterminate tests; comparator cases*

Tracking this outline, the ensuing analysis delves into each category in turn.

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A. Transparent Inconsistency

Transparent inconsistency refers to doctrines that apply differently to discrete referents on their faces. These doctrines determine whether remedies will obtain for constitutional violations in ways that are expressly idiosyncratic to particular substantive concerns. Transparent inconsistency is especially prominent in the case law surrounding prophylactic and legislative remedial doctrines.

1. Prophylactic Doctrines

Defining prophylactic remedial doctrines with precision is difficult.[138] Generally speaking, though, they "permit the overenforcement of certain constitutional provisions in service of values like administrability and deterrence."[139] They are "somehow distinguishable from judicial interpretation of the Constitution" itself.[140] Instead, they "'expand' or 'sweep[] more broadly than' the constitutional constraints that do or would emerge" from a purely substantive construction.[141]

Constitutional waiver rules determine when courts can deem individuals to have relinquished constitutional rights. To the extent they afford some rights special protection, waiver rules are a species of prophylactic remedial doctrines.[142] Case law reflects a theme that "a citizen's waiver of a constitutional right must be knowing, intelligent, and voluntary."[143] But this theme does not translate into consistent articulations or applications, which renders waiver law non-transsubstantive.

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[138] See Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 30 (2004) (noting that "commentators have proposed a wealth of sometimes widely divergent definitions").

[139] Katherine Mims Crocker, A Prophylactic Approach to Compact Constitutionality, 98 Notre Dame L. Rev. 1185, 1202 (2023).

[140] Berman, supra note 138, at 30.

[141] Id. (alteration omitted) (first quoting Dickerson v. United States, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting); and then quoting Oregon v. Elstad, 470 U.S. 298, 306 (1985)).

[142] See Charles Weisselberg & Stephanos Bibas, Debate, The Right to Remain Silent, 159 U. Pa. L. Rev. PENNumbra 69, 78 (2010), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1056&context=penn_law_review_online [https://perma.cc/62V4-VWBY] ("Waiver is simply a prophylaxis, creating additional evidence that a defendant understood her rights and chose not to exercise them.").

[143] Schriro v. Landrigan, 550 U.S. 465, 484 (2007) (Stevens, J., dissenting).

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The statements the Supreme Court required in *Miranda v. Arizona*[144] are prophylactic in this way. *Miranda* instructs law enforcement to give individuals subject to custodial interrogation specific warnings: that they have the right to remain silent; that anything they say can be used against them in court; that they have the right to an attorney; and that if they cannot afford one, an attorney will be appointed.[145] If the government fails to inform arrestees accordingly, the exclusionary rule generally bars subsequent confessions from coming into evidence.[146]

The Court confronted questions about waiver law's transsubstantivity in *Schneckloth v. Bustamonte*,[147] which held that police officers need not provide *Miranda*-style warnings about the consequences of refusing so-called consent searches.[148] Denying that "[o]ur cases . . . reflect an uncritical demand for a knowing and intelligent waiver in every situation where a person has failed to invoke a constitutional protection," the Court "decline[d] to follow . . . 'the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.' "[149] Given the Court's acknowledgment of doctrinal diversity here, constitutional waiver law is transparently inconsistent.

Miranda used an elaborate analysis to justify treating the Fifth and Sixth Amendment rights in play differently from the mine-run of constitutional provisions. First, the Court suggested that warnings were necessary to preserve the privilege against self-incrimination and the right to counsel in the custodial interrogation environment. Relying on evidence about police use of physical and psychological force,[150] the Court concluded that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak."[151] Second, the Court said other values were at stake too. "The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the

[144] 384 U.S. 436 (1966).
[145] Id. at 479.
[146] Id.
[147] 412 U.S. 218 (1973).
[148] Id. at 229–31.
[149] Id. at 235, 246 (quoting Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 950 (1965)).
[150] *Miranda*, 384 U.S. at 445–55.
[151] Id. at 467.

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public," the Court asserted.[152] "The presence of counsel" can also "mitigate the dangers of untrustworthiness" inherent in custodial confessions and help ensure both "that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial," the Court added.[153] Third, *Miranda* implied that the rights involved deserved extra protection because they were extra important. The idea "that the individual may not be compelled to incriminate himself" is "one of our Nation's most cherished principles," the Court said.[154] The privilege helps comprise "the hallmark of our democracy," represents "the essential mainstay of our adversary system," ensures the very "inviolability of the human personality," and stands as "fundamental to our system of constitutional rule."[155]

Commentators view doctrines concerning the scope of statutory invalidity as prophylactic too.[156] The Supreme Court purports to "disfavor[]" so-called facial constitutional challenges (which attack a law as invalid in all applications) when compared with their as-applied counterparts (which attack a law as invalid in the application at bar).[157] This is especially true where plaintiffs' lines of attack do not necessarily render the law in question unconstitutional with respect to their own acts.[158] But the Court embraces facial challenges in some areas. One is the First Amendment "overbreadth" doctrine, where "a law may be

[152] Id. at 448 (quoting 4 Nat'l Comm'n on L. Observance & Enf't, Report on Lawlessness in Law Enforcement 5 (1931)).

[153] Id. at 470.

[154] Id. at 457–58.

[155] Id. at 460, 468 (quoting United States v. Grunewald, 233 F.2d 556, 582 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, Grunewald v. United States, 353 U.S. 391, 392 (1957)); see also, e.g., id. at 442 (stating that "[t]hese precious rights were fixed in our Constitution only after centuries of persecution and struggle"); id. (stating that "in the words of Chief Justice Marshall, they were secured 'for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it' " (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821))).

[156] See, e.g., Gillian E. Metzger, Facial Challenges and Federalism, 105 Colum. L. Rev. 873, 889 (2005) (noting that "[s]ome argue that . . . prophylactic concerns with chilling constitutional rights justify nonseverability presumptions and broad third-party standing rules").

[157] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998).

[158] See, e.g., Sabri v. United States, 541 U.S. 600, 609 (2004) (stating that "[f]acial challenges of this sort are especially to be discouraged" because "[n]ot only do they invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: . . . relaxing familiar requirements of standing, to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand").

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invalidated . . . if 'a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep.'"[159] Another is the "void-for-vagueness" strand of due process, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[160]

The Court describes its rationale for allowing facial challenges by plaintiffs who may not have suffered constitutional wrongs as avoiding the "chilling effect" that overbroad and vague laws may cause through discouraging people from exercising (and defending) protected forms of speech and action, respectively.[161] In *Broadrick v. Oklahoma*,[162] the Court justified overbreadth doctrine on the ground that "the First Amendment needs breathing space," such that "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . because of the possible inhibitory effects of overly broad statutes."[163] And as far back as 1939, the Court explained that the problem with overly vague provisions was that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."[164]

In short, there are no "trans-substantive rules governing a purported general category of facial challenges."[165] Instead, this remedial area turns on "the consequence of the particular doctrinal tests that courts apply to resolve particular cases."[166] As with waiver, moreover, the Court has been clear about this variability, rendering the law of statutory invalidity

[159] United States v. Stevens, 559 U.S. 460, 473–74 (2010) (first quoting United States v. Williams, 553 U.S. 285, 293 (2008); and then quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).

[160] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[161] See Leslie Kendrick, Speech, Intent, and the Chilling Effect, 54 Wm. & Mary L. Rev. 1633, 1652–53 (2013) (stating that "the chilling effect" represents a "chief explanation" for overbreadth doctrine because the law at issue reaches "would-be speakers of protected expression who stay silent to avoid prosecution but thereby lose the opportunity to challenge the law" and that void for vagueness doctrine is also "partly explained on chilling grounds" because "[a] vague law creates uncertainty as to its scope").

[162] 413 U.S. 601 (1973).

[163] Id. at 611–12.

[164] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[165] Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1321 (2000).

[166] Id.

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transparently inconsistent. In *Sabri v. United States*,[167] for instance, the Court noted that "we have recognized the validity of facial attacks alleging [that the law would be unconstitutionally applied to different parties and different circumstances from those at hand] in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence."[168]

2. Legislative Doctrines

Legislative remedial doctrines—meaning judicially created enforcement rules over which courts expressly exercise discretion to promote policy preferences, like a legislature—are also transparently inconsistent.

In at least two contexts, the Supreme Court has treated the mode of determining whether a cause of action exists as a legislative remedial doctrine. Practices surrounding the kind of claims permitted by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[169] are one. To decide whether a federal official's constitutional violation should give rise to damages relief, Justice Harlan argued in his influential *Bivens* concurrence in 1971 that "the range of policy considerations we may take into account is at least as broad as the range of those a legislature would consider with respect to an express statutory authorization of a traditional remedy."[170] Justice Powell sang the same refrain in embracing the early *Bivens* regime, repeatedly emphasizing that "[a] plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task."[171]

Bivens practices look a lot different now than they did during the supposedly "heady days" of the doctrine's first decade.[172] Critically, though, the Court doubled down on characterizing the doctrine as requiring judges to engage in a "legislative endeavor" as recently as

[167] 541 U.S. 600 (2004).

[168] Id. at 609–10 (stating that these settings include the free speech, right-to-travel, and abortion contexts).

[169] 403 U.S. 388 (1971).

[170] Id. at 407 (Harlan, J., concurring in judgment).

[171] Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring in judgment); see id. (adopting Justice Harlan's statement); Davis v. Passman, 442 U.S. 228, 252 (1979) (Powell, J., dissenting) (same).

[172] Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action . . . .").

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2022.[173] Repeating Justice Harlan's famous formulation, Justice Thomas's majority opinion in *Egbert v. Boule*[174] declared that "[c]ourts engaged in th[e] unenviable task" of "creating a cause of action" "must evaluate a 'range of policy considerations . . . at least as broad as the range . . . a legislature would consider.'"[175] Such considerations, *Boule* explained, "include 'economic and governmental concerns,' 'administrative costs,' and the 'impact on governmental operations systemwide.'"[176] In theory, then, by granting courts discretion to make decisions on the basis of unbounded inputs, this doctrine is transparently inconsistent.

In practice, the Roberts Court views the *Bivens* regime's legislative nature as delegitimizing rather than empowering judicial decision-making.[177] The Court has accordingly redeployed the doctrine's indefinite criteria (currently whether a case presents a "new context" and whether there are any "special factors counselling hesitation"[178]) from allowing actions as a matter of will to rejecting them as a matter of course.[179] But that hardly makes the doctrine less legislative. For as Justice Gorsuch said in *Boule*, "[t]o atone for *Bivens*, it seems we continue repeating its most basic mistake" by "tot[ing] up for ourselves the costs and benefits of a private right of action in this or that setting" to "reach a legislative judgment."[180] Nor does it make the doctrine transsubstantive. For "'[v]irtually everything' beyond the specific facts of the *Bivens* trilogy" (in which the Court approved causes of action in the search and seizure, sex discrimination, and deliberate indifference areas[181]) "is a 'new

173 Egbert v. Boule, 596 U.S. 482, 491 (2022).

174 Id.

175 Id. (quoting *Bivens*, 403 U.S. at 407 (Harlan, J., concurring in judgment)).

176 Id. (quoting Ziglar v. Abbasi, 582 U.S. 120, 134, 136 (2017)).

177 See id. at 492 (stating that "absent utmost deference to Congress' preeminent authority in this area, the courts 'arrogat[e] legislative power'" (quoting Hernández v. Mesa, 140 S. Ct. 735, 741 (2020))).

178 *Abbasi*, 582 U.S. at 136 (first quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001); and then quoting Carlson v. Green, 446 U.S. 14, 18 (1980)).

179 See *Boule*, 596 U.S. at 491–92 (stating that "[w]hile our cases describe two steps, those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy"; that "'even a single sound reason to defer to Congress' is enough to require a court to refrain from creating such a remedy"; and that such a reason will exist "in most every case" (alteration omitted) (quoting Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) (plurality opinion))).

180 Id. at 503 (Gorsuch, J., concurring in judgment).

181 See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389, 397 (1971) (approving certain Fourth Amendment claims); Davis v. Passman, 442 U.S.

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context' " nowadays,[182] with a dissimilarity as slight as whether a confrontation occurred "in a parking lot, not a private home" sufficing for divergent treatment.[183] The Court, moreover, has made manifest that *Bivens* doctrine is non-transsubstantive not only across facts but also across interests and issues. Echoing precedent, *Boule* pronounced that "a 'new category of defendants' " or "a new 'constitutional right at issue' " necessarily creates a new context.[184]

Despite purporting to abhor the legislative character of *Bivens* doctrine, the Court recently adopted a legislative approach to another cause-of-action question. The issue in *Vega v. Tekoh*[185] was whether Section 1983 permits plaintiffs to sue law enforcement officers for failing to give *Miranda* warnings.[186] Section 1983 provides a cause of action for conduct that violates "any rights, privileges, or immunities secured by the Constitution and laws."[187] *Tekoh* held that *Miranda* rights are not "secured by the Constitution" because they are prophylactic rather than substantive in scope—notwithstanding that they are "constitutionally based" either way.[188] *Tekoh* likewise held that *Miranda* rights are not "secured by" federal "laws" because—well, because the majority thought the system would be better off if they were not.[189] A prophylactic rule "should apply 'only where its benefits outweigh its costs,' " the Court declared.[190] "[A]nd here, while the benefits of permitting the assertion of *Miranda* claims under § 1983 would be slight, the costs would be

228, 230–31 (1979) (approving certain Fifth Amendment claims); *Green*, 446 U.S. at 16 & n.1, 17–18 (approving certain Eighth Amendment claims).

[182] Byrd v. Lamb, 990 F.3d 879, 883 (5th Cir. 2021) (Willett, J., specially concurring) (quoting Oliva v. Nivar, 973 F.3d 438, 442 (5th Cir. 2020)), *cert. denied*, 142 S. Ct. 2850 (2022).

[183] Id. at 882 (per curiam); see *Bivens*, 403 U.S. at 389 (explaining that the search and arrest underlying the suit occurred in the plaintiff's apartment).

[184] 596 U.S. at 492, 498 (first quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)); and then quoting Ziglar v. Abbasi, 582 U.S. 120, 140 (2017)).

