

VIRGINIA LAW REVIEW

VOLUME 112

APRIL 2026

1-116

IN TRIBUTE: PROFESSOR FREDERICK SCHAUER

FOREWORD..... *Leslie Kendrick* 1

ESSAYS

The Shaping of Information
Flow in Law and Life..... *John Allenbach*
Richard Zeckhauser 4

First-, Second-, and Third-Order
Reasons in Legal Institutions,
with First Amendment Examples *Mark Tushnet* 27

A Wonderful Professional Relationship
Surpassed Only by a Personal One *Larry Alexander* 52

Fred Schauer: A Truly
Original Thinker *Jed S. Rakoff* 66

Deepfakes, Photographs, and
Trust in Evidence..... *Edward K. Cheng* 74

Constitutional Acceptance
in a Polarized Era *Amanda Shanor* 86

Schauer's Free Speech Comparativism..... *Adrienne Stone* 99

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

1-3

FOREWORD

*Leslie Kendrick**

I am delighted to introduce this special issue of the *Virginia Law Review Online*, which celebrates the life and work of my friend, mentor, and colleague, the late Fred Schauer. The essays that follow were written for a symposium entitled “Rules and Reasons: A Conference for Fred Schauer,” held here at the University of Virginia in September 2025 to honor Fred and mark the one-year anniversary of his passing, on September 1, 2024.

As a result, this collection is something beyond a regular law review issue, or even a regular festschrift. It is a memorial, a tribute, and the product of a gathering of a worldwide community. The scholars who assembled in September 2025 were a very distinguished group, as you will see as you read some of their work. Nevertheless, the most important distinction they all shared was that Fred mattered to them, and they mattered to Fred. The conference, and these essays, were created in Fred’s memory, but they also attest to his enormous impact and his enduring legacy across multiple areas of the law.

To give a small sense of that legacy, let me describe Fred by the numbers. Fred wrote more than 300 works, including 14 books, which he authored, edited, or co-edited. (And here, I must digress for a moment. When preparing the program for the conference, the Law School communications director wanted to include a full chronological list of Fred’s works. When she asked ChatGPT to produce such a list, it kept returning answers such as, “This is going to be a really long list. Are you

* Dean and Arnold H. Leon Professor of Law, University of Virginia School of Law.

sure you want such a long list?” and “Here are Fred Schauer’s top titles instead.” As she told me, Fred wrote so much that he defeated ChatGPT.)

Fred’s work cut across many areas of law and many dimensions, from the most practical to the most theoretical. The essays that follow address a multitude of topics, any one of which would occupy most scholars for a lifetime. Fred turned his considerable talents to each of these fields over the course of his remarkable career and contributed significantly to each.

Fred is also one of the most-cited legal scholars ever: A 2021 study put him in the top 20 most-cited legal scholars of all time, with 11,222 citations in books and articles as of that time, ahead of the likes of Herbert Wechsler and Henry Hart.¹ Even this astounding fact falls far short of capturing Fred’s legacy. In addition to that enormous impact on scholarship in English, Fred’s works have been translated into at least six other languages: Italian, Spanish, Portuguese, French, Chinese, and Turkish. Participants in our conference represented four countries, sixteen universities, and two courts of law—and are just a small sliver of the scholars and lawyers around the world who have been influenced by Fred and his work.

That is Fred by the numbers: he was a giant, by any measure.

But none of that captures Fred the person—Fred the teacher, mentor, and colleague. All of us who knew him have stories about how remarkable he was. Speaking for myself, I joined the Virginia Law School faculty the same year as Fred and his spouse Bobbie Spellman, in 2008. I was working on freedom of speech and was awestruck by Fred. The Law School provides new faculty members with a mentor, a senior scholar on the faculty who will read their work, give advice, and generally offer support. I asked if Fred could be my mentor because I thought that was the only chance I had of possibly getting this incredibly important person to read any of my work.

It did not take me long to realize how wrong I was. As incredibly accomplished as he was, Fred was equally unassuming, approachable, and—this is very important in a teacher and colleague—both honest and kind. In addition to being one of the most distinguished people in the legal academy, Fred was one of the most generous about reading others’ work, especially that of junior scholars. Fred not only read everything I ever sent him, but he did it in record time and always sent it back with a long email

¹ Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. Chi. L. Rev. 1595, 1602 (2021).

list of suggestions and comments, which ranged from the insightful to the devastating. He did the same for any scholar who asked him, junior or senior. He also took time to give junior scholars advice about new projects, potential future lines of inquiry, and that all-important but hard-to-articulate question of what kind of scholar one ought to be. He appreciated each of us for our individual talents and strengths and had a knack for engaging in those big career questions in a way that was at once knowing—about us, about the vagaries of legal academia—and supportive. (The last piece of advice Fred ever gave me was, “Don’t be a university president.”)

Fred was a first-generation law school graduate, a first-generation college graduate, and a first-generation high school graduate. Born in Newark, N.J., he attended Dartmouth College and then Harvard Law School. He started his teaching career at West Virginia University and worked at five very different institutions: WVU, the College of William & Mary, the University of Michigan, Harvard University, and finally the University of Virginia. He was a generous mentor and role model to first-generation students. Equally importantly, he was down to earth, and that is not just a nice thing to have in a colleague or teacher: for anyone who sometimes feels out of place in academia, it is vital. Where some distinguished scholars might insist upon their rank in ways quiet and loud, Fred was the opposite. He made everyone feel welcome. He felt no need to assert his status: he simply asserted his mind, which was assertion enough.

I could write as many words as Fred wrote across his lifetime and still not capture everything that was wonderful about him. I am grateful to the *Virginia Law Review* for publishing this collection of essays, and to all the authors who have contributed here. Many hands together paint a fuller picture of Fred Schauer the scholar, mentor, teacher, and friend.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

4–26

ESSAY

THE SHAPING OF INFORMATION FLOW IN LAW AND LIFE

*John Allenbach & Richard Zeckhauser**

INTRODUCTION

Fred Schauer showed how the law takes a messy, probabilistic world and uses rules to draw bright lines through it: liable or not, knowing or ignorant, guilty or innocent.¹ Such neat categorical boxes are a feature, not a bug, for the law. They serve two critical purposes: (1) they determine an outcome, and (2) they fulfill the law’s need for predictability and administrability.²

From an economic perspective, though, information comes in shades of gray, not black and white. Indeed, sometimes those grays include dots and waves and not merely tones, such as when potential states of the world are poorly defined. Beliefs update by degree, and uncertainties in the law are rarely resolved to one or zero before a decision must be made.

* Teaching Fellow, Kennedy School, Harvard University; Frank P. Ramsey Professor of Political Economy, Kennedy School, Harvard University. We are grateful to the editors of the *Virginia Law Review* for their careful editing and insightful suggestions. We thank the Mossavar-Rahmani Center for Business and Government for research support.

¹ Of course, the law sometimes uses standards or probabilistic thresholds (reasonableness tests, burdens of proof), but the ultimate result is a categorical determination.

² See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 95, 137 (1991); Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* 35–37 (2009); Frederick Schauer, *Formalism*, 97 *Yale L.J.* 509, 539 (1988); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *Duke L.J.* 557, 611 (1992) (underscoring the need for legal predictability).

Finally, information may be written in invisible ink, as when ignorance hits and individuals do not even recognize the existence of some states of the world.

When law imposes categorical boundaries on this amorphous, ill-defined reality, it does more than merely regulate information asymmetries. It creates new strategic landscapes, where the boundaries themselves create games among strategic players. Hold people liable for what they know, and they might choose not to learn. Punish lies but not misleading truths, and quasi-truths will flourish. When some reputations get protected but others sullied, collective identities become both a valuable resource and a significant vulnerability.

This Essay explores three conceptual domains, which lie well outside of traditional legal scholarship. Nonetheless, each of the three has strong implications for the law. Those domains are information asceticism, the strategic choice not to learn; paltering, misleading without lying; and reputational externalities, spillovers—positive or negative—from associations. In each case, we show how and where the law draws lines. We then use simple economic models to illustrate the incentives that follow. Schauer’s insights about legal categorization embrace the economic logic of uncertainty, generating predictable strategic responses that often reshape but rarely eliminate the asymmetries that underlie them.

I. STRATEGIC INFORMATION ASCETICISM

We use the term “Strategic Information Asceticism” to describe the phenomenon where individuals or institutions deliberately deny themselves otherwise valuable information to prevent others from accessing it and using it against them. A tech firm might avoid market testing if there is a chance the results will leak to a competitor. An intelligence agency might forgo further surveillance that would improve the success of an operation but risk tipping off the target. Colleges might avoid collecting standardized test scores from all their applicants, so they can report higher median scores.

Many intentional self-denials of knowledge do not fit our category. For our purposes, three criteria define Strategic Information Asceticism:

1. *Feasible Acquisition*: Information is available and cost-effective to acquire.
2. *Deliberate Non-Acquisition*: The decision-maker actively chooses not to acquire the information.

3. *Concern with External Reaction*: The decision-maker avoids the information because it wants to avoid others' getting and acting upon it in a way that harms her.³

To illustrate the distinction, consider a patient who is genetically predisposed to Huntington's Disease. According to historical data, the chance that he will take a cheap and accurate test to determine if he has the genetic markers of the disease is less than ten percent.⁴ In some cases, this is to avoid the psychic pain and loss of hope that comes if the news is bad.⁵

This does not fit our definition.

An alternative motivation, though, fits our criteria: he avoids the test to prevent its results from leaking to insurers, who might raise the rates on life or long-term care coverage.⁶ Because this is a strategic response to the potential for adverse actions of others, it qualifies as Strategic Information Asceticism.

Strategic Information Asceticism, though its phrasing has hardly been used, has long been a concern of the law.⁷ Legal doctrines wrestle with how much an actor's knowledge, or deliberate lack of it, should matter in determining liability. Different areas of law adopt different tests, which seem to fall into four general buckets:

1. *Strict Liability*: At one extreme, the law sometimes deems knowledge irrelevant. Under strict liability, an actor is responsible regardless of what she knew or could have known.⁸ For instance, environmental statutes may require parties to remediate hazardous waste whether or not they have knowledge of the contamination.⁹

³ John Allenbach & Richard Zeckhauser, Strategic Information Asceticism: Denying Self to Deny Others 3–4 (Oct. 24, 2025) (unpublished manuscript) (on file with authors).

⁴ See Emily Oster, Ira Shoulson & E. Ray Dorsey, Optimal Expectations and Limited Medical Testing: Evidence from Huntington Disease, 103 *Am. Econ. Rev.* 804, 809 (2013).

⁵ *Id.* at 806.

⁶ See Emily Oster et al., Fear of Health Insurance Loss Among Individuals at Risk for Huntington Disease, 146A *Am. J. Med. Genetics Part A*, 2070, 2072 (2008).

⁷ See, e.g., David Luban, Contrived Ignorance, 87 *Geo. L.J.* 957, 959 (1999) (considering the common law tradition of “deniability” in criminal law).

⁸ See Restatement (Second) of Torts §§ 519–520 (A.L.I. 1965).

⁹ See Alexandra B. Klass, From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims, 39 *Wake Forest L. Rev.* 903, 920–22 (2004).

2. *Actual Knowledge Only*: At the opposite end of the spectrum are doctrines where liability attaches only if the actor truly knew—and the state can prove it.¹⁰ Ignorance, whether genuine, deliberate, or feigned, becomes a shield. This creates a strong incentive for actors to avoid knowing in the first place. Tax law illustrates this point: courts sometimes excuse individuals who failed to report foreign accounts or income on the grounds that they lacked awareness of the obligation.¹¹

3. *Negligence*: Between these poles lies negligence, where the law asks not what the actor knew, but what a reasonable person in their position should have known.¹² Ignorance offers no refuge if a duty of care required investigation. In *The T.J. Hooper*, tugboat owners were held liable for cargo lost in a storm because, despite the threat, they had not equipped themselves with radios.¹³ They may not have known the storm was coming, but they should have known. Failure to acquire readily available information tipped them to fault.¹⁴

4. *Willful Blindness*: Related to negligence is willful blindness. Here, liability attaches when an actor deliberately avoids confirming what they strongly suspect to be true; the law treats purposeful ignorance as equivalent to knowledge.¹⁵ In *Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court held a parent company liable for patent infringement because it deliberately avoided checking whether a rival's patent existed.¹⁶ In this regime, “see no evil” is not a defense. Strategic Information Asceticism, if it can be exposed, can be grounds for liability.¹⁷

¹⁰ See, e.g., 18 U.S.C. § 1001(a) (criminalizing false statements made “knowingly and willfully”).

¹¹ *Cheek v. United States*, 498 U.S. 192, 201–03 (1991); Mark C. Winings, Comment, Ignorance is Bliss, Especially for the Tax Evader, 84 J. Crim. L. & Criminology 575, 575–77 (1993).

¹² See Restatement (Second) of Torts § 283 (A.L.I. 1965).

¹³ 60 F.2d 737, 739 (2d Cir. 1932).

¹⁴ *Id.*

¹⁵ See Model Penal Code § 2.02(7) (A.L.I. 1985).

¹⁶ 563 U.S. 754, 770–71 (2011).

¹⁷ Jeremy Adler, See No Evil: How the Supreme Court's Decision in *Global-Tech Appliances, Inc. v. SEB S.A.* Further Muddles the Intent Element of Induced Infringement, 11 Nw. J. Tech. & Intell. Prop. 559, 559 (2013).

These doctrines create incentive structures for Strategic Information Asceticism. For decision-makers on the margins, modest shifts in how liability applies—whether knowledge is irrelevant, required, presumed, or inferred—can decisively alter behavior. In some regimes, actors are pushed to seek information aggressively; in others, they are nudged to remain in the dark.¹⁸ Often, they must weigh not just whether to learn, but the probability that a court will later conclude that they should have learned.¹⁹ The law, in effect, shifts between penalizing, tolerating, and even encouraging the non-acquisition of information. Strategic Information Asceticism, then, emerges not just as a behavioral quirk, but as a rational adaptation to the liability frameworks that govern knowledge.

Unlike markets, which often handle uncertainty through price adjustments, the law is often forced into binary determinations. A parcel of land that might flood sells for less, reflecting the confluence of the buyer's and seller's assessments of risk. But in court, the question becomes categorical: Was the seller liable for failing to disclose flood risk?²⁰ That indivisibility sharpens the incentives for information asceticism: actors may avoid knowledge not just to shift a price, but to avoid crossing a line that triggers liability altogether.

A. Illustrative Model

We demonstrate how a public-records disclosure law can reshape incentives with a stylized example. Imagine a clean-energy start-up, Firm *A*, which develops smart-grid hardware. To win a long-term supply contract with a city, *A* could first run a pilot program. Pilots generate valuable information: Do customers adopt quickly? Do systems perform reliably? What price will clear the market?

But, because the pilot is conducted with a government agency, the results may be subject to public-records requests. Consider two regimes: In the first, a disclosure law allows a competitor, Firm *B*, to file a request

¹⁸ See, e.g., Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 Va. L. Rev. 415, 428 (2007) (“Unlike mens rea, strict liability induces offenders to make the socially desirable level of investment in verification.”).

¹⁹ See Jonathan L. Marcus, *Model Penal Code Section 2.02(7) and Willful Blindness*, 102 Yale L.J. 2231, 2237 (1993) (“Many courts have voiced concern that a jury could easily translate the notion that the defendant consciously avoided the truth into the idea that the defendant should have known the truth.” (emphasis omitted)).

²⁰ See *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (“[W]here the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer.”).

and obtain the pilot data. If the pilot reveals a viable, profitable market, *B* can immediately enter with an undercut bid. In the second regime, there is an exception in disclosure law that allows courts to deny requests if they contain trade secrets.

Here, the strict disclosure law encourages information asceticism. What would normally be a prudent information-gathering step becomes a liability because the information will be secured by *B*. Firm *A* knows that, as the results of the pilot improve, *B* becomes more likely to bid on the contract. Faced with that knowledge, *A* may rationally choose ignorance, skipping the pilot altogether. The statute designed to promote government transparency, with its administrable bright lines, chills useful exploration by private firms.

We can formalize this trade-off with a two-player game theoretic model.²¹ Firm *A* makes two choices. The first is whether to conduct the pilot. If *A* conducts the pilot, it receives a signal, *s*, which is uniformly distributed from 0 to 100 and represents the attractiveness of the market. If required by law, this signal inevitably is seen by *B*.

Then, both firms must choose whether to bid on the contract. If *A* bids alone, it enjoys a stronger position. If *B* also bids, however, prices are driven down.

The payoffs (in the form (*A*, *B*)) to the two players are:

		<i>B</i>	
		No Bid	Bid
<i>A</i>	No Bid	$(100 + 0.2s, 80 + 0.2s)$	$(80 + 0.2s, 45 + 0.8s)$
	Bid	$(75 + s, 60 + 0.2s)$	$(40 + 0.8s, 20 + 0.8s)$

²¹ See generally Avinash K. Dixit & Barry J. Nalebuff, *The Art of Strategy: A Game Theorist's Guide to Success in Business and Life* 76–78 (2008) (introducing game tables, or “payoff tables,” which offer a visual representation of the consequences of two players acting simultaneously).

These payoffs and the distribution of the signal are common knowledge. As the Appendix shows, *A*'s choice to conduct a pilot is dictated by the state's disclosure law.²²

In both cases, if *A* eschews the pilot, it chooses to bid, and its expected payoff is 125. If the law requires the pilot's results be provided if *B* requests them, the expected payoff for *A* drops to 112. However, if *A* can keep the pilot results private, its payoff is 128. Thus, if *A* expects to have to disclose the pilot results, it will not conduct the pilot; if it can be kept private, *A* will go through with the pilot test. The law here creates incentives that dictate behavior, and possibly behavior that is contrary to the public interest.

Rather than treat disclosure as binary, decision theorists would suggest that *A* might do better to assess subjectively the probability that the court requires it to disclose.²³ This is especially important since, in reality, at the federal level, courts have shifted the tests for disclosure of trade secrets in recent years.²⁴ Given the payoff structure above, *A* will conduct the pilot if it believes there is a seventy-seven percent chance it can keep the results private, whether due to a court ruling or *B*'s failure to file a request. Unless *A* is rather confident that *B*'s incompetence or the court's rulings will prevent *B* from accessing the pilot's findings, *A* will rationally choose to forgo the pilot and still bid on the contract.

This simple model highlights a broader truth: law can flip the value of information. Rules meant to encourage transparency or accountability sometimes make ignorance the safer bet. A landlord may avoid testing a unit for lead if a positive test forces her to remediate. A pharmaceutical firm might hesitate to run a trial if unfavorable results must be disclosed and could kill a promising drug line. Strategic Information Asceticism, which the law has wrestled with intuitively for generations, might be better understood—and thus more effectively regulated—as a sharp economic calculation of the risks and benefits of acquiring knowledge.

²² See *infra* Appendix.

²³ Maciej H. Kotowski, David A. Weisbach & Richard J. Zeckhauser, Audits as Signals, 81 U. Chi. L. Rev. 179, 180–85 (2014).

²⁴ In *Food Marketing Institute v. Argus Leader Media*, the Supreme Court shifted the standard for FOIA exceptions. 139 S. Ct. 2356, 2360, 2366 (2019). Previously, under *National Parks & Conservation Ass'n v. Morton*, information was exempt from disclosure if it would cause substantial competitive harm. 498 F.2d 765, 770 (D.C. Cir. 1974). Now, information is confidential if it is customarily kept private and the government assured it would be private. *Food Mktg. Inst.*, 139 S. Ct. at 2366.

II. PALTERING

We begin this Part with two palters, one by us and one by you. By introducing the term “palter,” we subtly suggest that we command an especially rich vocabulary.²⁵ And when you fail to raise your hand to ask what the word means, you too palter. Your silence plausibly implies that you already knew its meaning.²⁶ Neither act involves a lie, but both are designed to create a belief that is not quite true.²⁷

This is the essence of paltering: intentionally misleading despite telling the truth. Often palters function by reporting a selective part of the truth in a way that encourages the listener to draw a mistaken conclusion.²⁸ Paltering differs from lying, where the statement itself is false. It lives in the murky middle ground—sometimes less than lying, but often no less harmful.²⁹

Paltering is a family of strategies. It can be carried out by silence, by framing, by action, or, at its most pernicious, by altering by 180 degrees the meaning of the truth itself.

1. Paltering by Silence. This occurs when the response, or lack thereof, leaves out enough to mislead.³⁰ Fred Schauer was known as an accomplished furniture maker. If a visitor to his home complimented the craftsmanship of the desk in his office, he might simply have replied, “Thank you.” The visitor could easily infer that

²⁵ Frederick Schauer & Richard Zeckhauser, Paltering, *in* Deception: From Ancient Empires to Internet Dating 38, 39 (Brooke Harrington ed., 2009) (defining paltering as practices that are “less than lying,” but still deceptive, misleading, or insincere, inhabiting a grey area).

²⁶ Reputational concerns may lead to the “blindness” of the crowds. Thus, a single person may be more likely to ask than would be a group of, say, half a dozen people. None would know the meaning, but admitting that in a group, particularly where others might know, doubly risks embarrassment.

²⁷ Schauer & Zeckhauser, *supra* note 25, at 44 (“Often the recipient’s misimpression is a consequence of failing to correct a wrong impression.”).

²⁸ See Todd Rogers, Richard Zeckhauser, Francesca Gino, Michael I. Norton & Maurice E. Schweitzer, Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others, 112 *J. Personality & Soc. Psych.* 456, 456 (2017).

²⁹ Frederick Schauer & Richard Zeckhauser, Paltering 4 (John F. Kennedy Sch. Gov’t, Working Paper No. RWP07-006, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=832634 [<https://perma.cc/ZR4V-K9CN>].

³⁰ See Despoina Alempaki, Valeria Burdea & Daniel Read, Deceptive Communication: Direct Lies Versus Ignorance, Selective Truth, and Silence, 3 *J. Pol. Econ. Microeconomics* 827, 829 (2025).

Schauer built the desk himself, when in fact he had ordered it from an acclaimed woodworker in Oregon.³¹

2. *Paltering by Framing.* Here, the truth is presented selectively, with emphasis placed on a flattering detail so that the unflattering whole is concealed.³² At a dinner party, as you leave, the host asks if you enjoyed the food. “That tiramisu was unbelievably spectacular,” you reply. You have told the truth but shifted the frame. The gussied-up chicken was dry, and the fancy potatoes undercooked, yet your answer suggests broader approval.

3. *Paltering by Action.* Sometimes the arrangement of events misleads as effectively as words.³³ Consider a professor interviewing a promising undergraduate, Joe, for a research assistant (“RA”) position. “Come by my office at 10:00 AM,” he says. Then he invites a former RA, Denise, with whom he is coauthoring a paper, to stop by at 10:15. “Denise, tell Joe how we met and what we are working on now.” Every statement is true. But the professor has carefully staged the scene, highlighting one successful RA while leaving unmentioned the many others who did not work out.

4. *Altering.* A particularly nefarious form of paltering occurs when omission or selective framing projects the opposite meaning of the truth.³⁴ In Cambridge, Massachusetts, home sellers must complete a questionnaire about their property. In response to a question about water damage, a seller might reply: “A few years ago, there was a torrential downpour, and about a cup of water seeped into the basement through a crack in the wall. It has since been patched.” Every word is accurate. Yet the seller has omitted that the same storm caused the roof to leak badly, and the roof has not been repaired. The omission reverses the meaning: instead of “minor problem, now fixed,” which hints at full revelation, the hidden truth is “major problem, still unresolved.” This is altering. Dropping the “p” from paltering frames the partial truth so selectively that it functions as falsehood.

³¹ Schauer & Zeckhauser, *supra* note 25, at 40.

³² See Alempaki et al., *supra* note 30, at 829.

³³ Schauer & Zeckhauser, *supra* note 25, at 44.

³⁴ *Id.* at 43–44.

Paltering is strikingly common. We encounter it in advertising, politics, negotiations, and everyday conversation. Negotiation scholars note how parties highlight selective truths to gain leverage,³⁵ and psychologists studying influence show how framing accurate facts can mislead as effectively as lies.³⁶

Many who would never lie outright nonetheless palter in comfort. Sometimes a palter is as benign as a white lie; the dinner party host did not need to know her cooking was subpar. In other cases, however, it can create meaningful misunderstandings that hurt the deceived individual and yield material benefits to the palterer.³⁷ Such situations might benefit from legal intervention or regulation.

From the perspective of decision theorists, a two-pronged test for whether a palter ought to be sanctioned³⁸ might be optimal:

1. Would a high percentage of reasonable people be misled?
2. Does being misled create a consequential loss?

From a legal perspective, however, this test might be difficult to operationalize. It is far easier to identify a lie than to identify when a technically true statement has misled enough people in a costly way. Broadly, the law treats paltering in one of three ways: it regulates, tolerates, or explicitly protects it.

A. Regulated Paltering

The clearest interventions occur when paltering shades into what we call “altering”—truth framed so selectively that it functions as falsehood. Many of the Federal Trade Commission’s most prominent deception cases fit this category. In *FTC v. Brown & Williamson Tobacco Corp.*, the U.S. Court of Appeals for the District of Columbia Circuit held that the company’s claim that its cigarettes delivered only one milligram of tar was deceptive: it was true only when smoked by machines, not by

³⁵ See, e.g., Howard Raiffa, *The Art and Science of Negotiation* 352–53 (1982) (discussing the ethics of true but selective disclosure of information in negotiation).

³⁶ See, e.g., Daniel Kahneman, *Thinking, Fast and Slow* 88 (2011) (sharing experimental evidence on how the same fact framed in different ways changes perception).

³⁷ See Rogers et al., *supra* note 28, at 471 (finding that paltering adds value for the palterer but has harmful effects on the palterer’s relationship with the deceived).

³⁸ Here, “sanctioned” serves appropriately as a contronym, a second palter on our vocabulary.

humans.³⁹ Likewise, in *Kraft, Inc. v. FTC*, the Seventh Circuit ruled that Kraft could not advertise that its Singles contained the calcium of five ounces of milk, since nearly a third of that calcium was lost in processing.⁴⁰ These were not mere palterers. They conveyed the reverse of the truth itself and satisfied both prongs of our test, thus meeting our standard for punishment.⁴¹

B. Tolerated Paltering

Notably, toward the other end of the spectrum lie practices that are misleading in form but tolerated in law: puffery, signposting, and ambiguity. All involve truth-bending, but they rarely satisfy both prongs of our test to justify punishment.

Puffery. Puffery survives because it fails prong 1: very few reasonable people are actually misled. When a diner claims to have “the world’s best coffee” or a daycare describes itself as “top-rated,” consumers recognize the exaggeration for what it is. Courts have consistently treated such statements as non-actionable. In *Pizza Hut, Inc. v. Papa John’s International, Inc.*, for example, the slogan “Better Ingredients. Better Pizza.” was allowed to stand despite being unverifiable and in no sense literally true.⁴² Puffery escapes sanction primarily because it is discounted: consumers learn to ignore it, and thus the law sees no need to intervene.⁴³

Signposting. Signposting is a more sophisticated cousin to puffery. It involves emphasizing some true facts while omitting others, leading consumers to underestimate their negatives.⁴⁴ An airline ad trumpeting “Flights from Boston to Miami for \$199!” is a signpost if the fine print reveals that the price only applies to a middle seat on a 2:00 AM flight.

³⁹ 778 F.2d 35, 43 (D.C. Cir. 1985).

⁴⁰ 970 F.2d 311, 314, 322 (7th Cir. 1992).

⁴¹ *Brown & Williamson Tobacco Corp.*, 778 F.2d at 42 (“Consumers have no innate ability to assess an individual tar claim standing alone.”); *Kraft*, 970 F.2d at 322 (“Here, the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing, which leaves consumers with a misleading impression about calcium content.”).

⁴² 227 F.3d 489, 504 (5th Cir. 2000).

⁴³ See David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1435 (2006) (arguing against the “routine[] assum[ptions]” of “[j]urists and regulatory authorities” that consumers ignore puffery).

⁴⁴ See Richard J. Zeckhauser & David V. P. Marks, *Sign Posting: The Selective Revelation of Product Information*, in *Wise Choices: Games, Decisions, and Negotiations* 22, 22–23, 27–29 (Richard J. Zeckhauser, Ralph L. Keeney & James K. Sebenius eds., 1996).

The ad is literally accurate, but misleading by selective display.⁴⁵ Much signposting also fails one or both prongs of the test. Either few people are seriously misled (prong 1), or the expected losses are modest enough to rarely trigger legal action (prong 2).⁴⁶ Signposting is particularly common in resumes, where selective omission and emphasis are expected and therefore heavily discounted by evaluators. As a result, the magnitude of deception is usually modest. While such practices are tolerated, embellishment is risky, and outright lying, such as claiming a degree one does not possess, can carry major professional consequences.⁴⁷

In some areas, however, puffery and signposting do not escape completely. When claims implicate health or safety, regulators intervene. A pharmaceutical advertiser must show a “fair balance” between information about benefits and risks to avoid misleading consumers.⁴⁸ A weight-loss product showcasing unusually successful outcomes must note that the depicted results are atypical.⁴⁹ These disclaimers provide a formal shield but rarely undo the misleading net impression. Mutual fund disclosure requirements illustrate the same dynamic: SEC rules mandate exhaustive prospectuses and risk reports, yet the volume and framing often leave investors no clearer about fees or risk exposure.⁵⁰ In practice, the palter remains effective, even if liability is blunted.

