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Modeling Constitutional Doctrine

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MODELING CONSTITUTIONAL DOCTRINE

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I. INTRODUCTION

This Essay explains a simple model I have developed that graphically charts constitutional doctrine.[1] In my experience, the model significantly aids students in such basics as identifying the operative "black letter law," determining when and in what respect cases have wrought doctrinal changes,

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1. I have developed this model in several of my academic writings as an aid to facilitating analysis of some discrete constitutional questions. *See* Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 980–83 (2002); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1143–47 (1999). This Essay, as well as an upcoming article, *see* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005), refine the model and apply it to a broad range of constitutional doctrines.

assessing the likely stability of constitutional doctrine, and pinpointing the Justices' disagreements in particular cases. The model also facilitates identification and analysis of some of the deepest questions in constitutional law, including: (1) of what precisely does the Court's constitutional decision making consist of?,[2] (2) what expertise does the Court have in undertaking these tasks?, and (3) what role might other societal institutions play in these tasks? Among other things, the model shows what the bulk of the Court's constitutional decision making consists of.

Part II presents and explains the model. Part III displays the model's pedagogic benefits by applying it to many of the cases that typically are studied in the basic Constitutional Law course. Part IV provides a brief conclusion.

II. THE MODEL

I introduce the model early in the semester when the students study *Friends of the Earth, Inc. v. Laidlaw Envtl Services, Inc.*[3] The Court in *Laidlaw* resolves the standing question before it by applying a three-part test that had appeared in *Lujan v. Defenders of Wildlife*[4] eight years prior.[5] To motivate the model, I ask several questions: (1) Given the twin facts that the Supreme Court hears fewer than 100 cases per year and that *Laidlaw* simply deploys the approach developed in an earlier case, why did the Court expend its limited resources and grant certiorari in *Laidlaw*?,[6] (2) From where in the Constitution does the doctrine of "standing" come?, and (3) From where in the Constitution does *Lujan*'s three-part test come?

2. This aspect of the model's doctrinal clarifications is consistent with the approaches recently taken by Richard Fallon and Mitchell Berman. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

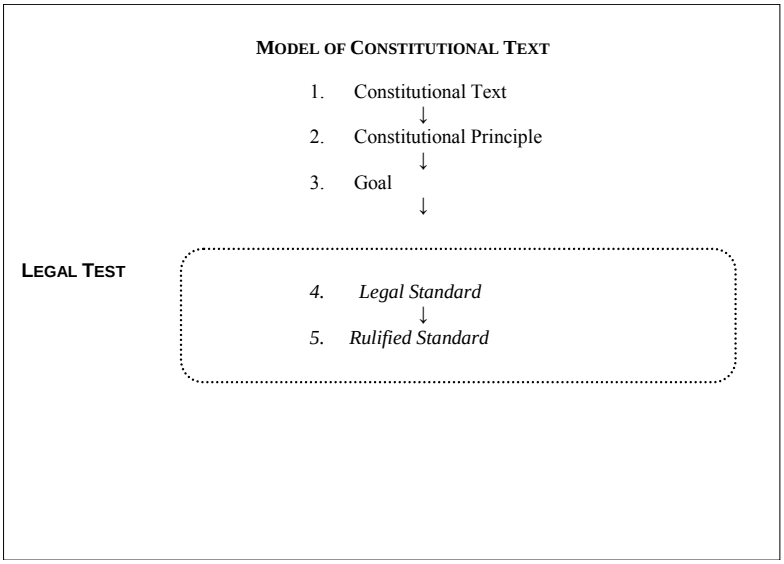
3. 528 U.S. 167 (2000).

4. 504 U.S. 555 (1992).

5. The Court held that the plaintiff must show: (1) "injury in fact," (2) traceability of the injury, and (3) redressability of the injury. *Laidlaw*, 528 U.S. at 180–81 (citing *Lujan*, 504 U.S. at 560–61).

6. I must admit that this question takes some poetic license insofar as the petition for certiorari in *Laidlaw* included questions apart from the standing issue. *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring) (actual petition for certiorari is available at 1998 WL 34080884). The question nonetheless is both useful for pedagogic purposes and legitimate; because the *Laidlaw* opinion primarily relied on a standing analysis that was based on *Lujan*'s test, it is important to motivate students to inquire what *Laidlaw* adds to the legal community's understanding of standing doctrine.