[185] 597 U.S. 134 (2022).

[186] See id. at 141.

[187] 42 U.S.C. § 1983.

[188] 597 U.S. at 149–50 (quoting Dickerson v. United States, 530 U.S. 428, 440 (2000)).

[189] See id. at 149–51; see also Lenese Herbert, Tantamount to Nothing: *Miranda* "Rights" Can(not) Be Wronged, SCOTUSblog (June 27, 2022, 11:57 AM), https://www.scotusblog.com/2022/06/tantamount-to-nothing-miranda-rights-cannot-be-wronged/ [https://perma.cc/3XCV-QE96] (describing this ruling as based on the idea that generally, "[f]rom where Alito sits, . . . the cost/benefit analysis does not augur in the plaintiff's favor" and explaining that the costs the Court considered concerned "judicial economy").

[190] *Tekoh*, 597 U.S. at 151 (quoting Maryland v. Shatzer, 559 U.S. 98, 106 (2010)).

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substantial."[191] Because *Miranda* rights rest on "pragmatic" policy judgments, the Court made clear, *Miranda* remedies would too.[192]

All this may seem obvious. Of course, *Miranda* applies specifically to the self-incrimination context. And so forth. But that is the point, for the areas just discussed represent instances of *transparent* inconsistency. It is not always immediately evident that doctrines apply differently depending on the context, and distinguishing relative levels of clarity can become useful.

B. Translucent Inconsistency

In describing non-transsubstantive legal rules, Professor Marcus includes both "unambiguously substance-specific doctrine and nominally trans-substantive doctrine that lends itself to regularized patterns of substance-specific application."[193] Translucent inconsistency captures one way in which the latter practice can occur: nominally transsubstantive doctrine can lend itself to regularized patterns of substance-specific application because it falls differently on discrete areas of preexisting legal terrain. (Opaque inconsistency captures another way in which regularized patterns of substance-specific application can occur.[194]) Two circumstances giving rise to translucent inconsistency involve constitutional claims based on fact-sensitive versus fact-insensitive standards and constitutional claims based on irregular interactions with external sources of law.

1. Factual Sensitivity

Some constitutional standards turn on largely legal, relatively fact-insensitive inputs, while others involve fuzzier, more fact-sensitive inquiries.[195] Consider the difference between First Amendment free

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[191] Id.

[192] Id.

[193] Marcus, supra note 25, at 1207.

[194] See infra Section II.C.

[195] See Aziz Z. Huq, The Collapse of Constitutional Remedies 145 (2021) (discussing how "challenges by regulatory entities" often "proceed absent evidence that the constitutional violation caused them any harm," such that "a plaintiff is relieved from the burden of even pointing to a constitutional violation on the facts of her case"); see also id. at 138–39 (discussing how such claims often involve either "structural constitutional principles" or "individual rights against regulation" like "[g]un rights under the Second Amendment, free speech and religious liberty arguments under the First Amendment, [and] constraints on government 'takings' under the Fifth Amendment").

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speech and Fourth Amendment excessive force claims. For speech in public forums, "[r]easonable time, place, and manner restrictions are allowed"; "restriction[s] based on the content of the speech must satisfy strict scrutiny"—"that is, . . . be narrowly tailored to serve a compelling government interest"; and "restrictions based on viewpoint are prohibited."[196] Especially where the government acts through written policies, none of these issues necessarily depend on plaintiffs' on-the-ground experiences.[197] Allegations of violence at the hands of police officers, by contrast, have long been judged under a "totality of the circumstances" reasonableness test "balancing . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[198] The plaintiff's on-the-ground experiences lie at the heart of this standard.

Some ways in which the Supreme Court treats claims that invoke fact-sensitive versus fact-insensitive constitutional standards, including in the immunity and justiciability contexts, evidence translucent inconsistency. In theory, for the qualified immunity defense applicable to retrospective damages claims, the same rubric applies to constitutional challenges judged under either type of test. The doctrine shields from liability acts that do not contravene "clearly established" rules assessed at a level of abstraction low enough "that a reasonable official would understand that what he is doing violates th[e] right" in question.[199] In practice, however, this test can apply quite differently—and sometimes quite predictably—to claims based on fact-sensitive versus fact-insensitive standards.

As Professors John Jeffries and George Rutherglen have explained, qualified immunity "plays a large role in immunizing official misconduct when constitutional standards are evaluative or unclear" because "[t]he more uncertainty in the constitutional standard, the more room exists for reasonable belief in the legality of one's acts."[200] Indeed, the Court has repeatedly and recently stressed that the analysis in Fourth Amendment

[196] Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) (citations omitted).

[197] See G. Alex Sinha, Policing's Free-Speech Problem, Utah L. Rev. (forthcoming 2025) (manuscript at 11–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4532845 [https://perma.cc/M8DA-JBL7].

[198] Graham v. Connor, 490 U.S. 386, 396 (1989) (internal quotation marks omitted) (quoting Tennessee v. Garner, 471 U.S. 1, 8–9 (1985)).

[199] Anderson v. Creighton, 483 U.S. 635, 640 (1987) (internal quotation marks omitted).

[200] John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Cal. L. Rev. 1387, 1417–18 (2007).

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challenges should occur as close to the ground as possible.[201] In the 2021 case *City of Tahlequah v. Bond*,[202] for example, the Court without noted dissent said that factual "specificity is 'especially important in the Fourth Amendment context.'"[203] Scholars thus recognize—and criticize—how qualified immunity can shake out differently depending on how fact sensitive the plaintiff's claim is.[204]

This counts as *translucent* inconsistency because the Court purports to derive such differential treatment not from, say, an issue-specific eccentricity or legislative-like enablement within qualified immunity law, but from the doctrine's general operation. In *Bond*, the Court began the pertinent passage by noting that "[w]e have repeatedly told courts not to define clearly established law at too high a level of generality."[205] Instead, the Court continued, "the 'rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"[206] The point about the Fourth Amendment followed, with the Court declaring that "[s]uch specificity is 'especially important in the Fourth Amendment context,' where it is 'sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'"[207] And lower courts have expanded this line of logic from the Fourth Amendment context to others they see as presenting especially fact-sensitive standards.[208]

The temporal aspect of justiciability doctrine represents another area—this one involving prospective equitable or declaratory relief—where the

[201] See, e.g., City of Tahlequah v. Bond, 142 S. Ct. 9, 11–12 (2021) (per curiam); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8 (2021) (per curiam).

[202] 142 S. Ct. 9.

[203] Id. at 11 (quoting Mullenix v. Luna, 577 U.S. 7, 12 (2015) (per curiam)).

[204] See, e.g., F. Andrew Hessick & Katherine C. Richardson, Qualified Immunity Laid Bare, 56 Wake Forest L. Rev. 501, 535 (2021) (stating that "the more indeterminate a doctrine, the greater the likelihood that an officer is entitled to qualified immunity"); id. at 535–36 (arguing that "[l]imiting recovery based on the indeterminacy of a doctrine implementing a right has several consequences," including "devalu[ing] indeterminate rights" and "undermin[ing] the utility of indeterminate doctrines"); id. at 537 (arguing that qualified immunity "converts the virtue of indeterminacy [(i.e., flexibility)] into a liability" by "restrict[ing] the options courts have to remedy violations of indeterminate rights" and by "less effectively deter[ring] officials from violating those rights").

[205] 142 S. Ct. at 11.

[206] Id. (internal quotation marks omitted) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018)).

[207] Id. (quoting *Mullenix*, 577 U.S. at 12).

[208] See supra notes 125–26 and accompanying text.

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treatment of constitutional claims exhibiting different levels of fact sensitivity demonstrates translucent inconsistency. Again, the relevant standards are stated in nominally transsubstantive terms. For standing (a doctrine that seeks "to assure that concrete adverseness which sharpens the presentation of issues"[209]), a plaintiff's injury must be "actual or imminent, not 'conjectural' or 'hypothetical.'"[210] For ripeness (a doctrine that seeks to "avoid[] . . . premature adjudication"[211]), the analysis turns on "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[212] But applications diverge across the factual-sensitivity divide.

In a handful of recent cases on the fact-insensitive side, the Supreme Court has declined to distinguish between standing and ripeness, instead explaining or implying that because the doctrines "'originate' from the same Article III limitation" restricting federal court jurisdiction to "'Cases' and 'Controversies,'" "standing and ripeness issues" may "boil down to the same question."[213] Under either rubric, the Court has been permissive about allowing challenges to proceed where the plaintiff "alleges 'an intention to engage in a course of conduct . . . proscribed by a statute.'"[214]

Consider the 2014 case *Susan B. Anthony List v. Driehaus*.[215] There, an advocacy organization asserted that an Ohio statute "prohibit[ing] certain 'false statement[s]' 'during the course of any [political] campaign'" violated the organization's speech and associational rights.[216] A congressional candidate invoked the statute to file a complaint against

[209] Baker v. Carr, 369 U.S. 186, 204 (1962).

[210] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

[211] Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967).

[212] Id. at 149.

[213] Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 & n.5 (2014) (first quoting DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 335 (2006); then quoting U.S. Const. art. III, § 2; and then quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 & n.8 (2007)); see also, e.g., Trump v. New York, 141 S. Ct. 530, 535–36 (2020) (describing standing and ripeness as "[t]wo related doctrines of justiciability—each originating in the case-or-controversy requirement of Article III"—and concluding that "[a]t the end of the day, the standing and ripeness inquiries both lead to the conclusion that judicial resolution of this dispute is premature").

[214] *Susan B. Anthony List*, 573 U.S. at 159 (quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)).

[215] Id. at 149.

[216] Id. at 152, 155 (second alteration in original) (quoting Ohio Rev. Code Ann. § 3517.21(B) (LexisNexis 2023)).

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the organization over statements that his vote for Obamacare amounted to supporting "taxpayer-funded abortion."[217] But the candidate lost the election and (with the organization's consent) dismissed his complaint before a final decision came down.[218] The organization nevertheless continued to press a federal court challenge for declaratory and injunctive relief.[219] In a unanimous decision, the Supreme Court held the organization's claim justiciable based on standing and ripeness principles.[220] The Court reasoned, in essence, that as long as a plaintiff has "an actual and well-founded fear" about a possibility of enforcement that is "not 'imaginary or wholly speculative,'" a statutory challenge can proceed.[221] The advocacy organization faced a "substantial" threat of future enforcement, the Court concluded, because it "plan[ned] to disseminate" "the same sort of statement[s]" that had produced a probable-cause finding in the previous proceeding.[222]

Things are much different for more fact-sensitive challenges, where standing doctrine dictates the frequent dismissal of claims seeking prospective injunctive or declaratory relief. Contrast *Susan B. Anthony List* with *Los Angeles v. Lyons*,[223] decided in 1983.[224] There, the plaintiff alleged that the defendant police officers, "without provocation or justification" during a traffic stop, subjected him to a chokehold that "render[ed] him unconscious and caus[ed] damage to his larynx."[225] The plaintiff contended that pursuant to the city's "authorization, instruction and encouragement," police officers "regularly and routinely appl[ied] . . . choke holds in innumerable situations where they [we]re not threatened by the use of any deadly force whatsoever."[226] Citing a "justifiabl[e] fear[] that any contact . . . with Los Angeles Police officers" could cause "his being choked and strangled to death without . . . legal excuse," the plaintiff sought an injunction forbidding certain kinds of

[217] Id. at 153–54.
[218] Id. at 154–55.
[219] Id.
[220] See id. at 156–57.
[221] Id. at 160 (first quoting Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 393 (1988); and then quoting Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 302 (1979)).
[222] Id. at 162, 164.
[223] 461 U.S. 95 (1983).
[224] Professor Aziz Huq also contrasts these cases to argue that "[n]ot all anticipatory suits are created equal." Aziz Z. Huq, Judicial Independence and the Rationing of Constitutional Remedies, 65 Duke L.J. 1, 65–66 (2015).
[225] *Lyons*, 461 U.S. at 97–98.
[226] Id. at 98.

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chokeholds absent an immediate lethal threat, as well as a declaratory judgment that the police department's practices were unconstitutional.[227] The Supreme Court held these claims nonjusticiable on standing grounds.[228]

Much about *Lyons* demonstrates translucent inconsistency across fact-sensitive versus fact-insensitive constitutional challenges. Despite suggesting—with language similar to some in *Susan B. Anthony List*—that a meaningful threat would suffice,[229] the Court in practice required absolute certainty of future injury. "In order to establish an actual controversy in this case," the Court said, the plaintiff "would have had not only to allege that he would have another encounter with the police."[230] He would also have had "to make the incredible assertion either (1) that *all* police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner."[231] This high bar appears connected to the fact-sensitive nature of excessive force claims. By requiring an assertion "that strangleholds are applied by the Los Angeles police to every citizen who is stopped or arrested *regardless of the conduct of the person stopped*,"[232] the Court suggested that for a challenge to proceed, plaintiffs seeking prospective relief must eliminate all factual uncertainty.[233] This move disadvantages fact-sensitive claims relative to fact-insensitive ones. Indeed, *Susan B. Anthony List* held the ripeness element requiring fitness for judicial review satisfied on the ground that the organization's challenge presented a "purely legal" issue that would "not be clarified by further factual development."[234]

[227] Id.

[228] See id. at 105, 107.

[229] Compare, e.g., id. at 105 (suggesting that the standard required "a real and immediate threat" of future injury), with Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014) (stating that "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending' or there is a 'substantial risk that the harm will occur' " (internal quotation marks omitted) (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 414 n.5 (2013))).

[230] *Lyons*, 461 U.S. at 105–06.

[231] Id. at 106.

[232] Id. at 108 (emphasis added).

[233] See Sunita Patel, Jumping Hurdles to Sue the Police, 104 Minn. L. Rev. 2257, 2274 (2020) (arguing that "the Court in *Lyons* . . . imputed an 'innocence' factor into the standing test" and stating that "[s]ubsequent courts have interpreted this reasoning as requiring plaintiffs to be blameless in provoking officers in order to have standing to enforce injunctions against police").