Intentional Ambiguity. Some palterers trade not on exaggeration, but on the multiple meanings a word can bear.⁵¹ A gallon in Great Britain is twenty percent larger than a gallon in the United States. If a British purveyor in the U.K. sold “a thousand gallons of milk” to an American

⁴⁵ *Id.* at 27–28.

⁴⁶ See *Moore v. Trader Joe’s Co.*, 4 F.4th 874, 882–83 (9th Cir. 2021) (finding no reasonable consumer would be deceived by ambiguous labeling on a jar of honey).

⁴⁷ Christine A. Henle, Brian R. Dineen & Michelle K. Duffy, *Assessing Intentional Resume Deception: Development and Nomological Network of a Resume Fraud Measure*, 34 *J. Bus. Psych.* 87, 88–90, 95 (2019) (distinguishing résumé fabrication, embellishment, and omission and treating outright falsification as categorically more serious than selective emphasis or omission).

⁴⁸ See U.S. Food & Drug Admin., U.S. Dep’t of Health & Hum. Servs., *Guidance for Industry: Consumer-Directed Broadcast Advertisements 1* (1999) (explaining that consumer-directed prescription drug advertisements must balance claims about benefits with disclosures of material risks).

⁴⁹ See 16 C.F.R. § 255.2(b), (e)(4) (2025) (prohibiting deceptive consumer endorsements and using weight-loss products as an example).

⁵⁰ See Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 *U. Pa. L. Rev.* 605, 611, 624–25 (2014).

⁵¹ See Rogers et al., *supra* note 28, at 456–57.

customer and delivered the smaller U.S. gallon, the claim would be literally true, yet misleading in context.

C. Protected Paltering

Some domains go further, not merely tolerating but deliberately protecting paltering.

Safe Harbors in Securities Law. Under the Private Securities Litigation Reform Act (“PSLRA”), forward-looking statements are sheltered from liability if framed cautiously.⁵² In *In re Cutera Securities Litigation*, the Ninth Circuit held that forward-looking projections accompanied by meaningful cautionary language fall within the PSLRA safe harbor.⁵³ The doctrine protects such statements even when they may lead investors to overly optimistic interpretations.

Politics. Political speech presents the most extreme case. Courts have gone beyond protecting palters; they have protected even outright lies through appeal to the First Amendment. In *United States v. Alvarez*, misleading and false political claims were held to be speech protected by the First Amendment.⁵⁴ From our perspective, this reflects a kind of common knowledge. If everyone knows that a type of statement is likely to be false or misleading, as might well be the case with speech by politicians, both social norms and the law seem less likely to punish it. A compact man who falsely claims to be six feet tall on a dating app is unlikely to be held accountable; it is common knowledge those heights are regularly inflated.

D. Regulating Paltering

In some cases, palters that meet both prongs of our test ought to be discouraged by regulation. But regulatory efforts to clamp down on paltering can themselves go awry. Professors Robinson, Viscusi, and Zeckhauser argue that effective warnings should distinguish serious

⁵² 15 U.S.C. § 78u-5(c)(1).

⁵³ 610 F.3d 1103, 1112–13 (9th Cir. 2010).

⁵⁴ 567 U.S. 709, 713–15, 729–30 (2012); see also Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. Rev. 231, 233–36 (2017) (arguing that First Amendment doctrine often values categorical protection of speech over the pursuit of factual accuracy).

“wolf” risks from trivial “puppy” ones.⁵⁵ When extensive puppy risks get mixed in with wolf risks, the wolf risks get insufficient attention.⁵⁶ Yet in practice, disclosure mandates often elicit just such mixes. Securities prospectuses bury investors under encyclopedic lists of potential risks; pharmaceutical ads often overwhelm patients when they disclose a deluge of side effects with no information on frequency or severity. Rather than illuminate, these disclosures desensitize.⁵⁷ By failing to separate the wolves from the puppies, regulation can leave people less, not more, protected from paltering. Ranking risks by their expected impact, whether in dollars for investors or Quality Adjusted Life Years for patients, would at least help investors distinguish the howls from the whimpers.⁵⁸

III. PALTERING AS A POTENTIALLY UNDESIRABLE EQUILIBRIUM OUTCOME

The persistence of paltering is not accidental. It reflects the incentives built into the system. Often, paltering represents a decision-maker’s dominant strategy, clearly preferable to lying or telling the truth. But the utility of society, not the private gain of the palterer, is generally the law’s concern.⁵⁹ To illustrate, consider a stylized example involving three different hypothetical ads for the same cholesterol pill and their related outcomes.

The first is the plain truth: “In clinical trials, 18% of patients saw a decrease in LDL cholesterol levels. The average LDL decrease among those patients was 19 mg.” This is accurate, but hardly compelling. Few patients may be moved by statistics that emphasize modest results. Profits increase by \$1 million, but there is no risk of regulator intervention.

The second is a palter: “Meet Jane. Her LDL cholesterol dropped by 56 points. Jack did even better—a 72-mg drop.” Every word is accurate, but the impression it leaves, that dramatic improvements are typical, is false. Consumers tend to overlook the fine print, stating that “results are not typical”; a massive number of new customers provide the evidence.

⁵⁵ Lisa A. Robinson, W. Kip Viscusi & Richard Zeckhauser, Efficient Warnings, Not “Wolf or Puppy” Warnings, *in* *The Future of Risk Management* 227, 237–38 (Howard Kunreuther, Robert J. Meyer & Erwann O. Michel-Kerjan eds., 2019).

⁵⁶ *Id.*

⁵⁷ See Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 101 (2014).

⁵⁸ See Robinson et al., *supra* note 55, at 238–40, 246 n.13.

⁵⁹ One reason paltering might dominate lying is the moral cost. Many are comfortable shading the truth but would bristle at lying, and their payoff functions reflect that. See Rogers et al., *supra* note 28, at 456–57.

Profits increase by \$5 million, but there is a 10% chance the FTC imposes a \$5 million fine. The expected payoff is a strongly positive \$4.5 million.

The third is a straight lie: “Take our pill. Your doctor will never bug you about your cholesterol again.” This is bolder and more successful, albeit flatly untrue. Profits soar to \$7 million, but now there is an 80% chance the FTC fines the advertiser \$10 million. The expected payoff is now -\$1 million. Lying, at least here, does not pay.

From the perspective of the pharmaceutical firm, paltering dominates, with much higher returns than fully objective truth-telling, which in turn is far better than lying. From society’s perspective, the truth would be far superior. Patients misled by paltering switch from or don’t try out other statins that would have been more effective for them and much cheaper for those paying.

This example omits broader harms, such as diminished trust in pharmaceutical advertising, but the key point is clear: paltering is not just rhetorical sleight-of-hand. Often, it is a clearly preferred strategy for the speaker or advertiser, yet harmful to overall welfare. This phenomenon is not limited to misleading advertising: a legal rule that asks only whether the speech is protected or permissible, not what its expected cost is, misses or ignores that misalignment.

There are at least three types of punishment that deter lying, only the first of them being legal punishment. The second is social punishment: if caught lying, people will think less well of you, sully your reputation, or no longer buy from your firm. The third is personal punishment: you think less well of yourself for having lied.⁶⁰ Relative to lying, the punishment for paltering is less severe, and the probability of being caught paltering and thus punished is lower. Indeed, many of us who would recoil from lying palter on a regular basis. In sum, paltering thrives even where lying is deterred. The law rarely punishes it, society often forgives it, and the speaker may find it quite acceptable.

Reputational Externalities. Few lay people can distinguish a skilled orthopedic surgeon from a mediocre one, or a trustworthy auto repair shop from a dishonest one. When shopping online, we face the same challenge: few could independently verify which product is more durable, or which seller is more reliable. Instead, we rely on reputational shortcuts—brands, licensing boards, rating organizations, online ratings, and professional

⁶⁰ See Sanne Preuter, Bastian Jaeger & Mariëlle Stel, The Costs of Lying: Consequences of Telling Lies on Liar’s Self-Esteem and Affect, 63 *British J. Soc. Psych.* 894, 907 (2024).

associations—to guide our decision-making in the face of asymmetric information. In the Renaissance, for example, artists formed guilds that imposed strict standards for testing and apprenticeships. This allowed patrons, who often lacked the expertise to judge quality directly, to rely on guild membership as a signal of an artist’s training and competence.⁶¹

Operating in this fashion creates both value and vulnerability. Reputational externalities run in both directions: an honest mechanic benefits when the high-reputation repair shop where he works attests to that fact. By contrast, a quality surgeon is hurt when local subpar surgeons in his specialty get bad outcomes. These spillovers are what we call reputational externalities: the costs or benefits that one actor’s behavior imposes on others with a shared association.⁶² The law, at times, steps in with bright lines to decide who has standing and who is liable when shared reputations are put at risk.

A. Policing Reputations

The law makes blunt distinctions when handling reputational externalities. If a group can decide for itself who belongs, or if a group is so large that any harm is diffuse, courts typically offer no remedy. But when outsiders can freely appropriate a reputation, the law is far more willing to play a role.

Unprotected Reputations. In many cases, the law shrugs at reputational harm. If the group bearing a collective reputation is large or amorphous, reputational harm is treated as a cost of group membership rather than a legal injury. For large enough groups, individual members are not allowed to sue for libel. In *Neiman-Marcus v. Lait*, models had standing to sue after being described as “call girls” since there were only 9 of them, but 382 saleswomen could not sue after most were labeled “fairies.”⁶³ The principle was bright: small groups could claim defamation; large ones could not. The size differences were sufficient that the court did not have to decide at what number a group was large.⁶⁴

⁶¹ Jonathan K. Nelson & Richard J. Zeckhauser, Risks in Renaissance Art: Production, Purchase, and Reception 77–78 (2023).

⁶² *Id.* at 78 (“Through the mechanism of reputational externalities, buyers extrapolated the quality of one guild member from the evidence of (or tales about) the quality of another; in much the same way, the reputations of today’s physicians, lawyers, or professors spill over to other members of their practice, firm, or university.”).

⁶³ 13 F.R.D. 311, 313, 315–17 (S.D.N.Y. 1952).

⁶⁴ See *id.*

Groups that control their own membership are treated the same way. Accountants at Arthur Andersen did not bring a claim against their peers nor their employer after Enron's collapse. Likewise, no police officer sued Derek Chauvin for reputational harm to the profession. The implicit message: if you admit or hire a group member, any reputational fallout falls on you.

Thus, unlike environmental externalities which are affirmatively regulated,⁶⁵ reputational externalities are not generally protected. Indeed, even the term and concept of reputational externality has received little attention, neglected by both economists and legal scholars.

Protected Reputations. By contrast, when outsiders can appropriate a reputation that others have invested in establishing, the law is far more willing to step in. Trademark dilution is the clearest case. Victoria's Secret spent decades and millions cultivating a brand associated with quality alongside a little naughtiness. When "Victor's Little Secret," a small adult novelty and lingerie store in Kentucky, tried to piggyback on the better-known brand, the company sued and ultimately won an injunction.⁶⁶ The law recognized that even a modest impostor could drain reputational value.⁶⁷

Collective brands, especially those tied to geography, have also won protection against imitators. Blue cheese must hail from Roquefort to claim that name.⁶⁸ Cognac must come from Cognac, France.⁶⁹ "Idaho Potatoes" is a protected certification mark.⁷⁰ Without such limits, outsiders could free ride on reputations built over generations. Legal protections ensure that the value of these shared investments stays with those who made them, rather than being siphoned off by impersonators. An economist might ask whether the losses due to market power outweigh the benefits coming from quality assurance. Such weighing would tend to compete with a law seeking bright-line clarity.

⁶⁵ See, e.g., Clean Air Act, 42 U.S.C. § 7401 (establishing regulation of air pollution).

⁶⁶ *Moseley v. V Secret Catalogue, Inc.*, 558 F. Supp. 2d 734, 750 (W.D. Ky. 2008), *aff'd*, 605 F.3d 382 (6th Cir. 2010). Cathy's Little Secret, renamed for Victor's wife, still operates in Elizabethtown, KY.

⁶⁷ *Id.* at 736, 750.

⁶⁸ *Cnty. of Roquefort v. William Faehndrich, Inc.*, 198 F. Supp. 291, 294 (S.D.N.Y. 1961).

⁶⁹ *Bureau Nat'l Interprofessionnel du Cognac v. Cologne & Cognac Ent.*, 110 F.4th 1356, 1363 (Fed. Cir. 2024).

⁷⁰ *Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 711 (9th Cir. 2005).

Professions operate much the same way. You cannot simply hang out a shingle and call yourself a doctor, or a lawyer, or even a barber. Licensing boards, sometimes state-run, sometimes delegated to private groups, police the collective brand of the profession. In principle, these gatekeepers protect consumers by ensuring minimum competence.⁷¹ In practice, they often also serve to protect insiders from competition. In Massachusetts, basic EMT training requires less than 200 hours.⁷² Commercial pilots can fly for hire after 250 training hours.⁷³ But to become a licensed barber in Massachusetts, candidates must complete 1,000 hours of professional training, file an application, pay fees, and then pass a board-written exam.⁷⁴ Barbers likely welcome the ordeal: were it easier to become a barber, the profession's reputation could conceivably take a hit from undertrained practitioners, but it is certain that the supply of barbers would rise and the price of a haircut would fall.

Lawyers once tried to protect their collective brand by suppressing advertising. The American Bar Association long argued that letting lawyers tout their services would cheapen the profession. State bars enforced this self-imposed code until *Bates v. State Bar of Arizona*, when the Supreme Court struck it down as a violation of the First Amendment.⁷⁵ Still, the ABA's Model Rules recommend that states restrict lawyer advertising that is misleading, including when the statements are literally true.⁷⁶

The law draws clear boundaries around reputational externalities. Some are fenced out: large or self-governing groups are left to manage reputational fallout on their own. Others are fenced in: trademarks, collective brands, and professions receive protection when outsiders might dilute the value of a shared investment. These bright lines serve administrability, but they make no effort to measure the costs and benefits of alternative approaches, and hence do not optimize outcomes. An economic approach would ask not who has standing, but how reputational spillovers alter outcomes, and how incentives shift depending on whether reputations are fenced in or out of protection. Economic determinations

⁷¹ See Jeffrey P. Gray, In Defense of Occupational Licensing: A Legal Practitioner's Perspective, 43 *Campbell L. Rev.* 423, 425 (2021).

⁷² Emergency Medical Technician (EMT), Quincy Coll., <https://quincycollge.edu/program/emt/> [<https://perma.cc/B3YE-WPMN>] (last visited Feb. 17, 2026).

⁷³ 14 C.F.R. § 61.129.

⁷⁴ See 240 Mass. Code Regs. 8.01 (2019).

⁷⁵ 433 U.S. 350, 353, 384 (1977).

⁷⁶ Model Rules of Pro. Conduct r. 7.1 (A.B.A. 1983).

would change with the times, as, say, when the internet or AI dramatically magnifies information flow. Legal determinations, at best, would evolve sluggishly due to the molasses of legislation on the books and past precedents.

B. The Economics of Reputation

An economist or decision theorist would approach regulating reputational externalities much in the way a group would regulate for itself. At some law school next week, a professor will prioritize pickleball ahead of paper production. Such free riding will slightly sully the school's reputation. Some schools, like some law firms, address this problem by paying big producer Bill twice what little producer Lil gets. Others rely on initial selection of its tenured professors or partners. Hence, within them, salaries correlate strongly with age.

Outright misbehavior presents a more challenging problem. Group reputations are much more vulnerable to the professor who plagiarizes or the lawyer who misrepresents than the mere loafer in either profession. Such "reckless riding" is much harder to detect than the free riding, since its perpetrator made efforts to cover it up and expected it to go undetected. The policy problem arises since the expected reward to the pickleball player or plagiarizer is strongly positive, despite the substantial expected reputational loss.⁷⁷ This also implies that without effective deterrence, cases will arise even when the expected loss dramatically outweighs the perpetrator's gains.

One of the most famous cases is the Enron scandal of 2001, which almost certainly had a strongly negative expected value from the outset. The accounting firm Arthur Andersen ("AA") joined with the firm to produce a raft of accounting documents, such as balance sheets and earnings statements, that hid its debt and multiplied its profits.⁷⁸ Enron ultimately collapsed.⁷⁹ When the scandal came to light, Arthur Andersen bled clients, and despite being a top-five firm, it too collapsed.⁸⁰ The reckless riding of a sliver of AA partners imposed massive losses on their

⁷⁷ There also is a loss to the group on a personal basis, quite apart from reputation, for having a colleague who will engage in such behavior.

⁷⁸ See Jeffrey S. Kinsler, *Arthur Andersen and the Temple of Doom*, 37 Sw. Univ. L. Rev. 97, 100–01 (2008).

⁷⁹ *Id.* at 101.

⁸⁰ *Id.* at 104–05.

colleagues. AA had done too little, through initial selection and/or deterrence, to protect its reputation.

There are two ways to plausibly address the swamping of private gain by shared expected loss. The first is via public regulation: the law may impose sanctions on the bad actor, as with harsh punishments for investment advisors who violate their fiduciary duties.⁸¹ The second is private governance: groups may police themselves through ex ante screens, like ethics requirements for lawyers, or after-the-fact punishments, including fines, expulsions, and shaming. But for private policing to work, the law must permit the group to employ tools strong enough to deter misconduct.

Good actors may exert themselves to improve internal policing mechanisms. But if doing so is too costly or the results too weak, they may choose exit over exertion.⁸² The departure of good agents further degrades the group's reputation. Left behind are those more willing to misbehave, hence a downward spiral. Meanwhile, if bad actors can still capture private gains despite sanctions or monitoring being too weak, they will continue to cheat. The combination of ineffective law and ineffective self-policing leads to underinvestment in collective reputation.⁸³

This example highlights the difference between legal and economic approaches. The law tends to ask a yes-or-no question: Does this kind of reputational harm get protection or not? That leaves large groups and self-governing associations outside the fence, whereas brands and professions are protected inside. The decision-analytic frame, by contrast, asks how strong the protection should be. *It asks how much protection is enough to align private and collective incentives.*

CONCLUSION

Fred Schauer taught us that the law often draws bright lines as a means to manage a messy, uncertain world. That insight, like many excellent

⁸¹ See, e.g., *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191–94 (1963) (describing SEC enforcement of fiduciary duties).

⁸² See also Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* 47 (1970) (explaining that the members most likely to voice objections are often the first to exit in case of deterioration). Even when effective mechanisms could be put in place, producing them is a public good for the group, and the exertions necessary to implement them may not be worth it to the individual creating them.

⁸³ For further discussion, see Jean Tirole, *A Theory of Collective Reputations (with Applications to the Persistence of Corruption and to Firm Quality)*, 63 *Rev. Econ. Stud.* 1, 3–4, 18 (1996).

insights, obvious when it is pointed out, inspired our analysis. We examine three domains—Strategic Information Asceticism, paltering, and reputational externalities—where asymmetric information is central, and where the law, with its passion for bright lines, sometimes steps in and sometimes does not. Paltering, explored in a work by Schauer and one of our coauthors and expanded here, has drawn little scholarly attention, yet it demonstrates how the law’s binary determinations create strategic landscapes that misalign incentives. Our analysis combines Schauer’s insight on the law’s passion for categorization with the economist’s passion for incentives. The result shows how bright lines can often produce behaviors that rational players pursue but society would like to avoid.

APPENDIX

The payoffs (in the form (A, B)) to the two players are as follows:

		<i>B</i>	
		No Bid	Bid
<i>A</i>	No Bid	$(100 + 0.2s, 80 + 0.2s)$	$(80 + 0.2s, 45 + 0.8s)$
	Bid	$(75 + s, 60 + 0.2s)$	$(40 + 0.8s, 20 + 0.8s)$

Given these payoffs, positing that if *B* does not bid, *A* will bid if $100 + 0.2s \leq 75 + s$,⁸⁴ hence when $s \geq 31.25$. Taking account of the prior distribution, the players’ optimal actions will be the following: If *B* does not bid, *A* bids at 31.25 and above. If *B* bids, *A* bids at 66.67 and above. If *A* does not bid, *B* bids at 58.33 and above. If *A* bids, *B* bids at 66.67 and above.

A must decide whether to receive a signal. If it chooses *no signal*, the average value of *s* will be 50. Hence, *A* bids and *B*, knowing that 50 value, does not bid. *A*’s expected payoff is 125.

Posit, contrary to our usual assumption, that *A* can get the signal, but can prevent *B* from getting it. *B* will not bid, since the expected value of

⁸⁴ Given a continuous distribution for values, a tie is a zero-probability event. For convenience, we assume players bid given ties.

s , 50, is below both of his required bid probabilities. A would then receive (in expectation) the following:

$$0.3125 \left[100 + 0.2 \frac{(0 + 31.25)}{2} \right] + (0.6667 - 0.3125) \\ \left[75 + \frac{(31.25 + 66.67)}{2} \right] + \\ (1 - 0.6667) \left[75 + \frac{(100 + 66.67)}{2} \right] = 128.91.$$

Since 128.91 exceeds 125, A would opt to receive the signal if it could keep it private from B . The advantage of the signal is that A would now not bid if the signal were below 31.25, whereas without a signal, A would bid and get a lower payoff. At 31.25, either action by A yields an expected 106.25.

A 's concern about getting the signal is that B will get it as well. Consider the payoffs if both get the signal. A will bid if the signal is 31.25 or higher. B will bid as well if the signal is 66.67 or higher. A 's payoff (in expectation) will be the following:

$$0.3125 \left[100 + 0.2 \frac{(0 + 31.25)}{2} \right] + (0.6667 - 0.3125) \\ \left[75 + \frac{(31.25 + 66.67)}{2} \right] + \\ (1 - 0.6667) \left[40 + 0.8 \frac{(100 + 66.67)}{2} \right] = 111.68.$$

Since 111.68 is less than 125, A will choose not to receive the signal if B will also receive it. That is because B would bid precisely when s is high, the time when A most wants B not to bid. Recognizing this situation, A will opt for no signal. It will be an information ascetic.

To summarize, here are *A*'s payoffs:

		<i>B</i> 's Access to <i>A</i> 's Information	
		<i>A</i> 's Information Private	<i>A</i> 's Information Shared
<i>A</i> 's Action	No Signal	125	125
	Get Signal	128.91	111.68

Obviously, if *A* can keep its information private, it will get the signal.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

27–51

ESSAY

FIRST-, SECOND-, AND THIRD-ORDER REASONS IN LEGAL INSTITUTIONS, WITH FIRST AMENDMENT EXAMPLES

*Mark Tushnet**

INTRODUCTION

Suppose a group wants to hold a demonstration in a public park. Would the world be better off if they did? First-order reasons go into answering that question. How much would the demonstration disrupt the park's use for relaxation and recreation? Would the demonstration attract supporters and opponents who are likely to cause violence either independently or because they are at each other's throats? Could the demonstrators get their message across in some other way?

We can proliferate questions like these—and worry about whether some questions ought to be irrelevant. Should we take into account the importance of the demonstrators' purposes? (Are they demonstrating to show support for the Flying Spaghetti Monster [look it up] or against the nation's immigration policies?) Should we take into account the fact, if it is one, that some people in society are offended by simply knowing that other people have the demonstrators' views?

At the end of the day, we will decide whether, all things considered, the world would be better off or worse off were the demonstration to occur.

* William Nelson Cromwell Professor of Law emeritus, Harvard Law School.

Who, though, is the “we” of whom I speak? One possibility is that the “we” is you and me, ordinary people who read about the proposed demonstration in their social media feeds. This Essay deals with an institutional “we,” some body charged with making a decision about allowing the demonstration to go forward or not. And not merely “some” body, but a particular one. Among the candidate institutions for making the “is the world better off?” decision are these: the head of the city’s parks department, the city’s police chief, the city council, and a court. And not merely “a” court, but a supreme court.

Most of the Essay treats the police chief, the city council, and the other candidate institutions as frontline actors whose initial decisions are subject to control by an ultimate decision-maker, the supreme court. “Control” means that the ultimate decision-maker (“the UDM”)—for expository purposes, the supreme court—can get the initial decision-maker to comply with the UDM’s judgment about what makes the world better off according to *its* criteria for “makes the world better off.”¹

It is important for my purposes that the “is the world better off?” judgment is not a free-floating or “God’s eye” normative judgment. Rather, it is an institutional judgment: In the view of the ultimate decision-maker, would the world be better off with or without the demonstration?

Were the UDM to make that judgment—were it to be both the frontline and the ultimate decision-maker—it would make an all-things-considered (“ATC”) assessment of first-order reasons. In many—probably pretty much all—real-world settings, though, the UDM reviews decisions made by a frontline decision-maker.² And *that* institutional feature introduces the need for second-order reasons.³

¹ The criteria could be consequentialist or deontological. Many of the examples I give in this Essay are consequentialist in form. That is because I am basically a consequentialist and because exposition of the argument is easier if we give “makes the world better off” a consequentialist reading. But, analytically, swapping in deontological formulations would not affect the analysis. For additional discussion of what “get to comply” means, see *infra* Part II.

² See Mark Tushnet, *Who Am I to Judge?: Judicial Craft Versus Constitutional Theory* 84 (2025).

³ The term “second-order reasons” has been used in other ways in scholarship related roughly to this Essay’s topic. See, e.g., James D. Nelson & Micah Schwartzman, *Second-Order Decisions in Rights Conflicts*, 109 Va. L. Rev. 1095, 1105 (2023), which, as I read it, uses the term to identify reasons that improve “God’s eye” normative judgments independent of any institutional locus. See also *infra* note 66 (discussing my prior use of the term).

Second-order reasons are typically rules that screen out from the frontline decision-maker's consideration first-order reasons that are rationally relevant to an all-things-considered "God's eye" (that is, noninstitutional) assessment.⁴

The next Part of this Essay asks, "Why on earth would you try to prevent a decision-maker from taking a relevant first-order reason into account?" The answer is that doing so in the right way *increases* the number of occasions on which the world is made better off by the ultimate decision-maker's lights. The analysis is almost entirely unoriginal, though perhaps I emphasize some things more than other scholars have.⁵

Part II turns to what I believe to be unexplored territory.⁶ Suppose that the city's police chief takes direction from the city council, which has enacted an ordinance prescribing conditions for granting permits to use the park for demonstrations. Complying with that ordinance, the police chief denies a permit. Litigation ensues, and when the smoke clears, the supreme court tells the police chief to issue the permit, which she does. That action does not in itself wipe the ordinance off the books.⁷ The supreme court might think, though, that the world would be a better place if the ordinance had not been enacted in the first place (so that the police chief would not have had the authority to prevent the demonstration), and it believes that the reasons the city council had for enacting it were rooted in the incentives its members had. The supreme

⁴ See Joseph Raz, *Practical Reason and Norms* 39–40 (Oxford Univ. Press 1999) (1975); see also *infra* note 17 for a brief discussion of the similarity to and difference from Joseph Raz's argument that rules issued by "practical authorities" exclude relevant considerations from a decision-maker's purview.

⁵ I am reasonably sure that everything I say in Part I is anticipated in Fred Schauer's work, beginning with Frederick Schauer, *Free Speech: A Philosophical Enquiry* 42–43 (1982). See also Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* 159–60 (2007) (explaining, through *Chevron*, the benefit of second-order interpretation), and more obscurely, Giulio Itzcovich, *On the Legal Enforcement of Values. The Importance of the Institutional Context*, in *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* 28, 32–36 (András Jakab & Dimitry Kochenov eds., 2017) (describing normative theories of legal interpretation).

⁶ Though I might well have overlooked relevant scholarship.

⁷ In terms used in some jurisdictions, the supreme court disapplies the ordinance but does not invalidate it (perhaps because applying the ordinance in other circumstances would make the world better off as the supreme court sees things). See Adam Perry, *Why Constitutional Conventions Aren't Laws (Hint: It's Not Why You Think)* (Feb. 27, 2018), <https://adamdperry.com/2018/02/27/why-constitutional-conventions-arent-laws-hint-its-not-why-you-think/> [<https://perma.cc/T7FT-6YN2>].

court might try to develop what I call third-order reasons to take those incentives (and thereby those reasons) into account when generating its second-order rules.⁸ To bring the analysis to ground, I narrow the scope of the inquiry: legislators might act because of public-choice-type reasons (self-interested voters mobilize differentially to support or oppose legislators whose actions advance the voters' private ends) or because of republican, public-interest reasons.⁹ Third-order reasons might be deployed to improve the operation of a public-choice-based legislative process.

I conclude by briefly pulling together some strands of the Essay's argument that suggest—only suggest, not establish—that the ideal of the rule of law to which Schauer and many others are committed is unachievable in the real world of complex institutions and bodies of law.

I. SECOND-ORDER REASONS

It is easy to describe largely unrealistic scenarios in which the ultimate decision-maker serves as the frontline decision-maker as well. The nation is small and peaceable, with relatively few people dissatisfied with the way things are. You want to hold a demonstration, so you go to the supreme court, and it decides whether, all things considered, the nation would be better off if you were allowed to hold it.¹⁰ This arrangement is impossible in larger nations with more people wanting to hold more demonstrations. The UDM simply lacks the capacity to act as a frontline decision-maker.¹¹

⁸ See *infra* Part II.

⁹ See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 100–03 (2015).

