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ESSAY

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

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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.

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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 domains[25]). 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—itself 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 applications[33]—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 newspapers[54] (some of which are owned by the billionaires I've discussed[55]), slanted news coverage[56] (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

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[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 *Carolene 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 jurisprude 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.

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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).