[234] 573 U.S. at 167 (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985)).

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The pertinence of plaintiffs' past experiences also appears to diverge depending on the factual sensitivity of constitutional claims. *Susan B. Anthony List* described the "history of past enforcement" as the "*[m]ost obvious[]*" point in support of declaring "the threat of future enforcement" to be "substantial."[235] In *Lyons*, by contrast, the Court insisted that the plaintiff's history "*d[id] nothing* to establish a real and immediate threat that he would again be stopped . . . by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance"[236]—notwithstanding that "[t]he complaint clearly allege[d] that the officer who choked [him] was carrying out an official policy."[237] *Susan B. Anthony List*, moreover, found previous enforcement especially probative of future injury where proceedings under the challenged statute were "not a rare occurrence," with the relevant commission allegedly "handl[ing] about 20 to 80 false statement complaints per year."[238] In *Lyons*, by contrast, the Court treated the plaintiff's prior chokehold as irrelevant because "five months"—*five months*—"elapsed between" the date of the initial traffic stop "and the filing of the complaint" without any "allegation of further unfortunate encounters between [the plaintiff] and the police."[239] And it did so while ignoring evidence that Los Angeles police used chokeholds hundreds of times per year.[240] Lurking in the background seems to have been the idea that past cannot be prologue where prospective constitutional claims are especially sensitive to factual variation.

Whether almost any specific party will suffer direct effects under almost any government policy is necessarily hypothetical for constitutional claims based on both fact-sensitive and fact-insensitive standards.[241] But such claims' differential treatment makes it unsurprising

[235] Id. at 164 (emphasis added).

[236] 461 U.S. at 105 (emphasis added).

[237] Id. at 113–14 (Marshall, J., dissenting).

[238] 573 U.S. at 164.

[239] 461 U.S. at 108.

[240] See id. at 116 & n.6 (Marshall, J., dissenting) (citing police affidavits for the propositions that "[i]n reported 'altercations' between LAPD officers and citizens the chokeholds are used more frequently than any other means of physical restraint"; that "[b]etween February 1975 and July 1980, LAPD officers applied chokeholds on at least 975 occasions, which represented more than three-quarters of the reported altercations"; and that "[t]hese figures undoubtedly understate the frequency of the use of chokeholds").

[241] See Fallon, supra note 136, at 1077 (stating that "future injury is seldom 'absolutely certain' " (quoting Clapper v. Amnesty Int'l USA, 568 U.S. 398, 431 (2013) (Breyer, J., dissenting)).

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that in the past few years, multiple prominent controversies from the Supreme Court's merits docket have involved plaintiffs pursuing injunctive (and sometimes declaratory) relief for fact-insensitive constitutional claims against government defendants that never took enforcement action against them—and not facing any temporal-justiciability problems.[242] On the fact-sensitive side, in comparison, Professor Myriam Gilles reported in 2000 that Shepardizing *Lyons* in Westlaw produced 1,158 cases applying that decision to deny plaintiffs standing versus only 42 where courts had "distinguished *Lyons* and granted plaintiffs standing to seek injunctive relief."[243]

To be sure, plaintiffs asserting fact-sensitive constitutional challenges can still seek damages without running into *Lyons*-like justiciability problems.[244] But damages claims are subject to qualified immunity, while other claims are not.[245] Fact-sensitive constitutional challenges are twice hindered, then—by special immunity obstacles if victims seek monetary relief and by special justiciability hurdles if they pursue equitable or declaratory remedies.

2. Irregular Interactions

Translucent inconsistency can also come into play where federal court-made doctrines involve irregular interactions with external sources of law, like state judicial decisions or congressional statutes. Examples from the abstention and exhaustion arenas help illustrate.

Depending on how one counts, there are around five abstention doctrines permitting federal courts to refrain from deciding cases that connect with state law or processes in ways that might be problematic. *Pullman* abstention allows courts to avoid unsettled state issues that could resolve or refine federal questions, especially federal constitutional

[242] See, e.g., 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2318 (2023) (regarding antidiscrimination-related speech restrictions); FEC v. Cruz, 142 S. Ct. 1638, 1646 (2022) (regarding campaign-finance restrictions); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530 (2021) (regarding abortion restrictions); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 65–66, 68 (2020) (regarding COVID-related religious-gathering restrictions).

[243] Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384, 1399 n.57 (2000).

[244] See *Lyons*, 461 U.S. at 109 (noting that the plaintiff "still ha[d] a claim for damages against the City that appear[ed] to meet all Art. III requirements").

[245] See Katherine Mims Crocker, Qualified Immunity and Constitutional Structure, 117 Mich. L. Rev. 1405, 1454 (2019).

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questions, by telling plaintiffs to start in state court.[246] Courts can rely on *Burford* abstention where adjudication of state issues would disrupt a coherent (often administrative) state approach to complex and important policy problems.[247] *Thibodaux* abstention may be appropriate where courts are confronted with state issues related to policy problems of broad public significance.[248] *Younger* abstention can occur where adjudication could interfere with state enforcement proceedings.[249] And if circumstances warrant, courts can resort to *Colorado River* abstention where adjudication could interfere with other state proceedings.[250]

As articulated, these doctrines are all transsubstantive across constitutional claims. As applied, however, they frequently close the proverbial courthouse doors to a particular class of cases—those aimed at vindicating property rights. One formal reason is that constitutional case law often treats "property" in the Due Process and Takings Clauses as bearing a meaning derived mainly from state law.[251] More functional reasons include that property disputes are often bound up with "elaborate [state] administrative and judicial appeal procedures" that federal courts are hesitant to disturb, plus that property disputes may seem especially local in character.[252] Abstention, then, is translucently inconsistent across issues that exhibit irregular interactions with state law.

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[246] See Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). This kind of abstention is named after *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).

[247] See *Colo. River*, 424 U.S. at 814–15. This kind of abstention is named after *Burford v. Sun Oil Co.*, 319 U.S. 315, 332–33 (1943).

[248] See *Colo. River*, 424 U.S. at 814. This kind of abstention is named after *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

[249] See *Colo. River*, 424 U.S. at 816. This kind of abstention is named after *Younger v. Harris*, 401 U.S. 37, 54 (1971).

[250] See *Colo. River*, 424 U.S. at 817–20. This kind of abstention is named after *Colorado River*. See id.

[251] See Phillips v. Wash. Legal Found., 524 U.S. 156, 164 (1998) (stating in the takings context that "[b]ecause the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'" (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)); *Roth*, 408 U.S. at 577 (same in the due process context); see also Ernest A. Young, In Praise of Judge Fletcher—And of General Standing Principles, 65 Ala. L. Rev. 473, 492 (2013) ("In the takings and due process contexts, federal law imposes a floor and a ceiling on the property and liberty interests that trigger federal protection, but within these outer bounds state law retains its primary and ordinarily dispositive role.").

[252] William E. Ryckman, Jr., Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines, 69 Calif. L. Rev. 377, 416 (1981); see also, e.g., Laurel Sand & Gravel, Inc. v.

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Applying background knowledge about the constitutional topography should have made the inconsistency inherent in abstention doctrines apparent from the time of their mid-twentieth-century creation—and should also do so today. The *Burford*, *Thibodaux*, and *Colorado River* cases all involved property-related claims,[253] with *Thibodaux* justifying abstention on the notion that "an eminent domain proceeding" has "a special and peculiar nature" that is "intimately involved with sovereign prerogative."[254] Professors Ann Woolhandler and Julia Mahoney have observed that during "the post-New Deal era," "[s]ome circuits frequently directed abstention in land use cases."[255] Indeed, judges harnessed these doctrines to deny property rights plaintiffs a federal forum at what appears to have been a staggering rate as Section 1983 takings litigation took off during the 1970s and '80s.[256] One study from this period found that federal courts abstained from (both general and constitutional) land-use disputes "close to fifty percent" of the time.[257] The rise of abstention, moreover, roughly corresponded with an ebb in enthusiasm for substantive constitutional property rights in cases like 1978's *Penn Central Transportation Co. v. New York City*,[258] which articulated an

Wilson, 519 F.3d 156, 167 (4th Cir. 2008) ("Matters relating to property law, land use, and zoning ordinances have frequently been held to be 'important' state interests justifying *Younger* abstention." (quoting Harper v. Pub. Serv. Comm'n of W. Va., 396 F.3d 348, 353 (4th Cir. 2005)); Pomponio v. Fauquier Cnty. Bd. of Supervisors, 21 F.3d 1319, 1327 (4th Cir. 1994) (supporting *Burford* abstention on the ground that "[w]e can conceive of few matters of public concern more substantial than zoning and land use laws"); Ryckman, supra, at 414 ("Zoning cases are typically local in flavor, and often involve difficult questions of state and municipal law. As such they represent classic examples of a federal potential for needless interference, and are best left to the complex but comprehensive administrative and judicial regulatory systems provided by state law.").

[253] See *Colo. River*, 424 U.S. at 805 (approving abstention from a suit filed by the federal government "against some 1,000 water users, s[eeking] declaration of the Government's rights to waters in certain rivers and their tributaries"); *Thibodaux*, 360 U.S. at 25–26 (approving abstention from an eminent domain proceeding in diversity jurisdiction); Burford v. Sun Oil Co., 319 U.S. 315, 317–18, 332 (1943) (approving abstention from a suit alleging a property-related due process violation and seeking determination of a state agency's "reasonableness" in administering oil and gas interests under Texas law).

[254] 360 U.S. at 28.

[255] Ann Woolhandler & Julia D. Mahoney, Federal Courts and Takings Litigation, 97 Notre Dame L. Rev. 679, 698–99 (2022) (footnote omitted).

[256] See id. at 699–700 (discussing relevant developments in Section 1983 doctrine).

[257] Brian W. Blaesser, Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases, 2 Hofstra Prop. L.J. 73, 92–93 (1988).

[258] 438 U.S. 104 (1978).

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anemic standard for regulatory takings,[259] and 1981's *Parratt v. Taylor*,[260] which rejected due process liability for most "random and unauthorized" property deprivations.[261]

This correlation has carried through to the present, albeit in a converse way. As the Roberts Court "has expanded the constitutional and statutory protections afforded to [property] owners to a greater extent than any prior Court,"[262] a contraction in abstention and similar property-disfavoring process doctrines has followed. In 2013, for example, the Court unanimously shaded abstention as contravening the principle that "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging,'" with the Justices issuing the "instruction" to lower courts that abstention should be "the 'exception, not the rule.'"[263]

Irregular interactions with federal statutes can also produce translucent inconsistency. Courts, for instance, can issue decisions about constitutional remedies with knowledge that prisoners will not be able to take full advantage of plaintiff-friendly rulings because of federal statutes like the Prison Litigation Reform Act ("PLRA").[264] In both *Knick v. Township of Scott* from 2019 and *Pakdel v. City & County of San Francisco*[265] from 2021, the Supreme Court decided takings disputes in favor of the plaintiffs on the ground that under "the ordinary operation of civil-rights suits," "exhaustion of state remedies is not a prerequisite to an action under . . . § 1983."[266] But that is not true in cases subject to the PLRA, which provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner . . . until such administrative remedies as are available

[259] See id. at 124–25.

[260] 451 U.S. 527 (1981).

[261] Id. at 540–41; see also, e.g., Daniels v. Williams, 474 U.S. 327, 328 (1986) (holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property"); United States v. Bodcaw Co., 440 U.S. 202, 203–04 (1979) (per curiam) (holding that "just compensation" under the Takings Clause does not include "indirect costs" like attorney's fees and appraisal expenses).

[262] John G. Sprankling, Property and the Roberts Court, 65 U. Kan. L. Rev. 1, 1–2 (2016).

[263] Sprint Commc'ns, Inc. v. Jacobs, 571 U.S. 69, 77, 81–82 (2013) (first quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); and then quoting Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236 (1984)); see also infra Subsection II.C.2 (discussing Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019)).

[264] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended in scattered sections of Titles 11, 18, 28, and 42 U.S.C.).

[265] 141 S. Ct. 2226 (2021).

[266] Id. at 2230 (alteration in original) (quoting *Knick*, 139 S. Ct. at 2167).

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are exhausted."[267] So by relying on purportedly general civil rights principles, courts can justify fortifying preferred kinds of protections (perhaps brought by preferred kinds of plaintiffs) without worrying about producing gains for less-favored claims (or claimants).

C. Opaque Inconsistency

Again, non-transsubstantive legal rules include both "unambiguously substance-specific doctrine and nominally trans-substantive doctrine that lends itself to regularized patterns of substance-specific application."[268] One can see opaque inconsistency as a form of the latter where judicial decision-makers apply nominally transsubstantive principles differently to discrete substantive concerns without obvious objective explanations. Opaque inconsistency presents at least two patterns. The first involves doctrines that depend on highly indeterminate tests. The second involves comparator cases with divergent outcomes caused by uneven reliance on expansive principles.

1. Indeterminate Tests

Courts can employ highly indeterminate—a cynic might say manipulable—tests in opaquely inconsistent ways. Unlike legislative remedial doctrines, which are transparently inconsistent,[269] doctrines involving highly indeterminate tests do not expressly invite subjective decision-making. But examining actual applications suggests that they implicitly do so. Two doctrines help demonstrate this tendency: the political question doctrine and the "plan of the Convention" doctrine.

The political question doctrine declares that certain issues are nonjusticiable because they are "entrusted to one of the political branches or involve[] no judicially enforceable rights."[270] The foundational

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[267] 42 U.S.C. § 1997e(a). For people convicted of state crimes, federal statutory law also requires exhaustion of state remedies (specifically, judicial remedies) in the habeas context under the Antiterrorism and Effective Death Penalty Act. See 28 U.S.C. § 2254(b)(1). But the doctrinal inconsistency is far more transparent in case discussions there. See, e.g., Heck v. Humphrey, 512 U.S. 477, 480–81 (1994) (stating that while Section 1983 and the habeas corpus statute "both . . . provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials," "exhaustion of state remedies 'is not a prerequisite to an action under § 1983' " but is required for habeas claims (quoting Patsy v. Bd. of Regents, 457 U.S. 496, 501 (1982))).