¹⁰ For an example of using the supreme court as both frontline and ultimate decision-maker, see Brazil Const. art. 102(1)(b) (giving the Federal Supreme Court the power to try “under its original jurisdiction . . . common criminal offenses committed by . . . members of the National Congress”). As the number of corruption charges against legislators has risen, implementing this provision has become infeasible. In 2016, “[o]f the 513 members of [Brazil’s] lower house in Congress, 303 face[d] charges or [were] being investigated for serious crimes”; the numbers for the Senate were forty-nine of eighty-one members. Vincent Bevins, *The Politicians Voting to Impeach Brazil’s President Are Accused of More Corruption Than She Is*, *L.A. Times* (Mar. 28, 2016, at 15:04 PT), <https://www.latimes.com/world/mexico-americas/la-fg-brazil-impeach-20160328-story.html>.

¹¹ But see *The Court and Constitutional Interpretation*, Sup. Ct. of the U.S., <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/2CYU-K5MF>] (last visited Jan. 4, 2026) (describing the Supreme Court as “the final arbiter of the law”).

So, obviously, you set up a frontline decision-maker whose decisions are subject to review by the UDM.¹² You want that decision-maker to arrive at the same conclusions as the UDM would as often as possible. What instructions does the UDM give the frontline decision-maker? You could tell it, “Issue the permit if, all things considered, you would make the nation better off by doing so, otherwise not.” That is, you could tell the frontline decision-maker to use the same decision rule that the UDM does.

There are a couple of obvious problems, though. Making an all-things-considered judgment requires, well, the exercise of judgment—about what values would be promoted and impaired and to what extent by allowing or prohibiting the demonstration, and about the likelihood that a bunch of events (“facts”) would occur were the demonstration to be held or prohibited.¹³ People acting in entirely good faith can reach different conclusions about these questions. And perhaps (though this is not essential to the argument for second-order reasons) the UDM may think that it is simply better at arriving at correct ATC judgments than the class of frontline actors.

In addition, a decision-maker considering what the frontline actor has done might think that there is some value in letting the frontline actor do what it wants. This is most pointed, of course, where the UDM is a court and the frontline actor a legislature.¹⁴ The court might think that there is a value to self-government itself, not implicated when *it* is the frontline actor.

Under these circumstances,¹⁵ some frontline actors told to make the ATC judgment are going to issue permits when, in the supreme court’s view, they should not and will refuse to issue permits when they should (“should” here with the same institution-specific definition). What to do? In the first instance, of course, allow dissatisfied permit applicants (or those dissatisfied with the fact that a permit was issued) to appeal to the UDM. There is a problem lurking here. You must be confident that not every decision by the frontline actors will be appealed, because otherwise, you are going to tax the capacity of the UDM again. Maybe

¹² See *id.*

¹³ See *id.*

¹⁴ See Vermeule, *supra* note 5, at 147.

¹⁵ The first of which is inevitable, an important point because it establishes the importance of second-order reasons no matter what one’s stance is on the role that considerations of self-government should play in judicial review.

experience will bear out your confidence that the number of appeals will be within the supreme court's ability to decide.¹⁶ If so, telling the frontline actors to make the ATC decision will work fine because the UDM can reverse *every* decision that is mistaken from its point of view.

What if you lack that confidence? That is, you expect that the supreme court will lack the capacity to review on the merits all the appeals that will be brought against ATC permit decisions made by frontline actors. You could tell the supreme court to give all the appeals a quick look, akin to admissibility decisions in some jurisdictions and to certiorari in the U.S. system; make a rough judgment about whether the decision under appeal seems to be right or wrong; and review on the merits only those that the quick look suggests are wrong. The supreme court can ensure that it has the capacity to decide on the merits the cases that get through the quick-look screen.

This system has a feature that becomes important as the argument proceeds. The "quick look" strategy guarantees that the UDM will know that some demonstrations will occur that, from its point of view, should not occur, and that some will not occur that should. The reason is that quick looks must be less accurate than full-scale deliberation on the merits (otherwise, we are back to the problem of institutional capacity). Sometimes the quick look will lead the supreme court to think that a permit was properly denied, but if the court took the time to review the case on the merits, it would conclude that the permit should have been issued.

The institutional design we have worked out to deal with discrepancies between frontline actors' all-things-considered judgments and the UDM's all-things-considered judgments means that we are going to have to live with *mistakes* (again, as usual, from the UDM's point of view). And that introduces another possibility: maybe we can give instructions to frontline actors that keep the number of mistakes as low as possible.

The instructions take the form of second-order reasons, more readily described as *rules* that substitute for direct ATC judgments. The trick is to come up with rules that, when followed by frontline actors, produce fewer errors (that would persist after the quick-look stage of review) than would directing those decision-makers to make ATC judgments.

¹⁶ This might happen if, for example, applicants denied permits decide, often enough, that they do not care enough about holding the demonstration to expend the resources needed to appeal.

The form the rules take is this: frontline actors should not take into account some consideration that is relevant to coming to well-grounded ATC judgments.¹⁷

It is not clear to me that working out the analysis requires that we have an account of where the rules come from (that is, how the UDM comes up with error-minimizing rules). Here is one speculation, though: the UDM looks at the cases where it reverses the frontline actors and notices a pattern. Perhaps it notices that it is reversing in lots of cases where the frontline decision-maker took the reaction of hostile audience members into account—even though the UDM believes that such reactions really are relevant to making a good ATC judgment.¹⁸ So, it comes up with a rule directing those decision-makers to ignore such reactions when considering permit applications. Or, the UDM observes that it is reversing decisions where the frontline decision-maker gave too much weight to the political position the demonstrators were taking—even though it believes that what those positions are is actually relevant to making a good ATC judgment.¹⁹ (A demonstration against the administration of the nation’s immigration laws might make it somewhat more difficult to enforce those laws, and the reduction in effective enforcement is relevant to the question, “Would the world be better or worse were the demonstration to occur?”) So, it comes up with a rule directing those decision-makers to ignore the content of the

¹⁷ The typical formulation includes an escape hatch/qualification: ignore this otherwise relevant consideration unless there are compelling reasons, beyond the fact that it is relevant to an ATC judgment, for doing so. I do not discuss such escape hatches in what follows because if you think them through, they do not add anything of analytic interest (that is, what I have to say about the unqualified rules carries over without significant modification to the rule with its escape hatches). These rules are similar to Raz’s exclusionary reasons but are justified differently. As I understand Raz’s argument, a person should follow a rule devised by a “practical authority” rather than coming to her own ATC judgment because the practical authority is better at assessing the relevance and weight to be given the excluded reason and has devised a rule that, when followed, improves the target’s well-being more than would occur were the target to make her own ATC judgment. Raz, *supra* note 4, at 62–63.

¹⁸ “Lots of” is informal here. The UDM would have to do a fair amount of fancy statistical analysis (perhaps intuitively) to isolate features of frontline actors’ all-things-considered judgments that produce errors disproportionately.

¹⁹ As above, it does not matter *why* the frontline actors are making these mistakes (lower ability than the UDC to give the relevant considerations appropriate weight, or unavoidable disparities in the exercise of discretion to come up with the weights).

message the demonstrators want to convey when deciding on permit applications.²⁰

Of course, the frontline actors are going to make mistakes (from the UDM's point of view) in applying the rule for the reasons I have already canvassed. But, perhaps well-designed rules will reduce the number of mistakes to a point where reviewing appeals from permit denials or issuances on the merits after a quick look is within the UDM's institutional capacity.

Now, though, another problem arises. Suppose a frontline decision-maker issues a permit after properly following the rule to ignore the risk of the reactions of a hostile audience. The UDM takes up the city's appeal on the merits and makes its own ATC judgment, which includes consideration of the concededly relevant facts about a hostile audience reaction. And, lo and behold, it decides that all things considered—including the hostile audience reaction—the permit should not have been issued.

What to do? Two possibilities: carve out an exception to the rule tied to the specifics of the case at hand, or affirm the (mistaken) decision to grant the permit. Both possibilities pose dangers.

A. Making an Exception.

The UDM has to think that frontline actors will apply the rule-plus-exception correctly often enough to reduce the number of errors. It is not clear, though, how the UDM could have that confidence because (aha!) it does not have the kind of experience with applying the exception that it had when it generated the rule about ignoring hostile audience reactions. And the UDM has to worry that frontline actors will take *its* willingness to carve out an exception to license *their* creating exceptions. The new exception could be created by analogy to the one the UDM created: “The hostile audience reaction here is not quite the same as the one the UDM used to carve out the exception, but it is enough like it to justify my carving out a new exception.” Or, it could be created by shifting focus from the hostile audience reaction to the reasons for that reaction: “The reason for the hostile audience reaction in the case triggering the UDM's carve-out is present here, so I will deny

²⁰ My intuition is that we could reconstruct the history of the rule that content-based regulations receive strict scrutiny along the lines suggested in the text. This Essay is not the place to do that reconstruction, though.

the permit—not because of the hostile audience reaction but because the UDM’s exception actually rests upon a judgment about the *kind* of demonstration at issue in the case before it.”

Further, you can be sure that the process that led to carving out an exception will generate cases where properly applying the rule-plus-exception will produce errors, and the UDM will be tempted to create a qualification for the rule-plus-exception. Continued long enough, and you are going to end up with a complex rule structure (rule-exception-qualification-limitation to qualification, and so on) that does not do much, if anything, to improve on the situation you began with: frontline actors directed to make ATC judgments.

Taken together, these considerations pose a real risk that the strategy of constraining frontline actors by telling them to follow second-order rules will not work. And, though of course I cannot prove it, I have a rather strong sense that in domain after domain, the carve-out strategy eventually fails.²¹

B. Affirming the Erroneous Decision.

The UDM could say to itself, “Well, here is a case where a carve-out would make the world better off. If I do that, though, the strategy of making the world better by directing frontline actors to follow my rules rather than make their own ATC judgments is going to fail. So, I guess I have to swallow hard and affirm a decision that I know makes the world worse off.” Or, more pointedly, “In affirming, I myself am making the world worse off in respect of this case, in the service of the larger goal of making the world better off in general.”²²

Judges do sometimes say that. It is the import of Justice Kennedy’s concurrence in *Texas v. Johnson*, for example, which states that applying the rule against viewpoint-based regulations leads to a result he really dislikes, but maintaining the rule structure against a seemingly unprincipled carve-out as proposed by the dissenters overrides his

²¹ Though perhaps the “eventually” makes the strategy good enough for government work.

²² If they want to get fancy, UDMs can leverage the literature on the distinction between directly and indirectly causing harm to salve their conscience. For a particularly pointed example these days, see John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 317–18, 322–23, 329–31 (1998) (concluding, as I read the article, that a Catholic trial judge cannot impose a death sentence, but that a Catholic Supreme Court justice dealing with a habeas corpus case can render a decision whose effect is to lead to an execution).

distaste.²³ And, though again I rely on my intuition, I think it may be the import of some claims by judges that an opinion reaching a result they at first favored “won’t write”: it “won’t write” because the only way to write it is to carve out an exception, and the obvious candidates for the exception would raise the serious difficulties associated with the carve-out strategy.

Still, it is going to take nerves of steel to affirm erroneous decisions more than occasionally, and again, my intuition is that most judges most of the time have weaker nerves.²⁴

The bottom line, in my view, is this. The institution-based argument for using second-order reasons as a way of making the world a better place (as against telling everyone to make their own ATC judgments) is analytically sound and probably underlies a fair amount of First Amendment law (and probably constitutional law in other domains²⁵). But, it is probably practically unsustainable because it asks too much of

²³ *Texas v. Johnson*, 491 U.S. 397, 420–21 (1989) (Kennedy, J., concurring).

²⁴ A note on the relation between the analysis presented here and scholarship on theories of constitutional interpretation: the best defense of a theory of constitutional interpretation is that the world will be a better place if judges adopt and consistently follow it. For analyses, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Calif. L. Rev.* 535, 573–76 (1999); Cass R. Sunstein, *How to Interpret the Constitution* 8 (2023). Applying the theory of interpretation across all domains, the argument goes, judges will hit the target of making the world a better place more often than if they make their own all-things-considered judgments. Implausible on its face (the argument might work “locally,” so to speak, with respect to discrete issues, but it is hard to believe that any theory of constitutional interpretation will work equally well on the “make the world a better place” scale for free expression, searches and seizures, the scope of presidential power vis-à-vis Congress, and the scope of national power vis-à-vis the states), the argument is basically the subject of the general critiques of theories of constitutional interpretation. For my early and late contributions to those critiques, see Tushnet, *supra* note 9, at 4–7; Tushnet, *supra* note 2, at 83–87. And, for discussion of the “nerves of steel” question, see Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 *Tex. L. Rev.* 221, 276–77 (2023); Caroline Mala Corbin, *Free Speech Originalism: Unconstraining in Theory and Opportunistic in Practice*, 92 *Geo. Wash. L. Rev.* 633, 670–71 (2024); Eric J. Segall, *Every True Story Ends in Death: How the Roberts Court Killed Originalism* 87–88 (*Ga. St. U. Coll. L., Legal Stud. Research Paper*, Paper No. 2025-08, 2025), <https://ssrn.com/abstract=5235511> [<https://perma.cc/NQL2-52KW>] (concluding, the last two more strongly than the first, that judges do not have nerves of steel).

²⁵ I interpret the “constitutional criminal procedure” episode of the podcast L. Michael Seidman and I have as making this claim with respect to the Fourth Amendment, for example. See (actually, listen to) *Supreme Betrayal: How the Supreme Court and Constitutional Law Have Failed America: Constitutional Criminal Procedure*, at 27:08–29:33 (Simplecast, Aug. 3, 2025), <https://supreme-betrayal-how-the-supreme-court-and-constitutional.simplecast.com/episodes/constitutional-criminal-procedure-7gldr43c> [<https://perma.cc/5SPY-XZ82>].

ultimate decision-makers. I leave readers to question the implications of that conclusion for ideas about the rule of law.

One final question remains. Call it the problem of precedents and canonical texts. When presenting the foregoing argument, I frequently encounter the following objection: You have assumed that the UDM takes its job as making all-thing-considered judgments. But, at least if you are imagining the U.S. Supreme Court as a paradigmatic UDM, that assumption might be misplaced. At least for public consumption, the Supreme Court describes its role as interpreting a canonical text, the U.S. Constitution, and implementing the body of precedents it has inherited.²⁶ Those descriptions overlap imperfectly with the description of the role as making ATC judgments, and the gap is interesting and important.

I wonder about the cogency of that objection for the following reason. I will use precedential reasoning as my example, though the argument holds, appropriately modified, for interpreting canonical texts. As Fred Schauer, among others, emphasized, following precedent matters only when the precedent appears to dictate a result different from the decision-maker's all-things-considered judgment.²⁷ Why should a UDM take its role to follow precedents? Doing so means that whenever precedent matters, the role-constrained UDM will choose a path that makes the society worse off (from the UDM's point of view); rejecting that description of the role allows the UDM always to take the path that makes the society better off.

Aside from that quite general worry, there is a narrower "confession and avoidance" strategy. Conventional arguments about how a precedent and a canonical text constrain almost always posit a single precedent or canonical text and say, "Surely there is no way around *that*—the role-constrained judge simply *has to do X*," where "*X*" is, again in the interesting cases, "make the society worse off."²⁸ That form of argument overlooks the fact that the role-constrained judge is never faced simply with a single precedent or one line of canonical text. She always faces a rich field of precedents and canonical texts. And decades of Legal Realist analysis has shown, at least to my satisfaction, that (in

²⁶ See Tushnet, *supra* note 2, at 89.

²⁷ Frederick Schauer, *Precedent*, 39 *Stan. L. Rev.* 571, 597 (1987).

²⁸ These kinds of arguments have begun to acquire the label "toy stories" or "toy cases"—simplified examples that expose the purported logic of arguments said to be applicable to more complex sets of facts. See Nelson & Schwartzman, *supra* note 3, at 1136–38.

legal systems prevailing in moderately complex societies) a talented judge who thinks the stakes are high enough and has the time to work things out can always find a way through the body of precedents and canonical texts to reach the result that, in her view, makes the society better off.²⁹

Before proceeding to third-order reasons, I want to raise a general concern about the institution-based argument, which can be said to arise from the very idea of “an” institution or ultimate decision-maker. To adapt a well-known aphorism from political science, institutions are a “they,” not an “it.”³⁰ Note, for present purposes, that UDMs are typically multimember bodies. The institution-based analysis works in connection with any output from such a body according to its own decision rules. Rather, the difficulty is that the UDM changes over time. Collapse the UDM into a single real-world actor—the Judge—who has life tenure. Eventually the Judge’s term ends, and a new Judge comes on the scene. There is no analytic reason to think that Judge B’s all-things-considered judgments will match those of her predecessor, Judge A. If they do not, Judge A’s rules go out the window, and the rule-generating process must start over again. Here too, we might worry about rule-of-law questions.

Perhaps the analysis can be salvaged by positing a system—itsself probably institution-based—in which Judge B’s ATC judgments are quite likely to match Judge A’s because they are basically the same type of people: trained in basically the same way, drawn from “the same” talent pool, and assessed for appointment according to criteria that screen out people whose ATC judgments are outliers.³¹ The institution-based analysis then survives because it rests on what I would call sociological foundations—which raises a somewhat different set of rule-of-law concerns.³²

²⁹ The qualifications “talented,” “stakes,” and “time” are quite important in my formulation. The classic presentation of the argument is Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. Legal Educ.* 518, 518–30 (1986), on which I elaborate in Mark Tushnet, *American Legal Realism Today: An Idiosyncratic Restatement*, 1 *Nw. L.J. des Refusés* 43, 54–56 (2024).

³⁰ See Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 *Int’l Rev. L. & Econ.* 239, 244–45 (1992).

³¹ See Tushnet, *supra* note 2, at 86–87.

³² And at this point, arguments from “outsider jurisprudence” have bite—not because the institution-based analysis is formally defective (some extravagant versions of such jurisprudences, including, to be honest, some versions associated with Critical Legal Studies,

II. THIRD-ORDER REASONS

The preceding analysis deals with as-applied challenges to frontline decision-makers' permitting decisions. It might seem that it could also deal with facial challenges. If the UDM concludes that a regulation or statute can almost never be applied in a way that makes the world a better place—if it is impermissible in virtually all of its applications³³—the UDM can use the occasion of a single challenge to tell all frontline decision-makers that they can never apply the regulation.

With respect to second-order reasons, though, as-applied and facial challenges differ in an interesting way. Disposing of an as-applied challenge, the UDM can get the frontline decision-maker to comply with its decision: the permit will be issued or denied. That's because the frontline decision-maker has strong incentives to do what the UDM wants (it will be fined or held in contempt if it does not). And, though there might be outlying cases where these ordinary incentives are not strong enough,³⁴ we can expect routine compliance with the UDM's directives in as-applied cases.

Facial challenges are different because the frontline decision-maker does not actually have to do anything to comply with the UDM's directive.³⁵ A city council does not have to repeal an ordinance regulating signs that the UDM says is impermissibly content-based.³⁶ The UDM's decision does affect the frontline decision-maker's incentives, though. It sets up a situation in which political opponents of the decision-maker can say, "Why did you waste your time enacting this unconstitutional ordinance when you could have been spending time on

do contend that the analysis is formally defective), but because its sociological foundations cannot give the structure significant normative force.

³³ E.g., *United States v. Salerno*, 481 U.S. 739, 745 (1987) (stating that a facial challenge to the constitutionality of a statute requires the statute to be invalid in all circumstances, except in the limited context of the First Amendment, where the statute could be unconstitutional even if there are some circumstances in which its operation is valid).

³⁴ For example, where the frontline decision-maker has unusually strong personal reasons for defying the UDM. The contemporary example is Kim Davis, the registrar whose opposition to marriage equality was so strong that she refused direct orders from above to register marriages between same-sex partners. *Ermold v. Davis*, 130 F.4th 553, 556–57 (6th Cir. 2025), *cert. denied*, 146 S. Ct. 398 (2025).

³⁵ Howard M. Wasserman, *Zombie Laws*, 25 *Lewis & Clark L. Rev.* 1047, 1049 (2022).

³⁶ *Id.* at 1071.

figuring out how to deal with the problem of the unhoused in our community?”³⁷

In cases involving facial challenges, the UDM’s decisions operate by affecting the frontline decision-maker’s political incentives. Suppose the UDM concludes, as I think reasonable, that generating rules based on second-order reasons remains its best strategy for making the world a better place. To do that when the rules operate through political incentives, the UDM must have some sense of what those incentives are.

Let’s switch my motivating example from issuing demonstration permits to sign ordinances. *Reed v. Town of Gilbert* dealt with such an ordinance.³⁸ As Justice Thomas’s opinion for the Court pointed out, the ordinance sorted signs into twenty-three categories, regulating each category a bit differently.³⁹ Put aside for the moment the categories on which the Court focused and look at the others. They included “Residential Open House Signs,” “Garage Sale Signs,” “Umbrella Signs” in a designated area, “Restaurant Menu Signs,” and “Boutique Signs.”⁴⁰ The town’s city council described the ordinance’s purposes as “eliminat[ing] confusing, distracting, and unsafe signs; and . . . enhanc[ing] the visual environment” while “assur[ing] proper and efficient expression through visual communications.”⁴¹ Call these “public interest” purposes. At least some of the categories have another feature: they ensure that some entities—restaurants and “boutiques” most obviously—can communicate with potential customers.⁴² Call these “special interest” provisions.⁴³

³⁷ This argument is available when the UDM deals with an as-applied challenge, but the frontline decision-maker has a ready response: “Well, we accomplished a lot with the ordinance and almost all of it remains effective.”

³⁸ 576 U.S. 155, 159–61 (2015).

³⁹ *Id.* at 159.

⁴⁰ Joint Appendix at 28–30, *Reed*, 576 U.S. 155 (No. 13-502). If you are curious, the last of these is defined unhelpfully as “[a] temporary sign advertising the location of a boutique sale.” *Id.* at 29, 64.

⁴¹ *Id.* at 25.

⁴² *Id.* at 64, 67.

⁴³ Special-interest provisions are almost certainly more common in contexts other than the First Amendment, and I will use some non-First Amendment examples to ease the exposition. Special-interest provisions are not alien to First Amendment law. They are scattered through copyright and trademark law, for example. See, e.g., *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 527, 531–32, 548 (1987) (rejecting a First Amendment challenge to a provision giving the U.S. Olympic Committee the “exclusive right” to use a number of terms, including “Olympic”).

Suppose the UDM looks at Gilbert's ordinance and asks, "What sort of political process generated this ordinance?" Clearly, a process that combines public-interest and special-interest reasons. Maybe the UDM thinks that this combination is just fine. It can then do its thing without worrying about the political process.

Suppose, though, the UDM concludes that the world would be better off if the political process were (somewhat) different. It might discern problems with the way in which special interests affect the process: some special interests have "too much" influence, others too little. Or, it might see that the frontline decision-maker does not take public-interest considerations into account as much as it "should" (from the UDM's point of view).

Here's where what I call third-order reasons come in. Third-order reasons deal with perceived defects in the political process. The perception of a defective process arises from the UDM's consideration of challenges to legislation produced by the process. Instead of saying, "This legislation is bad because implementing it will make the world worse off," a UDM thinking about the political process will say, "This legislation looks fishy to me, but I can't say right now whether implementing it will make the world better or worse off. What I can say is that the process that generated the policy seems defective because the relative roles of special interests and the public interest seem out of what I think is the right balance. So, here's what you can do to correct the balance. Once you do that, let's see if you generate this same policy or abandon it. Once the process is straightened out, though, I will go along with whatever it produces."

I discuss three candidates for adjusting the balance: reducing the impact of some special interests, increasing the impact of other special interests, and increasing the role that public-interest considerations play. Each has its attractions and its defects (the latter of which probably outweigh the former).

A. Decreasing Special-Interest Influence Directly.⁴⁴

In liberal democratic societies, attempting to reduce the influence of special interests is probably a nonstarter. Special interests are, in Mitt Romney's memorable words, "people" too—people who tell their

⁴⁴ "Directly" because the third candidate (increasing public-interest influence) indirectly decreases or increases special-interest influence.

representatives to vote for policies that these people think will improve *their* lives even if doing so makes some other people worse off.⁴⁵ You can directly decrease special-interest influence pretty much only by interfering with individuals' decisions to express themselves politically.⁴⁶ An ultimate decision-maker might come up with an ATC judgment that this or that limitation on such decisions makes the world better off. Generically, though, ultimate decision-makers (in the plural) cannot.

I will cut to the chase and discuss, though rather briefly, the obvious subject here: the regulation of campaign finance.⁴⁷ First, no actually existing campaign finance regulation has eliminated problems one might think are associated with too much special-interest influence.⁴⁸

⁴⁵ Frank James, Romney's 'Corporations Are People' a Gift to Political Foes, NPR (Aug. 11, 2011, at 03:13 ET), <https://www.npr.org/sections/itsallpolitics/2011/08/11/139551684/romneys-corporations-are-people-getting-lots-of-mileage> [<https://perma.cc/R4Z2-UVPV>].

⁴⁶ See Kenneth J. Levit, Campaign Finance Reform and the Return of *Buckley v. Valeo*, 103 Yale L.J. 469, 470 (1993) ("Prohibited from directly capping campaign expenditures [by the Supreme Court in *Buckley v. Valeo*], Congress has now proposed *voluntary* spending limits and plans to offer . . . incentives to candidates who adhere to those limits.")

⁴⁷ The scenes before the chase involve UDM review of legislation adopted by the legislature that is, by hypothesis, overly influenced by special interests. Some brief observations: Experience suggests that such legislation is almost always incumbent-favoring for obvious reasons. Cass R. Sunstein, Political Equality and Unintended Consequences, 94 Colum. L. Rev. 1390, 1400–03 (1994). Sometimes the incumbent-favoring features will be lurking in exceptions and limitations. See *id.* at 1400–02; Daryl Levinson & Benjamin I. Sachs, Political Entrenchment and Public Law, 125 Yale L.J. 400, 402–04 (2015). "Hidden" along with them will be special-interest provisions benefiting or harming special interests outside the legislature. *Id.* at 435–36 (discussing the effects of incumbent-favoring legislation on unions). The UDM might be tempted to excise such provisions. Doing so, though, has some noteworthy effects. Often these provisions will have been inserted to assemble a majority coalition supporting the statute overall. Excising them "creates" a statute that would not have been enacted in that form. That UDM-created statute does not carry with it whatever weight the UDM gives to self-governance by frontline actors. In addition, sometimes these provisions will have been packaged with compromises dealing with core features of the legislation. The imperfect frontline actor concludes that the statute taken as a whole, compromises, exceptions, warts and all, makes the world a better place. Excise the exceptions, and you have no idea what the compromises on the core provisions would have looked like—and so nothing about which you can impute to the frontline actor a judgment about making the world a better place. See David H. Gans, Severability as Judicial Lawmaking, 76 Geo. Wash. L. Rev. 639, 664 (2008) (discussing severability doctrine as a form of creating a new statute, separate from the legislative process).

⁴⁸ See Sunstein, *supra* note 47, at 1400–11 (theorizing unintended consequences of campaign finance reform efforts).

Everywhere, even in the “cleanest” jurisdictions, you find corruption—sometimes minor, often major—associated with campaign finance.⁴⁹

Second, and probably related, no one has figured out how to deal with what are known in the United States as independent expenditures and elsewhere as third-party spending.⁵⁰ These occur when someone identifies a candidate she likes a lot and decides to spend her own money on advertisements and social media activities supporting the candidate, without interacting with the candidate even to get guidance about what messages to send.⁵¹ Here’s the problem: Sandy Socialist thinks that Alexandria Ocasio-Cortez would be just a terrific president and decides to spend the next two years of her life—and all her income—on activities promoting Ocasio-Cortez’s candidacy. To focus the argument, suppose she decides to spend all the money in an account that she would set aside to buy a nice house because she thinks she will be better off if AOC becomes president than she would be if she had a nice house. Compare her to Elon Musk, who decides to spend \$180 million on independent expenditures supporting Donald Trump rather than on buying five or ten more mansions around the world. (And, just to pin things down, assume that both Elon and Sandy hope that they will get some direct benefits—including positions in the government—if Trump or AOC win, but have no solid indications from the candidates that that will happen.) The difference between Elon and Sandy is that Elon is richer than Sandy.⁵² Here, too, a UDM might be able to say, “The world would be better off if really rich people were allowed to spend only a specified fraction of their wealth on politics, and everyone else could spend however much they wanted.” That’s what it would take

⁴⁹ A test: Prompt your search engine or AI assistant with “campaign finance scandals <candidate clean country>.” I guarantee that you will find something significant. I prompted Perplexity with <Please give me a memo describing campaign finance scandals in nations generally thought to be reasonably free of corruption> and got a memo that directed me to material from the International Consortium of Independent Journalists that identified, among others, Argentina, Belgium, the United Kingdom, and South Korea.

⁵⁰ Marina Pino & Julia Fishman, *Fifteen Years Later, Citizens United Defined the 2024 Election*, Brennan Ctr. for Just. (Jan. 14, 2025), <https://www.brennancenter.org/our-work/research-reports/fifteen-years-later-citizens-united-defined-2024-election> [https://perma.cc/GG83-VGLR].

⁵¹ *Id.*

⁵² Sometimes people worry about the problem of “drowning out,” now parading under the fancier label of “attention economy.” For a well-known example, see generally Chris Hayes, *The Sirens’ Call: How Attention Became the World’s Most Endangered Resource* (2025) (discussing the consequences of the newfound attention economy). Maybe Elon can drown out Sandy, but can he (did he?) drown out Kamala Harris?

to regulate independent expenditures out of a concern for excessive influence by the rich on elections.