Here is the model, followed by an explication of the terms that it employs:



Step 1: *Constitutional Text*. This term refers to language from the Constitution. In charting the doctrine announced in *Laidlaw*, the relevant constitutional text is Article III's "cases" or "controversies."[7]

Step 2: *Constitutional Principle*. "Constitutional Principle" refers to concepts that the Court draws upon when generating constitutional doctrine. Depending on the doctrinal field, the Constitutional Principle might be the Constitutional Text itself, a concept that is traceable to Constitutional Text (e.g., "standing"), or a concept that is not connected to Constitutional Text at all (e.g., "anti-commandeering," the "right to travel").

Why distinguish between Steps 1 and 2 in doctrinal fields in which Constitutional Text grounds the doctrine? The primary reason is to show students that the role that Constitutional Text plays in the development of legal doctrine varies across doctrinal fields. For example, it is fair to say that the constitutional language of "cases" and "controversies"[8] has played a smaller role in the conceptualization and development of the law of standing than the constitutional language "due process"[9] has played in developing the doctrine of procedural due process.[10] Another reason to distinguish between Steps 1 and 2 is that concepts that are independent of the constitutional language, and that in

7. U.S. CONST. art. III, § 2.

8. *Id*.

9. *Id*. at amend. XIV, § 1.

10. *See, e.g*., Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648–49 (2004) (giving definition and case development of procedural due process).

fact have implications that vary from the constitutional language, sometimes become the primary shaper of doctrinal development and hence are usefully identified as the Constitutional Principle. For instance, during large periods of our constitutional jurisprudence, the concept of creating a "separation of church and state" influenced doctrinal development far more than the concept that there should not be an establishment of religion.[11] Similarly, the non-textual concept that government is limited in the respects it can regulate "fundamental rights" has been more directly generative of constitutional doctrine than has been constitutional language of "due process" to which that concept has been linked.[12] The model accordingly distinguishes between the Constitutional Text of "establishment"[13] and "due process" (Step 1)[14] and the Constitutional Principles of "wall of separation" and "fundamental rights" (Step 2).

The model pointedly does not identify and differentiate the sources of non-textual Constitutional Principles (such as structural inferences from the Constitution). I do this primarily to emphasize to students during the semester that many Constitutional Principles do not have a textual basis in the Constitution. An instructor could easily modify the model by introducing the various sources of Constitutional Principles at Step 1, though this complicates matters very early in the semester.

Let us now turn to the relationship between Step 2 and the model's remaining steps. The model builds on the commonly appreciated distinction between "rules" and "standards,"[15] where standards describe the trigger of legal consequences in "abstract terms that refer to the ultimate policy or goal animating the law"[16] and rules "describe the triggering event with factual particulars or other language that is determinate within a community."[17] Virtually all Constitutional Principles take the form of standards that do not, on their own, self-evidently determine the concrete activities that are required, permitted, or proscribed in particular circumstances. Rather, the Constitutional Principles must be operationalized. Operationalization can be usefully

11. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002). The concept of a "separation of church and state" is less tolerant of the intermixing of governmental and religious authority than is the ban on establishment. *See id*. at 9–14.

12. *See, e.g*., Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) (giving case law background of "fundamental rights" and "due process").

13. U.S. CONST. amend. I.

14. *Id*. at amend. XIV, § 1.

15. *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 102–04 & 104 n.35 (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

16. Mark D. Rosen, *Nonformalistic Law in Time and Space*, 66 U. CHI. L. REV. 622, 623 (1999).

17. *Id*.

conceptualized as involving the three steps that correspond to steps 3, 4, and 5 of the model.[18]

Step 3: *Goal*. Constitutional Principles typically are identified with some "Goal" (or, very often, multiple Goals), by which I mean a "broad-stroke description of what the [Constitutional Principle] attempts to accomplish."[19] "The Goal sets the parameters within which subsequent doctrinal development occurs."[20] For example, a commonly identified Goal of standing doctrine is to ensure that federal lawsuits are brought only by those who properly should, namely, only those whose interests are directly at stake.[21]

On its own, the Goal is unworkably abstract for the judiciary's institutional needs of having a shorthand method for decision making that identifies as legally relevant only a subset of the infinite facts that characterizes any given circumstance.[22] The Goal's abstractness similarly does not afford lawyers and citizens adequate guidance so that they can conduct their affairs. Over time, the Court accordingly operationalizes the Goal by means of *a* "Legal Test."[23] It is useful to distinguish two aspects of the Legal Test, which constitute the model's final two steps.