[268] Marcus, supra note 25, at 1207; see supra text accompanying note 193.

[269] See supra Subsection II.A.2.

[270] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (plurality opinion).

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formulation comes from the 1962 case *Baker v. Carr*.[271] "Prominent on the surface of any case held to involve a political question," *Baker* said, "is found" at least one of six factors: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[272]

At first glance, this test may seem more determinate than an expressly subjective test. But it has not turned out that way. With respect to the factor concerning "a lack of judicially discoverable and manageable standards," dueling opinions from the 2019 case *Rucho v. Common Cause*[273] demonstrate why.

The question in *Common Cause* concerned the justiciability of constitutional challenges based on partisan gerrymandering, a theory alleging excessive incorporation of partisan electoral prospects into redistricting choices.[274] Courts, according to Chief Justice Roberts's majority opinion, cannot properly adjudicate such claims because (among other things) questions like how much partisan representation is fair and how to detect overages "are 'unguided and ill suited to the development of judicial standards.' "[275] For "[w]ith uncertain limits," *Common Cause* declared, "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust."[276]

As Justice Kagan's dissent pointed out, however, "federal courts across the country" had "largely converged on a standard for adjudicating partisan gerrymandering claims" that "d[id] not use any judge-made conception of electoral fairness" but instead "t[ook] as its baseline a

[271] 369 U.S. 186 (1962).
[272] Id. at 217.
[273] 139 S. Ct. 2484 (2019).
[274] Id. at 2491.
[275] Id. at 2501 (quoting *Vieth*, 541 U.S. at 296).
[276] Id. at 2498 (quoting *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in judgment)).

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State's *own* criteria of fairness, apart from partisan gain."[277] In response to the majority's remark that "[t]here is no way to tell whether the prohibited deviation from th[e median] map should kick in at 25 percent or 75 percent or some other point,"[278] the dissent (quoting an opinion Chief Justice Roberts had joined) noted that "'the law is full of instances' where a judge's decision rests on 'estimating rightly . . . some matter of degree'—including the 'substantial[ity]' of risk or harm."[279]

To the extent this holding rested on the notion that the judiciary must "act only in accord with especially clear standards" when seeking to "differentiate unconstitutional from constitutional" conduct concerning "the most heated partisan issues,"[280] other recent cases cast considerable doubt on the Supreme Court's consistency. In the 2022 case *West Virginia v. EPA*,[281] the Court invalidated the Obama Administration's Clean Power Plan (which sought to "implement a sector-wide shift in electricity production from coal to natural gas and renewables"[282]) on the basis of a newly articulated (or at least newly elevated[283]) "major-questions" test where the constitutionality of administrative action turns on its "economic and political significance."[284] Within the same term in *New York State Rifle & Pistol Ass'n v. Bruen*, the Court invalidated a New York gun-control measure (which, as interpreted, provided for "public-carry licenses only when an applicant [could] demonstrate[] a special need for self-defense"[285]) on the basis of a newly articulated test where the constitutionality of "distinctly modern firearm regulation[s]" turns on

[277] Id. at 2516 (Kagan, J., dissenting).
[278] Id. at 2506 (majority opinion).
[279] Id. at 2522 (Kagan, J., dissenting) (alteration in original) (quoting Johnson v. United States, 576 U.S. 591, 604 (2015)).
[280] Id. at 2498–99 (majority opinion) (internal quotation marks omitted) (quoting Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring in judgment)).
[281] 142 S. Ct. 2587 (2022).
[282] Id. at 2603.
[283] See Allison Orr Larsen, Becoming a Doctrine, 76 Fla. L. Rev. 1, 4–5 (2024) ("Beginning in the year 2000, there are a handful of Supreme Court cases that employ this concept. Until 2022, however, it had not earned 'doctrine' status in the Supreme Court, and rarely was it referred to in any lower court as a 'doctrine' . . . ." (footnote omitted)); Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1011 (2023) (similar).
[284] *West Virginia*, 142 S. Ct. at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).
[285] 142 S. Ct. 2111, 2122–23 (2022).

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whether they are "relevantly similar" to "historical regulation[s]."[286] Those tests are not any clearer than the one on hand in *Common Cause*,[287] and these are certainly heated partisan issues. But the *West Virginia* and *Bruen* majorities (which entirely subsumed the *Common Cause* majority[288]) were untroubled by such indeterminacy.

The political question doctrine thus provides an example of a highly indeterminate test that operates in an opaquely inconsistent way. Courts can deploy the doctrine selectively to stop disfavored kinds of constitutional claims while allowing favored ones to proceed.

Another doctrine that illustrates how courts can harness highly indeterminate tests to produce opaquely inconsistent results is the "plan of the Convention" doctrine, which limits state sovereign immunity. As recently as 2020, state sovereign immunity was almost entirely transsubstantive. The Eleventh Amendment says only that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[289] The Supreme Court, however, has long asserted that "[b]ehind the words . . . are postulates" providing states more expansive protection.[290] Since *Hans v. Louisiana*[291] in 1890, which blocked a citizen from suing his own state,[292] the Court has granted states safeguards

[286] Id. at 2132 (quoting Cass R. Sunstein, On Analogical Reasoning, 106 Harv. L. Rev. 741, 773 (1993)).

[287] See Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 266 (2022) (stating that the major questions standard "is so malleable that, at present, it can be said only to mean 'just what [the Court] choose[s] it to mean—neither more nor less' " (quoting Lewis Carroll, Through the Looking-Glass and What Alice Found There, *in* Alice's Adventures in Wonderland and Through the Looking-Glass 244–45 (Richard Kelly ed., 2015))); After the Highland Park Attack: Protecting Our Communities from Mass Shootings: Hearing Before the S. Comm. on the Judiciary, 117th Cong. 2 (2022) (written testimony of Professor Joseph Blocher), https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Blocher%20-%202022-07-20.pdf [https://perma.cc/BT89-YRM5] ("What is problematic about *Bruen* is its reliance on an unguided form of historical-analogical reasoning that invites the kind of judicial discretion that proponents of constitutional originalism and formalism regularly decry." (footnote omitted)).

[288] The *Common Cause* majority consisted of Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. The *West Virginia* and *Bruen* majorities both consisted of the same lineup plus Justice Barrett, who replaced Justice Ginsburg.

[289] U.S. Const. amend. XI.

[290] Principality of Monaco v. Mississippi, 292 U.S. 319, 322 (1934).

[291] 134 U.S. 1 (1890).

[292] See id. at 15.

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consistent with "[a] general principle of sovereign immunity,"[293] including by extending the doctrine to cover proceedings in state courts and federal agencies, actions in admiralty, and cases by foreign governments.[294] Until recently, therefore, sovereign immunity shielded states from suit in all but a small handful of relatively uncontroversial circumstances.[295]

The Court put a dent in this fortress in 2006 with *Central Virginia Community College v. Katz*,[296] which held that Congress could expose states to proceedings under the Bankruptcy Clause[297]—despite having previously held that Article I did not provide abrogation authority.[298] This decision was viewed as so aberrational, however, that the Court in 2020 unanimously declared its rule "a good-for-one-clause-only holding."[299] *Katz*, the Court said, did not reflect "a clause-by-clause approach" to determining whether various parts of Article I could supersede state sovereign immunity.[300] Instead, *Katz* embodied an instance of "bankruptcy exceptionalism."[301]

[293] Huq, supra note 195, at 94.

[294] See Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1496 (2019) (summarizing these developments).

[295] The federal government could sue states under the theory that "the permanence of the Union might be endangered" otherwise. United States v. Texas, 143 U.S. 621, 644–45 (1892). States could sue each other under a similar theory. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406–07 (1821). The Supreme Court could decide appeals involving state respondents under the theory that appealing a suit affects the original action's "form, and not substance," such that "no claim is asserted, no demand is made by the original defendant." Id. at 411–12. And Congress could abrogate—or withdraw—state sovereign immunity when acting pursuant to Section 5 of the Fourteenth Amendment, which grants power to enforce individual rights, under the theory that "not only is [Congress] exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); see U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

[296] 546 U.S. 356 (2006).

[297] Id. at 379 (holding that "Congress' determination that States should be amenable to [bankruptcy] proceedings is within the scope of its power to enact 'Laws on the subject of Bankruptcies'" (quoting U.S. Const. art. I, § 8, cl. 4)).

[298] See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

[299] Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

[300] Id. at 1002 (internal quotation marks omitted).

[301] Id.

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Except it did not. Initially in 2021 and again in 2022, the Court relied on *Katz* to establish new exceptions to state sovereign immunity: in *PennEast Pipeline Co. v. New Jersey*,[302] an exception for when the federal government delegates its eminent domain power,[303] and in *Torres v. Texas Department of Public Safety*,[304] an exception for when Congress acts pursuant to its Article I authority to "raise and support Armies" and to "provide and maintain a Navy."[305] The reason, the Court said, was that for all these subjects, "[u]pon entering the Union, the States implicitly agreed that their sovereignty would yield to federal policy" and "thus gave up their immunity from congressionally authorized suits pursuant to the 'plan of the Convention.' "[306] The Court identified the test for this doctrine as "whether the federal power" at issue "is 'complete in itself.' "[307]

This standard is remarkably indeterminate. As Justice Thomas argued in the *Torres* dissent, the Court's formulation "has the certainty and objectivity of a Rorschach test," for every federal power can be described as "complete in itself" in some ways and not others.[308] Indeed, this characterization "dates back to no less seminal a decision than Chief Justice Marshall's opinion in *Gibbons v. Ogden*"—which said that the commerce power, "like all others vested in Congress, *is complete in itself*, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[309]

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[302] 141 S. Ct. 2244 (2021).

[303] See id. at 2263.

[304] 142 S. Ct. 2455 (2022).

[305] U.S. Const. art. I, § 8, cls. 1, 12–13; see *Torres*, 142 S. Ct. at 2469.

[306] *Torres*, 142 S. Ct. at 2460 (quoting *PennEast*, 141 S. Ct. at 2258); see also *PennEast*, 141 S. Ct. at 2259; Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006) ("Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.").

[307] *Torres*, 142 S. Ct. at 2463 (quoting *PennEast*, 141 S. Ct. at 2263).

[308] Id. at 2481, 2483–84 (Thomas, J., dissenting).

[309] Id. at 2483 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)). Given that the Supreme Court recognized congressional authority to abrogate state sovereign immunity to enforce individual rights before its more recent "plan of the Convention" jurisprudence, see supra note 295, the two issues are somewhat separable. But the core question as to what extent the Constitution authorizes Congress to subject states to suit is essentially the same, and robust recognition of "plan of the Convention" "waiver" could support a less restrictive approach to Section 5 abrogation than current case law requires. See *Torres*, 142 S. Ct. at 2471 (Thomas, J., dissenting) (stating that "[t]hese cases contrast with those that involve congressional 'abrogation' of state sovereign immunity" but that "the line between 'plan-of-the-Convention waiver' and 'congressional abrogation' is a murky one" because "[b]oth inquiries ask the same basic question: whether Congress has authorized suit against a nonconsenting State pursuant

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Time will tell to what extent this doctrine "rework[s] or erase[s] the . . . prevailing sovereign immunity jurisprudence," as Justice Thomas worried.[310] But there could be no doubt that this area has become opaquely inconsistent in the shadow of the current approach. The point is not to condemn standards across the board in the perennial rules-versus-standards debate. For rules carry their own costs; courts can apply standards far more consistently, and far more candidly, than the Supreme Court has acted in these contexts; and at least the "plan of the Convention" doctrine is too sketchy to count as much of a standard anyway.[311]

2. Comparator Cases

A second pattern of opaque inconsistency arises from the Supreme Court's uneven reliance on expansive principles to reach divergent outcomes in comparator cases. Again, two sets of illustrations are helpful.

The first returns to the *Bivens* arena. *Bivens* law is rife with opaque inconsistency because of the Court's fluctuating feelings about federal common law.[312] *Tekoh*, the recent case refusing to allow *Miranda* claims under Section 1983, continues this trend. As discussed above, Section 1983 provides a cause of action to vindicate rights "secured by the Constitution and laws," and *Tekoh* held that *Miranda* rights are not cognizable on either basis.[313] Standing alone, the reasoning on "and laws" was transparently inconsistent because of the legislative-remedial superstructure.[314] But when considered beside *Bivens* precedent, this reasoning was opaquely inconsistent as well. For the Court insists in *Bivens* cases that it is institutionally incompetent to assess which rights

to 'a valid exercise of constitutional authority' " and because "both inquiries center on 'history, practice, precedent, and the structure of the Constitution,' to determine whether the Constitution either grants authority to Congress to abrogate immunity or strips States of their immunity on its own" (citations omitted) (first quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000); and then quoting Alden v. Maine, 527 U.S. 706, 741 (1999))).

[310] *Torres*, 142 S. Ct. at 2481.

[311] See Crocker, supra note 139, at 1230–31.

[312] See, e.g., James E. Pfander, *Iqbal*, *Bivens*, and the Role of Judge-Made Law in Constitutional Litigation, 114 Penn St. L. Rev. 1387, 1405 (2010) (contrasting *Bivens* retrenchment with the Court's treatment of qualified immunity, pleading rules, and the collateral order doctrine); Stephen I. Vladeck, The Inconsistent Originalism of Judge-Made Remedies Against Federal Officers, 96 Notre Dame L. Rev. 1869, 1871 (2021) (contrasting *Bivens* retrenchment with "judge-made prospective . . . relief against federal officers").

[313] 42 U.S.C. § 1983; Vega v. Tekoh, 142 S. Ct. 2095, 2106–08 (2022); see supra Subsection II.A.2.

[314] See supra Subsection II.A.2.