Suppose our UDM concluded that the world would be better off if independent *monetary* expenditures were limited notwithstanding such limitations' effect on individual autonomy. Still, she would have to deal with non-monetary expenditures. Here are a few: celebrity endorsements,⁵³ endorsements by newspapers⁵⁴ (some of which are owned by the billionaires I've discussed⁵⁵), slanted news coverage⁵⁶ (again, some from outlets owned by our billionaires), and social media postings.⁵⁷

Again, the trick is to think of what regulations might address these contributions and make the world a better place. For celebrity endorsements and social media postings, maybe no endorsements or political postings by people with more than 250,000 (or some such number of) followers. For newspaper endorsements, a ban. For slanted news coverage, monitoring by a "truth in news" agency.

Those suggestions sound, to me, like fingernails being dragged across a blackboard (for those who remember that). That's just me, though, and maybe we could find a UDM who would be comfortable making such ATC judgments.

The "they not an it" problem rears its head. Today's UDM might conclude that all things considered, the world would be better if celebrities with more than 250,000 followers could not endorse candidates. Tomorrow's might think that such a rule undervalues celebrities' autonomy interests too much and ups the threshold to one million or gets rid of the rule entirely. As before, we might posit a sociological account for why that might not happen. Both with and

⁵³ Samantha Majic, Daniel O'Neill & Michael Bernhard, *Celebrity and Politics*, 18 *Am. Pol. Sci. Ass'n* 1, 4 (2020).

⁵⁴ Robert S. Erikson, *The Influence of Newspaper Endorsements in Presidential Elections: The Case of 1964*, 20 *Am. J. Pol. Sci.* 207, 217–18 (1976).

⁵⁵ Rupert Neate, 'Extra Level of Power': Billionaires Who Have Bought Up the Media, *The Guardian* (May 3, 2022, at 11:49 ET), <https://www.theguardian.com/news/2022/may/03/billionaires-extra-power-media-ownership-elon-musk> [<https://perma.cc/7S8U-PZQB>] (noting many of the richest members of society who have purchased newspapers and other media entities).

⁵⁶ Sarah Childress, *Study: Election Coverage Skewed by "Journalistic Bias," Frontline* (July 12, 2016), <https://www.pbs.org/wgbh/frontline/article/study-election-coverage-skewed-by-journalistic-bias/> [<https://perma.cc/9H2K-3CPD>].

⁵⁷ Jessica T. Feezell, *Agenda Setting Through Social Media: The Importance of Incidental News Exposure and Social Filtering in the Digital Era*, 71 *Pol. Rsch. Q.* 482, 490–91 (2017).

absent such an account, we have rule-of-law problems (not, though, “liberal autonomy” concerns).

B. Increasing Special-Interest Influence Directly.

This is the world of Footnote Four and John Hart Ely.⁵⁸ Some people who, in the UDM’s view, ought to be full participants in the political process are not. The remedy is to include them and let the special-interest-dominated political process generate policy. This is obvious enough for formal exclusions from the process—formal disfranchisements. And, of course, historically formal disfranchisements were a real problem.

Once formal disfranchisements end, what’s left? For many, quite a lot. Here are three examples.

1. Intertemporal Undervaluing. The future is only virtually represented in the present. We want our great-grandchildren to live in an environmentally nice world and do not want them to live in a world without a social safety net because all the government’s resources are devoted to paying off the national debt. Faced with a choice between being nice to our as-yet-unborn great-grandchildren and having really well-paved streets today, though, many of us will vote for the politician who will build the roads and reject a politician who says, “Put up with the bumps and thumps because your great-grandchildren will thank you in their prayers after you are long gone.”⁵⁹

Modern constitutional design offers a solution to the problem of intertemporal undervaluing: create agencies somewhat removed from day-to-day politics to develop environmental policy and fiscal policy (the central bank).⁶⁰ A UDM with the views I’ve described would certainly get behind the idea that having such agencies is a good thing, though as I argued in connection with campaign finance regulations, the

⁵⁸ Does one really need citations for this? John Hart Ely, *Democracy and Distrust* 75–77 (1980).

⁵⁹ Lior Sheffer, Peter John Loewen & Jack Lucas, *Long-Term Policymaking and Politicians’ Beliefs About Voters: Evidence from a 3-Year Panel Study of Politicians*, 37 *Governance* 395, 401 (2023) (analyzing the impact of short-term costs on long-term policy choices).

⁶⁰ For my discussion of this solution, see Mark Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy* 31–32 (2021). In citing this, I must also note that the book is only a preliminary sketch and that much more work remains to be done (and is being done) on the design and functions of institutions designed to address problems of intertemporal undervaluing.

UDM might worry that the (distorted, in its view) political process will generate agencies that are overly protective of the special interests they are designed to counter.⁶¹ More important, and again as before, it would take a truly creative UDM to come up with a requirement that the frontline decision-maker be this sort of specialized agency. It's not that doing so would somehow be outside the role occupied by the UDM, and indeed, it might be thought an inherent component of the role: "Given our view that the ordinary political process gives too much weight to today's interests and not enough to the future's interests, you cannot adopt this regulation through that political process. If you want to do it, you have to do it by creating, and then using, a specialized agency. Our guess is that that agency will not generate the policy before us, but if we are wrong, so be it: we will let it stand."⁶²

2. *Structural Undervaluing*. Drawing on public-choice scholarship, Bruce Ackerman argued that the interests of groups with a lot of members, each of whom has a little at stake with respect to some policy, will be systematically overridden by the interests of concentrated groups, each of whose members has a lot at stake.⁶³ Ackerman's core examples are regulations that impose costs on consumers and benefit some well-defined special-interest producer group.⁶⁴ My favorite example comes from Germany: the legislature enacted a statute prohibiting the sale of chocolate-covered rice candies, purportedly as a consumer-protection measure. Think of an Easter bunny made out of chocolate only versus one with a Rice Krispies/marshmallow base and a thin layer of chocolate coating. You buy the latter and give it to your youngster, who bites in and starts howling, "What is this, a cruel hoax?"⁶⁵ I thought I was getting a chocolate bunny, and all I'm getting is a Rice Krispies treat." Fair enough, but the consumer-protective purpose could

⁶¹ See generally, Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 *Oxford Rev. Econ. Pol'y* 203, 204 (2006) (reviewing the academic literature on regulatory capture, with an emphasis on utility regulation).

⁶² I personally am inclined to say that this is a version of Roberto Unger's ideas about a destabilization branch of government but have no reason to think that Unger (or indeed anyone else) would agree. For Unger's version, see Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* 450–53 (1987).

⁶³ Bruce A. Ackerman, *Beyond *Caroline Products**, 98 *Harv. L. Rev.* 713, 724–27 (1985).

⁶⁴ *Id.* at 728.

⁶⁵ Alluding here to a classic cartoon showing two sharks circling a sinking ship that has discharged a slew of inedible mannequins into the sea. See Gary Larson, *The Complete Far Side: Volume One 1980–1986*, at 465 (1986).

be served (almost) as well by a prominent disclosure: “Easter bunny of Rice Krispies coated with chocolate” right there on the label. You can gin up a consumer-protection story to take even this into account,⁶⁶ but honestly, we all know—and the UDM will know—that what’s going on, really, is that the legislature was basically giving a subsidy (from consumers’ pockets) to the chocolate candy industry.

As Ackerman argued, that’s a pervasive problem, cropping up in occupational licensing statutes and even in Gilbert’s sign ordinance (visually distracting signs promoting boutiques and home sales are implicit subsidies).⁶⁷ The problem’s pervasiveness pretty much rules out the “fourth branch” solution I sketched for intertemporal undervaluing. Using it would go a long way to eliminating “ordinary” politics altogether.⁶⁸ Another remedy available to the UDM, discussed in more detail below, is for it to substitute its judgment about what’s in the public interest for the outcome of a special-interest-dominated political process.

3. *Prejudiced Undervaluing.* On standard views, prejudice against a formally enfranchised group affects policy outcomes when that group’s voice—and votes—do not count as much as the voices and votes of others. The story is straightforward with respect to voice: members of the target group have their say, but the others in the audience do not listen, disregarding what they have to say.⁶⁹

⁶⁶ Labeling might not be enough to prevent impulse purchases at the check-out line when the child sees and demands the chocolate bunny or when the parent is putting items on the conveyor belt and not paying attention to labels. You can deal with that problem by requiring labeling and banning sales at check-out lines. See Mark Tushnet, *Verhältnismäßigkeit und das Problem regulatorischer Subventionen* [Proportionality and the Problem of Regulatory Subsidies], in *Rechtsdiskurs, Rechtsprinzipien, Rechtsbegriff: Elemente einer diskursiven Theorie fundamentaler Rechte—Symposium zum 75. Geburtstag von Robert Alexy* (Carsten Bäcker ed., 2022). I have an English version of this paper in my files (and on taking a look at it I discovered that I use the terms “first-order,” “second-order,” and “third-order” differently from the way I use them in this Essay). For an earlier version in English, see Mark Tushnet, *Three Essays on Proportionality Doctrine* (Harv. Pub. L. Working Paper, Paper No. 16-43, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818860 [<https://perma.cc/56VG-QB6R>].

⁶⁷ Ackerman, *supra* note 63, at 728.

⁶⁸ I note, though, that there are some advocates for a form of technocracy that would displace ordinary politics over an extremely wide policy range. A prominent example is Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59–61 (1993).

⁶⁹ The usual way of presenting this point is along these lines: “Women/members of racial minorities have to do twice as much to get half as far” or “You know, I said that fifteen minutes ago and only now, because a man has said it, are you taking the point seriously.”

It's much more complicated, and perhaps implausible, with respect to votes. A stylized version of the problem, which tracks some real-world experiences, is this: Political leaders of the group targeted by prejudice say to other political leaders, "Look, I know that you don't like us and maybe even actively would like to do us harm. But you are living in a world where you have a bunch of policies you want to enact, and you are having trouble doing so because your opponents have almost as many votes as you do. We have a policy agenda that's consistent with yours. If you vote for our agenda, we will vote for yours—and we both come out winners." And these leaders can go from one group just short of assembling a winning coalition to another and get what their group wants, even in the face of prejudice.

A lot of real-world evidence supports the proposition that enfranchised members of groups who are targets of prejudice are not systematically disadvantaged in a special-interest political process.⁷⁰ There are a couple of qualifications. The group's political leaders might have trouble keeping folks in line—that is, ensuring that they will switch from one coalition to another as opportunities present themselves.⁷¹ Or, the group might be a "pariah" in the sense that when it joins a coalition, enough people already in that coalition are so horrified that they drop out, which more than offsets the vote-gains the group brings to the coalition.

The problems associated with difficulties in herding cats and with pariah groups are real, but there probably are not structural ways of overcoming them (that is, of somehow giving the votes of these groups the weight they should have, as the UDM sees things). Here, too, the remedy of a UDM's substituted judgment might be the only way forward.

See Jeanette Morehouse Mendez & Tracy Osborn, *Gender and the Perception of Knowledge in Political Discussion*, 63 *Pol. Rsch. Q.* 269, 274–75 (2010) (identifying the quantifiable gap between women's perceived and actual political knowledge).

⁷⁰ See, e.g., Jose Javier Alcocer, *Minority Legislators Sponsor and Cosponsor Differently from White Legislators: Causal Evidence from U.S. Congress*, 10 *J. Race, Ethnicity, & Pol.* 277, 278–79 (2025) (discussing how legislators from minority groups utilize bill co-sponsorship to engage in coalition building more than their white and male counterparts).

⁷¹ See *Changing Partisan Coalitions in a Politically Divided Nation*, *Pew Rsch. Ctr.* (Apr. 9, 2024), <https://www.pewresearch.org/politics/2024/04/09/changing-partisan-coalitions-in-a-politically-divided-nation/> [<https://perma.cc/BA7X-RNY6>] (providing quantitative data regarding recent shifts in party membership demographics).

My interim conclusion is that the UDM can build mechanisms into the political process for properly valuing the interests of the future, but not easily. Such mechanisms probably are not available for structural and prejudicial undervaluing. Another possibility, closer to hand, is for the UDM to make a guess about what those folks would want out of the political process if they could fully participate. That's the third candidate.

C. Increasing Public-Interest Influence.

The chocolate-bunny regulation serves only the interest of the chocolate candy industry, and no public interest. In *Reed v. Town of Gilbert*, Justice Kagan said the town's justifications for the regulation challenged there did not "pass . . . even the laugh test."⁷² The town's regulation allowed large "ideological" signs to be erected permanently, an unlimited number of large-ish political signs for 60 days prior to an election, and a limited number of smaller "temporary directional signs" informing people how to get to an event for twelve hours before the event.⁷³ Reed wanted to put up signs informing people about a regular Sunday religious gathering, which would be displayed for about eighteen hours.⁷⁴ The town's lawyers argued, I hope half-heartedly, that banning the signs promoted the town's interests in traffic safety and aesthetics.⁷⁵ But, Justice Thomas wrote, if a limited number of small temporary directional signs were an eyesore, so were an unlimited number of larger political signs.⁷⁶ The ordinance could not promote any coherent aesthetic ideal. And larger "sharply worded" ideological signs were likely to be a greater distraction than smaller directional signs, so the ordinance did not really improve traffic safety.⁷⁷

⁷² 576 U.S. 155, 184 (2015) (Kagan, J., concurring).

⁷³ *Id.* at 159–61 (majority opinion).

⁷⁴ *Id.* at 161.

⁷⁵ *Id.* at 171.

⁷⁶ *Id.* at 172.

⁷⁷ *Id.* I'm not sure Justice Thomas was correct here. I have to look harder at smaller directional signs (taking my eyes off the road longer) than at larger ideological signs. If that's right, having such signs out on the streets for eighteen hours reduces traffic safety more than having ideological signs up permanently and more than having temporary directional signs out for twelve hours.

We are now in the land of rationality with bite.⁷⁸ We might wonder, though, why the UDM approaches the problem with a standard of review in hand (rather than simply making and enforcing its ATC judgment about the regulation). The answer is that the UDM is working along two fronts to make the world a better place. The first obviously deals with the regulation before it. The second deals with the overall legislative process, and on that front the UDM wants to change legislators' incentives so that they reduce—but do not eliminate—the weight they give special interests. Making only the ATC judgment would not have any effect on that front.

And, the UDM might think, a standard of review stronger than rationality with bite would lead special interests to take their marbles and go home. That is, after a rationality-with-bite decision, a legislator can say to the lobbyist for the chocolate-candy industry, “Look, I can’t get you everything you want (a complete ban on Rice Krispies chocolate bunnies), but I can get you something that will give you a pretty decent advantage over your competitors: a label that will discourage purchases.” Rationality with bite reduces the incentive a legislator has to accommodate a special interest, but it does not eliminate that incentive. Stronger standards of review would. Because special interests are people, the UDM might not want to do that.⁷⁹

There is another reason a UDM might be cautious about altering legislators' incentives to reduce the weight given to special interests. Governing majorities are coalitions of groups with their own takes on what would make the world a better place. Some of those groups are special interests. If one of them decides to get out of politics because it's not getting any payoffs—as might happen with a stronger standard of review—the coalition of which it is part will be reconfigured, with effects on policy outcomes that are unknowable in practice and probably in principle.⁸⁰ Even more so if a whole bunch of special interests are

⁷⁸ See Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 12 (1972).

⁷⁹ For a seemingly contrary view, see Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1730 (1984) (arguing that voters' mere preferences, apparently meaning solely self-interested ones, should be disregarded in generating policy).

⁸⁰ The fancy citation here would be to stuff about chaos theory. See Tien-Yien Li & James A. Yorke, *Period Three Implies Chaos*, 82 *Am. Mathematical Monthly*, 985, 985–86 (1975) (coining chaos as a mathematical term). A less fancy citation is to Lon L. Fuller's discussion

driven out of politics. Do things like that, and you really have no idea whether you are making the world better or worse.

There is yet another problem. So far, I have dealt with cases where the UDM looks at the political process and concludes that it could operate “better” in terms of making the world a better place. How come the process looks the way it does? The answer is obvious: because that’s what the frontline decision-maker’s constituents want. And it is not at all clear that the UDM can do much to affect the constituents’ desires. There may be some looseness in those desires, so perhaps some interventions can change things around the edges. In the end, I suspect that the case for using third-order reasons to alter the political process is significantly weaker than that for using second-order reasons to generate rules that make the world better (and, as discussed in Part I of this Essay, that case is not all that strong in the first place).

CONCLUSION

Fred Schauer was committed to the view that the rule of law properly understood was, as E.P. Thompson famously put it, an “unqualified human good.”⁸¹ He was a good enough jurist to know that properly understanding what the rule of law was was no easy task. In his First Amendment scholarship as throughout the body of his work, rule-ness was an important component of the rule of law properly understood.⁸² At the center of this Essay are two propositions: first that the best understanding of why rule-ness matters is an institutional one, and second that as we work out that understanding, we may begin to question the proposition that the rule of law must be to some significant degree a law of rules and then, perhaps, to question the proposition that there is something fairly described as a rule of law that could be a contribution, unqualified or qualified, to human good.

of spiderwebs in multipolar settings. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 395 (1978).

⁸¹ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* 266 (1975).

⁸² See, e.g., Frederick Schauer, *Rules and the Rule of Law*, 14 *Harv. J.L. & Pub. Pol’y* 645, 678–82 (1991) (describing the use of rules in the American legal system descriptively and discussing the value of those rules to the rule of law).

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

52–65

ESSAY

A WONDERFUL PROFESSIONAL RELATIONSHIP SURPASSED ONLY BY A PERSONAL ONE

*Larry Alexander**

INTRODUCTION

The late Frederick Schauer and I were longtime academic and personal buddies. We wrote academic articles together, managed an academic journal together, and exchanged academic ideas frequently. But we also played golf together whenever we could, and we and our wives travelled together several times, on several continents. Most of this Essay is devoted to describing the articles we coauthored—not just because they were ours, but because the intellectual and moral issues they raised were both of supreme importance and remain unresolved (and in my mind, and I suspect Fred’s, are incapable of being resolved). But I end this Essay by focusing on the non-intellectual side of my relationship with Fred.

I. OUR JOINTLY AUTHORED ARTICLES

Fred and I did not write articles together until several years after we had become friends and professional cohorts. But in 1997, two years after we had helped found and then lead the journal *Legal Theory*, we published in the *Harvard Law Review* our first coauthored article, *On Extrajudicial*

* Warren Distinguished Professor, University of San Diego School of Law.

*Constitutional Interpretation.*¹ Because it was in perhaps the most read and respected law review, it garnered a lot of response by well-regarded legal academics, much of it negative.²

In that piece, we endorsed *Cooper v. Aaron*'s³ assertion that the Supreme Court's interpretation of the Constitution binds all officials.⁴ Because a consensus had developed that *Cooper*'s assertion was erroneous, and that public officials need not take the Supreme Court's constitutional verdicts as authoritative,⁵ we believed we should show why that consensus view was itself erroneous. Our disagreement with the scholars' disagreement with *Cooper* and our defense of judicial supremacy in constitutional interpretation were based on the need for settlement of contests over constitutional interpretation.⁶ And, we believed, the Supreme Court was best equipped to provide that settlement.⁷ Because we are obligated to adhere to constitutional requirements even when we believe those requirements are normative mistakes, the same value of settlement requires adherence to what we believe are mistaken interpretations of the Constitution. Just as the goals of settlement of disagreements and coordinating with others leads to the obligation to obey the law, so too does the obligation to obey what we believe is a mistaken law produce the obligation to obey what we believe is a mistaken interpretation of the law by the Supreme Court, including a mistaken interpretation of the Constitution.

The view we were arguing against was widely accepted, not only at the time we wrote, but also by, among countless others, notables such as Thomas Jefferson, Abraham Lincoln, and Franklin Roosevelt.⁸ And among then (and now) contemporary legal scholars, it was endorsed by Michael Paulsen, Mark Tushnet, Laurence Tribe, and Sanford Levinson.⁹ The view we supported was to defer to judicial authority in legal, including constitutional, interpretation. We believed that such deference

¹ Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev 1359 (1997).

² Larry Alexander & Frederick Schauer, Defending Judicial Supremacy: A Reply, 17 Const. Comment. 455, 458 & n.12 (2000) (compiling published responses).

³ 358 U.S. 1, 18 (1958).

⁴ Alexander & Schauer, *supra* note 1, at 1359.

⁵ *Id.*

⁶ *Id.* at 1377.

⁷ *Id.* at 1359.

⁸ *Id.* at 1360 & nn.2–5.

⁹ *Id.* at 1361–62 nn.8–12.

could be overcome by a sufficiently strong reason not to defer, but we rejected the position of general non-deference.¹⁰ Our position and the position we were rejecting were meta-rules that themselves rested on acceptance today. As we put it, “[t]he present, and not the past, decides whether the past is relevant.”¹¹

The settlement of some—perhaps most—normative questions is preferable to non-settlement, even if the settlement is not the ideal one. As we conceded, if the settlement were too inferior, then it might not be preferable to non-settlement.¹² But even mistaken laws provide settlement, and settlement has value. As we put it, the best reason to obey laws, including constitutional interpretations by courts, that we think are wrong is

because of law’s ability to coordinate a multiplicity of substantive views, mutually exclusive interests, and self-defeating individual strategies into the thing we call a state, and into beneficial collective activity. Coordination and the settlement of disagreements—and the individually and socially beneficial goods these goals produce—provide content-independent reasons for the existence of the state, of law, and of the obligation of obedience to the law.¹³

But what if there is no moral obligation to obey the law qua law? There may be good reasons for lawmakers and law interpreters to teach law obedience and to punish and discourage disobedience to law. As we explained,

As paradoxical as it may seem, there are good arguments for requiring people, and particularly legal officials, on pain of penalty, to follow the law even when they believe they have good reason to disobey and even if they in fact do have good reason to disobey. Perhaps there are even good arguments for teaching that law has practical authority—that it provides content-independent reasons for obedience—even when or if it does not. . . . [T]he point is that, even though the addressees of the law may have good moral reasons for not treating law qua law as providing content-independent reasons for action, those who make the

¹⁰ Id. at 1361–62.

¹¹ Id. at 1370.

¹² Id. at 1377 & n.79.

¹³ Id. at 1374.

law may have equally good moral reasons for trying to minimize the consequences of the moral errors of law's addressees.¹⁴

For even if the law is morally imperfect, and some cases of legal disobedience will be morally superior to legal obedience, most instances of actual legal disobedience will be morally inferior to legal obedience.

If law's designers have reason to believe that law's addressees will, in exercising their moral independence, make such independent (or autonomous) but morally erroneous decisions, then law's designers have good moral reasons to try to make it painful for those addressees to exercise their expected-to-be-mistaken moral independence.¹⁵

(Note that this will create a "gap" between legal culpability and moral culpability, a gap that creates a dilemma for legal enforcers who are also devoted to morality, as, of course, they should be.¹⁶)

Note that what is said applies to law enforcing officials as well as to ordinary citizens. Officials may believe that applying some laws will be at odds with morality, but even so, there may be good moral reasons to compel the officials to apply those laws. For although the officials' beliefs may be right in some cases, those beliefs may be wrong in too many. If that is true, punishing officials who in good faith believed their refusal to apply the law was the morally correct thing to do—and in some cases was the morally correct thing to do—will nonetheless produce a morally superior state of affairs than would be achieved if we refused to punish them.

Perhaps the most important function of law is to settle authoritatively what is to be done. And because the Constitution governs all other law, it is especially important that it settle all the matters *it* covers. That is why we believed and so stated that *Cooper v. Aaron* was correct. As we put it near the end of our article,

[O]ne of the primary reasons for entrenching a constitution as law is to achieve a degree of settlement and stability, and another is to remove a series of transcendent questions from short-term majoritarian control. Both of these justifications, however, also support judicial supremacy.¹⁷

¹⁴ *Id.* at 1375.

¹⁵ *Id.*

¹⁶ See Larry Alexander, *The Gap*, 14 *Harv. J.L. & Pub. Pol'y* 695, 695 (1991).

¹⁷ Alexander & Schauer, *supra* note 1, at 1380.

Our bottom line in this article was that a constitutional law that is more specific than “act morally” will diverge in some of its application from what morality would prescribe and yet, if followed, would produce consequences morally superior to “act morally.” But those who *do* act morally rather than legally will have to be punished, as will those who incorrectly but in good faith believe they are acting morally. And given that, the punishment of such lawbreakers will be legally proper though morally undeserved, as judges will also understand. That is the moral dilemma that all law, including constitutional law, creates.

Once we accept that we should obey laws that are morally imperfect, it is, we asserted, a short step to accept the obligation to obey imperfect interpretations of those imperfect laws. As we put it, “[w]e argue, therefore, for an obligation to follow judicial interpretations, not because they are, by definition, correct, but despite the fact that they may be incorrect.”¹⁸

Finally, were we arguing that Lincoln was wrong in his rejection of the obligation to adhere to the Supreme Court’s reasoning in *Dred Scott v. Sandford*?¹⁹ As I indicated above, we were not arguing in favor of an absolute duty to follow all Supreme Court constitutional interpretations. What we did say was that although rejecting Supreme Court constitutional interpretations is a wrong, acting in accord with those interpretations might in some cases be a greater wrong.²⁰ Lincoln, therefore, may have had a stronger reason to refuse to follow *Dred Scott* than the reason he had to follow it.

We opined that there was always a reason to follow precedents, even if in some cases that reason was outweighed.²¹ We never maintained that every precedential decision of the Supreme Court should be followed by the Court itself, nor, in some cases, by lower courts. But we did maintain that the Court’s decisions, even if regarded as erroneous, carried substantial weight.²²

Because of the high profile of *On Extrajudicial Constitutional Interpretation*, given where it was published and the blistering attacks on

¹⁸ Id. at 1381.

¹⁹ See generally 60 U.S. (19 How.) 393 (1857) (arguing that the Constitution, as originally understood, excluded Black people from citizenship and protected slavery as a property right under the Fifth Amendment, thereby rendering congressional limits on slavery unconstitutional).

²⁰ Alexander & Schauer, *supra* note 1, at 1382.

²¹ Id. at 1363.

²² Id. at 1382.

it by several high-profile academics, we decided to come to its defense three years later. In *Defending Judicial Supremacy: A Reply*,²³ we defended our position that the Supreme Court's interpretation of the Constitution should bind all other officials. As we put it,

The undeniable fact that a judicial interpretation of an attempted legal settlement may be incorrect does not and should not call into question its authority, for it is inherent in all legal settlements of what ought to be done that such settlements claim authority even if those subject to them believe the settlements to be morally and legally mistaken.²⁴

In a footnote to the above quote, we pointed out that taking the legal settlements as conclusive of what ought to be done may lead to fewer substantive mistakes than having each agent acting on his or her own view of what ought to be done.²⁵

This view of ours, as we expressed it in the *Harvard Law Review* piece, was, as I said, attacked in numerous articles, many written by very distinguished scholars.²⁶ In response to those attacks, we framed the arguments we were making in response to these critiques as one based on a preconstitutional norm.²⁷ In our view, such a norm

determines not what was adopted *then*, but how what was adopted then should be regarded *now*. The Constitution's authority—its status as fundamental law—ultimately rests not on facts about the past, but on the Constitution's acceptance as authoritative in the present. This is a logical and not a historical point, and it is a logical point that undergirds our entire approach.²⁸

What makes the 1787 Constitution our Constitution today is its acceptance by us today. And if we accept the *Cooper v. Aaron* rule as authoritative today, then it is authoritative in exactly the same way that

²³ Alexander & Schauer, *supra* note 2, at 457–58.

²⁴ *Id.* at 457.

²⁵ *Id.* at 457 n.11.

²⁶ See Alexander & Schauer, *supra* note 2, at 458 & n.12 (2000).

²⁷ See generally Richard S. Kay, Preconstitutional Rules, 42 *Ohio St. L.J.* 187 (1981) (proposing that constitutional interpretation ultimately rests on preconstitutional norms, which are defined as rules of recognition that determine how courts identify and apply constitutional limits).

²⁸ Alexander & Schauer, *supra* note 2, at 460. We did admit that we were mistaken in claiming that our position was nonempirical and admitted that the empirical could not be avoided. *Id.* at 464.

the 1787 Constitution is authoritative today.²⁹ And being authoritative, it produces the very high value of the coordinated settlement of what ought to be done.³⁰ As we said,

When the disagreement is merely with the Supreme Court's interpretation of a constitutional rule and not with the substantive result, where people believe that the Supreme Court's constitutional rule is superior to the actual rule adopted by the framers, then the case for Cooper is . . . strongest. This is not to say that the Court should not attempt to interpret the Constitution faithfully, even when it believes the Constitution to be sub-optimal or even mischievous as a matter of morality or policy. It is merely to point out that when the stakes consist only of the correctness of an interpretation of an earlier settlement, the value of settlement appears to outweigh the value of interpretive correctness.³¹

* * *

Where Fred and I arrived after these first two coauthored pieces was the following:

- (1) What the law requires, including constitutional law, and what morality requires will not be identical in all cases. This means

²⁹ Id. at 466. In other words, we argued that we can accept as authoritative *now* both what the Constitution required *then* and what the Supreme Court now interprets it to have required, even if the latter departs from the former.

³⁰ Id. at 467. We also pointed out the “gap” that even the morally best law will produce between what the law requires and what morality requires:

An authority's rules claim absolute obedience, and not mere consideration. They demand that the subject obey even if the subject is convinced that the balance of reasons, including the reasons to have the rule and its settlement benefits, favors disobedience. The subject, however, faced with an authoritative rule, cannot alienate her rationality and moral agency, even if the overall results would be better if agents were to do so. There is thus always a gap between the concept of what the authority is right to command and what the subject is right to do. As a result, there appears to be no inconsistency in saying that the Court, from *its* perspective, was right to demand obedience from Lincoln, and that Lincoln, from his, was morally right to disobey.

Id. at 472 n.50.

³¹ Id. at 474–75 (footnote omitted). As we pointed out, even when the other political branches believe the Supreme Court's interpretation of the Constitution is not only incorrect but also bad from a moral or policy standpoint, the value of settlement suggests that it will in general outweigh that of substantive correctness. Alexander & Schauer, *supra* note 2, at 475. In a footnote we acknowledged that the position we were defending allowed some mistaken constitutional decisions to stand and at the same time also allowed some mistaken constitutional decisions to be overruled. Id. at 477 n.62.

that those who choose to follow what they believe, correctly or incorrectly, will face the sanctions the law imposes on its violators. This is the ineliminable “gap” between what the law requires and what morality requires. If we attempt to eliminate that gap and have the law require only what morality requires—i.e., the law of “do the right thing”—too many people will in good faith but erroneously believe their acts are morally justified. Therefore, we have a system of more precise laws that will inevitably depart from “the right thing” in some cases. But when we do so, many people will rightly or wrongly believe their acts are on the morally correct side of the gap and disobey the law. They, the morally innocent, will be legally guilty and, if the law is followed, punished.

- (2) What the legal system’s final decision-maker, i.e., the Supreme Court, concludes is the Constitution’s meaning may be erroneous, but that meaning may be preferable to the correct interpretation as a moral or policy matter, or it may be so widely followed that repudiating it would be morally or politically disastrous; or, alternatively, the effect of that misinterpretation can be limited, or it can be rather painlessly overruled.

In the same year the previous article was published, Fred and I produced a short entry in the *Encyclopedia of the American Constitution* titled *Nonjudicial Interpretation of the Constitution*.³² In it, we addressed the question of what lower court judges and other officials should do when they face a Supreme Court decision that they believe to rest on an incorrect interpretation of the Constitution.³³ Should they treat it as (1) only binding on the specific parties in the Supreme Court, as (2) having force but not absolute force on other parties, or (3) having the force of the Constitution itself, the supreme law of the land. We endorsed (3), based on the value of settlement.³⁴ We did not take a position on how the Supreme Court should treat its constitutional precedents that it now thinks were erroneous, except to say that it should not overturn constitutional precedents merely because they are now in their eyes believed to be erroneous.

³² Larry Alexander & Frederick Schauer, *Nonjudicial Interpretation of the Constitution*, in 4 *Encyclopedia of the American Constitution* 1823, 1823–24 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

³³ *Id.* at 1823.

³⁴ *Id.* at 1824.

After these year 2000 articles, Fred and I did not publish a jointly authored piece until 2007. In that piece, *Law's Limited Domain Confronts Morality's Universal Empire*, we argued that law cannot perform its essential functions if it is open to the full universe of moral considerations.³⁵ In other words, we argued that, as a moral matter, law must ignore at least some moral arguments in legal decision making. “[L]egal incorporation of morality presents the odd case of the subset incorporating the larger set, and thus suggests the peculiar image of a mouse attempting to swallow a python.”³⁶

We went on to show why law has a limited domain:

Law exists against a background of moral disagreement and moral uncertainty; for if people generally agreed about what morality required, there would then not be much reason to substitute law for the direct moral decision-making of citizens and officials alike. But because that is not a world we recognize, and because moral and practical disagreement seems endemic to the human condition, law must step in to settle practical controversies over what ought to be done. But law can fulfill this role only if its domain . . . is less than that of all practical reasons or even of all moral reasons.³⁷

Because we are not all-knowing gods, “[a] legal system in which the law . . . were coextensive with the universe of moral norms would serve primarily to embroil the citizens in never-ending and enormously morally costly controversy over what ‘the law’ required.”³⁸

We pointed out that law has a complex relationship with morality; its determinacy serves its moral function of reducing the moral costs of error, conflict, lack of coordination, and the time and resource costs of decision-making through claiming practical authority.³⁹ It succeeds, though, by simplifying what morality requires, guiding citizens better than morality itself can do. For morality, unmediated by law, will produce more morally erroneous decisions and moral conflicts.⁴⁰ Law must claim authority to serve its moral function, but morality will deny law’s claim. We explained:

³⁵ Larry Alexander & Frederick Schauer, *Law’s Limited Domain Confronts Morality’s Universal Empire*, 48 *Wm. & Mary L. Rev.* 1579, 1579–80 (2007).

³⁶ *Id.* at 1581.

³⁷ *Id.* at 1583.

³⁸ *Id.*

³⁹ *Id.* at 1586.

⁴⁰ *Id.*

As a result, . . . moral agents would have good moral reasons for rejecting those claims of law that they believe to be morally erroneous, just as the law has good moral reasons for imposing its legal will on those same moral agents who, from the law's perspective, mistakenly refuse to accept the law's wise guidance.⁴¹

This is what I called “the gap” and Fred called the “asymmetry of authority.”⁴²

We then proceeded to deny that morality could be sufficient for legality or necessary for legality.⁴³ The former either renders morality the key to legality, or else morality and legality must be weighed against each other, which we deny is possible. The latter reduces to the ultimate decision-maker's belief that its rulings on legality are consistent with morality, or else it will produce anarchy. Further, treating morality as a necessary condition of legality collapses into treating it as a sufficient condition.

Finally, making accord with moral norms the necessary condition of legality runs against the fact that there is no guarantee that the joints at which the law attempts to carve morality are joints that exist within morality.⁴⁴ And likewise, there is no guarantee that the morality that law incorporates won't undermine the non-incorporationist legal provisions.⁴⁵ Finally, and perhaps paradoxically, providing the moral goods of guidance and settlement suggests that not making morality a test for legality is what morality itself would prescribe.⁴⁶

In the same year that previous article was published, Fred and I responded positively to an invitation to publish our views on legal interpretation in Australia. So we published *Is Policy Within Law's Limited Domain?* in the *University of Queensland Law Journal*.⁴⁷ Just as we had argued that law best serves morality by simplifying its requirements, here we argue similarly that law produces wise policies “by reducing the costs of error, of conflict, of lack of coordination, and of time and resource-consuming decision-making by claiming practical authority

⁴¹ Id. at 1587.

⁴² Id. at 1587–88 (citation omitted).

⁴³ Id. at 1592–99.

⁴⁴ Id. at 1600.

⁴⁵ Id.

⁴⁶ Id. at 1599–1600.

⁴⁷ Larry Alexander & Frederick Schauer, *Is Policy Within Law's Limited Domain?*, 26 *Univ. of Queensl. L.J.* 221 (2007).

for its more determinate commands.”⁴⁸ And just as law has a paradoxical relation to morality, so too “the policy that creates law always puts it into potential conflict with the policies it serves. . . . As a result, it may well be the case that agents would have good reasons, and especially good moral reasons, for rejecting those claims of law that those agents believe to be erroneous.”⁴⁹ But the law will have good reasons, “including good moral reasons, for imposing its legal will on those same agents.”⁵⁰ Once again, “the legal-moral relationship of dependence and conflict . . . ‘the gap.’”⁵¹

Paralleling what we said in the prior piece, if consistency with the morally best policy is a necessary condition of legality, it will also have to be a sufficient one. Consider the Model Penal Code’s lesser evil defense, which amounts to “Don’t violate the criminal law unless it’s the right thing to do.”⁵² That, if followed literally, would be quite morally inferior to more specific exceptions to criminal liability. The morally best legal regime is one that rejects recourse to the unlimited domain of morality.⁵³

In 2009, Fred and I published our last coauthored piece in the book *The Rule of Recognition and the U.S. Constitution*.⁵⁴ Our chapter was titled *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*.⁵⁵ In it, our basic topic was the U.S. rule of recognition and a variety of questions about it: Does it change over time? If so, how? Has the Constitution changed other than by the processes prescribed by the Constitution itself, and if so, how? If interpreters employ different interpretive methods, is there one Constitution or are there several? If the Supreme Court or some other institution has final interpretive authority, and it misinterprets the

⁴⁸ Id. at 225.

⁴⁹ Id. at 226.

⁵⁰ Id.

⁵¹ Id.

⁵² See Model Penal Code, §3.02(1)(a) (“Conduct the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . .”).

⁵³ See Alexander & Schauer, *supra* note 47, at 235.

⁵⁴ Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *The Rule of Recognition and the U.S. Constitution* (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

⁵⁵ Id. at 175–92.

Constitution, what is the legal status of that misinterpretation? And if one function of the Constitution is to entrench the fundamental legal rules, then because such rules will be both over- and under-inclusive with respect to their background purposes, how can citizens accept the authority of such rules? We dealt with all those issues and the problems faced by the possible resolutions of them.

Along the way we pointed out that if only the officials need to accept the rule of recognition, Hart's view of law collapses into Austin's, given that the citizens who do not accept the rule of recognition will view the officials as just a gang of muggers and may accept a government in exile.⁵⁶ We also pointed out that if those accepting the Constitution have different interpretive methodologies, they won't be accepting *the* Constitution but *different* constitutions.⁵⁷ This is easy to see if we translate the Constitution into a language in which those different meanings of an English word are represented by different words in that language.⁵⁸ In other words, different interpretive methodologies produce different constitutions.⁵⁹ Finally, we came back to a point that we had discussed in former pieces:

[T]here are rational reasons to create and enforce rules that the subject of those rules will perceive, from their lights, to be irrational. This may appear paradoxical, but the paradox, which one of us has called "the asymmetry of authority" and the other has called "the gap," applies to all legal rules, including constitutional rules and even the rule of recognition itself. There will frequently be [moral] reasons . . . for those in authority to create rules that limit the decisional moral freedom of the subjects of those rules, but there will always be a [moral] reason . . . for the rule subject (from the rule subject's perspective) to ignore a legal rule where the rule's requirements depart from the subject's own vision about what the right thing to do is.⁶⁰

* * *

⁵⁶ Id. at 178–79.

⁵⁷ Id. at 181–82.

⁵⁸ Id. at 182–83.

⁵⁹ Id. at 184.

⁶⁰ Id. at 189 (citing Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* 128–34 (Oxford Univ. Press ed., 1991)); Alexander, *supra* note 16.

This 2009 piece was the last Fred and I wrote together. In the following years, Fred and I perhaps drifted apart to some extent. Fred, I believe, was more comfortable than I became with enforcing incorrect constitutional interpretations that we believed were superior in terms of policy or morality to correct interpretations. At a later time, I even suggested that the Court, when it recognizes that its constitutional interpretation is both mistaken as an interpretation but superior as a moral or policy matter, should announce that it will stick to its misinterpretation for a limited number of years. That will give Congress and the state legislatures a chance to amend the Constitution to square it with the heretofore misinterpretation. But although Fred and I may have parted ways for dealing with beneficial misinterpretations, we continued to see eye to eye regarding the basic problem that dogs constitutional law and indeed all law, namely, that the law—even the morally best law—will have applications that are at odds with morality. And this means that one can be legally guilty but morally innocent. Neither Fred nor I saw, nor do I see now, a solution to this dilemma.

CONCLUSION: FRED AS FRIEND

As significant as was my intellectual relationship with Fred, equally was my personal relationship with him. Long before our coauthored papers, and soon after we began our professional relationship (over thirty-five years ago), we began and continued through Fred's lifetime a close personal relationship.

One aspect of this relationship was golf. Whenever Fred and I were in the same town, and the weather was even minimally decent, we would head to a local golf course. That meant that if we were going to be at the same conference, and the site was south of the North Pole, we would bring our golf clubs. And when we were the coeditors of *Legal Theory*, along with Yale's Jules Coleman, we would hold our annual editors' meeting in a place where the three of us could play golf and then discuss journal issues over a fine dinner. (Jules and I shot in the mid-70s to low 80s, though Jules' swing was better than mine; Fred shot about ten strokes worse than us, but that never lessened his enthusiasm one bit for joining us.)

But an even more significant aspect of my nonprofessional relationship with Fred—much more significant in fact—was the fact that Fred and his then-wife Virginia and my wife Elaine and I traveled together several times. One was a day trip while the four of us were in Israel. But our more

2026]

A Wonderful Professional Relationship

65

significant travels together were in Australia (Tasmania), South America, and Africa. The latter two were quite memorable because they were quite lengthy and because on the Africa trip, Virginia and Fred and Elaine and I were the only ones traveling with our guide and his crew.

As you can see, my relationship with Fred, as *very* significant as it was intellectually, was equally if not more significant personally. The world has lost an important intellectual. I have lost that but much more.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

66–73

ESSAY

FRED SCHAUER: A TRULY ORIGINAL THINKER

*Jed S. Rakoff**

It is a great privilege to be part of this program honoring the late, wonderful Fred Schauer. I first met Fred after he had relocated to the University of Virginia, but we quickly became friends. Even before that, however, he had already become friendly with my brother Todd when they were both at Harvard, my brother as a law professor and the multi-talented Fred as a member of the faculties of both the Law School and the Kennedy School of Government. Fred and my brother first met when Todd became Dean of the J.D. Program at the Law School in the year 2000. Todd, wanting to get a better idea of the job of being an academic dean, went to see Fred, who was then Academic Dean of the Kennedy School. As Todd recalls it, it was a rainy day, and after a few pleasantries, he asked Fred to describe the essence of being a dean. Fred responded by walking to a window, pointing to the pouring rain, and saying to Todd, “See that rain? It’s your fault!”

Although in later years, I was privileged to become good friends with both Fred and his fantastic wife Bobbie, I want to focus my remarks not so much on Fred’s lively personality or his unquestionable brilliance, but on the originality of his thinking. To be frank, originality is not a long suit in the legal profession. We judges—perhaps because our common-law-derived legal system focuses on precedents and our analysis of laws and regulations is ever more textualist—tend to have

* Senior U.S. District Judge.

trouble “looking outside the box,” so to speak. For everyday practitioners, concerned with solving their clients’ problems, “originality” largely consists of finding loopholes that can be logically supported. And as to members of the legal academy, even the so-called “theories” that increasingly occupy their attention are often more focused on public policy implications than on new perceptions. So, Fred’s gift for thinking about familiar legal issues in highly original ways was itself highly unusual.

But in the limited time I have here today, let me focus on just one example involving one of his lesser-known articles, “Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond,” which was published in the *Cornell Law Review* in 2010.¹ The article grew out of Fred’s participation in the MacArthur Foundation’s Law and Neuroscience Project, in which both he and I were deeply involved. That Project, which continues to this day under the able leadership of Professor Owen Jones at Vanderbilt Law School, was and is concerned with the implications of discoveries in the rapidly advancing field of neuroscience for the Anglo-American system of law, with its heavy emphasis on mental states.² Put simply, our legal system tends to assign moral fault to injurious actions taken with conscious intent, so the question of how to determine an actor’s intent becomes critical. And, much more generally, central not just to our system but to virtually every judicial system is determining whether a witness is lying or telling the truth.

Beginning in the early 2000s, some neuroscientists began to claim that a careful analysis of brain scans could show whether a witness was consciously lying or not.³ To give a simple example from one of the earliest experiments, the subjects were given playing cards, placed in fMRI brain-scanning machines, and then shown photos of playing

¹ Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 *Corn. L. Rev.* 1191 (2010).

² Mission of the Research Network, Vanderbilt Univ. L. Sch.: MacArthur Found. Rsch. Network on L. & Neuroscience, <https://www.lawneuro.org/mission.php> [<https://perma.cc/43W6-XSG6>] (last visited Jan. 10, 2026); Network Administration, Vanderbilt Univ. L. Sch.: MacArthur Found. Rsch. Network on L. & Neuroscience, <https://www.lawneuro.org/people.php#admin> [<https://perma.cc/S58J-9NRY>] (last visited Jan. 10, 2026).

³ See Eric Jaffe, *Detecting Lies*, *Smithsonian Mag.* (Feb. 1, 2007), <https://www.smithsonianmag.com/science-nature/detecting-lies-147115783/> [<https://perma.cc/A7SW-W3GE>].

cards.⁴ Subjects were then instructed that they would be rewarded with cash if they successfully concealed possession of a particular card.⁵ For example, if they were asked if they had the ace of spades, and the ace of spades was not in their possession, they would respond truthfully.⁶ But if they were shown the ten of hearts, and they had the ten of hearts, they would deny possession.⁷ When they did this, it turns out, the amount of activity in the parts of the brain associated with cognition and emotion both increased, and the experimenters hypothesized that such increases were associated with the act of lying.⁸ One might intuit from these results that, while a witness could not realistically be hooked up to a brain-scanning machine while testifying in court, he could be asked beforehand to give the same testimony while his brain waves were being simultaneously recorded, and a qualified neuroscientist could then determine whether or not he was being truthful. Several companies were then incorporated to market such brain-scan lie detection to the legal profession and other potential consumers.⁹

But under the auspices of the MacArthur Project, many reputable neuroscientists and others concluded that the experiments on which brain-scan lie detection was based—even though they were mostly much more sophisticated than the experiment I have described—were either unreliable or subject to conflicting interpretations.¹⁰ For example, the increase in cognitive brain activity when a subject lied could simply be the result of his having to take greater cognitive efforts to decide when to lie and what lie to tell.¹¹ In other words, the subjects, just in order to follow the directions of the experimenter, had to engage in greater cognitive activity when they chose the moments to lie, and this might have independently led to the increase in the measured brain activity. As a result of these and other concerns, the work of the MacArthur Project and its leaders, in some of the pioneer cases in which

⁴ D.D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 *NeuroImage* 727, 729 (2002).

⁵ *Id.*

⁶ See *id.*

⁷ See *id.*

⁸ *Id.* at 727.

⁹ See Schauer, *supra* note 1, at 1198–99.

¹⁰ MacArthur Found. Rsch. Network on L. & Neuroscience, *fMRI and Lie Detection 2–4* (2016), <https://www.lawneuro.org/fMRI%20and%20Lie%20Detection-%20Knowledge%20Brief.pdf> [<https://perma.cc/UR9J-VBD3>].

¹¹ *Id.* at 2–3.

brain-scan lie detection was sought to be introduced, provided the relevant courts with cautionary critiques of brain-scan lie detection—critiques so strong that they led to the proffered evidence being excluded.¹²

But it was only Fred Schauer who had the imagination to question whether brain-scan lie detection, even if subject to conflicting interpretations, was still good enough to warrant its admissibility in court, where credibility was often determined by such “soft” and definitely nonscientific factors as a witness’s demeanor. Indeed, a great many studies have shown that judges’ and jurors’ assessments of witnesses’ credibility on the basis of “demeanor” are both inconsistent and highly unreliable.¹³ So Fred suggested that experimental approaches that the scientific community regarded as less than definitive science might still be an improvement over the status quo.¹⁴ And implicit in this question, as Fred recognized, was the broader question of when, if ever, science that was less than perfect but still not “junk” could be received in evidence in the courtroom.¹⁵ As Fred put it in his article, “Bad science is worse than good science, but may not be worse than the nonscience that lurks in the heads of judges and jurors.”¹⁶

To appreciate how original this thought was, consider the legal background. Back in 1923, the U.S. Court of Appeals for the D.C. Circuit, in the case of *Frye v. United States*, addressed the question of whether the results of a test of credibility involving the first quasi-scientific lie detector, which we now call the polygraph, could be admitted in evidence.¹⁷ The court concluded that science-based evidence

¹² For example, in *United States v. Semrau*, the Government relied on the work of Dr. Marcus Raichle, a founding member of the MacArthur Project, to successfully exclude fMRI lie detection evidence that purported to show defendant’s truthfulness. United States’ Motion in Limine and Memorandum in Support to Exclude Defendant’s Expert Witness Testimony of Dr. Steven Laken and Request by the United States for a *Daubert* Hearing at 6–7, *United States v. Semrau*, No. 07-cr-10074, 2010 WL 6845092 (W.D. Tenn. June 1, 2010); *Semrau*, 2010 WL 6845092, at *1, *aff’d*, 693 F.3d 510, 516 & n.2 (6th Cir. 2012); New \$10 Million MacArthur Project Integrates Law and Neuroscience, MacArthur Found. (Oct. 9, 2007), <http://www.macfound.org/press/press-releases/new-10-million-macarthur-project-integrates-law-and-neuroscience> [<https://perma.cc/A4PL-HCTA>].

¹³ See, e.g., Jeremy A. Blumenthal, A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility, 72 *Neb. L. Rev.* 1157, 1159 & n.14 (1993).

¹⁴ Schauer, *supra* note 1, at 1213–16.

¹⁵ *Id.* at 1216–17.

¹⁶ *Id.* at 1216.

¹⁷ 293 F. 1013 (D.C. Cir. 1923).

was not admissible unless the scientific principle or discovery on which it was based was “sufficiently established to have gained general acceptance in the particular field in which it belongs.”¹⁸ This so-called “*Frye* standard” (which, incidentally, led to the exclusion of polygraph evidence, as remains the case—with few exceptions—in the majority of jurisdictions) was then adopted as the prevailing standard across the United States.¹⁹ While it proved difficult to apply in many cases, there was never any question thereafter that, at least in principle, only evidence well accepted in the scientific community as good science should be admitted in court.

Then, in 1993, in the famous case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court of the United States changed the standard to a rather more complicated inquiry into whether the scientific evidence in question had complied with prevailing scientific methodology, that is, had been tested, peer reviewed, applied consistently, and much else.²⁰ This so-called “*Daubert* standard” was eventually adopted by a majority of the states as well, though a significant minority of states stuck with the *Frye* standard.²¹ But both standards were alike in insisting that the only scientific evidence that could even be admitted in court had to be based on what the scientific community regarded as sound practices and principles.²² Put another way, those who favored *Frye* and those who favored *Daubert* all agreed that scientific evidence that did not in some sense meet what the scientific community regarded as rigorous scientific standards and methodology should be excluded from admissibility in court.

It took Fred to recognize that this was fundamentally different from the much more relaxed standards of admittance imposed by state and federal courts alike with respect to virtually all other kinds of evidence.²³ Consider the following example, which is not itself discussed in Fred’s article but which I think nicely illustrates his point. Suppose that one cold evening, the water pipes burst in your basement,

¹⁸ *Id.* at 1014.

¹⁹ Schauer, *supra* note 1, at 1196; 5 David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 38:1–7 (2025) (collecting cases).

²⁰ 509 U.S. 579, 592–95 (1993).

²¹ Nat’l Civ. Just. Inst., *State-by-State Compendium Standards of Evidence* (2023), <https://ncji.org/wp-content/uploads/2024/01/Evidence-Standards-by-State-7.12.23.pdf> [<https://perma.cc/39QL-GE75>].

²² Schauer, *supra* note 1, at 1196–97.

²³ *Id.* at 1207–1209.

causing flooding and a great deal of damage. And you, the homeowner, bring a lawsuit against the manufacturer of the pipes, saying they were negligently manufactured. As part of your case, you call your plumber, who is prepared to testify that in his experience, there are three reasons for pipes bursting. The first is that they were improperly installed, but in this case he himself did the installation and is prepared to testify they were properly installed in every respect. The second is that they were insufficiently insulated, but he was also the person who did the insulation, and he is prepared to testify that these pipes were fully insulated. And that, he is prepared to testify, just leaves the third alternative: that the pipes were improperly manufactured, which, in his “expert opinion,” must have been the case here. Notice that while some of his testimony is based on his personal knowledge as to how he installed and insulated the pipes, much of his testimony, such as that there are only three reasons for a pipe to burst and that he has deductively concluded that negligent manufacturing was the cause here, is a form of expert testimony about technology and perhaps even about the physics of pipes. Should his testimony that, “in his experience,” there are only three reasons that a pipe would burst be excluded as disguised scientific testimony that does not pass either *Frye* or *Daubert*? Even though it does not strictly comply with *Daubert*, and maybe not even with *Frye*, I think most judges would allow the testimony. But in doing so, they are effectively applying Fred’s approach that if it is not totally junk, it should come in—subject, of course, to cross-examination.

Well, you might say, even the technical aspects of the plumber’s testimony are sufficiently close to everyday experience that most judges and jurors can fairly evaluate them. But let me give another example, again not discussed in Fred’s article, but drawn from a real-life event. Some of you may possibly recall that right after 9/11, letters containing deadly anthrax spores were mailed to various U.S. Senators, as well as prominent news organizations, resulting in five deaths.²⁴ The FBI then launched an intensive investigation to try to determine who had sent the poisoned letters.²⁵ Initially they focused on a scientist named Stephen Hatfill, but after they determined he was innocent and had no other immediate suspects, they recruited some of the nation’s most highly

²⁴ U.S. Dep’t of Just., *Amerithrax Investigative Summary 1* (2010), <https://www.justice.gov/archive/amerithrax/docs/amx-investigative-summary.pdf> [<https://perma.cc/6VTY-CCXM>].

²⁵ *Id.*

regarded scientific experts on anthrax to help.²⁶ Working in secret (because it was a criminal investigation), those scientists developed a new technique for observing and recording how an individual anthrax spore morphs over time, and based on that new technique, they were eventually able to determine that the remaining anthrax spores from the mailed envelopes had morphed in a particular way.²⁷ Using this morphological fingerprint, so to speak, they then found that of the many anthrax spores the FBI had collected from laboratories throughout the world, only one had morphed in the same way as the crime samples, and it was from a sample taken from the refrigerator of a U.S. government scientist who worked on anthrax research named Bruce Ivins.²⁸ After some further investigation, the Department of Justice announced that Ivins would be charged as the culprit—at which point Ivins committed suicide.²⁹

But suppose Ivins had not committed suicide and the case had gone to trial? The evidence against Ivins mostly would have consisted of the testimony of the scientists, based on their new methodology. Would it have been admissible under either *Daubert* or *Frye*? Probably not, as the science in question, having been developed in secret as part of the criminal investigation, had not been subject to any outside testing, peer review, or the like, let alone become generally accepted in the overall scientific community. But under Fred’s approach, it likely would have been admissible—which seems to me to be the right result.

Lest it be thought that I am endorsing Fred’s approach across the board, let me offer three clarifications. First, what Fred somewhat satirically referred to as “bad” science was really experimental science that had not yet made its way to full acceptance in the scientific community or to full adherence to the rigors of the scientific method but, by any objective standard, was very far from sheer hypothesis or “junk.”³⁰ Second, Fred was by no means suggesting that such experimental science should not be confronted rigorously in court, both by cross-examination and by competing expert testimony; his point was only that whether it should make it to the point of initial admissibility should be determined by a less exacting standard than scientists require

²⁶ Id. at 6–7.

²⁷ Id. at 24–25.

²⁸ Id. at 24–26.

²⁹ Id. at 1.

³⁰ Schauer, *supra* note 1, at 1214–15.

for full acceptance or for rigorous compliance with the scientific method.³¹ And third, I don't want to be understood as suggesting that Fred's approach is not without its own significant problems. For example, as Fred pointed out in his article, his approach implicitly suggested that *Daubert* should be overruled.³² In my own view, *Daubert*, for all its arguable shortcomings, has succeeded in keeping a lot of truly junk science out of the reach of juries, and I am not sure that Fred's approach would so readily have that salutary effect.

But my point for today's purposes is to show how Fred could so completely think "outside the box" and bring wholly new and broader perspectives to bear on what were otherwise narrow debates. He was, like his thinking, a true original—and he is sorely missed.

³¹ See *id.* at 1214.

³² See *id.* at 1216–17.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

74–85

ESSAY

DEEPPAKES, PHOTOGRAPHS, AND TRUST IN EVIDENCE

*Edward K. Cheng**

In Fred Schauer’s final book, *The Proof: Uses of Evidence in Law, Politics, and Everything Else*, Fred argued that trust and truth matter now more than ever, and that the law of evidence contains important insights for navigating our ever-challenging world of fake news, misinformation, and alternative facts.¹ I hope that this contribution, focused on new technology, the law of evidence, and most importantly trust, pays a worthy tribute to *The Proof* and to the incomparable scholar behind it.

INTRODUCTION

Recent voices in the evidence literature have expressed alarm over deepfake technology—AI-driven algorithms that can manufacture fictitious images and audio that are difficult to distinguish from reality. These voices for reform claim that deepfakes represent a sea-change in technology that threatens to upend the legal proof process. The problem

* Hess Chair in Law and Professor of Law, Vanderbilt University. Thanks to the University of Virginia School of Law faculty for inviting me to this memorial conference for Fred Schauer. Thanks also to Jeff Bellin, Neal Feigenson, a Vanderbilt Brown Bag workshop, and participants at the Schauer memorial conference for helpful comments. Finally, I will always be grateful to Fred Schauer for his brilliance, his friendship, and his generosity: may his memory be for a blessing.

¹ Frederick Schauer, Preface to *The Proof: Uses of Evidence in Law, Politics, and Everything Else* (2022).

lies not only in deepfakes' ability to mislead and confuse, but also in the technology's pervasiveness and ease of use.

Are these fears over deepfakes justified? Does the legal system need to adopt new authentication rules and approaches to address their threat? In this Essay, I argue that the answer is no, but more significantly, I use deepfakes as a vehicle to explore the nature of authentication and, more generally, legal proof. My argument proceeds in three related steps: First, I propose a tentative model of evidentiary authentication based on base rates of trust. Such a base rate model suggests that existing evidentiary principles of authentication are more than sufficient to address the problem of deepfakes, particularly as the public becomes aware of and exposed to their existence and dangers. Second, the authentication problem of deepfakes parallels the legal system's angst over photographs a century ago. Indeed, the compromises that the legal system made to handle photographs and other images provide a ready framework for thinking about and addressing the deepfake problem. Finally, I raise some broader implications of taking a trust model of evidence seriously. On the one hand, a theory of legal proof based on trust may illuminate evidentiary problems like authentication. On the other hand, a trust theory of proof lays bare some troubling realities. If legal proof is ultimately about trust, what happens to information sources that certain factfinders are inclined to distrust, and what will this mean in an increasingly polarized society?