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should give rise to damages actions by comparing costs and benefits.[315] But that is precisely what happened in *Tekoh*, with the Court declaring that "'[a] judicially crafted' prophylactic rule should apply 'only where its benefits outweigh its costs'"—and concluding that "here, while the benefits of permitting the assertion of *Miranda* claims under § 1983 would be slight, the costs would be substantial."[316]

Additional examples of opaque inconsistency keep popping up in the *Bivens* context. On one hand, consider *Boule*, a characteristically restrictive *Bivens* decision, which—in an opinion by Justice Thomas—refused to allow a cause of action where a Border Patrol agent allegedly shoved the plaintiff and initiated a retaliatory administrative process against him.[317] On the other hand, consider *Tanzin v. Tanvir*,[318] a 2020 case holding—also in an opinion by Justice Thomas—that the Religious Freedom Restoration Act ("RFRA"), a statute intimately related to the Free Exercise Clause,[319] authorizes damages awards against federal

[315] See, e.g., Ziglar v. Abbasi, 137 S. Ct. 1843, 1857–58 (2017) (stating that the *Bivens* analysis "must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed" and that "[w]hen an issue 'involves a host of considerations that must be weighed and appraised,' it should be committed to 'those who write the laws' rather than 'those who interpret them'" (quoting Bush v. Lucas, 462 U.S. 367, 380 (1983))); Hernández v. Mesa, 140 S. Ct. 735, 743, 750 (2020) (similar); Egbert v. Boule, 142 S. Ct. 1793, 1803–04 (2022) (similar); see also id. at 1810 (Gorsuch, J., concurring in judgment) ("Weighing the costs and benefits of new laws is the bread and butter of legislative committees. It has no place in federal courts charged with deciding cases and controversies under existing law.").

[316] 142 S. Ct. at 2107 (alteration in original) (quoting Maryland v. Shatzer, 559 U.S. 98, 106 (2010)). A skeptic might respond that the Court was merely fulfilling Congress's wishes in implementing the "and laws" language, which could not plausibly call for a literal interpretation. See Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 511 (1982). But the best evidence that members of Congress have ever desired the Court to apply a discretionary approach here appears to be ex post legislative acquiescence rather than ex ante congressional purpose or intent. See The Supreme Court, 1979 Term—*Maine v. Thiboutot*, 94 Harv. L. Rev. 75, 226–27 (1980) (arguing that "[s]urely Congress would have acted had it . . . disapproved of th[e] almost universal practice" of federal courts entertaining a broad range of statutory claims under Section 1983). For "and laws" was inserted—perhaps inadvertently—during a supposedly nonsubstantive 1874 revision process and never received independent congressional approval. See Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1009 (7th ed. 2015).

[317] See supra Subsection II.A.2.

[318] 141 S. Ct. 486 (2020).

[319] See id. at 489 (stating that "Congress passed the Act" to "restore the . . . 'compelling interest test'" that governed free-exercise claims before the Supreme Court decided *Employment Division v. Smith*, 494 U.S. 872 (1990)).

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officials.[320] The relevant RFRA text provides that "[a] person whose religious exercise has been burdened in violation of this section may . . . obtain *appropriate relief* against a government" through a judicial proceeding.[321] *Boule* (the *Bivens* case) declared that "the Judiciary is comparatively ill suited to decide whether a damages remedy . . . is appropriate."[322] But just two years before, *Tanvir* (the RFRA case) expressed no discomfort about pronouncing that "damages have long been awarded as appropriate relief" in "suits against Government officials"—and "remain an appropriate form of relief today."[323]

The inconsistencies do not end there. *Boule* disclaimed judicial competence over cases implicating national security interests,[324] notwithstanding that any such concerns were peripheral to the facts at hand.[325] *Tanvir*, by contrast, where the plaintiffs sued more than a dozen FBI agents for placing or keeping them on the terrorism-related "No Fly List," never even mentioned the case's national security connections.[326] This silence was all the more remarkable in light of *Ziglar v. Abbasi*,[327] another recent *Bivens* case. The Supreme Court reasoned there that "[j]udicial inquiry into the national-security realm"—especially "in the context of a claim seeking money damages"—"raises concerns for the separation of powers in trenching on matters committed to the other branches."[328] *Abbasi* triggered this principle because the plaintiffs "challenge[d] . . . major elements of the Government's whole response to the September 11 attacks."[329] But in *Tanvir*, where the U.S. Court of Appeals for the Second Circuit made clear that the plaintiffs "assert[ed] that they were caught up in a broader web of federal law enforcement

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[320] See id.

[321] 42 U.S.C. § 2000bb-1(c) (emphasis added).

[322] 142 S. Ct. 1793, 1805 (2022).

[323] 141 S. Ct. at 491.

[324] 142 S. Ct. at 1804–05 ("Because '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention,' we reaffirm that a *Bivens* cause of action may not lie where, as here, national security is at issue." (quoting Haig v. Agee, 453 U.S. 280, 292 (1981) (alteration in original) (citation omitted))).

[325] See id. at 1810 (Gorsuch, J., concurring in judgment) ("[A]s the Court emphasizes, the episode here took place near an international border and the officer's search focused on violations of the immigration laws. But why does that matter?").

[326] See Tanvir v. Tanzin, 894 F.3d 449, 453–54 (2d Cir. 2018) (quoting 49 U.S.C. § 114(h)(2)), *aff'd*, 141 S. Ct. 486 (2020).

[327] 137 S. Ct. 1843 (2017).

[328] Id. at 1861 (quoting Christopher v. Harbury, 536 U.S. 403, 417 (2002)).

[329] Id. at 1853, 1861.

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mistreatment of American Muslims" after 9/11,[330] the Justices had nothing to say about national security.

To be sure, there are meaningful distinctions between *Boule* and *Abbasi* on one hand and *Tanvir* on the other. Most prominently, while the *Bivens* setting of *Boule* implicates the Supreme Court's (intermittent) contempt for common law decision-making, the statutory setting of *Tanvir* could entail less acute concerns about stepping on congressional toes.[331] But the judiciary's ability to determine what amounts to "appropriate" relief would seem to hold basically steady from one setting to the next. Likewise, there are meaningful distinctions that could have produced greater national security concerns in *Abbasi* than in *Tanvir*—including that *Abbasi* involved higher-level government officials than *Tanvir* did.[332] But the bar for considering national security connections has been set extremely low in the *Bivens* context.[333]

Given this opaque inconsistency, one could suspect that the difference in the rights at issue in *Boule*, which was (primarily) about excessive force, and *Tanvir*, which was about religious freedom, played a role in the cases' divergent reasoning and results. After all, Justice Thomas and the other members of the Court who signed on to both judgments (Chief Justice Roberts and Justices Alito, Gorsuch, Kavanaugh, and Barrett) have been quite friendly toward religious freedom claims—and not toward excessive force challenges.[334] Indeed, it is worth asking to what extent the Court's approval of monetary remedies pursuant to other legal

[330] 894 F.3d at 453 n.2.

[331] Compare Egbert v. Boule, 142 S. Ct. 1793, 1802 (2022) (criticizing "the heady days in which this Court assumed common-law powers to create causes of action" (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring))), with *Tanvir*, 141 S. Ct. at 493 (noting that Congress passed the statute in question and stating that "[o]ur task is simply to interpret the law as an ordinary person would").

[332] See *Abbasi*, 137 S. Ct. at 1853 (noting that the defendants included "former Attorney General John Ashcroft, former FBI Director Robert Mueller, and former Immigration and Naturalization Service Commissioner James Ziglar").

[333] See *Boule*, 142 S. Ct. at 1820 (Sotomayor, J., concurring in judgment in part and dissenting in part) (stating that the Court's reliance on national security concerns was "sheer hyperbole" and "mere sleight of hand").

[334] Compare Lee Epstein & Eric A. Posner, The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait, 2021 Sup. Ct. Rev. 315, 337–38 (concluding based on an empirical examination that "the Roberts Court has ruled in favor of religious organizations . . . more frequently than its predecessors"), with City of Tahlequah v. Bond, 142 S. Ct. 9, 11–12 (2021) (per curiam) (reversing the denial of qualified immunity in a Fourth Amendment excessive force case with no noted dissents); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 9 (2021) (per curiam) (same).

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sources for constitutional rights that recent majorities have favored may be operating in the background to bolster *Bivens*'s retrenchment more broadly. In addition to allowing damages relief for religious freedom claims under RFRA, for instance, the Justices have long permitted compensatory awards against the federal government for takings claims under a combination of the Tucker Act, which provides jurisdiction in the U.S. Court of Federal Claims,[335] and the Fifth Amendment, which case law suggests includes an implied monetary cause of action.[336]

Speaking of takings, another comparison illustrating the kind of opaque inconsistency where uneven reliance on expansive principles produces divergent case outcomes comes from weighing the dissent's reasoning in the 2019 *Knick* decision against the same Justices' votes in the 2021 *Tekoh* matter. *Knick* overruled an idiosyncratic "ripeness" rule requiring would-be takings plaintiffs to start by seeking compensation in state court.[337] Because of preclusion principles, this rule often confined takings claims entirely to the state system, preventing the possibility of repairing to federal court after the initial litigation.[338] *Knick*'s result enhanced remedial consistency by aligning the treatment of takings claims with that of other constitutional violations. But the dissent's reasoning reflects an instance of opaque inconsistency.

The major theme of Justice Kagan's dissent was that the Fifth Amendment "does not prohibit the taking of private property, but instead places a condition"—providing just compensation—"on the exercise of that power."[339] Textually, Justice Kagan argued, courts need not interpret the compensation obligation as a condition precedent, and case law, she asserted, had long construed it as a condition subsequent.[340] In other

[335] See 28 U.S.C. § 1491(a)(1); United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is . . . within the jurisdiction of the Court of Claims to hear and determine.").

[336] See Jacobs v. United States, 290 U.S. 13, 16 (1933) (stating that "[t]he form of the remedy did not qualify the right," such that an affirmative suit by property owners "rested upon the Fifth Amendment" and did not require "[s]tatutory recognition," for "a promise was implied because of the duty to pay imposed by the Amendment"). The Supreme Court recently declined to decide the extent to which the Takings Clause may be self-executing against the states in *DeVillier v. Texas*, No. 22-913, slip op. (U.S. Apr. 16, 2024).

[337] See 139 S. Ct. 2162, 2169–70 (2019) (overruling Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 194 (1985)).

[338] See id. at 2167.

[339] Id. at 2181 (Kagan, J., dissenting) (quoting First Eng. Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987)).

[340] See id. at 2184 (observing that the Takings Clause's "spare" text "says that a government taking property must pay just compensation—but does not say through exactly what

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words, Justice Kagan contended, both the language and law of the Fifth Amendment supported holding that no constitutional violation was complete until a government entity had both "taken" *and* denied "just compensation" for private property[341]—with those separate actions potentially occurring at separate times. The majority rejected both arguments.[342] What matters here is how Justice Kagan's theory maps onto analogous questions in other contexts.

The age-old interpretation of the Tucker Act as embracing suits seeking just compensation presented an obstacle for the *Knick* dissent. As relevant, the Tucker Act grants the Court of Federal Claims "jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution."[343] The rule that "[i]f there is a taking, the claim is 'founded upon the Constitution'" seems to mean that constitutional violations have already occurred when claims for monetary awards proceed under this statute[344]—such that plaintiffs are not required to seek just compensation through some other means first, as the *Knick* dissent's logic would appear to suggest. But not so fast, Justice Kagan said. The fact that "the compensatory obligation that the Tucker Act vindicates arises from . . . the Fifth Amendment" does not mean "that the Government has already violated the Fifth Amendment when the Tucker Act claim is brought."[345] Rather, she argued, a claim aimed at fulfilling this compensatory obligation "*forestalls* any constitutional violation by ensuring that an owner gets full and fair payment."[346] According to the dissent, the same reasoning prevented plaintiffs from pursuing Fifth Amendment claims against state and local defendants in a parallel

mechanism or at exactly what time" and contending that "[u]nder our caselaw [since 1890], a government could use reliable post-taking compensatory mechanisms (with payment calculated from the taking) without violating the Takings Clause").

[341] U.S. Const. amend. V.

[342] See *Knick*, 139 S. Ct. at 2170 (majority opinion) ("If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says—without regard to subsequent state court proceedings."); id. at 2175–77 (arguing that "under today's decision every one of the cases cited by the dissent would come out the same way" since they all "concerned requests for injunctive relief," such that "the plaintiffs would not be entitled to the relief they requested because they could instead pursue a suit for compensation").

[343] 28 U.S.C. § 1491.

[344] United States v. Causby, 328 U.S. 256, 267 (1946).

[345] *Knick*, 139 S. Ct. at 2186 n.5 (Kagan, J., dissenting).

[346] Id. at 2186.

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posture. For "[e]veryone agrees," Justice Kagan said, "that a § 1983 suit cannot be brought before a constitutional violation has occurred."[347]

Recall that prophylactic remedial doctrines permit the overenforcement of certain constitutional provisions in service of values like administrability and deterrence.[348] That is exactly how the *Knick* dissent treated Tucker Act takings claims. Compare the *Tekoh* dissent, which was likewise written by Justice Kagan and joined by Justices Breyer and Sotomayor. The *Tekoh* dissent was willing to "assume" that the majority was correct to portray *Miranda* as providing "prophylactic" rights by "extend[ing] beyond—in order to safeguard—the Fifth Amendment's core guarantee."[349] But unlike the *Knick* dissent, the *Tekoh* dissent advocated "a broad construction [of] § 1983's broad language"—one broad enough to cover prophylactic rights violations.[350]

The inconsistency between the treatment of the constitutional claims in the *Knick* dissent and the *Tekoh* dissent is stark. In *Knick*, Justice Kagan and company argued that the government duty invoked by takings plaintiffs *could not* form the foundation of a Section 1983 suit *because it was prophylactic*.[351] In *Tekoh*, the same cohort (minus the late Justice Ginsburg) argued that the government duty invoked by *Miranda* plaintiffs *could* form the foundation of a Section 1983 suit *even if it was prophylactic*.[352] Using the *Knick* dissent's characterization, moreover, the claim at issue there appears easily to clear the bar the *Tekoh* dissent set for a "right[] . . . secured by the Constitution" under Section 1983's text.[353] The *Tekoh* dissent said (first) that a "right[]" was "anything that creates specific 'obligations binding on [a] governmental unit' that an individual may ask the judiciary to enforce"—and (second) that "secured by the Constitution" meant "'protect[ed] or ma[de] certain' by the country's foundational charter."[354] The *Knick* dissent (first) called the government duty at issue an "obligation," making clear that an individual

[347] Id. at 2183–84.
[348] See supra Subsection II.A.1.
[349] 142 S. Ct. 2095, 2110 (2022) (Kagan, J., dissenting).
[350] Id. at 2108–10.
[351] See 139 S. Ct. at 2183.
[352] 142 S. Ct. at 2110 (Kagan, J., dissenting).
[353] 42 U.S.C. § 1983.
[354] 142 S. Ct. at 2108 (Kagan, J., dissenting) (alterations in original) (first quoting Dennis v. Higgins, 498 U.S. 439, 448–49 (1991); and then quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 527 (1939) (opinion of Stone, J.)).