I. DEEPFAKES AND EVIDENTIARY REFORM

Famous deepfake examples abound: a robocall in 2024 purportedly from President Biden urging New Hampshire voters not to vote in the democratic primary;² a photograph in 2023 of Pope Francis wearing a white Balenciaga-style puffer jacket;³ a video in 2022 of Ukrainian President Volodymyr Zelenskyy telling his troops to lay down their

² Shannon Bond, A Political Consultant Faces Charges and Fines for Biden Deepfake Robocalls, NPR (May 23, 2024, at 14:58 ET), <https://www.npr.org/2024/05/23/nx-s1-4977582/fcc-ai-deepfake-robocall-biden-new-hampshire-political-operative> [https://perma.cc/SLY5-7RWN].

³ Simon Ellery, Fake Photos of Pope Francis in a Puffer Jacket Go Viral, Highlighting the Power and Peril of AI, CBS News (Mar. 28, 2023, at 11:39 ET), <https://www.cbsnews.com/news/pope-francis-puffer-jacket-fake-photos-deepfake-power-peril-of-ai/> [https://perma.cc/HH34-EBP4].

weapons and surrender to Russia.⁴ Recent evidence scholarship has raised concerns over deepfake technology and its potential to disrupt the legal system.⁵ Psychological studies suggest that ordinary citizens are insufficiently critical of the kind of evidence at the core of deepfake technology—images, videos, and audio recordings.⁶ And once gullible factfinders see or hear a deepfake, they have trouble un-seeing or un-hearing it, making such evidence especially prejudicial.⁷ At the same time, deepfake technology is readily accessible and constantly improving. Producing a deepfake no longer requires special audio processing or Photoshopping skills along with hours of meticulous editing. Deepfakes can be produced in mere seconds using publicly accessible AI engines. For now, many of these deepfakes are not quite convincing, but with the inevitable progress of technology, their production will only become cheaper and easier, and their detection more difficult.⁸

The most prominent proposal for addressing the deepfake problem is one by Maura Grossman and Paul Grimm.⁹ The Grossman-Grimm proposal is to heighten the traditional Rule 403 balancing test for suspected fake electronic evidence, so that such evidence would be admissible only if “the proponent demonstrates that [the evidence’s] probative value outweighs its prejudicial effect.”¹⁰ Other proposals seek

⁴ Bobby Allyn, *Deepfake Video of Zelenskyy Could Be ‘Tip of the Iceberg’ in Info War, Experts Warn*, NPR (Mar. 16, 2022, at 20:26 ET), <https://www.npr.org/2022/03/16/1087062648/deepfake-video-zelenskyy-experts-war-manipulation-ukraine-russia> [https://perma.cc/93N4-8MVY].

⁵ E.g., Maura R. Grossman & Paul W. Grimm, *Judicial Approaches to Acknowledged and Unacknowledged AI-Generated Evidence*, 26 *Colum. Sci. & Tech. L. Rev.*, no. 2, 2025, at 110, 124 (discussing the authentication problem presented by deepfakes).

⁶ E.g., Nils C. Köbis, Barbora Doležalová & Ivan Soraperra, *Foiled Twice: People Cannot Detect Deepfakes But Think They Can*, *iScience*, Nov. 19, 2021, at 1, 1 (reporting that “people cannot reliably detect deepfakes and . . . they overestimate their own detection abilities”).

⁷ Rebecca A. Delfino, *Deepfakes on Trial: A Call to Expand the Trial Judge’s Gatekeeping Role to Protect Legal Proceedings from Technological Fakery*, 74 *Hastings L.J.* 293, 311 (2023); Grossman & Grimm, *supra* note 5, at 124.

⁸ Riana Pfefferkorn, “Deepfakes” in the Courtroom, 29 *B.U. Pub. Int. L.J.* 245, 249–50 (2020).

⁹ Grossman & Grimm, *supra* note 5, at 147–48. Grossman and Grimm offer proposals for both acknowledged and unacknowledged AI-generated evidence. *Id.* This Essay only focuses on the unacknowledged scenario, in which the proponent claims that its electronic evidence is authentic, and the opponent claims that the evidence is fabricated (e.g., a deepfake).

¹⁰ *Id.* at 148.

greater reliability through alternative mechanisms. Rebecca Delfino, for example, has argued for a *Daubert*-like gatekeeping stage in which the court must first decide authentication under a 104(a) preponderance standard.¹¹ John LaMonaca has proposed a corroboration requirement.¹² By contrast, a number of courts and Riana Pfefferkorn have expressed confidence that “[t]he protective processes that courts have developed over the years [for excluding manipulated evidence] will . . . prove robust against deepfakes, as they have for previous generations of technology.”¹³

For its part, the Advisory Committee on the Federal Rules of Evidence has thus far stayed its hand on the issue of deepfakes. In 2014, the Committee rejected a proposed general rule on the authentication of digital evidence, concluding that the existing rules were sufficiently flexible to handle the new challenges.¹⁴ Deepfakes, however, seem to have re-captured the Advisory Committee’s attention and imagination. It considered the issue as recently as May 2025,¹⁵ when a consensus supported “work[ing] up a proposal on deepfakes to hold for future publication, if necessary.”¹⁶

II. A BASE-RATE MODEL OF AUTHENTICATION

One way of thinking about the process of assessing authenticity is through base rates of trust. Factfinders begin with an implicit base rate about the authenticity or reliability of evidence. This base rate depends on the prevalence of forgery, which is in turn partly a function of the difficulty of forgery. The difficulty depends on attributes inherent to the medium itself, as well as other technological and social factors.

¹¹ Delfino, *supra* note 7, at 341.

¹² John P. LaMonaca, A Break from Reality: Modernizing Authentication Standards for Digital Video Evidence in the Era of Deepfakes, 69 *Am. U. L. Rev.* 1945, 1985 (2020).

¹³ Pfefferkorn, *supra* note 8, at 266; see also *id.* at 265–66 (discussing previous case law).

¹⁴ Daniel J. Capra, Deepfakes Reach the Advisory Committee on Evidence Rules, 92 *Fordham L. Rev.* 2491, 2496–98 (2024).

¹⁵ Advisory Comm. on Evidence Rules, Agenda for Committee Meeting, May 2, 2025, at 1 (2025) [hereinafter May 2025 Committee Meeting Agenda], www.uscourts.gov/sites/default/files/document/2025-05_evidence_rules_committee_agenda_book_final.pdf [https://perma.cc/G96D-W48E]; Al Windham, AI-Generated Deepfakes in Court: An Emerging Threat to Evidence Authenticity?, *Nat’l L. Rev.* (June 11, 2025), natlawreview.com/article/ai-generated-deepfakes-court-emerging-threat-evidence-authenticity [https://perma.cc/9CDE-HM M7].

¹⁶ Advisory Comm. on Evidence Rules, Draft Minutes of the Meeting of November 8, 2024, *in* May 2025 Committee Meeting Agenda, *supra* note 15, at 12, 28.

For example, in everyday life, we tend to assume the authenticity of paper currency, absent suspicious circumstances. This belief is due to the rarity of counterfeit money,¹⁷ which is in turn due to the various security features in paper currency, the criminal penalties associated with counterfeiting, as well as the government's considerable efforts in detecting and prosecuting counterfeiters.¹⁸ By contrast, we approach oral statements and testimony with far greater skepticism, especially in an adversarial setting, because witnesses can (and do) easily lie. A responsible factfinder faced with oral testimony will accordingly employ various tactics to scrutinize its reliability, including accounting for a witness's incentives, considering other circumstantial evidence, demanding corroboration, or triangulating among different witness accounts. Similarly, the opposing party will use cross-examination and the presentation of contrary evidence.

The same conceptual analysis applies to documents. Today, handwritten documents are relatively more difficult to forge than typed ones. Assuming that the handwriting appears genuine, we may be more inclined to believe that a handwritten note came from a particular person than a computer printout. This base rate, however, depends critically on the available technology. In an earlier era, the trust ranking between handwritten and typewritten notes was likely reversed. Printed matter like a booklet or letterhead was much more difficult to forge because of the cost of printing equipment. The modern development of electronic publishing and low-cost, high-resolution color printing flipped that assessment.

This base rate perspective strongly suggests that deepfakes are an evolutionary, not revolutionary, problem. Deepfakes are just one in a long line of technological developments that have prompted an adjustment in base rates. Mechanically or electronically produced evidence like images, video, and audio currently enjoy a strong presumption of trust because forgeries are (or at least previously were) difficult to fabricate. The danger of fabrication has of course always

¹⁷ Ruth Judson, *Estimating the Volume of Counterfeit U.S. Currency in Circulation* 16 (Bd. of Governors of the Fed. Rsv. Sys. Int'l Fin. Discussion Paper, Paper No. 1404, 2025), <https://www.federalreserve.gov/econres/ifdp/files/ifdp1404.pdf> [<https://perma.cc/8HL4-8FMM>].

¹⁸ See Donald J. Mihalek, *How the Crime of Counterfeiting Is Making a Comeback*, ABC News (Mar. 12, 2024, at 08:46 ET), abcnews.go.com/US/counterfeiting-modern-age/story?id=108005573 [<https://perma.cc/C6XM-2TUE>] (discussing counterfeiting trends and government efforts to suppress counterfeiting).

existed. Images can be photoshopped, sound files can be digitally processed, and we are all familiar with the computer-generated imagery (“CGI”) in movies.¹⁹ But high-quality fakes required specialized software, substantial expertise, and considerable time and effort. Low-quality fakes were easy to detect. Forgeries were thus relatively rare.

Deepfake technology concededly has the potential to radically alter this landscape. This technology may enable anyone, with little effort and no expertise, to produce a passable forgery. But if that happens, then base rate estimates will simply adjust. Audiovisual evidence, which previously enjoyed a strong presumption of reliability, will suddenly become suspect—a phenomenon dubbed the “liar’s dividend” by Bobby Chesney and Danielle Citron.²⁰ In such a world, trust in audiovisual evidence can derive only from the evidence’s attributed source—for example, the witness who presents it—not from the nature of the medium itself.

Note that while deepfakes may provoke a reassessment of the evidentiary weight to give audiovisual evidence, they do not require a change in the evidentiary rules. To be sure, in the short term, jurors unaware or unfamiliar with deepfake technology may improperly assess the reliability of video or audio evidence. But that problem is scarcely different from other instances in which juries make mistakes. For example, psychologists have shown that eyewitness identifications are less reliable than laypersons think.²¹ They have also shown that people are unable to detect lies on the basis of demeanor, despite popular beliefs to the contrary.²² Yet, in general, no special evidentiary rules exist to address these problems. Cross-examination, the presentation of expert evidence, and, in rare cases, the use of cautionary jury instructions are usually sufficient responses.²³

¹⁹ Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 *Calif. L. Rev.* 1753, 1759 (2019).

²⁰ *Id.* at 1785–86.

²¹ Michael J. Saks & Barbara A. Spellman, *The Psychological Foundations of Evidence Law* 121 (2016) (reporting studies showing that expert knowledge on eyewitness reliability diverges from the knowledge of legal actors).

²² *Id.* at 123; see also *id.* at 122–25 (discussing psychological research on lie detection).

²³ E.g., *Commonwealth v. Serge*, 896 A.2d 1170, 1186–87 (Pa. 2006) (using a jury instruction on computer-generated animations); *State v. Henderson*, 27 A.3d 872, 919–20 (N.J. 2011) (mandating jury instructions on eyewitness reliability). To be sure, the *Henderson* Court not only mandated jury instructions, but also instituted a judicial gatekeeping hearing, in line with some of the deepfake proposals explored earlier. 27 A.3d at

III. A HISTORICAL LINK

Ironically, the deepfake problem makes what was old, new again. As Jennifer Mnookin recounts in her seminal piece on the history of photographic evidence, the legal system has long been highly skeptical and distrustful of photographs.²⁴ Indeed, the traditional legal treatment of photographs, which continues to this day, is as demonstrative evidence or “pictorial testimony,” equating photographs to a diagram or drawing.²⁵ A witness must vouch that an image is a fair and accurate representation of the witness’s testimony, and then the photograph is admitted as an illustrative aid—not substantive evidence.²⁶

The reasons that led to this odd framework for thinking about photographs are diverse. One early reason was a concern that photographs could become too powerful a form of proof, one that could usurp the jury. As Mnookin argues, “[t]he more unquestionably accurate and truthful the process of photography, the more threatening photography might seem to factfinders and the judicial process.”²⁷ Another related reason was a judicial reluctance to treat photographs as a kind of “self-proving” evidence that did not require testimonial support.²⁸ If photographs were considered “real evidence” like a knife,²⁹ then they could quickly de-emphasize the role of witness testimony. Still another reason was the power of analogy. Courts already had a framework for handling visual representation evidence like diagrams.

919. This raises broader questions of when judicial gatekeeping is necessary and appropriate, as opposed to when the conventional deference to the jury should prevail.

²⁴ Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 *Yale J.L. & Humans* 1, 43–50 (1998).

²⁵ 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 9:23, at 490 (4th ed. 2013).

²⁶ Fed. R. Evid. 901; Mnookin, *supra* note 24, at 44 (“Before a witness could use such a visual aid, he was required to authenticate the image and verify that it in fact offered a correct representation of whatever was at issue. Only thus would the picture be admissible as the witness’s testimony.”); see, e.g., Fed. R. Evid. 107 (“An illustrative aid is not evidence and must not be provided to the jury during deliberations . . .”).

²⁷ Mnookin, *supra* note 24, at 20, 57.

²⁸ *Id.* at 53.

²⁹ Although the Federal Rules of Evidence abandoned use of the term, “real evidence” (coined by Jeremy Bentham) was traditionally used to describe “evidence furnished by a view of a ‘res,’ or thing itself.” John Henry Wigmore, *Select Cases on the Law of Evidence* 13 (2d ed. 1913). Wigmore chose to describe real evidence as “autoptic preference,” in that a “tribunal uses its own senses to observe the thing” (autoptic), and “the parties produce the thing for that purpose to the tribunal” (preference). *Id.*

Using that framework on photographs handled the new disruptive technology while defanging it at the same time.³⁰

Regardless of its origins, the “pictorial testimony” theory of photographic images created an epistemic disconnect between law and society. Law treated audiovisual evidence as a mere *representation* of testimony, something without evidentiary worth beyond the testimony supporting it.³¹ But in broader society, it was all too clear that the value of audiovisual evidence extended far beyond its sponsoring witness. Audiovisual evidence was not perfect: it could be inaccurate, it could distort based on its perspective,³² and it could be forged. But ultimately, audiovisual evidence was generally far more reliable and more objective than any witness testimony,³³ and prior to deepfakes, such evidence was costly and difficult to fabricate. The base rate for reliability was therefore very high, making video and audio recordings especially compelling evidence.

³⁰ Mnookin, *supra* note 24, at 54.

³¹ 1 John Henry Wigmore, *Evidence in Trials at Common Law* § 790, at 893 (1904).

³² Voices have long maintained that photographs and videos are colored by the photographer’s point of view. E.g., Susan Sontag, *Regarding the Pain of Others* 26 (2003) (describing objectivity as “inbuilt” but necessarily also involving a point of view); see also Schauer, *supra* note 1, at 140 (discussing Sontag and the choices made in taking a photograph). More recently, scholars have applied this critique to police-worn body cameras. E.g., Rémi Boivin, Annie Gendron, Camille Faubert & Bruno Poulin, *The Body-Worn Camera Perspective Bias*, 13 *J. Experimental Criminology* 125 (2017) (exploring the effect of perspective on assessments of police interventions); see also Timothy Williams, James Thomas, Samuel Jacoby & Damien Cave, *Police Body Cameras: What Do You See?*, *N.Y. Times* (Apr. 1, 2016), www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html (examining sample police-worn body camera footage from multiple perspectives). While this observation is surely true, the mechanically or electronically produced image is still more objective and more reliable than a human witness. One could argue that dramatic examples showing the importance of perspective are notable precisely because they depart from the modal case in which most points of view yield similar perspectives. For example, photographs of the pyramids of Giza in one direction famously show them against their timeless desert landscape, while photographs in the opposite direction show their anomalousness against the backdrop of modern Cairo. See Maya Salam, *The Pyramids of Giza Are Near a Pizza Hut, and Other Sites that May Disappoint You*, *N.Y. Times* (May 30, 2018), www.nytimes.com/2018/05/30/travel/world-famous-destinations-depictions.html. By contrast, pictures of the exterior façade of the White House look pretty much the same regardless of what point of view you select.

³³ See Schauer, *supra* note 1, at 141 (“[A] photograph is usually pretty good evidence of some aspect of what the photograph is a photograph of.”); *id.* at 144 (“Skepticism [of photographs] is justified, but complete skepticism is not.”).

Pictorial testimony was thus a legal construct that never captured the essence of what photographs were as evidence.³⁴ Indeed, one might say that pictorial testimony theory was an intellectual embarrassment, as it got things exactly backwards. It was not that an image was worth believing because a sponsoring witness vouched for the image; rather it was that a witness's testimony was worth believing because an image vouched for the witness.³⁵

The advent of modern surveillance cameras ultimately made the construct untenable, at least in some contexts. In the case of a lot of surveillance footage, there could be no sponsoring witness, as no human witnessed the live event. Courts thus developed an alternative “silent witness” theory of photographic authentication to handle these cases.³⁶ Under “silent witness theory,” photographs could be admitted based on a showing that the creation process was sufficiently reliable.³⁷ This theory accorded far more with common sense. It recognized that audiovisual evidence had substantive value independent of any sponsoring testimony, and any concerns about fabrication or inaccuracy could be best addressed by scrutinizing the creation process itself.

The great irony is that deepfakes have the potential to turn this narrative full circle. In the dystopia painted by deepfake doomsayers, pictorial testimony theory had it right all along. In a world awash in deepfakes, an image is indeed “simply nothing, except so far as it has a human being's credit to support it.”³⁸ If deepfake technology truly makes fabricated images costless to produce and nearly impossible to detect, then images will not only lose their special evidentiary value—they will potentially lack any independent evidentiary value at all.

To be sure, one can imagine less extreme outcomes. For example, if detection technology keeps pace with the ability to fabricate, or if manufacturers embed cryptographic markers in the images captured on

³⁴ See Mnookin, *supra* note 24, at 46–47 (“For even though the photograph may be misleading or inaccurate, it may also make a special kind of truth-claim that these other forms of representational evidence cannot. The analogy that judges built ignored the photograph's veridical power.”).

³⁵ See Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 *Tex. L. Rev.* 1077, 1101 (2019) (arguing that the photograph is better evidence than the witness testimony it nominally supports).

³⁶ 5 Mueller & Kirkpatrick, *supra* note 25, at 490.

³⁷ E.g., *State v. Reeves*, 967 N.W.2d 144, 150 (S.D. 2021) (establishing requirements for the admission of video evidence under a silent witness theory).

³⁸ 1 Wigmore, *supra* note 31, § 790, at 893.

their smartphones,³⁹ then images will retain some base rate of reliability. Perhaps the base rate of reliability will not be the same as digital images circa 2000, but it will not be zero either.

History and logic thus suggest that creating bespoke evidentiary schemes to deal with the deepfake threat is unnecessary, if not a fool's errand. Just as the authentication rules have weathered other disruptive technologies, they are perfectly capable of handling deepfakes. If deepfakes do become pervasive, then the base rates with which jurors assess digital images will adjust. We may see a shift back to pictorial testimony theory in earnest. Alternatively, we may see the emergence of technological fixes to guarantee reliability. Either way, though, the existing conceptual framework remains perfectly serviceable.

CONCLUSION: A TRUST THEORY OF PROOF

So far, my focus has been on authenticating audiovisual evidence and the threat of deepfake technology. The underlying analysis, however, has broader implications across evidence law. Our discussion of deepfakes relies on a theory of legal proof rooted in trust. As Fred Schauer noted in *The Proof*, “[l]ittle of what we know is based on our own perceptions.”⁴⁰ The way we know things about the world is through some form of trust, whether that is trust in witnesses,⁴¹ trust in institutions, or trust in the authenticity of objects or images. When we cannot trust one form of evidence, we switch to another. For example, a mistrust of police testimony led to widespread reliance on body-worn cameras.⁴² Conversely, in a world awash with deepfakes, mistrust of images will likely force us to fall back on vouching witnesses. But *whether* we trust something and to what extent are ultimately about base rates. What is the prior probability that this image is genuine? What is the prior probability that this witness is telling the truth?

³⁹ E.g., Sydney A. Beckman, Presentation at the 2025 Evidence Summer Workshop, *The New Gatekeepers: Blockchain, Zero-Knowledge Proofs, and the Future of Evidence Authentication in an AI World* (May 6, 2025).

⁴⁰ Schauer, *supra* note 1, at 82.

⁴¹ *Id.* at 11 (“Much that we know, we learn from what others tell us.”); *id.* at 82 (“[M]uch of what we believe, not just about the past but about everything, is based on testimony that it is scarcely credible that we could get along without it.” (quoting R.F. Atkinson, *Knowledge and Explanation in History: An Introduction to the Philosophy of History* 42 (1978))).

⁴² Mary D. Fan, *Justice Visualized: Courts and the Body Camera Revolution*, 50 *U.C. Davis L. Rev.* 897, 912–21 (2017).

While a trust-based theory of proof may be empirically descriptive, it carries troubling normative implications in our increasingly polarized world. If proof depends on trust, what happens to groups that are mistrusted? Marginalized or disfavored groups surely face different implicit reliability base rates, and therefore may find it difficult to be believed in court. The problem can also cut the other way, against elites rather than the marginalized. Distrust of the mainstream medical or scientific establishment, for example, will impede accurate decisionmaking in cases requiring expertise. In other work, I have argued that legal actors (non-experts) should defer to expert communities when determining facts requiring expertise, because non-experts lack epistemic competence.⁴³ But if factfinders do not trust those communities, where will that leave the legal system?

The existential threat to the legal system is not the dystopia wrought by a world of deepfakes. Deepfakes the traditional authentication rules can handle. The real dystopia is a world in which deep *polarization* causes factfinders to have wildly disparate base rates and an inability to achieve compromise or consensus on a shared set of trusted sources of information. In such a world, factfinding, let alone accurate factfinding, becomes next to impossible.

Worse yet, if legal proof is about trust, and we fundamentally cannot agree on whom or what to trust, then there is very little that the rules of evidence can do. Evidence law can moderate society's worst tendencies. It can even ameliorate known and acknowledged cognitive biases. But while evidence law may help us think analytically and rigorously about the problems of proof, evidence law is no panacea for the broader epistemic troubles of society. The solution to polarization lies in broader social and political discourse, not evidence law; there is no magic solution waiting to be discovered in the Federal Rules of Evidence.

So just as the solution of deepfakes must eventually come from the learned skepticism of factfinders, so too must the solution to fake news and alternative truths come from a more critical populace and a public willing to rethink how we interact with social media platforms. On this point, I think that Fred would have agreed. After all, as he wrote in his conclusion to *The Proof*,

⁴³ Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 *Vand. L. Rev.* 407, 410 (2022).

2026] *Deepfakes, Photographs, and Trust in Evidence* 85

This book has been written for those for whom evidence matters, and for when it matters to them. For those for whom evidence does not matter, no amount of evidence, and no amount of the analysis of evidence, is going to make a difference.⁴⁴

This is the evidentiary challenge of our age. How do we get back to some kind of consensus on what constitutes good or acceptable evidence? Unfortunately for us, there would have been no one better with whom to tackle this problem than Fred Schauer.

⁴⁴ Schauer, *supra* note 1, at 238.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

86–98

ESSAY

CONSTITUTIONAL ACCEPTANCE IN A POLARIZED ERA

*Amanda Shanor**

INTRODUCTION

Frederick Schauer left an indelible mark on my thinking and my life. One of the most special aspects of his work, to my mind, was his exploration of the nonconstitutional grounds of constitutional law. The idea of Fred’s that has captivated me more than any other is his concept of constitutional salience: “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not.”¹

Fred began his study of constitutional salience analyzing what he termed “First Amendment coverage.” He traced the boundaries of the First Amendment—that is, the line demarcating the social acts that constitute “speech” for constitutional purposes and those that do not. He observed that while the Constitution forbids abridgement of the “freedom of speech,” in practice, much, if not most, of what we might

* Associate Professor & Wolpow Family Faculty Scholar, The Wharton School of the University of Pennsylvania. I am grateful to Deborah Hellman, Leslie Kendrick, Micah Schwartzman, Lawrence Solum, Barbara Spellman, and the University of Virginia School of Law for organizing the gathering and conversation celebrating Fred Schauer.

¹ Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1768 (2004) [hereinafter Schauer, *Boundaries of the First Amendment*].

describe colloquially as “speech” is not covered by the First Amendment.² From contracts to perjury and workplace harassment to the rules of evidence, governments at all levels regularly and pervasively regulate speech in ways that no one, lawyers and nonlawyers alike, identifies as a constitutional concern.³ The Constitution simply does not appear. It is not salient, Fred brilliantly pointed out. Fred later extended this idea of constitutional salience to explore the nonlegal and nonconstitutional bases of constitutionalism more broadly, including what makes a constitution valid and how constitutions change.

These inquiries are extremely relevant today. We are now in a tumultuous moment in U.S. constitutionalism where polarization and the rise of populist authoritarianism have made many once-well-settled constitutional principles seem up for grabs, including core ideas of both the freedom of speech and the separation of powers—if not the persistence of U.S. constitutionalism itself.

People often ask me what it is like to teach constitutional law now, when American constitutional law, culture, and norms seem to be rapidly changing. Teaching constitutional law, I have found, feels ever more important and pressing, including to students who in other times might have little interest. Trying to theorize both the fast shift in U.S. constitutional culture towards populist authoritarianism and what it means for U.S. constitutional law—let alone what, if anything, can or should be done about any of that—has proven far more vexing. These questions prompted me to turn, as I often do, to Fred’s work for insight.

This Essay offers a first sketch of how Fred’s theories on constitutional salience, validity, and change illuminate recent shifts in U.S. constitutional law and culture. In so doing, I tie together elements of Fred’s thinking that, to my knowledge, Fred had not, and I both elaborate on and challenge aspects of his thoughts. Fred’s ideas—re-situated and extended here—help shed light on some of the most vexing questions of our current moment and, as Fred’s work so often does, reveal new paths of inquiry.

² Id. at 1769 (“The acts, behaviors, and restrictions not encompassed by the First Amendment at all—the events that remain wholly untouched by the First Amendment—are the ones that are simply not *covered* by the First Amendment.”).

³ Id. at 1783–84; Amanda Shanor, First Amendment Coverage, 93 N.Y.U. L. Rev. 318, 320–21, 325 (2018).

I. FIRST AMENDMENT COVERAGE AND CONSTITUTIONAL SALIENCE

One of the reasons I long admired Fred Schauer is that so many of his ideas, like constitutional salience, require one to step back and see not only what was there—in his words, for example, “covered” by the First Amendment—but what was left out, or what was beyond the frame.⁴ So much of First Amendment debate centers on what doctrines should look like or how they are or should be normatively justified. Those debates generally, and certainly before Fred’s seminal article on First Amendment coverage,⁵ take for granted as obvious what constitutes “speech” and may also assume, anachronistically, that what counts as “speech” today is the same, or at least definitionally similar, to what the framers of the First Amendment saw as within that ambit. It is the rare scholar, and the rare mind, that has the perspicacity to make such insights.

In his work, Fred made the distinction between coverage and protection, a distinction he says is a “necessary feature” of all rules.⁶ He observed, “All rules—legal or otherwise—apply only to some facts and only under some circumstances. Even before we see what a rule *does*, we must make the initial determination of whether it *applies* at all—whether we are within its scope of operation.”⁷ It turns out that the regulation of a whole lot of what we would describe colloquially as speech is not seen as raising any First Amendment issue whatsoever.⁸ “The First Amendment just does not show up.”⁹

This includes laws dealing with contracts, wills, trusts, gambling, warranties, securities, and fraud, not to mention copyright, perjury, malpractice, panhandling, telemarketing, antitrust, a public-school teacher giving a bad grade for wrong answers, and the rules of evidence. While each of these involves “speech” in the ordinary sense, none generally raises constitutional concern. By contrast, so many things,

⁴ Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 *Wm. & Mary L. Rev.* 1613, 1617–18 (2015) [hereinafter Schauer, *Politics and Incentives*].

⁵ Schauer, *Boundaries of the First Amendment*, *supra* note 1.

⁶ Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 *Harv. L. Rev. F.* 346, 348 (2015) [hereinafter Schauer, *Out of Range*].

⁷ Schauer, *Boundaries of the First Amendment*, *supra* note 1, at 1769.

⁸ See *id.* (“It is not that the speech is not *protected*. Rather, the entire event—an event that often involves ‘speech’ in the ordinary language sense of the word—does not present a First Amendment issue at all, and the government’s action is consequently measured against no First Amendment standard whatsoever.”).

⁹ *Id.*

such as sculpture, instrumental music, the display and desecration of flags, or that modernist painting with only a large red dot, do not colloquially involve “speech” but are all covered by the First Amendment.¹⁰

What can explain these boundaries? Here, Fred identified a key issue in First Amendment law and a deep gap in its theory. None of the existing normative theories of the First Amendment, he pointed out, can explain its boundaries as a descriptive matter.¹¹ Not the marketplace of ideas. Not theories from democracy, autonomy, or the checking function, among others. “The fact that even the best of the currently available normative accounts” cannot explain the First Amendment’s boundaries means we must contemplate “that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it has developed.”¹² That is, we need to explore what Fred termed “the political psychology” of the First Amendment.¹³

Fred was one of the first to observe that the universe of First Amendment coverage—what we understand as constitutionally relevant activities—was expanding in part due to the First Amendment’s “cultural magnetism.”¹⁴ Lawyers and nonlawyers alike were identifying the regulation of more and more parts of life, from refusing to sell a wedding cake to disclosing a product’s ingredients, as raising First

¹⁰ Schauer, *Politics and Incentives*, supra note 4, at 1619.

¹¹ Schauer, *Boundaries of the First Amendment*, supra note 1, at 1784–85 (“Yet however hard we try to theorize about the First Amendment’s boundaries, and however successful such theorizing might be as a normative enterprise, efforts at anything close to an explanation of the *existing* terrain of coverage and noncoverage are unavailing. Prescriptive theories abound, but descriptive or explanatory accounts of the existing coverage of the First Amendment are noticeably unsatisfactory.”).

¹² *Id.* at 1787; see also *id.* at 1768 (“Rather, the boundaries of the First Amendment, far more than the doctrine lying within those boundaries, turn out to be a function of a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment. If it is true that more of the First Amendment is explained by its boundaries than we have previously thought, it may also be the case that less of the First Amendment can be explained by the tools of legal and constitutional analysis than we have formerly recognized.”).

¹³ *Id.* at 1788.

¹⁴ *Id.* at 1784, 1789, 1796.

Amendment concern.¹⁵ “Time and again,” Fred observed, “legal arguments that initially appear to have little to do with free speech turn up in First Amendment clothing.”¹⁶

II CONSTITUTIONAL ACCEPTANCE AND CONSTITUTIONAL CHANGE

To my knowledge, Fred did not explicitly connect this work on First Amendment coverage and constitutional salience with his scholarship on the rule of recognition, but the deep connection seems clear and particularly important in this moment. Both issues speak, in the positivist tradition, to the nonlegal foundations of U.S. constitutional law.

Fred built on the work of Hans Kelsen and H.L.A. Hart to argue that the inescapably nonlegal ground of the acceptance of constitutional law—indeed, of what is *in* the U.S. Constitution as a social fact—need not be all or limited to what is contained in the text of the document.¹⁷ Just as what falls within the First Amendment is not simply the written or colloquial concept of “speech,” the metes and bounds of constitutions more broadly, Fred concluded, are not the written contents of the document bearing that name, either as a necessary or sufficient matter.¹⁸ Understood as such, the Constitution’s content is always in theory and likely often in practice subject to change.¹⁹

“[I]t turns out,” Fred argued, “that the constitution . . . of the United States is not the document that is entitled ‘The Constitution of the United States of America.’”²⁰ It is both less and more than that document and that text.²¹ It is based on “pre-constitutional

¹⁵ See Shanor, *supra* note 3, at 329 n.44, 334; Leslie Kendrick, First Amendment Expansionism, 56 *Wm. & Mary L. Rev.* 1199, 1207–09 (2015); Schauer, Politics and Incentives, *supra* note 4, at 1633 (“[I]t is at this point that we can see that the political, cultural, ideological, and psychological resonance of the First Amendment, when coupled with an increasingly receptive doctrinal landscape, will lead good lawyers to strain to make First Amendment arguments more than they would strain to make arguments based on other constitutional doctrines or provisions.”).

¹⁶ Schauer, *Boundaries of the First Amendment*, *supra* note 1, at 1793.

¹⁷ Frederick Schauer, The Unwritten Foundations of (All) Written Constitutions, *in* *Amending America’s Unwritten Constitution* 217, 217–20 (Richard Albert, Ryan C. Williams & Yaniv Roznai eds., 2022) [hereinafter Schauer, *Unwritten Foundations*].

¹⁸ *Id.* at 220, 222, 229–230.

¹⁹ *Id.* at 220.

²⁰ *Id.* at 227.

²¹ *Id.* at 229–30; see also *id.* at 220 (“If the constitutionality, legality, and ultimately the authority of a written constitution is grounded not on any more foundational *legal* item but

understandings and assumptions [that] are necessarily unwritten, and . . . are typically, even if not necessarily, highly variable.”²²

An example makes this clearer. Where Americans and their lawyers once saw many laws in economic life as implicating constitutional substantive due process concerns, now, long after the New Deal revolution, they generally no longer do. Decades later, against the rise of the digital economy, a robust libertarian intellectual and legal movement, and a shift in much regulation from command-and-control to informational,²³ much of the regulation of economic life came to be seen as raising First Amendment concerns.²⁴ Throughout this period, the constitutional text of the due process and speech clauses remained the same. The content of the Constitution—what activities were understood

instead on the empirical and nonlegal fact of acceptance [by the relevant cohort], then there is no reason to believe that such acceptance must be an all-or-nothing affair. The relevant accepting group might instead accept only part of some written instrument as its constitution and might in addition accept all or part of some other particular written instrument as part of its constitution, while also accepting all or part of something else—written instrument or not—as its constitution. . . . [O]nce we recognize [this point] . . . and add [it] to the basic Kelsenian and Hartian idea of a legal system resting on nonlegal foundations, then we can understand that the foundations of all constitutions—written or otherwise—are always subject to change.” (footnotes omitted).

²² *Id.* at 231.

²³ Say, a required warning label rather than a ban on cigarettes. Amanda Shanor, *The New Lochner*, 2016 *Wis. L. Rev.* 133, 135, 166–67.

²⁴ See, e.g., *id.* at 135; Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 *Harv. L. Rev. F.* 165, 166–67 (2015); John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 *Const. Comment.* 223, 223–24 (2015); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 *Law & Contemp. Probs.* 195, 196–203 (2014); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, *New Republic* (June 3, 2013), <http://www.newrepublic.com/article/113294/howcorporations-hijacked-firstamendmentevade-regulation> [https://perma.cc/7537-HTT5]. For seminal work considering early signs of this trend, see J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *Duke L.J.* 375, 376–87; Mark Tushnet, *An Essay on Rights*, 62 *Tex. L. Rev.* 1363, 1386–88 (1984); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 *Va. L. Rev.* 1, 1–6, 30–33 (1979).

Schauer himself identified this trend early: “Similarly, objections to government regulation of business that were originally based on concern for economic liberty have become objections to the regulation of commercial advertising, just as objections to hostile-environment sexual harassment law on the ground of alleged intrusiveness have become objections to regulating speech in the workplace.” Schauer, *Boundaries of the First Amendment*, *supra* note 1, at 1794 (footnote omitted); see also Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 *U. Colo. L. Rev.* 935, 935–42 (1993) (observing the contemporary shift away from political neutrality and towards conservative ideals in First Amendment jurisprudence).

as constitutionally salient, as within the Constitution’s protection—nonetheless changed in profound ways.

Fred favored a notion of constitutional salience and validity that boiled down to, in Hartian terms, the brute social fact of acceptance.²⁵ In this way, Fred parted ways with another great First Amendment theorist, Robert Post. While Post argues that his theory of the freedom of speech is grounded in democratic legitimacy—that is, that the opportunity to participate in public discourse produces sociological legitimacy, meaning an identification with the actions of the state even when we disagree with them—Fred recognized that a better account of Post’s theory is that he derives the right to freedom of speech from discursive democracy.²⁶ Post’s theory, Fred argued, “should be understood as premised on the normative and largely foundational dimensions of the belief that citizen preferences, as expressed in and filtered through public opinion, are simply and irreducibly an essential part of representative democracy.”²⁷ Fred’s account of the First Amendment, then, is one of the most thoroughly and deeply sociological accounts of the content and validity of constitutions, including the freedom of speech.

III. OF TURTLES AND CONSTITUTIONAL CHANGE IN AN AGE OF POLARIZATION AND POPULIST AUTHORITARIANISM

One question that Fred repeatedly explored in his career seems ever more important today: What makes a law valid? Typically, he answered, a regression of references from one law to another law, and that law to another law, and so on, usually ending with a constitution.²⁸ “But the turtles are still with us,” he pointed out with his usual clarity and charm.²⁹ “[W]hat makes the Constitution valid? In a word—nothing. Or, to be more precise, the Constitution is the ultimate source of *legal* validity, but *its* validity is simply a matter of, as Hart explained, social

²⁵ Schauer, *Unwritten Foundations*, supra note 17, at 219–20.

²⁶ Frederick Schauer, *Constitutions of Hope and Fear*, 124 *Yale L.J.* 528, 533, 548 (2014) [hereinafter Schauer, *Hope and Fear*] (reviewing Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014)).

²⁷ *Id.* at 539.

²⁸ Frederick Schauer, *The Force of Law* 78 (2015) (“We know that laws are made valid by other laws, and those other laws by still other laws, and so on, until we run out of laws. But what determines the validity of the highest law? What keeps the entire structure from collapsing? On what does the validity of an entire legal system rest?”).

²⁹ *Id.* at 79.

fact.”³⁰ Fred observed, “It is the bottom turtle, and it rests on the brute fact that it is simply accepted as such.”³¹

So, what then happens when social facts, including elements of that crucial social fact of acceptance of a constitution, change? In ordinary times, when social facts around the salience or validity of an aspect of U.S. constitutionalism shift—such as, say, whether being compelled to sell foodstuff to a person by a public accommodations law raises a First Amendment problem—we might think of that bottom turtle as on the move. Or perhaps we could conceive of it as always changing clothes in keeping with styles of the times, or even shape-shifting into an entirely different species, if one we still call a turtle. “Constitutions, written or unwritten,” Fred taught, “are necessarily dependent on and subject to a set of typically fluid and unwritten foundations and understandings that are, always in theory and usually in practice, subject to change. So it is, so it has been, and so it must always be.”³²

Pushing the question of changing social facts further, what happens if that bottom turtle becomes unstable? What happens when the relevant group of acceptors no longer accepts the constitution, at least as it has been accepted for some time, as valid?

Something of this sort now seems like it is afoot in U.S. constitutional law and culture, and perhaps more generally in constitutional democracy, which is eroding globally in something of a crash of the earlier wave of constitutional democratization.³³ I will not try to prove up that assertion here, though I suspect most readers will not need more evidence than they have already witnessed.

For these purposes, I want to assume that:

- (1) Many federal officials who are part of the relevant acceptor group in the rule-of-recognition sense, including ones that exercise significant constitutional authority such as the President, either do not know what generally has been accepted over the last half century as “within” the executive power (or separation of powers principles) and First Amendment protections, do not care, or reject much of those principles as within any constitution that validly

³⁰ *Id.*

³¹ *Id.*

³² Schauer, *Unwritten Foundations*, *supra* note 17, at 233.

³³ See David Singh Grewal, *A World-Historical Gamble: The Failure of Neoliberal Globalization*, *Am. Affs.* (Nov. 20, 2022), <https://americanaffairsjournal.org/2022/11/a-world-historical-gamble-the-failure-of-neoliberal-globalization/> (describing that wave and crash).

binds them. For ease, let us assume these officials do not believe that there are any valid constitutional limits on the President's powers or that the First Amendment prohibits the government from censoring messages in public discourse or retaliating against speakers because of what they are seen as expressing; and

(2) Much of the public supports the government's action when presented with an example of governmental conduct violating these previously accepted constitutional principles. For example, assume our public favors punishing universities by taking away scientific and medical research grants because, in the words of the Vice President, they teach "progressive orthodoxies," including the value of critical race theory and women working outside the home.³⁴ Universities, "which control the knowledge in our society, which control what we call truth and what we call falsity, that provide[] research that gives credibility to some of the most ridiculous ideas that exist in our country," Vice President Vance explained, should be attacked.³⁵ Let us assume that much of the public agrees with that proposition as well.

³⁴ Nat'l Conservatism, J.D. Vance: The Universities Are the Enemy, at 15:32 (YouTube, Nov. 10, 2021), <https://www.youtube.com/watch?v=0FR65Cifnhw&feature=youtu.be> [<https://perma.cc/A2BF-MKRG?type=image>]. Parroting President Nixon, the Vice President concluded, "The professors are the enemy." *Id.* at 30:20 (quoting Document 175: Conversation Among President Nixon, the President's Assistant for National Security Affairs (Kissinger), and the President's Deputy Assistant for National Security Affairs (Haig), in 9 U.S. Dep't of State, Foreign Relations of the United States, 1969–1976: Vietnam, October 1972–January 1973, at 635, 678 (John M. Carland & Edward C. Keefer eds., 2010)). President Trump has made similar statements, including, "We are going to choke off the money to schools that aid the Marxist assault on our American heritage and on Western civilization itself. . . . The days of subsidizing communist indoctrination in our colleges will soon be over." Liz Essley Whyte, Douglas Belkin & Sara Randazzo, The Little-Known Bureaucrats Tearing Through American Universities, *Wall St. J.* (Apr. 14, 2025, at 21:00 ET), <https://www.wsj.com/us-news/education/anti-semitism-task-force-who-247c234e?st=NzSj4q>. Before stripping additional funding from Harvard and its ability to sponsor international students, the President threatened to revoke Harvard's tax-exempt status "if it keeps pushing political, ideological, and terrorist inspired/supporting 'Sickness?'" Collin Binkley, Harvard's Challenge to Trump Administration Could Test Limits of Government Power, *AP News* (Apr. 15, 2025), <https://www.ap.org/news-highlight/s/spotlights/2025/harvards-challenge-to-trump-administration-could-test-limits-of-governme-nt-power/> [<https://perma.cc/Q4TV-GMNS>].

³⁵ Nat'l Conservatism, *supra* note 34, at 00:02; *id.* at 00:32 ("I think if any of us want to do the things that we want to do for our country, and for the people who live in it, we have to honestly and aggressively attack the universities in this country.").

Given these facts, Fred's work would seem to suggest that a significant part of what has been in the U.S. Constitution for approximately the last eighty years may soon fall outside it—that is, both with respect to what issues surface as constitutional ones and what the content of the U.S. Constitution *is* for rule-of-recognition and validity purposes.

What is more, in a provocative piece on why officials obey the law, Fred argued that even if presidents and other officials are aware that their actions or policies are unlawful or illegal, “if [they] guess right on the substance, no one will care that their substantive decisions happened to be illegal; but if presidents and other officials guess wrong on the substance, the degree of social and political punishment will be greater when there is illegality than when there is not.”³⁶ That is to say, as long as assumption (2) above holds, (1) likely will as well. This appears likely in the current context in which the Supreme Court has taken off the table the possibility of many formal sanctions against the President, and perhaps lower officials, and appears uninterested in placing significant roadblocks in the Executive's way.³⁷ Instead, “[i]f sanction-independent norms of legality are less present for officials than we have imagined, then in an important way the remedy lies less with the officials themselves than with the public that those officials represent.”³⁸ But if (2) does not hold, the administration will face more political blowback than if it took the same actions (say, withholding federal funding or dissolving agencies) in a legal way (i.e., with congressional support).

But this gets us only so far. For, if Fred identified the grounds of the boundaries of constitutions and the sociological basis of the validity of constitutions and their contents, he recognized many important

³⁶ Frederick Schauer, *When and How (If at All) Does Law Constrain Official Action?*, 44 *Ga. L. Rev.* 769, 796 (2010) [hereinafter Schauer, *When and How*]; see also Frederick Schauer, *The Political Risks (if Any) of Breaking the Law*, 4 *J. Legal Analysis* 83, 93 (2012) (“When illegal policies are successful on policy and political grounds, and when formal sanctions are unavailable, the fact of illegality will be relatively inconsequential, but when illegal policies are unsuccessful on policy and political grounds, the fact of illegality will increase what would otherwise have been the political and reputational penalty for officials responsible for the policies.”).

³⁷ See, e.g., *Trump v. United States*, 144 S. Ct. 2312, 2331 (2024); Erwin Chemerinsky, *Why the Shadow Docket Should Concern Us All*, SCOTUSblog (Aug. 4, 2025), <https://www.scotusblog.com/2025/08/why-the-shadow-docket-should-concern-us-all/> [<https://perma.cc/H9FL-2744>].

³⁸ Schauer, *When and How*, *supra* note 36, at 800–01.

questions he did not resolve, leaving them as pregnant paths of inquiry for another person or another day.

Foremost among these questions is what group of acceptors must accept, for rule-of-recognition purposes, a given aspect of a constitution for it to be valid, or for it really to *be* in the constitution, as a matter of fact. This is a particularly important and vexing question. For, as Fred recognized, “in constitutional law generally, the right constitutional question usually involves, or just is, the question of who is to make decisions of some type.”³⁹

In work with Larry Alexander, Fred identified this crucial inquiry and raised questions about Hart’s answer that “for a legal system to exist, only the officials need accept the ultimate rule of recognition as obligatory”; ordinary citizens need not.⁴⁰ They argued that the nine Justices of the Supreme Court are the group of relevant acceptors for rule-of-recognition purposes, pointing out, nonetheless, that even on that account, the United States has “at least as many legal systems as there are ‘constitutions,’ the number of which is the number of different interpretive methodologies” adopted by members of the Court.⁴¹

Fred and Larry, however, rejected a multiplicities-of-constitutions account in light of the need for settlement, concluding that the rule of recognition includes not only the substance of a constitution but the rules of settlement among competing constitutions.⁴² In our system, that mechanism, they contended, is the decision of the Supreme Court.⁴³ Unlike Hart, however, Fred and Larry believed that “citizens as well as officials must accept the rule of recognition, . . . not in the way a sophisticated legal analyst would, but in an indirect, mediated way.”⁴⁴ They argued that ordinary people “assume that the Supreme Court Justices and other officials are adhering in good faith to the rules of the game, whatever those rules might be.”⁴⁵

³⁹ Schauer, Hope and Fear, *supra* note 26, at 552.

⁴⁰ Larry Alexander & Frederick Schauer, Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance, *in* *The Rule of Recognition and the U.S. Constitution* 175, 177 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

⁴¹ *Id.* at 184.

⁴² *Id.*

⁴³ *Id.* at 184–85.

⁴⁴ *Id.* at 186.

⁴⁵ *Id.* at 187.

It is here that I think we might push Fred further. Or more accurately, I believe that recent social, political, and cultural changes, particularly hyperpolarization, are placing great pressure on this aspect of Fred's thinking, which he astutely identified as an empirical supposition that may become mistaken in the future.⁴⁶

Another background supposition in Schauer's early analysis of constitutional salience and of the rule of recognition in U.S. constitutional law—and in many ways a reasonable one for much of the last century—was that there is a relevant American constitutional culture, perhaps a relatively unitary one, in which policy questions might “surface” as constitutional concerns, and that, as just mentioned, ordinary people assume that the Supreme Court and other officials are “adhering in good faith to the rules of the game.”⁴⁷

Hyperpolarization and populist authoritarianism are putting great pressure on that supposition as well. Rich social science research has demonstrated that, since the beginning of the twenty-first century, Americans have grown more socially polarized along partisan lines.⁴⁸ This shift has been a sea change, as work by Petter Törnberg et al. describes: “While social identity has always played a role in politics, this literature suggests we have entered a new regime where partisan identity comes to engulf and align other social identities. Rather than contests over policies, elections turn into struggles between competing groups separated by a fundamental sense of difference.”⁴⁹ This fundamental sense of difference, paired with one partisan group's apparent commitment to aspects of populist authoritarianism that depart from heretofore well-accepted aspects of American constitutional law, draw into question the public's belief in the good faith of the Supreme Court as well as the possible existence of anything like a unitary

⁴⁶ Id. at 192 (“Our conclusions about the effect of Supreme Court decisions on public consciousness and political decision making are empirical suppositions, and as such they may very well be mistaken. And even if they are not mistaken now, they may become mistaken in the future.”).

⁴⁷ Id. at 187.

⁴⁸ See, e.g., Christopher Weber & Samara Klar, Exploring the Psychological Foundations of Ideological and Social Sorting, 40 *Pol. Psych.* 215, 215 (2019); Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, The Origins and Consequences of Affective Polarization in the United States, 22 *Ann. Rev. Pol. Sci.* 129, 132 (2019).

⁴⁹ Petter Törnberg, Claes Andersson, Kristian Lindgren & Sven Banisch, Modeling the Emergence of Affective Polarization in the Social Media Society, *PLOS One*, Oct. 11, 2021, at 2 (endnotes omitted).

constitutional culture. This, in turn, threatens the existence, as a matter of social fact, of a single U.S. Constitution.

CONCLUSION

Today, the bottom turtle, as Fred described it—the brute social fact of acceptance of the validity of long-accepted aspects, at least long-accepted aspects of the U.S. Constitution, by both key federal officials and large parts of the public—appears to be tottering. We appear to be on a path toward a world in which the United States very clearly has in fact, in Fred’s words, more than one constitution. Or we are perhaps on a path toward losing the prelegal basis for constitutionalism altogether.

Fred saw this fragility.

Once we appreciate the unavoidable and dizzying fragility of a legal system’s nonlegal foundations, we discover that the security and stability that constitutionalism is alleged to bring depends less on constitutionalism itself than on the preconstitutional understandings that make constitutionalism possible That will provide little solace to lawyers and judges, but it will be a useful reminder that constitutionalism of any sort resides not in a constitution, but in the preconstitutional commitments that make any form of constitutionalism possible.⁵⁰

Fred thus leaves it largely to us to identify the forces that shape pre-constitutional commitments to constitutionalism itself. I wish now more than ever that we had Fred still with us to shed his brilliance on that question and what, if anything, might be done to foster the sort of pre-constitutional commitments that make constitutionalism possible. But the gift Fred has given us in this and so many other contexts is that he revealed the key paths for inquiry and so the new beginnings that we should pursue.

⁵⁰ Alexander & Schauer, *supra* note 40, at 192.

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

APRIL 2026

99–116

ESSAY

SCHAUER'S FREE SPEECH COMPARATIVISM

*Adrienne Stone**

INTRODUCTION

It is a great honour to make this contribution about Frederick Schauer. I am especially pleased that I can give voice to the many Australian scholars who had the pleasure of meeting and working with him and those who were influenced by his work.

Fred was a frequent visitor to Australia, where he was well known and widely admired. I first came across him at the Australian National University in the late 1990s at the beginning of my career. It will surprise no one to know that he was memorably generous and straightforward. He had a way of being kind to junior scholars that consisted simply in taking them seriously. Years later, I invited him to co-teach a freedom of speech seminar with me at Melbourne Law School, and after to join me as an editor of *Oxford Handbook of Freedom of Speech* (2021) together. Both experiences were career highlights.

For the purposes of this tribute, I want to offer a reflection on two of the most important essays he wrote on freedom of speech for a

* Melbourne Laureate Professor, Melbourne Law School, University of Melbourne. Part I and Section II.A of this Essay draw upon an unpublished paper for discussion at the VII World Congress of the International Association of Constitutional Law, Athens that I co-authored with Simon Evans, *Balancing and Proportionality: A Distinctive Ethic* (April 28, 2007) (unpublished manuscript) (on file with author). My thanks to Professor Evans for his collaboration.

comparative audience: *The Exceptional First Amendment*¹ and *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*.² Both were published in 2005 and offer a prediction on the development of freedom of expression in the United States and elsewhere that is worth revisiting after twenty years.

In the first piece, Schauer revisited the well-known claim that First Amendment law is exceptional for the strong protection it provides to freedom of speech. Even in this well-travelled field, Schauer offered an insightfully detailed account, swiftly moving through a range of ideas, well beyond the conventional account. But perhaps the most important idea in the essay lies in introduction of a second dimension: “methodological exceptionalism.”³ American free speech adjudication is characterised by “a formal and sharply demarcated two-step process” and other rule-like doctrines.⁴ By contrast, in most other constitutional democracies the inquiry is a “less formal and more open-ended question of whether a restriction is reasonable, necessary in a democratic society, or, most commonly, proportional in light of the importance of the restriction and the extent of the free expression interest that is restricted.”⁵

The second essay developed the argument advanced in the first, but it went further to draw firm links between American substantive and methodological exceptionalism. The argument in this essay goes somewhat against the grain of the first, concluding that the “rulified” nature of First Amendment law, because of its deep roots in American constitutional culture, was unlikely to change.⁶

Before going on to consider their arguments in more detail, let me pause to reflect on how they illustrate some of the distinctive virtues of Fred Schauer’s scholarship. They combine an eye for doctrinal detail, powerful jurisprudential insights about the relationship between doctrinal structures and their underlying reasons, and a deep appreciation of the significance of legal and political culture.

¹ Frederick Schauer, *The Exceptional First Amendment*, in *American Exceptionalism and Human Rights* 29 (Michael Ignatieff ed., 2005).

² Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in *European and US Constitutionalism* 49 (Georg Nolte ed., 2005).

³ Schauer, *supra* note 1, at 53.

⁴ *Id.*

⁵ *Id.* at 53–54.

⁶ See Schauer, *supra* note 2, at 63–67.

For the remainder of this Essay, I will turn to consider how Schauer developed his claims about method and substance in free speech cases and examine his claims with a comparative analysis of two jurisdictions which allow some testing of Schauer's claims and predictions.

I. SCHAUER'S FREE SPEECH COMPARATIVISM

A. The Exceptional First Amendment and the Convergence Thesis

Let me start with *The Exceptional First Amendment*. In this essay, Schauer's focus is on the possible *convergence* between American ruled approaches to free speech law⁷ and the more open-ended balancing approaches—typically in the form of proportionality tests—that dominate elsewhere.⁸

This argument builds upon an earlier article that is not specific to the free speech context, but theorizes about rules more generally,⁹ which in turn builds upon his enormous body of work on these questions.¹⁰ In that article, Schauer proposes that although there is a difference between rules and standards, “the adaptive behaviour of rule-interpreters and rule-

⁷ Schauer's well-known account of rules is clearly explained by Kathleen Sullivan. A “rule” binds a decision-maker to respond in a determinate way to the presence of specified triggering facts. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 *Harv. L. Rev.* 22, 58 (1992). A rule is based on some kind of background justification, but a distinguishing feature of a rule is that it will apply even where its application might be contrary to that background justification. *Id.* By contrast, a “standard” seeks to apply the background justification or policy directly to a fact situation. *Id.* at 58–59. Standards allow the decision-maker more discretion because they encourage considering all the relevant factors in a particular case. *Id.* For Schauer's account, see Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 23 (1991) (outlining the “factual predicate” and “consequent” of a rule). The description of First Amendment law as “rulified” should not be overstated. Rules and standards exist along a spectrum, and many of the “rules” that characterise First Amendment law have some standard-like features. They may incorporate general or vague concepts that allow for considerable discretion at the point of application. Nonetheless, First Amendment law remains unusual for its reliance on relatively rigid and rule-like doctrines. See *supra* notes 4–5 and accompanying text. On the difference between the categorical or conceptual structure of First Amendment law and other systems of freedom of speech, see Adrienne Stone, *The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication*, 23 *Melb. U. L. Rev.* 668, 685–89 (1999).

⁸ See Iddo Porat, *Proportionality*, in *Max Planck Encyclopedia of Comparative Constitutional Law* ¶¶ 19–42 (2018).

⁹ See Frederick Schauer, *The Convergence of Rules and Standards*, 2003 *N.Z. L. Rev.* 303, 305.

¹⁰ For Schauer's most systematic account of rules, see generally Schauer, *supra* note 7.

enforcers will push rules towards standards, and push standards towards rules.”¹¹ More fully, he argues:

When authorised to act in accordance with rules, rule-subjects will tend to convert rules into standards by employing a battery of rule-avoiding devices that serve to soften the hard edges of rules. . . .

Conversely, the adaptive behaviour of rule-subjects when given a standard goes in the opposite direction. These rule-subjects, when given few rules in the rules-standards sense, will make them themselves, and apply them to their own allegedly discretionary behaviour, thus limiting significantly the case-sensitive discretion that it was the intention of the rule-maker to grant.¹²

In this way, “gravitation towards the same degree of ruleness (or standardness, if you will), regardless of the starting point, will occur, and that convergence will produce a world in which the choice between rules and standards makes far less difference than is generally believed to be the case.”¹³

In light of this general account of the relationship between rules and standards, Schauer is sceptical that the methodological dimension of American free speech exceptionalism is an enduring phenomenon. In short, his view (in 2005) was that the experience of free speech adjudication outside the United States is simply too short, and the cases too few, to allow this conclusion. On the contrary, there is a real chance that the rules-based American approach and the more standard-like approaches elsewhere will ultimately converge and that the preference for balancing approaches seen in jurisdictions outside of the United States might be a reflection of their relative youth.

B. The Divergence Thesis? Linking Substantive and Methodological Preferences

The *Comparative Constitutional Architecture* essay, on the other hand, strikes a different note, turning from a general account of rules and standards to questions of the operation of rules and standards in particular legal and constitutional cultures. On this account, Schauer ties preferences in doctrine to deeper choices in constitutional culture:

¹¹ Schauer, *supra* note 9, at 305.

¹² *Id.* at 312.

¹³ *Id.* at 319 (footnote omitted).