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could seek judicial enforcement.[355] And the *Knick* dissent (second) described this right as "aris[ing] from—or 'rest[ing] upon'—the Fifth Amendment," thus indicating its protection by the nation's founding document.[356]

Even if one could distinguish the two cases on some ground, the *Knick* dissent's forceful rejection of Section 1983 suability for prophylactic constitutional claims still contradicts the *Tekoh* dissent's eager acceptance of the same. The *Knick* dissent insisted that its approach did not "treat[] takings claims worse than other claims founded in the Bill of Rights."[357] The same Justices' tone in *Tekoh* casts doubt on this denial—and demonstrates why these comparator cases provide a characteristic example of opaque inconsistency.

The framework outlined above introduces both conceptually and illustratively a large body of constitutional remedies doctrines that treat discrete substantive concerns differently. The catalog is extensive but not exhaustive, and its borders can be cloudy and contestable. Someone may think, for instance, that a case described here as opaquely inconsistent is actually translucently inconsistent—or that it does not demonstrate remedial inconsistency at all. But that should not detract from the bigger-picture argument that remedial inconsistency is present, prevalent, and patterned along analytically important lines throughout constitutional law.

III. IDEAS FOR IMPROVEMENT

The point of this project is to center remedial consistency as an important, but not absolute, aspect of constitutional adjudication. The point is *not* to suggest that remedial consistency should always control.

People doubtless have diverging ideas about whether the instances of remedial inconsistency canvassed above amount to justifiable variations or superficial distinctions. Such discrepancies surely derive to some extent from contrasting conclusions about whether discrete substantive concerns are similar in meaningful ways—and to some extent from different interpretive methodologies privileging different values to different degrees. Assorted instances of inconsistency, that is, may be acceptable or unacceptable to different people according to whether they

[355] 139 S. Ct. 2162, 2186 n.5 (2019) (Kagan, J., dissenting).
[356] Id. (quoting Jacobs v. United States, 290 U.S. 13, 16 (1933)).
[357] Id. at 2184.

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follow an interpretive approach that favors equity or history or deference to democratic preferences—or any number of other priorities. This project is agnostic among methodologies, as all mainstream interpretive approaches leave room for generality and neutrality in indeterminate interstices.

From the descriptive framework set forth above, what normative lessons can one draw about improving how the judiciary approaches remedial consistency? A consideration of four ideas—roughly summarized as enhancing attention, increasing transparency, decreasing overdetermination, and reconsidering foundations—follows.

A. Enhancing Attention

The first idea for improvement is simple: enhance attention on remedial consistency in constitutional adjudication by spotlighting occasions for adherence and explaining departures. One way to give the remedial consistency paradigm a more central role is by imagining a rebuttable presumption by which doctrines should apply the same way to discrete referents unless circumstances justify idiosyncratic treatment.

The contention is not that this presumption should exist as a formal matter. In many situations, it would be too difficult to establish a baseline about what consistency would entail.[358] And current court practices already follow this presumption to a large extent, with judges and litigants espousing consistency across substantive concerns. Nevertheless, imagining a rebuttable presumption in favor of remedial consistency could pay dividends by encouraging relevant actors to focus on the idea early and affirmatively, to accord it significant analytical weight, and to articulate in express terms any reasons why it should not control. It is hard to believe, for instance, that the unanimous Supreme Court in *Tanzin v. Tanvir* would have felt comfortable ignoring the parallels between the case at bar and the *Bivens* context[359]—which recurred throughout the case

[358] For an example from the rulemaking context, Professor Marcus describes a difficulty that can arise where two bodies of law intersect. See Marcus, supra note 25, at 1205 (explaining that "[i]f habeas corpus law is a distinct substantive category, then [Federal Rule of Appellate Procedure 22, which regulates appeals in habeas cases,] is substance-specific"—but that "[i]f the[] discrete regimes [underlying habeas law] are the relevant substantive categories, then Rule 22 is trans-substantive, since it regulates habeas appeals of petitioners challenging criminal convictions as well as immigration detention").

[359] See supra Subsection II.C.2.

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file[360]—if remedial consistency had occupied a more prominent place in the decision-making matrix.

Now is an opportune time to focus attention on the remedial consistency paradigm precisely because of its apolitical properties. Significant skepticism surrounds the Supreme Court's legitimacy, especially since (but not exclusively because of) *Dobbs v. Jackson Women's Health Organization*,[361] and a substantial cause is the perception that political priorities dictate the Justices' decisions.[362] The problem has become so pressing that Justices themselves have publicly scuffled over it.[363] Of course, scholars appreciate that "[l]egitimacy is a complex and puzzling concept."[364] Professor Richard Fallon, for instance, splits the idea into sociological, moral, and legal legitimacy. "Sociological legitimacy depends on an external perspective: Does the public view the legal system and its institutions as worthy of respect and obedience . . . ?"[365] By contrast, "[m]oral legitimacy is an inherently normative concept, focusing on whether people *should* treat a legal regime or its institutions as worthy of respect and obedience."[366] And "legal legitimacy depends on an internal perspective," such that "a Supreme Court decision is legally legitimate if the Justices use

[360] See, e.g., Tanvir v. Tanzin, 915 F.3d 898, 903 (2d Cir. 2019) (Jacobs, J., dissenting from denial of rehearing en banc) ("The panel has done what the Supreme Court has forbidden: it has created a new *Bivens* cause of action, albeit by another name and by other means."); id. at 905 (Cabranes, J., dissenting from denial of rehearing en banc) ("'We are not extending *Bivens*,' the panel in effect insists. 'We are simply presuming that Congress legislated a *Bivens*-like remedy—*sub silentio*—in enacting RFRA.' This rationalization is as flawed as it is transparent.").

[361] See Pew Research Center, supra note 22 (reporting, as of August 2022, that "45% of U.S. adults say the court has too much power, up 15 percentage points from the share who said this in January (30%)" and that "nearly two-thirds of Democrats (64%) say the Supreme Court has too much power, up from the 40% who said this in January [2022], and almost three times the share who said this in August 2020 (23%)").

[362] See id.; see also supra text accompanying note 22 (discussing survey results showing a dim view of the extent to which people think the Justices rely on their political views in deciding cases).

[363] See Jessica Gresko, Supreme Court Justices Spar Over Court Legitimacy Comments, Associated Press (Oct. 26, 2022), https://apnews.com/article/abortion-us-supreme-court-elena-kagan-samuel-alito-government-and-politics-10bf92ae6830573054da5f756a029d1c [https://perma.cc/E5XU-F48M] (discussing remarks by Chief Justice Roberts and Justices Alito and Kagan).

[364] Tara Leigh Grove, The Supreme Court's Legitimacy Dilemma, 132 Harv. L. Rev. 2240, 2240 (2019) (reviewing Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court (2018)).

[365] Id. at 2244 (citing Fallon, supra note 364, at 21).

[366] Id. (citing Fallon, supra note 364, at 21, 24).

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interpretive methods that are generally accepted within the legal culture."[367]

Comments from Justice Kagan capture how some regard the controversy engulfing the Court as imperiling all three forms of legitimacy—and suggest how intensifying the focus on consistency in constitutional adjudication could help respond to such concerns. "When courts become extensions of the political process, when people see them as extensions of the political process, when people see them as trying just to impose personal preferences on a society irrespective of the law, that's when there's a problem," Justice Kagan declared—"and that's when there ought to be a problem."[368] In short, Justice Kagan asserted, the Court loses legitimacy—sociological (given the focus on what "people see"), moral (given the focus on when "there ought to be a problem"), and legal (given the focus on courts proceeding "irrespective of the law")—when the population believes that the Justices are acting "political[ly]," whatever that means.[369]

In the present moment, inconsistent rulings, including in the constitutional remedies context, represent an important source of such beliefs. Recall Professor Vladeck's contention—about the shadow docket treatment of S.B. 8 and religious liberty cases—that "inconsistent rulings . . . drive home the perception, if not the reality, that the court is advancing a partisan political agenda and not a legal one"—and that concerns like this "go[] straight to the court's legitimacy."[370]

Professor Price observes that our governmental system may "function in a divided polity only if both sides accept the basic legitimacy of procedures (such as judicial review) for elaborating [the Constitution's] meaning and resolving concrete disputes."[371] Price's idea of "symmetric constitutionalism" bears a kinship to the presumption of remedial

[367] Id. (citing Fallon, supra note 364, at 35–36).

[368] Josh Gerstein, Kagan Repeats Warning That Supreme Court Is Damaging Its Legitimacy, Politico (Sept. 14, 2022, 5:56 PM), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766 [https://perma.cc/BCQ7-JWV8].

[369] Id.

[370] Vladeck, supra note 62. Even if constitutional remedies rulings were not part of the public's problem with "politics" in the law, they could still be part of the solution. One could hope, for instance, that employing a presumption making remedial rulings more consistent across constitutional contexts (or encouraging meaningful explanations for why they are not) would renew some faith in the Supreme Court's commitment to decision-making on appropriate bases at least among prominent commentators, which could filter down to the population more broadly.

[371] Price, supra note 17, at 1283.

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consistency to the extent that both advance the notion that "[i]nsofar as the governing legal materials of text, structure, precedent, and history leave room for judicial discretion, courts in a polarized period should lean towards outcomes, doctrines, and rationales that confer valuable protections across both sides of the Nation's major political divides."[372] While seeking similar ends, however, these models employ different means. Where indeterminacy persists after analyzing more traditional factors, symmetric constitutionalism appears to encourage courts to make decisions on the basis of their partisan consequences.[373] The presumption of remedial consistency, by contrast, encourages courts to premise decisions on whether discrete categories of issues, interests, and facts are logically and legally similar. So political evenhandedness constitutes an input of symmetric constitutionalism but an output of remedial consistency.

A special role seems open to legal scholars here. In some ways, the dissent's failure in *Vega v. Tekoh* to grapple with the implications of the dissent in *Knick v. Township of Scott* on broader questions of suability for prophylactic constitutional claims is unsurprising.[374] Conceptually, the takings context is quite removed from the *Miranda* context. And it may have been unrealistic to expect the counsel or law clerks working up a case on Section 1983's text to infer highly abstract lessons from a previous decision on an idiosyncratic ripeness issue—let alone from the *dissent* in a previous decision on an idiosyncratic ripeness issue. Indeed, not a single Supreme Court brief in *Tekoh* attempted to rely on or distinguish the dissent's treatment of prophylactic claims in *Knick*.

Federal courts scholars acting as amici could have examined the extent to which remedial precedents like *Knick* bore on *Tekoh*. (Given that the *Knick* majority did not reject the dissent's perspective on prophylactic litigation but adopted an alternative interpretation where just compensation claims state substantive constitutional violations,[375] Justice Kagan's contention that "[e]veryone agrees that a § 1983 suit cannot be

[372] Id. at 1274–75.

[373] See id. at 1278 ("Symmetric constitutionalism . . . is a judicial ethos in which courts, when possible, favor outcomes, doctrines, and rationales that distribute benefits across the country's major ideological divides. It seeks to orient constitutional decision-making towards achieving bipartisan appeal (or at least acceptance) and away from zero-sum competition between partisan understandings.").

[374] See supra Subsection II.C.2.

[375] See supra notes 337–48 and accompanying text.

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brought before a constitutional violation has occurred" remained live.[376]) Similar situations will arise time and again. To the extent that scholars possess panoramic doctrinal expertise and privilege law development over policy outcomes, they may be uniquely capable of exposing and exploring issues of remedial consistency before courts.

B. Increasing Transparency

As mentioned, Professor Marcus defines transsubstantivity as encompassing "doctrine that, *in form and manner of application*, does not vary from one substantive context to the next."[377] This articulation connects with the insight that there are at least two structural dimensions along which a legal rule can vary: what one could call its *rationale* (which relates to its "form," in Marcus's words) and what one could call its *range* (or its "manner of application," to Marcus).[378]

Legal decisions exhibiting a mismatch between a doctrine's rationale and an appropriate range are commonly perceived as inconsistent in problematic ways. Of overly broad rationales, Professor Frederick Schauer explains that "[t]o speak of a decision as 'unprincipled' is typically to say that a court gave as a reason for a decision a reason it was not in fact willing to follow in subsequent cases, thus suggesting that the reason . . . was not really a reason it took very seriously."[379] And of overly narrow rationales, he writes that because "a court giving a reason for its decision is in effect committed to the outcomes of some number of future cases whose factual detail it cannot now comprehend or accurately anticipate," "it may be reluctant to provide reasons any broader than what is absolutely necessary to explain what it has done in the case before it."[380] This can produce criticisms that such decisions turn on "ad hoc improvisations" instead of "general principles."[381]

The remedial-inconsistency framework outlined above includes three categories ranging from highest to lowest degree of clarity in non-

[376] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2183 (2019) (Kagan, J., dissenting).
[377] Marcus, supra note 25, at 1191 (emphasis added); see supra text accompanying note 26.
[378] See Marcus, supra note 25, at 1203–06.
[379] Schauer, supra note 41, at 177–78.
[380] Id. at 180.
[381] Richard Re, On "A Ticket Good for One Day Only," 16 Green Bag 2d 155, 161–63 (2013) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in the judgment)).

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transsubstantivity.[382] As one moves from transparent to translucent to opaque inconsistency, the rationale–range mismatch becomes greater. Each category comprises doctrines resting on non-transsubstantive ranges: regardless of how courts describe them, they all treat discrete referents differently. But only transparently inconsistent doctrines rest on non-transsubstantive rationales too: these areas of law treat discrete referents differently *on their faces*. Accordingly, for this category (and this category alone), there is no mismatch. Translucently inconsistent doctrines rely on transsubstantive rationales, but the fact that their non-transsubstantive ranges are not particularly difficult to predict ameliorates the mismatch to some extent. By contrast, the non-transsubstantive ranges of opaquely inconsistent doctrines belie their transsubstantive rationales only upon inductive analysis of multiple applications, making them the most problematic on this score.

What emerges is a general principle: (if all else is equal) the clearer, the better. For judicial opinions to be translucent about their inconsistency is better than being opaque, and for opinions to be transparent about their inconsistency is better still. Increasing transparency should entail the favorable effects of judicial candor, including democratic accountability.[383] For increasing transparency would facilitate the relevant institutional actors publicly assessing, affirming, altering, or abandoning inconsistent doctrines as appropriate.

Transsubstantivity "is not 'sacred.' "[384] As Professor Marcus explains, "Sometimes equal treatment of legal processes involving different antecedent regimes makes little sense, especially when antecedent regimes involve particular policy problems that specially-tailored process law might address."[385] One can generalize about some situations where non-transsubstantive approaches may be more or less desirable. Marcus opines, for instance, that "[a] court can most likely overcome its institutional limitations and properly craft a substance-specific rule when the court does so to enable the legal process to achieve the policy

[382] See supra Part II.

[383] See Fallon, supra note 136, at 1112; see also Richard H. Fallon, Jr., A Theory of Judicial Candor, 117 Colum. L. Rev. 2265, 2280–87 (2017) (discussing the theory and importance of "judicial candor" in legal decision-making).

[384] Marcus, supra note 25, at 1221 (quoting Stephen B. Burbank & Stephen N. Subrin, Litigation and Democracy: Restoring a Realistic Prospect of Trial, 46 Harv. C.R.-C.L. L. Rev. 399, 409 n.56 (2011)).

[385] Id.

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objectives in the antecedent regime more accurately."[386] Applied to constitutional remedies, this could mean that court-created doctrinal idiosyncrasies are more warranted where they overenforce rather than underenforce individual rights relative to the legislatively determined remedial norm, given that such protections may suffer neglect at the hands of the political actors they constrain.[387] Or it could mean that court-created doctrinal idiosyncrasies are more defensible where necessary to protect rights that parties cannot enforce through other means.[388]

In addition to courts, Congress has wide discretion to "enact substance-specific process law,"[389] including in the constitutional remedies context. Regardless of the decision-maker, the ultimate "wisdom" of each "departure[]" from a transsubstantivity-promoting paradigm must be determined on an individual basis.[390] For "rights reflect interests," and "which interests should be protected in which ways depends partly on enduring values, often as reflected in constitutional language, but partly also on historically contingent, instrumental reasoning."[391] What matters is that by encouraging judges to justify doctrines' non-transsubstantive ranges through non-transsubstantive rationales, increasing transparency can permit later courts or members of Congress to weigh the costs and benefits to particular interests of particular interventions—and to decide whether to retain, recraft, or reject them.[392]

Miranda doctrine provides a useful example. Different aspects of the original decision's tripartite justification—regarding (1) the necessity of

[386] Id. at 1237.

[387] See Fallon & Meltzer, supra note 104, at 1788 ("The Constitution . . . contemplates a judicial 'check' on the political branches not merely to redress particular violations, but to ensure that government generally respects constitutional values—one of the hallmarks of the rule of law.").

[388] See Evan H. Caminker, *Miranda* and Some Puzzles of "Prophylactic" Rules, 70 U. Cin. L. Rev. 1, 9 (2001) (positing that while "[m]uch of the time, . . . the Supreme Court apparently believes that the fit between the results of a doctrinal test and what it purports to measure is, shall we say, close enough for government work," "sometimes, the Court will conclude that . . . the direct doctrinal inquiry actually proves to be insufficiently protective of the constitutional values at stake given the persistence of unconstitutional conduct"—and arguing that "this is the best, and a fully sufficient, explanation for and justification of *Miranda*'s so-called prophylactic rule governing custodial interrogations").

[389] Marcus, supra note 25, at 1234.

[390] Id.

[391] Fallon, supra note 129, at 963.

[392] See Fallon, supra note 136, at 1112 (arguing that "it would dispel confusion and enhance clarity of analysis for the Court to frame debates about the propriety of remedies in terms that bring all pertinent considerations clearly into view").

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the intervention, (2) the multiplicity of relevant values, and (3) the importance of the underlying rights[393]—may be more or less attractive to different people for different reasons. The first part is consistent with Professor Marcus's argument about non-transsubstantive rules being most appropriate when aimed at "achiev[ing] the policy objectives in the antecedent regime more accurately."[394] The second part supports the idea that the privilege against self-incrimination and the right to counsel during custodial interrogation "involve particular policy problems that specially-tailored process law might address."[395] The third part seems more dubious because discrete constitutional rights strike various coalitions as more or less important because of different precommitments—and because this form of favoritism may seem especially political in character to those who disagree with a court's appraisal.[396]

But for present purposes, more important than the *Miranda* justifications' potency is their presence. By acknowledging and rationalizing the imposition of heightened protections relative to the remedial norm (both in *Miranda* itself and in subsequent cases doubling down on the doctrine's non-transsubstantivity[397]), the Supreme Court left the rule open to assessment and adjustment as necessary to align with whatever policies support a special approach. Indeed, the Court has continually adapted *Miranda*'s requirements to diverse factual circumstances under the principle that the doctrine's applications must be "justified . . . by reference to its prophylactic purpose."[398] As students of criminal procedure know, Congress attempted to reevaluate *Miranda* too, but the Justices responded that "*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress."[399] Whoever the proper institutional actors are, *Miranda*'s transparent inconsistency allows them to regulate this corner of constitutional

[393] See supra Subsection II.A.1.

[394] Marcus, supra note 25, at 1237.

[395] Id. at 1221.

[396] See Moore, supra note 18 (presenting survey results indicating that Republicans and Democrats ascribe different levels of importance to discrete Bill of Rights amendments); see also supra text accompanying note 18 (discussing some of these survey results).

[397] See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 240–41 (1973).

[398] Davis v. United States, 512 U.S. 452, 458 (1994) (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987)).

[399] Dickerson v. United States, 530 U.S. 428, 431–32 (2000) (explaining that after *Miranda*, "Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of [statements made during custodial interrogation] should turn only on whether or not they were voluntarily made").

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remedies in an especially open manner. The point is not about the substance of *Miranda* jurisprudence; the point is about the process the Court has followed in elaborating it.

If *Miranda* illustrates transparency about inconsistent decision-making, temporal-justiciability doctrine illustrates its lack. There are many ways to comprehend, and to criticize, *Los Angeles v. Lyons*.[400] The majority, for instance, never mentioned that the plaintiff was Black—nor, as Justice Marshall's dissent discussed, that he "alleged racial discrimination in violation of the Equal Protection Clause."[401] Likewise, despite noting that Los Angeles police chokeholds had caused a number of deaths, the majority failed to acknowledge, as the dissent disclosed, that twelve of the sixteen people who had died were Black men—such that "in a City where Negro males constitute[d] 9% of the population, they . . . accounted for 75% of [chokehold] deaths."[402] Communities of color and people in poverty interact with the policing and prison systems at disproportionate rates.[403] So to the extent that constitutional claims from those contexts require relatively fact-sensitive analyses, such populations are especially likely to suffer disadvantageous effects. The Supreme Court has nevertheless failed adequately to address not only the

[400] See, e.g., Richard H. Fallon, Jr., Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of *Lyons*, 59 N.Y.U. L. Rev. 1, 5–9 (1984) (arguing that *Lyons* "exemplifie[d]" trends involving "the hostility to the phenomena of public law litigation, and the unrestrained reworking of doctrine to obtain a 'restrained' result" and then introducing themes that emerge when "the case's implications are explored and its logic critiqued"); Linda E. Fisher, Caging *Lyons*: The Availability of Injunctive Relief in Section 1983 Actions, 18 Loy. U. Chi. L.J. 1085, 1085 (1987) (arguing that "*Lyons* was incorrect, in terms of both the Court's rationale and its use of precedent" and that it is therefore "desirable to construe the case narrowly, to limit its application, and, when possible, to harmonize its broad reaching language with a more traditional approach to standing and equitable relief" (footnote omitted)); Brandon Garrett, Note, Standing While Black: Distinguishing *Lyons* in Racial Profiling Cases, 100 Colum. L. Rev. 1815, 1817–18, 1834–39 (2000) (arguing that "*Lyons* has needlessly distracted courts from focusing solely on group harm in racial profiling cases alleging equal protection violations").

[401] Los Angeles v. Lyons, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting).

[402] Id.; see id. at 100 (majority opinion).

[403] See Aliza Plener Cover, Hybrid Jury Strikes, 52 Harv. C.R.-C.L. L. Rev. 357, 368, 368 n.64 (2017) (providing evidence that "communities of color have a disproportionate rate of contact with law enforcement" that "extend[s] to . . . contact on the streets and rates of incarceration and probation"); Darren Lenard Hutchinson, *Who* Locked Us Up? Examining the Social Meaning of Black Punitiveness, 127 Yale L.J. 2388, 2400 (2018) (reviewing James Forman, Jr., Locking Up Our Own: Crime and Punishment in Black America (2017)) ("As many commentators have demonstrated, the 'War on Drugs' has severely impacted 'low-income African American communities.' " (quoting Forman, supra, at 17)).

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formal discrepancies between such doctrines[404] but also the functional discrepancies they can produce. Increasing transparency here should encourage decision-makers to confront and account for both.

Courts and observers should remain attentive to the possibility that under "remedial equilibration" (through which "[r]ights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence"[405]), "more remedy may mean less right."[406] Responsive adjustments are often possible at the political level, though, and increased transparency could help highlight where such responses are most needed. Plus, remedial consistency could help facilitate rights expansions in some situations by permitting courts to better predict how heightened protections might fit into the broader legal landscape.

C. Decreasing Overdetermination

Another idea for improving remedial consistency in constitutional adjudication involves decreasing overdetermination and related practices. Many propositions in judicial opinions are overdetermined, meaning supported by multiple lines of reasoning.[407] Overdetermination can entail certain advantages, like reducing the odds of appellate reversal and satisfying stakeholders of a decision's soundness.[408] The tendency is also understandable as a matter of both lawyerly training and human psychology. The judges who craft constitutional remedies come from a tradition where attorneys learn that as zealous advocates, they should provide courts with a plethora of arguments for their clients' positions.[409]

[404] See supra Subsection II.B.1.

[405] Levinson, supra note 24, at 858.

[406] John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 80 (1998).

[407] See Joel Levin, Justification and the Law, 32 Emory L.J. 987, 1004 (1983) ("In some cases, there will be a number of rules, each of which could have determined the holding.").

[408] See id.

[409] Indeed, "the first national code of legal ethics in this country" provided that "[i]n the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense." James M. Altman, Considering the A.B.A's 1908 Canons of Ethics, 71 Fordham L. Rev. 2395, 2395, 2453 (2003) (quoting Code of Pro. Ethics Canon 15 (Am. Bar Ass'n, Proposed Official Draft 1908)). The current American Bar Association rules provide that lawyers should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and must act "with zeal in advocacy upon the client's behalf" but that lawyers are "not bound . . . to press for every advantage that might be realized for a client." Model Rules of Pro. Conduct r. 1.3 cmt. 1 (Am. Bar Ass'n 2020).

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And common phenomena like confirmation bias and motivated reasoning could help explain why judges, having concluded that the law best supports a particular outcome, would invoke an abundance of explanations in the opinion-writing process.[410]

But overdetermination and the like can entail disadvantages too, including by introducing unnecessary and unjustified instances of inconsistent doctrine. Examples from three contexts demonstrate such downsides. First, it would be hard to overstate how much consternation the transparently inconsistent statement in *Massachusetts v. EPA*[411] that states are entitled to "special solicitude" in the standing analysis has produced.[412] But there is good reason to think the Supreme Court's comment was superfluous. There are three bases on which states can proceed as plaintiffs in federal courts: proprietary standing, sovereign standing, and quasi-sovereign standing.[413] The *Massachusetts* opinion suggested that the Commonwealth could claim at least proprietary standing under the usual doctrinal rubric, and the opinion arguably linked special solicitude exclusively to sovereignty-related standing anyway.[414] So special solicitude, whatever it meant, may have been unnecessary.[415]

Second, a recent high-profile case refocused attention on a related rhetorical device. In June 2023, *Students for Fair Admissions v. President*

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[410] See Allison Orr Larsen, Constitutional Law in an Age of Alternative Facts, 93 N.Y.U. L. Rev. 175, 181, 190 (2018) (asserting that "judges, like the rest of us, are vulnerable to confirmation bias" and that "confirmation bias and motivated reasoning" have long affected constitutional law); id. at 190 n.76 (explaining that "[m]otivated reasoning and confirmation bias are phrases used by psychologists to explain the human tendency to make decisions with a prior goal in mind and to confirm what one already believes to be true"); see also Fallon, supra note 136, at 1098–100 (discussing motivated reasoning).

[411] 549 U.S. 497 (2007).

[412] Id. at 520; see Note, An Abdication Approach to State Standing, 132 Harv. L. Rev. 1301, 1307 (2019) (explaining that "[i]mmediately after *Massachusetts v. EPA* was decided, commentators began to question the weight, scope, and longevity of special solicitude for states, in no small part because the logic undergirding the rule was ambiguous"—and that "[m]ore than ten years on, the confusion has not abated" (footnotes omitted)).

[413] See Katherine Mims Crocker, Note, Securing Sovereign State Standing, 97 Va. L. Rev. 2051, 2055–69 (2011).

[414] See *Massachusetts*, 549 U.S. at 522 (stating that "[b]ecause the Commonwealth 'owns a substantial portion of the state's coastal property,' it has alleged a particularized injury in its capacity as a landowner" (quoting an affidavit)); see also id. at 520 ("Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis").