“[D]ifferent architectures emerge from different substantive commitments, different experiences, and different views about the locus of decision-making authority.”¹⁴

With respect to the United States in particular, he argues that the American distrust of balancing derives from “a culture of extreme distrust” that encompasses “distrust of discretion and . . . a fear of the official ability to assess accurately the dangers that might come from speaking, writing and printing.”¹⁵ He continues, “[I]n such a culture, strong protection of free speech goes hand in hand with distrust of structures that allow, encourage or even require a weighing of interests.”¹⁶

This distrust is compounded by the continuing debate about the legitimacy of judicial review in the United States given its “textually and historically fragile provenance”¹⁷ and the fact that balancing is also often seen as incompatible with the guidance function that the Supreme Court must perform—a function that is particularly salient given the minuscule fraction of the cases presented to it that it can give substantive attention.¹⁸

It follows from Schauer’s argument that American free speech law is *not* likely to move significantly away from its current rule structure. Rather, that structure is embedded in, and supported by, cultural and institutional features.

II. PROPORTIONALITY: TRANSITION OR RESISTANCE TO RULES?

Now with the hindsight of a further twenty years, how do these two forms of argument about convergence and divergence look? In short, the answer is that the second form of the argument, that links questions of substance and method, prevails.

With respect to Schauer’s most specific prediction about American free speech law, First Amendment law has not moved significantly from its rulified structure. Exceptions to First Amendment protection continue to be expressed in doctrinal forms that have a relatively rule-like structure.¹⁹

¹⁴ Schauer, *supra* note 2, at 57.

¹⁵ *Id.* at 63–64.

¹⁶ *Id.* at 64.

¹⁷ *Id.* at 64–65.

¹⁸ *Id.* at 66.

¹⁹ For recent examples, see *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2307–08, 2310–13 (2023) (treating the question of whether a website designer would be required under the Colorado Anti-Discrimination Act to create websites celebrating same-sex marriage as an instance of “compelled speech” attracting strict scrutiny); *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2300, 2306 (2025) (treating the validity of a Texas law requiring that certain

More specifically, the Court continues to insist that only narrow categories of expression escape full First Amendment protection.²⁰ The presumptive invalidity of content-based laws under strict scrutiny remains, and rare cases in which content-based laws survive tend to be treated as new “low-value” categories rather than a “softening” of strict scrutiny.²¹ Far from any convergence on a more standard-like doctrinal form, the rigidity of First Amendment doctrinal structures have maintained First Amendment’s substantive exceptionalism. Indeed, buttressed by the exacting nature of its doctrine, First Amendment law has, if anything, become ever more protective: expansionist if not absolutist in its protection of speech.²²

Equally, examining jurisdictions outside the United States—specifically Canada and Australia—reveals that they have not moved significantly in the direction of the US. Rather, for reasons of their legal context and political culture, they have resisted rulification, though in quite different ways as between them.

A. Canada

Let me begin with Canadian law of freedom of expression and specifically with the proportionality test established by the Canadian Supreme Court in *R. v. Oakes*.²³ As is well known, the Court established a three-stage standard of review for determining challenges brought under the *Canadian Charter of Rights and Freedoms* (“*Charter*”) that assesses:

websites publishing sexually explicit content verify that visitors are 18 years or older as triggering intermediate scrutiny).

²⁰ See *United States v. Stevens*, 559 U.S. 460, 470 (2010) (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 791 (2011); *McCutcheon v. FEC*, 572 U.S. 185, 191–93, 197 (2014).

²¹ For instance, the Court’s finding in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8–9, 40 (2010), that a federal law could validly prohibit the provision of material assistance (including “training” and “expert advice or assistance”) to a terrorist organisation, is treated by Chemerinsky as a category of “unprotected and less protected speech.” Erwin Chemerinsky, *Constitutional Law: Principles and Policies* §11.3, at 1095 (7th ed. 2023).

²² See Leslie Kendrick, *First Amendment Expansionism*, 56 *Wm. & Mary L. Rev.* 1199, 1216–19 (2015); Zachary S. Price, *Our Imperiled Absolutist First Amendment*, 20 *J. Const. L.* 817, 824 (2018).

²³ [1986] 1 S.C.R. 103, 138–40 (Can.). The *Oakes* test is used to implement Section 1 of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), which provides that *Charter* rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, c. 11 (U.K.).

- (1) whether the challenged law serves the end it purports to serve (the rational connection element);
- (2) the availability of alternative, less drastic means by which that same end could be achieved (the minimal impairment or narrow tailoring element); and
- (3) whether the end pursued by that law is worth the restriction or costs imposed (the balancing element).²⁴

This test, derived from the jurisprudence of the German Constitutional Court²⁵ (itself derived from 19th-century German administrative law) and widely adopted throughout the world,²⁶ is usually understood to entail a flexible form of analysis that pays close attention to the particular legal and factual circumstances at hand.²⁷

This form of analysis *could* in principle be deployed in ways that are quite rule-like. Indeed, U.S.-style strict scrutiny analysis bears some conceptual similarity to proportionality analysis, as both require a test of the relationship between ends and means. Strict scrutiny undertakes this task in a more rigid and rule-like way that at least reduces—and perhaps even eliminates—the judge’s capacity to “balance” in the individual case.²⁸ Moreover, the history of the proportionality test in Canada demonstrates exactly this possibility. For a period in the 1980s and 1990s, the Supreme Court of Canada began to develop more specific forms of the test. For instance, differentiated forms of the test were developed according to the Court’s assessment of the relative institutional strengths of the courts and the Parliament in particular policy areas.²⁹ Thus, the Court indicated it would scrutinize the availability of alternative means more closely in relation to criminal justice, given the competence of the

²⁴ *Oakes*, 1 S.C.R. at 139.

²⁵ Robert Alexy, *A Theory of Constitutional Rights*, at xvii, 66–67 (Julian Rivers trans., 2002).

²⁶ See Porat, *supra* note 8, at ¶¶ 13–17. On proportionality in supranational contexts, see Yutaka Arai-Takahashi, *Proportionality*, in *The Oxford Handbook of International Human Rights Law* 446, 450–52 (Dinah Shelton ed., 2013).

²⁷ See Stone, *supra* note 7, at 689; Adrienne Stone, *Proportionality and Its Alternatives*, 48 *Fed. L. Rev.* 123, 138 (2020).

²⁸ Hence the description “‘strict’ in theory and fatal in fact.” Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972).

²⁹ See Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section 1*, 34 *Sup. Ct. L. Rev.* 501, 511–12 (2006).

Court in this area,³⁰ whereas the Court showed more deference with respect to labor relations³¹ and commercial regulation.³²

However, even in the early 2000s when Schauer wrote these essays, the Supreme Court of Canada had shown considerable resistance to the rulification of proportionality analysis and consistently emphasized the importance of context. In *Thomson Newspapers Co. v. Canada (Attorney General)*, the Court stressed the significance of context in each application of section 1 of the *Charter*:

In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right.³³

The focus on context remains at the core of section 1 analysis under the *Charter*, and the Court's analysis of the guarantee of freedom of expression is still dominated by the analytical framework outlined in *Oakes*. In the Canadian context, attention to the question of "minimal impairment" (i.e., the availability of alternative, less restrictive means) has assumed particular significance and requires detailed consideration of the factual context, including possible alternative laws.³⁴

That is not to say that there is no recognition that certain categories of cases might merit particular approaches. On the contrary, the Court has indicated that for expression close to the "core" of the *Charter*'s protection (political expression for instance), scrutiny will be more exacting, whereas there are recognised kinds of "low-value" expression (hate speech for instance) which might more readily be limited.³⁵ But

³⁰ See *Irwin Toy Ltd. v. Quebec (Att'y Gen.)*, [1989] 1 S.C.R. 927, 994 (Can.).

³¹ See *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, 795–96 (Can.).

³² *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229, 318 (Can.); *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, para. 257 (Can.).

³³ [1998] 1 S.C.R. 877, para. 87 (Can.). For similar statements, see *R. v. Sharpe*, [2001] 1 S.C.R. 45, para. 155 (Can.); see also Richard Moon, *Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights*, 40 *Osgoode Hall L.J.* 337, 351 (2002) (noting criticism of the development of the *Oakes* test as excessively deferential).

³⁴ See Moon, *supra* note 33, at 346; Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *U. Toro. L.J.* 383, 389 (2007); Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* 106 (2017).

³⁵ E.g., *Saskatchewan (Hum. Rts. Comm'n) v. Whatcott*, [2013] 1 S.C.R. 467, paras. 112, 115 (Can.). For a very recent instance in a closely analogous context, see *Ontario (Att'y Gen.)*

crucially, the recognition of these categories does not displace proportionality testing, and the degree of additional scrutiny entailed is not precisely defined.

As with the United States, the most convincing reasons for this trajectory lie in Canada's constitutional culture.³⁶ There may be other factors of course: the text of the *Charter* could be seen as inviting this type of analysis,³⁷ and the comparative openness of the Canadian Supreme Court to the influence of foreign law explains why it is proportionality rather than some other form of doctrinal flexibility that has prevailed in the Canadian Courts. Two other factors, however, stand out that go to the heart of Canada's constitutional culture.

1. Proportionality and Dialogue

The first lies in Canadian understandings of judicial review. It is conceptualised and justified as involving interinstitutional dialogue between courts and parliaments, with parliaments usually able to respond to judicial review by amending, modifying, or reenacting the law or, in rarer cases, with the judicial override mechanism permitted under section 33 of the *Charter*.³⁸ Proportionality-based review may be a better fit for a constitutional order committed to this form of dialogue than more rulified forms of constitutional doctrine.

v. Working Fams. Coal. (Can.) Inc., 2025 SCC 5, para. 118 (Can.) (considering campaign funding and the right to vote under Section 3 of the *Charter*).

³⁶ See generally Adrienne Stone, *Canadian Constitutional Law of Freedom of Expression, in Canada in the World: Comparative Perspectives on the Canadian Constitution* 245 (Richard Albert & David R. Cameron eds., 2018) (linking the Canadian preference for flexible and context-sensitive proportionality to aspects of Canadian constitutional culture, including the Canadian commitment to facilitating interinstitutional dialogue).

³⁷ Section 1 of the *Charter* provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). Section 1 thus calls for a judgment, it might be said, as to whether any law is a proportionate restriction of the protected rights. See *Comm. for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 152 (Can.). The First Amendment, by contrast, contains no such explicit external limitation of protected rights. See U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

³⁸ See Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 *Osgoode Hall L.J.* 75, 96–98 (1997); Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 *Osgoode Hall L.J.* 235, 247–51 (2009).

The central aim of a dialogue model is to enable the legislature to respond to a judicial determination. Proportionality analysis contributes to the capacity for dialogue by allowing the parliament to respond with a law that more effectively pursues its objective or does so in a manner that is more narrowly tailored towards that objective. Or, it is open for the legislature to attempt to reset the balance by reducing the impact of the impugned law on the protected right or drafting the law in a manner that identifies and pursues a weightier objective.³⁹

The proportionality test will, of course, be most effective in encouraging dialogue when it is applied to preclude as little as possible, at least in the first instance. For that reason, a commitment to dialogue encourages the use of the proportionality test in a manner that is fact specific, resolving the case on matters particular to the legislation challenged and making as few determinations as possible on the nature of possible alternative formulations.

2. Proportionality and Political Culture

Second, proportionality may be a better fit in the context of a social democratic (rather than a laissez-faire liberal) state, given its focus on accommodating legitimate state objectives.⁴⁰ As we have seen, the very flexibility and fact-specificity of the proportionality test facilitates greater institutional dialogue, thus giving greater room for the state to pursue its objectives than is likely under a more rule-based system. Indeed, to put the argument another way, if the critics of flexibility and context-sensitivity are correct, the ad hoc nature of such tests weakens the judiciary's resistance to the legislature and thus weakens the protection of rights. Accordingly, the tendency of doctrinal flexibility to maximize room for the legislature is widely agreed upon, even if its desirability is disputed.

This feature of proportionality tests explains why proportionality has proved congenial to Canadian constitutionalists. As has been well explored elsewhere, Canada is more statist than the United States.⁴¹ This

³⁹ Stone, *supra* note 36, at 259.

⁴⁰ Richard Mullender argues, "Proportionality is a mediating principle. It provides guidance on the question as to how we should seek to accommodate both the public interest in the pursuit of generally beneficial outcomes and the countervailing interests of individuals and collectivities." Richard Mullender, *Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy*, 27 *J.L. & Soc'y* 493, 503 (2000).

⁴¹ Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* 8 (1990).

trend is well-revealed in its constitutional law and specifically in the law of section 1 of the *Charter*. Although it would be a mistake to discount the idea of mistrust of government entirely,⁴² the specter of governmental abuse of power and misjudgment does not loom nearly so large as it does in the United States.⁴³ The Canadian confidence in government as a constructive force has been evident from the early days of *Charter* interpretation. Chief Justice Dickson's judgment in *R. v. Edwards Books* provides some important expression of this sentiment: "In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that [the *Charter*] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."⁴⁴

B. Australia

The Australian case introduces a further complexity to our observation as to the connection between preferences along the spectrum from rules to standards in free speech adjudication. Australia's legal, political, and constitutional heritage is in many respects similar to Canada's, and certainly much closer to Canada's than to the United States'. Its political culture, particularly the political consensus surrounding the role of the state, is also much closer to Canada's than to the United States'. Indeed, the strong expectations of the state and the degree of state involvement in social and economic life are amongst the most remarked upon aspects of Australia's political culture.⁴⁵

⁴² See *R. v. Keegstra*, [1990] 3 S.C.R. 697, 763 (Can.) ("[T]he state should not be the sole arbiter of truth, but neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas." (emphasis added)).

⁴³ The point is colourfully put by Jamie Cameron: "Unlike Americans, [Canadians] do not live in obsessive fear of the state. Instead, we live in obsessive fear of the *United States*. We don't lack confidence in the viability of parliamentary institutions. We lack confidence in our viability as a nation." Alan Borovoy et al., *The James McCormick Mitchell Lecture—Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 *Buff. L. Rev.* 337, 357 (1988).

⁴⁴ *R. v. Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713, 779 (Can.). The Court is wary of the substantive due process jurisprudence of the *Lochner* Era, during which the United States Supreme Court invalidated much progressive economic regulation. See *R. v. Wholesale Travel Grp. Inc.*, [1991] 3 S.C.R. 154, 233–34 (Can.); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 *Int'l J. Const. L.* 1, 27 (2004).

⁴⁵ Famously, W.K. Hancock wrote: "Australian democracy has come to look upon the State as a vast public utility, whose duty it is to provide the greatest happiness for the greatest number." W.K. Hancock, *Australia* 72 (1930); see also Frank Bongiorno, *Dreamers and Schemers: A Political History of Australia* 448 (2022) (contending that Hancock's description

Our argument as put so far would suggest that Australian attitudes to balancing in the free speech context—and proportionality in particular—would resemble those found in Canada. Yet Australian constitutionalism is remarkably ambivalent about proportionality as a standard of constitutional review and has shown some notable instability on this score. At various times, it embraces and then resiles from proportionality analysis, in the process vacillating between more rule-like and more standard-like approaches. This section describes and attempts some explanation of these observations.

1. *The Australian Position*

I will begin, however, by tracing the somewhat complex Australian position. Under the Australian *Constitution*, “freedom of speech” is protected by a doctrine known as the “freedom of political communication”⁴⁶: an unwritten doctrine derived from the democratic features of the Australian Constitution.⁴⁷

For almost two decades, the starting point was provided by the High Court of Australia’s adoption of a standard of review that appeared to mimic proportionality—albeit in distinctively Australian terms. Pursuant to this standard of review, the Court asks, “[I]s the law reasonably appropriate and adapted to serve a legitimate end?”⁴⁸ Like

remains accurate, with “broad acceptance . . . that government should play the predominant role in defining where the boundaries between individual rights and the common good lie”); Lynsey Blayden, *Active Citizens and an Active State: Uncovering the ‘Positive’ Underpinnings of the Australian Constitution*, 52 *Fed. L. Rev.* 293, 304–05 (2024) (discussing the active role that the Australian colonial government played in the lives of its citizens).

⁴⁶ The Australian Constitution protects “political communication” rather than “freedom of speech” per se, though in most ways the “freedom of political communication,” as the doctrine is known, operates in a similar fashion to a right of freedom of expression. See Adrienne Stone, *Expression*, in *The Oxford Handbook of the Australian Constitution* 952, 954–55 (Cheryl Saunders & Adrienne Stone eds., 2018); Adrienne Stone, *Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication*, 25 *Melb. U. L. Rev.* 374, 388–90 (2001) [hereinafter *Stone, Rights, Personal Rights, and Freedoms*]; Adrienne Stone, *The Forms of Freedom of Expression*, in *The Elgar Companion to Freedom of Speech and Expression* (Ashutosh Bhagwat & Alan K. Chen eds., forthcoming May 2026) (manuscript at 14–16) [hereinafter *Stone, The Forms of Freedom of Expression*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5625370 [<https://perma.cc/6YAW-29DK>].

⁴⁷ On the distinction between this form of freedom of communication and a more conventional right of freedom of expression, see Stone, *The Forms of Freedom of Expression*, *supra* note 46 (manuscript at 14–18).

⁴⁸ *Lange v Austl Broad Corp* (1997) 189 CLR 520, 567 (Austl.). Or in full, “is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is

proportionality, this standard of review involves means-ends analysis and contains language (“reasonably appropriate”) that allows for context sensitive judgment. However, it does not explicitly direct attention to a consideration of possible alternative means, and the language of balancing is notably absent. Perhaps because of these features, the “reasonably appropriate and adapted” standard has often been applied in a deferential manner.⁴⁹

Furthermore, despite the apparent clarity on this score, the methodological preference of Australian courts as between rules and standards was not immediately clear. In the period after the High Court of Australia first announced its adoption of this standard of review, the Court nonetheless appeared to fluctuate between a preference for more rule- and standard-like approaches.⁵⁰

But in 2015, it appeared that Australia had entered the worldwide constitutional mainstream with the adoption of structured proportionality in a form that clearly drew from German and Canadian law and entailed flexible balancing analysis. Specifically, in its new form, the Court would now consider three additional inquiries “as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses”:

suitable—as having a rational connection to the purpose of the provision;

necessary—in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance—a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.⁵¹

compatible with the maintenance of the constitutionally prescribed system of representative and responsible government”? Id. In a footnote that immediately followed the passage just quoted, the High Court stated “In this context, there is little difference between the test of ‘reasonably appropriate and adapted’ and the test of proportionality.” Id. at 567 n.272.

⁴⁹ Stone, *supra* note 7, at 676–78 (noting, though, that it is less deferential in the context of freedom of political communication than in some other contexts).

⁵⁰ See *id.* at 676–79.

⁵¹ *McCloy v New South Wales* (2015) 257 CLR 178, 194–95 (Austl.) (footnote omitted).

Despite the apparent settling of the matter in 2015, the decade since has seen a long-running controversy within the Court with considerable (and growing) opposition to proportionality analysis. The position now seems to be that while *McCloy*, and proportionality analysis with it, has not been overruled, most members of the Court decline to use it, preferring the older “reasonably appropriate and adapted” formulation.⁵²

Moreover, a highly significant voice among the proportionality opponents—Chief Justice Stephen Gageler—favours a form of analysis that *calibrates* the intensity of scrutiny according to the nature of the burden on political communication, the importance of the law’s objective, and the institutional position of the Court.⁵³ Thus, Chief Justice Gageler appears to envisage the development over time of some form of a tiered scrutiny, which is at least a step in the direction of a more rule-like approach. Thus, like other briefer flirtations with a proportionality test,⁵⁴ the adoption of proportionality analysis in *McCloy* has also been followed by a retreat,⁵⁵ and the Court’s record of vacillating between more rule-like and more standard-like approaches continues.

2. Australian Ambivalence

This doctrinal instability reveals distinctive aspects of Australia’s constitutional and jurisprudential culture, both as compared with the United States and—despite outward similarities—as compared to Canada. Three aspects of Australia’s constitutional culture have combined to produce this distinctive response.

⁵² See *Babet v Commonwealth* [2025] HCA 21 (12 February 2025) 14–15 (Austl.) (opinion of Gageler, CJ & Jagot, J); *id.* at 23 (opinion of Gordon, J.); *id.* at 84 (opinion of Gleeson, J); *Farmer v Minister for Home Affs* [2025] HCA 38 (15 October 2025) 14 (Austl.) (opinion of Gageler, CJ, Gordon & Beech-Jones, JJ); *id.* at 39 (opinion of Edelman, J.).

⁵³ See *McCloy*, 257 CLR at 235–38 (opinion of Gageler, J); *Brown v Tasmania* (2017) 261 CLR 328, 378 (Austl.) (opinion of Gageler, J). For further discussion, see Rosalind Dixon, *Calibrated Proportionality*, 48 Fed. L. Rev. 92, 95–96 (2020).

⁵⁴ See, e.g., Stone, *supra* note 7, at 679–80.

⁵⁵ This was confirmed recently in *Babet*, where three members of the Court (consisting of Chief Justice Gageler and Justice Jagot in joint reasons at ¶ 49, and the separate concurrence of Justice Gordon at ¶ 72) reverted to the older formulation, though without overruling *McCloy*. *Babet*, [2025] HCA 21, at 14–15 (opinion of Gageler, CJ & Jagot, J); *id.* at 23 (opinion of Gordon, J). A fourth member did not decide. *Id.* at 94–96 (opinion of Beech-Jones, J).

The first arises from Australia's unusual constitutional position with respect to rights.⁵⁶ Although Australia has an old, written constitution and a long-standing practice of judicial review, its constitution is principally devoted to structural and federal provisions, leaving little that resembles constitutional rights adjudication elsewhere.

The protection accorded to political communication is perhaps the clearest exception, but even so, the Australian High Court has continually insisted on a sharp distinction between a "personal right" of freedom of speech or expression and the Australian norm of freedom of political communication. The distinction is overstated by the Court⁵⁷ and only inconsistently observed,⁵⁸ but it has formed the basis for some of the resistance to proportionality analysis. That is, for some judges the reason to reject proportionality analysis lies in its association with the implementation of rights provisions. And even those judges who accepted it were at pains to stress its adaptation to the Australian context.

This comparatively inward approach to freedom of political communication explains reservations about European or Canadian style proportionality, but the concerns about balancing analysis go deeper. In the distinctively Australian formulation of proportionality, the balancing element of the test is considerably qualified, requiring only that the

⁵⁶ Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 *Va. J. Int'l L.* 985, 986 (2009) ("Australian exceptionalism seems rooted in a deep national commitment to legislative supremacy as the best expression of democratic self-governance."). See generally Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 *Syd. L. Rev.* 29 (2005) (noting that Australia has few constitutional rights and that some provisions commonly understood as rights are better understood in other ways).

⁵⁷ The doctrine is structurally and substantively similar to a right of freedom of expression. That is, it is negative and vertical in orientation, operating principally to restrain interference with political communication, and relying on a justification that resembles the "argument from democracy" commonly advanced in support of freedom of speech. In other words, just as freedom of speech is commonly justified on the grounds that it is necessary to ensure the proper functioning of democracy, the Australian doctrine is justified on the basis that freedom of political communication is necessary to ensure that voters are sufficiently informed to exercise a true choice in elections. See Stone, *Rights, Personal Rights, and Freedoms* supra note 46, at 377–78, 400–01.

⁵⁸ For citations to First Amendment free speech law in the context of the freedom of political communication, see *Clubb v Edwards* (2019) 267 CLR 171, 230–31 (Austl.) (opinion of Gageler, J) (citing First Amendment law with respect to "time, place and manner" restrictions on speech and "buffer zones around premises providing abortion services"); *Coleman v Power* (2004) 220 CLR 1, 54–55 (Austl.) (opinion of Gummow & Hayne, JJ) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)); *id.* at 78 (opinion of Kirby, J) (citing *Chaplinsky*, 315 U.S. at 571–72).

impugned law be “adequate in its balance” and stressing consistency “with the limits of the judicial function.”⁵⁹

3. Australian Legalism and Political Constitutionalism

This last feature of Australian law points to the second element of Australia’s distinctive constitutional culture—a strong commitment to formalist legal reasoning usually described by Australian judges as legalism.⁶⁰

The preference for this formalist style is a feature of constitutional reasoning in Australia generally.⁶¹ It is especially evident, however, in relation to the freedom of political communication, where the Court has constantly stressed that meaning is tied to “[c]onstitutional text and structure,”⁶² which is in turn an effort to ensure the legitimacy of the right, given its unwritten form.⁶³

This theory of adjudication will sound implausible to outsiders, and some qualifications should immediately be made. First, the implausibility of the claim that legalism can fully govern constitutional reasoning in general or freedom of political communication is well recognized, at least outside the Court.⁶⁴ Second, the commitment to legalism is often modified with explicit acknowledgment that legalist methods do not equate to an American-style originalism,⁶⁵ allow for at least some

⁵⁹ *McCloy v New South Wales* (2015) 257 CLR 178, 195 (Austl.).

⁶⁰ See Owen Dixon, *Concerning Judicial Method*, in *Jesting Pilate and Other Papers and Addresses* 152, 155 (Woinarski ed., 2d ed. 1997).

⁶¹ See *Amalgamated Soc’y of Eng’rs v Adelaide SS Co* (1920) 28 CLR 129, 142–43; Adrienne Stone, *Judicial Reasoning*, in *The Oxford Handbook of the Australian Constitution*, supra note 46, at 472, 475.

⁶² *Lange v Austl Broad Corp* (1997) 189 CLR 520, 566–67 (Austl.) (emphasis omitted).

⁶³ Stone, supra note 56, at 42–43.

⁶⁴ See Stone, supra note 7, at 670–71. For this reason, scholars strongly committed to formalist or originalist methods regard the freedom of political communication as illegitimate. See Jeffrey Goldsworthy, *Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue*, 23 *Monash U. L. Rev.* 362, 369–71 (1997); Nicholas Aroney, *A Seductive Plausibility: Freedom of Speech in the Constitution* 18 *U. Queensl. L.J.* 249, 260–62 (1995). The point is, however, also accepted by those who defend the legitimacy of the freedom of political communication. See George Williams & David Hume, *Human Rights Under the Australian Constitution* 168–74 (2d ed. 2013).

⁶⁵ On Australian “originalism” and its comparison with its U.S. counterpart, see Lael K. Weis, *What Comparativism Tells Us About Originalism*, 11 *Int’l J. Const. L.* 842, 845–48 (2013).

changed meaning over time,⁶⁶ and can be read “generously and not pedantically, but as a whole.”⁶⁷ Moreover, legalism has not prevented the Court from making highly value-laden choices not determined by legalist methods.⁶⁸

In any event, such formalism, considered alone, does not account for the Australian approach. Formalist theories of adjudication rely on a conception of the rule of law that requires judicial review to be constrained by some ascertainable law of general application,⁶⁹ and those values would be best pursued through a more rule-like doctrinal structure.⁷⁰

What then accounts for the continuing Australian resistance to rules? The answer lies in a better account of the underlying motivation for Australian legalism. The most coherent rationale for the Australian Court’s insistence on legalism can be attributed to a deep commitment to political constitutionalism, especially with respect to rights, that is a well-recognized aspect of Australia’s constitutional culture.⁷¹ That is, there is a strong preference for rights protection through the political branches of government.⁷² On this conception of the Constitution, its role is to establish a democratic structure within which substantive disputes about matters of fundamental value, especially matters of rights are to be resolved.

The development of clear rules governing freedom of political communication has a tendency both to reveal the evaluative basis for the

⁶⁶ See, e.g., *Roach v Electoral Comm’r* (2007) 233 CLR 162, 173–74 (Austl.) (addressing the evolving meaning of “directly chosen by the people”); *Sue v Hill* (1999) 199 CLR 462, 523–25 (Austl.) (opinion of Gaudron, J) (describing the changing meaning of “foreign power”); *Cheatle v The Queen* (1993) 177 CLR 541, 560 (Austl.) (discussing the meaning of “jury”).

⁶⁷ *Att’y Gen of the Commonwealth ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 17 (Austl.).

⁶⁸ For an especially clear example in the context of freedom of political communication, see *Coleman v Power* (2004) 220 CLR 1, 34 (Austl.) (opinion of McHugh, J); *id.* at 58 (opinion of Gummow & Hayne, JJ); *id.* at 70 (opinion of Kirby, J); Adrienne Stone, ‘Insult and Emotion, Calumny and Invective’: Twenty Years of Freedom of Political Communication, 30 *U. Queensl. L.J.* 79, 84–89 (2011).

⁶⁹ See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 14–15 (1997); Frederick Schauer, Formalism, 97 *Yale L.J.* 509, 510 (1988).

⁷⁰ See Stone, *supra* note 7, at 691.

⁷¹ See, e.g., Tushnet, *supra* note 56, at 986.

⁷² See Patrick Emerton, Ideas, in *The Oxford Handbook of the Australian Constitution*, *supra* note 46, at 143, 148–49.

decision and also to strengthen judicial protection of the underlying right. These qualities appeal to certain rule of law values but exist in tension with Australian legalist rhetoric and political constitutionalist preferences.

CONCLUSION

In its comparative analysis, this Essay has travelled some distance from Schauer's work. It is, nonetheless, demonstrative of its power. I wrote at the outset of the distinctive virtues of Schauer's work, combining respect for doctrinal detail and deep jurisprudential insight. I hope also to have shown how these essays marry these virtues to a careful form of comparativism—one that showed humility without giving up insight. Within the United States, Schauer was known as a First Amendment sceptic. When in other places, he did not shift gears to its defence, but he had a way of encouraging other scholars to face the full force of the First Amendment tradition and the insights it offered. For these reasons, his work will travel often and with great influence well beyond the United States.