[415] See Katherine Mims Crocker, Not-So-Special Solicitude, 109 Minn. L. Rev. (forthcoming 2024) (manuscript at 13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4713677 [https://perma.cc/KD4J-2LUA].

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& Fellows of Harvard College[416] held race-conscious admissions programs improper under the Equal Protection Clause.[417] There, the Supreme Court—and especially Justice Kavanaugh's concurrence—put a great deal of stock into a statement in Justice O'Connor's majority opinion from the 2003 case *Grutter v. Bollinger*,[418] which grudgingly upheld the University of Michigan Law School's race-conscious admissions approach while stating that such programs "must be limited in time."[419] *Grutter* specified that "the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity."[420] *Grutter* ended this discussion (and in effect, the majority opinion) by remarking that "[i]t has been 25 years" since the Court first allowed a similar program; that in the interim, "the number of minority applicants with high grades and test scores has . . . increased"; and that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary."[421]

In *Students for Fair Admissions*, the majority suggested—and Justice Kavanaugh accepted—that Justice O'Connor's statement about "25 years" set an actual constitutional expiration date.[422] That would make the force of *Grutter* as precedent highly inconsistent with usual practices. For as Professor Dan Epps has put it, "[t]his is a really weird feature of *Grutter*"—and if understood as a "ticking time clock," is "just not a thing that we do."[423]

Third, as a more systemic matter, opaquely inconsistent reasoning appears especially likely to occur in comparator cases where courts take a kitchen-sink approach to justifying their decisions. The divergent treatment of national security implications in *Egbert v. Boule* and *Tanvir* provides a demonstration. While Justice Thomas's majority opinion in *Boule* emphasized what Justice Gorsuch and the dissenters all chided as

[416] 143 S. Ct. 2141 (2023).
[417] See id. at 2175.
[418] 539 U.S. 306 (2003).
[419] Id. at 341–42.
[420] Id. at 342.
[421] Id. at 343.
[422] See *Students for Fair Admissions*, 143 S. Ct. at 2172–73; id. at 2224 (Kavanaugh, J., concurring).
[423] Divided Argument, Relentless Personal Attacks, at 51:25, 54:03 (Nov. 14, 2022), https://www.dividedargument.com/episodes/relentless-personal-attacks [https://perma.cc/LQE5-FUHG] (podcast episode).

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attenuated national security ties, Justice Thomas's majority opinion in *Tanvir* paid no attention to any such connections.[424] As it turns out, the outcome in *Boule* was overdetermined. The Supreme Court stressed that anything can derail efforts to obtain *Bivens* relief in situations beyond the precise circumstances of the original trilogy.[425] Besides national security issues, the Court provided additional and fully adequate reasons to deny damages.[426] So it was unnecessary to invoke national security implications in the first place.

Tradeoffs between so-called major and minor preferences could help explain this kind of discrepancy. As Judge Posner put it, just like everyone else, judges "have multiple desires, often clashing" that "they must weigh . . . against each other."[427] Where judges pursue major preferences for following consistent principles at the expense of minor preferences for achieving particular outcomes, observers celebrate their ostensible objectivity.[428] Opaque inconsistency may reveal instances of the opposite propensity: where judges pursue major preferences for achieving particular outcomes at the expense of minor preferences for following consistent principles. Perhaps, then, the *Tanvir* majority cared more about expanding remedies for religious freedom claims than about avoiding national security entanglements.[429] Or perhaps the *Knick* dissenters were

[424] See supra Subsection II.C.2.

[425] See Egbert v. Boule, 142 S. Ct. 1793, 1805 (2022) ("A court faces only one question: whether there is *any* rational reason (even one) to think that *Congress* is better suited to 'weigh the costs and benefits of allowing a damages action to proceed'" (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017))); see also supra note 181 and accompanying text (discussing the *Bivens* trilogy).

[426] See id. at 1806 (regarding the Fourth Amendment claim, stating that "Congress has provided alternative remedies . . . that independently foreclose a *Bivens* action"); id. at 1807 (regarding the First Amendment claim, stating that because of "social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties," "'Congress is in a better position to decide whether or not the public interest would be served' by imposing a damages action" (first quoting Anderson v. Creighton, 483 U.S. 635, 638 (1987); and then quoting Bush v. Lucas, 462 U.S. 367, 390 (1983))).

[427] Richard A. Posner, The Supreme Court, 2004 Term—Foreword: A Political Court, 119 Harv. L. Rev. 31, 50–51 (2005).

[428] See id. at 49–52; see also Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 129–30 (discussing how a decision can garner praise when it "purportedly cuts against a Justice's policy preferences and therefore proves the objectivity of his interpretive methodology").

[429] See supra Subsection II.C.2.

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focused on denying a federal forum for takings claims rather than permitting damages for violations of prophylactic constraints.[430]

From a rule of law perspective, the propensity to privilege outcomes over principles poses significant problems. This is all the more true in the constitutional remedies context, where favoritism for particular claims can hide behind a patina of apolitical process talk. But judges can at times avoid this kind of conflict by disciplining their reliance on overdeterminative reasoning. And practically speaking, Supreme Court Justices can do so to a greater extent than lower court judges can because the advantages of overdetermination decrease as the level of review increases. Supreme Court Justices need not worry about reducing the odds of appellate reversal.[431] And as for satisfying stakeholders of a decision's soundness,[432] the Justices "are not final because [they] are infallible, but . . . are infallible only because [they] are final" (to quote Justice Robert Jackson).[433] Scattershot justifications can carry more disadvantages coming from higher levels of the judiciary too. With some lower court judges feeling duty-bound to observe most every high court jot and tittle, the Justices can cause considerable confusion and conflict by piling on unnecessary proclamations.[434] In light of the Court's ever-shrinking merits docket, moreover, the Justices could perhaps make better use of their time by deciding more cases than by giving more reasons for the decisions they would have made anyway.[435]

D. Reconsidering Foundations

The final idea for improvement concerns reconsidering foundations. Sometimes doctrines become inconsistent because courts harbor doubts about their soundness and carve out context-specific distinctions, producing variability where none existed before. And sometimes inconsistent doctrines become even *more* inconsistent because skeptical courts create even *more* context-specific distinctions. In important ways,

[430] See id.
[431] See supra text accompanying note 408.
[432] See id.
[433] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).
[434] See, e.g., Gaylor v. United States, 74 F.3d 214, 217 (10th Cir. 1996) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements.").
[435] See Meg Penrose, Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket, 72 SMU L. Rev. 8, 10 (2019) ("Despite having the lowest decisional output in the modern era, the Roberts Court is the most verbose Supreme Court in history.").

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emphasizing consistency favors a strong view of precedent by encouraging courts to apply settled principles broadly. But in these particular situations, emphasizing consistency could have the opposite effect by encouraging courts to reevaluate and perhaps (although not necessarily) to reject dubious foundational doctrines.

The "plan of the Convention" doctrine provides a helpful example. The 1996 case *Seminole Tribe of Florida v. Florida*[436] "launched" the Rehnquist Court's "sovereign immunity revolution" by holding that Congress cannot abrogate state sovereign immunity under its Article I powers.[437] The Supreme Court has continued to state this rule as dogma.[438] But beginning with *Central Virginia Community College v. Katz* in 2006 and accelerating with *PennEast Pipeline Co. v. New Jersey* and *Torres v. Texas Department of Public Safety* in recent years, the Court has begun implicitly chipping away at *Seminole Tribe*'s canonical status.[439] For to the extent these cases' respective holdings recognizing waiver under the Bankruptcy Clause, the eminent domain authority, and the Army and Navy Clauses do not provide persuasive reasons to treat those areas differently from the mine-run of congressional powers, the problem could be with *Seminole Tribe* itself. Focusing on consistency across constitutional contexts suggests that the time may be ripe to reconsider this precedent—as some jurists have long advocated.[440]

Bivens doctrine provides a more complex illustration.[441] The Supreme Court says its refusal to allow damages relief in cases presenting issues, interests, or facts apart from the specific circumstances of the original trilogy derives from its disdain for those cases' mode of analysis.[442] But instead of overruling them, "the Court's approach now looks much like

[436] 517 U.S. 44 (1996).

[437] Katherine Florey, Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine, 43 Wake Forest L. Rev. 765, 766 n.7 (2008); see *Seminole Tribe*, 517 U.S. at 72–73.

[438] See, e.g., PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2259 (2021).

[439] See supra Subsection II.C.1.

[440] See, e.g., *Seminole Tribe*, 517 U.S. at 99–100 (Stevens, J., dissenting) (asserting that compared with the majority opinion, "the better reasoning in Justice Souter's far wiser and far more scholarly [dissenting] opinion will surely be the law one day").

[441] See supra Subsection II.A.2.

[442] See, e.g., Hernández v. Mesa, 140 S. Ct. 735, 741–43 (2020) (stating that "*Bivens*, *Davis*, and *Carlson* were the products of an era when the Court routinely inferred 'causes of action' that were 'not explicit' in the text of the provision that was allegedly violated"; affirming that "expansion of *Bivens*" had since become "a 'disfavored' judicial activity"; and reiterating that "if 'the Court's three *Bivens* cases [had] been . . . decided today,' it is doubtful that we would have reached the same result" (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1855–57 (2017)).

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its predecessor's approach during the *Bivens* regime's brief rise: the thumb is just on the other side of the scale, with the earlier cases weighted toward and the later cases weighted against allowing relief."[443] The result is doctrinal disarray, where a more or less random set of situations gives rise to damages claims while all other situations do not—but maybe, possibly, theoretically could.[444]

Stressing remedial consistency points toward three potential solutions. The first is to embrace *Bivens* relief for all constitutional claims (subject to the possibility of affirmatively justified exceptions), which would be unthinkable for the current Court but would maximize consistency on the plaintiffs' preferred end of the spectrum. The second is to return to the *Bivens* regime's initial incarnation, which would be transparently inconsistent but conceptually coherent across contexts. The third is to overrule the foundational *Bivens* cases, which would provide a more candid explanation for the Court's recent moves and would maximize consistency on defendants' preferred end of the spectrum.

To be sure, there are compelling arguments against discarding all or any of the cases allowing *Bivens* remedies. In particular, as Justice Kennedy implied in *Ziglar v. Abbasi*, there are good reasons to believe that the pros of holding federal officials accountable for at least some constitutional violations outweigh the cons of doctrinal inconsistency.[445] Plus, "the Justices could someday swing back toward a willingness to provide plaintiffs relief—a prospect that preserving the present path would simplify."[446] The point for now, however, is that focusing on consistency provides an important concern supporting reconsideration amid competing concerns.[447]

[443] Katherine Mims Crocker, A Scapegoat Theory of *Bivens*, 96 Notre Dame L. Rev. 1943, 1963 (2021).

[444] See Egbert v. Boule, 142 S. Ct. 1793, 1810 (2022) (Gorsuch, J., concurring in judgment) (stating that the Court's current approach "'leaves a door ajar and holds out the possibility that someone, someday might walk through it' even as it devises a rule that ensures 'no one . . . ever will'" (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring))).

[445] See 137 S. Ct. at 1856–57 (explaining that "*Bivens* does vindicate the Constitution by allowing some redress for injuries" and "provides instruction and guidance to federal law enforcement officers going forward," such that "[t]he settled law of *Bivens* in th[e] common and recurrent sphere of [the search and seizure context], and the undoubted reliance upon it as a fixed principle in the law, are powerful reasons to retain it in that sphere").

[446] Crocker, supra note 443, at 1968.

[447] And greater consistency could yield distinctive, perhaps counterintuitive, benefits. To the extent the Court is correct that Congress is the constitutionally exclusive or practically superior regulator, for instance, the majority's present approach may be self-defeating. By

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In sum, the Supreme Court and the judiciary more generally could improve approaches to constitutional law by enhancing attention on remedial consistency, improving transparency where remedial inconsistency exists, decreasing overdeterminative reasoning and related practices, and embracing a willingness to reconsider (and perhaps reject) some foundational precedents.

CONCLUSION

In the present period of controversy surrounding the Supreme Court, remedial decision-making that maintains consistency across constitutional contexts seems less and less common but more and more crucial. For by affording evenhanded treatment, remedial consistency reduces opportunities for judges to play (and the public to perceive) favorites—or "politics," as some would say—among constitutional rights.

This Article has explained and explored the remedial consistency paradigm. At its heart is a novel framework for classifying instances of remedial inconsistency in constitutional law as transparent, translucent, or opaque depending on the clarity of doctrinal non-transsubstantivity. Transparently inconsistent doctrines apply differently to discrete referents on their faces. Background knowledge about the legal landscape reveals the variability inherent in translucently inconsistent doctrines. And one can discern the contradictions behind opaquely inconsistent doctrines only by analyzing a range of actual applications.

From this framework and numerous illustrations, the Article has drawn several insights about how stakeholders could seek to improve judicial approaches to constitutional remedies. As an initial matter, judges, litigants, and scholars should work to enhance attention on remedial consistency by, say, imagining a rebuttable presumption in favor of transsubstantivity. Judges should also try to increase the transparency underlying inconsistent doctrines so that appropriate institutional actors can evaluate their current and continuing justifications. Judges, and especially Supreme Court Justices, should likewise engage in efforts to decrease overdetermination and related practices in the opinion-writing

prevaricating about the extent to which *Bivens* claims are actually available, current doctrine may obscure the relative absence of accountability for constitutional violations by federal officials from the voting public. Id. at 1966. By more forthrightly rethinking this area, the Court could jumpstart the political reform process.

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process because of the danger of introducing pockets of opaquely inconsistent law. Finally, judges should be more willing to reconsider foundational precedents when doing so could expand remedial consistency while reducing unwarranted idiosyncrasies.

At bottom, this Article has offered a wide range of strategies for promoting the remedial consistency paradigm within constitutional law while preserving space for the major interpretive methodologies to operate. Especially insofar as these strategies can help improve judicial legitimacy by reducing concerns about courts playing politics with constitutional rights, they are well worth considering at this time of widespread skepticism.