Step 4: *Legal Standard*. After deciding several cases in a given doctrinal field, the Court typically identifies what I call a "Legal Standard" that is to be used to determine if constitutional requirements have been met. A relatively small number of generic Legal Standards account for a majority of constitutional doctrines; these include balancing tests, means-ends tests (such as rational basis, intermediate scrutiny, and strict scrutiny), and, less commonly, categorical rules (such as is found in the anti-commandeering case law).[24] Much free speech law and fundamental rights doctrine employs the

18. Although "[t]he steps do not necessarily correspond to the chronology" of a constitutional principle's doctrinal development, the steps provide a useful means for comparing legal doctrine. S*ee* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 490 (2000) [hereinafter *Tribal Courts*].

19. *Id*.

20. *Id*. Perhaps counterintuitively, identification of the goal frequently is *not* "what happens first in time during the interpretive process." *Id*. at n.43. Quite often, the first decisions are of an *ipse dixit* nature. *Id*. Once the goal is identified, however, it affects subsequent doctrinal development. *Id*.

21. *See Lujan*, 504 U.S. at 560–61.

22. *Cf*. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 56–57 (1997) ("Even when general agreement exists that the Constitution reflects a particular value or protective purpose . . . the norms reflecting purposes such as these are too vague to serve as rules of law; their effective implementation requires the crafting of doctrine by courts.").

23. *See Tribal Courts*, *supra* note 18, at 490 & n.46.

24. For a fuller discussion, *see* Fallon, *supra* note 22, at 76–101.

Legal Standard of strict scrutiny.[25] Standing doctrine, it so happens, utilizes a unique Legal Standard; *Lujan* announced that the plaintiff must show (1) it has suffered an "injury in fact," (2) that the injury must be "fairly . . . trace[able] to the challenged action of the defendant," and (3) that it is "likely" that the injury will be "redressed by a favorable decision."[26]

As their name suggests, Legal Standards are composed *of* "standards." Averting once again to standing doctrine, what precisely do "injury in fact," "traceability," and "redressability" mean? While the Legal Standard provides far more guidance than the Goal, the Legal Standard's standard-like language still leaves considerable uncertainty.

Step 5: *Rulified Standard*. As the Legal Standard is applied over a series of cases, it almost always becomes increasingly rule-like. This occurs because cases involve particular facts. As the cases are decided they become showcases of what, as a concrete matter, the Legal Standard requires.[27] The model refers to the process that invariably accompanies the determination of what satisfies a Legal Standard as "rulifying" a Legal Standard or the creation of a "Rulified Standard."

Most Supreme Court cases contribute to our knowledge of the law by rulifying previously announced Legal Standards. This is true, for instance, of the *Laidlaw* decision, which established that the possibility that a private plaintiff could recover civil penalties (that is, money damages payable to the government rather than to the plaintiff) satisfied the redressability requirement.[28] This is a non-obvious rulification of the redressability standard. Indeed, *Laidlaw*'s rulification shows that far from being a merely ministerial step, rulification can effectively nullify a legal standard or the Goal that stands above it; if redressability were a Legal Standard designed to ensure that the party bringing the lawsuit had standing because she was particularly affected by the defendant's action, this Goal is thwarted if redressability is rulified such

25. *See, e.g.*, Republican Party of Minnesota v. White, 536 U.S. 765, 774–75 (2002) (applying strict scrutiny in speech context); Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (Souter, J., concurring) (noting that strict scrutiny applies when government regulates fundamental rights).

26. *See Lujan*, 504 U.S. at 560–61.

27. This process of utilizing case law to make standards more concrete is not logically necessary; some say, for instance, that it does not occur in French law. Barry Nicholas, *Introduction to the French Law of Contract*, *in* CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 7, 9-10 (Donald Harris & Denis Tallon eds., 1989). This process is, however, what happens under the United States' common law method of constitutional adjudication. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–906 (1996).

28. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 187 (2000).

that it is satisfied by a lawsuit's possible deterrent effect in respect of the public.[29]

Two other important points concerning rulification are worth noting from the outset. First, rulification frequently is undertaken by referring to the Goal, that is, by asking which rulification best advances the Goal of the Constitutional Principle. Second, what constitutes the goal frequently (if not typically) is contestable. Both these aspects of rulification are nicely illustrated by Justice Scalia's dissent in the *Laidlaw* decision. With regard to the first point, Justice Scalia's suggestion that standing serves (inter alia) to ensure that law generally is enforced by publicly accountable members of the executive branch[30] can be understood as a claim concerning the Goal of standing, and Scalia relies on this declared Goal in critiquing the majority's rulification of redressability.[31] With regard to the second point, it is not axiomatic that the Goal of standing includes ensuring execution of the law by those who are politically accountable. Justice Kennedy, for instance, believes that this limitation concerning political accountability is a requirement of Article II, not Article III standing.[32]

III. THE MODEL'S PEDAGOGIC BENEFITS

This Part catalogs the model's pedagogic benefits, proceeding from the model's most basic analytical clarifications to some of its most subtle and sophisticated insights.

A. Identifying "Black Letter" Law

To begin, the model helps students identify the operative legal doctrine. Students who in the past may have confused the Court's discussions concerning the Goal of a Constitutional Principle with the "black letter law"

29. *See id*. at 208–09 (Scalia, J., dissenting) (arguing that the majority's rulification of redressability would "permit the entire body of public civil penalties to be handed over to enforcement by private interests").

30. *See id*. at 209–10.

31.

> By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. And once the target is chosen, the suit goes forward without meaningful public control.

Id. (citations omitted).

32. *See id*. at 198 (Kennedy, J., concurring).

are encouraged by the model to scour the opinion to identify the more specific Legal Test.

B. Determining When Doctrinal Change Has Occurred

Even for those not inclined to such basic confusions, the model promotes doctrinal clarity by pinpointing doctrinal change across cases that frequently can be missed by even sophisticated students (and even lawyers). For example, the Legal Standard announced in *Lochner v. New York*[33] directed courts to inquire whether a challenged statute was "a fair, reasonable, and appropriate exercise of the police power of the state, or . . . an unreasonable, unnecessary, and arbitrary interference" with a protected liberty.[34] Many Constitutional Law casebooks illustrate *Lochner*'s rejection by means of the *West Coast Hotel Co. v. Parrish*[35] case, but this can be confusing because the Legal Standard identified in *Parrish*—is a regulation "reasonable in relation to its subject"[36] or is it instead "arbitrary and capricious?"[37]—does not sound all that much different from *Lochner*'s formulation. The model highlights the importance of being attentive to how Legal Standards such as "reasonable" and "arbitrary" are rulified, and it is at this point (Step 5) that *Lochner* and *Parrish* diverge: *Lochner* treated the reasonableness standard as licensing courts to ask whether *they* thought the legislature's decision was correct, whereas *Parrish* rulified the reasonableness standard by asking whether the legislature's judgment could be said to have been reasonable. While it is possible to characterize the *Lochner* and *Parrish* rulifications in other ways, what is important for present purposes is that the model highlights that the difference between the two cases is manifest at the level of rulification of a common legal standard.

A similar phenomenon can be found in the Commerce Clause context. The 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*,[38] which is widely treated by Constitutional Law casebooks as a landmark opinion in which the Court limited judicial checks on (and thereby expanded) Congress's Commerce Clause powers, grounded its holding in the Legal Standard that Congress can regulate intrastate activities that "have such a close and substantial relation to interstate commerce."[39] The 1995 case of *United States v. Lopez*[40] properly is taught as a reassertion of judicial checks on Congress's Commerce Clause

33. 198 U.S. 45 (1905), *overruled in part by* Ferguson v. Skupa, 372 U.S. 726 (1963) and Day-Brite Lighting Inc. v. State of Missouri, 342 U.S. 421 (1952).

34. *Id*. at 56.

35. 300 U.S. 379 (1937).

36. *Id*. at 391.

37. *Id*. at 399.

38. 301 U.S. 1 (1937).

39. *Id*. at 37.

40. 514 U.S. 549 (1995).

powers, but the Legal Standard that *Lopez* announced for determining congressional power over matters that are neither channels nor instrumentalities of interstate commerce is a virtual restatement of the language from *Jones & Laughlin*: *Lopez*'s Legal Standard bids courts to ask whether the congressionally regulated activities have a "substantial relation to interstate commerce."[41] As with understanding the relationship between *Lochner* and *Parrish*, the key to understanding the doctrinal shift from *Jones & Laughlin* to *Lopez* is to focus on changes in the Court's rulification of what essentially is an unchanged Legal Standard. Among other things, under *Lopez* and the subsequent case of *United States v. Morrison*,[42] if the regulated activity (possession of a gun, violence against women) itself is not an "economic activity" then it will be almost impossible to establish that the activity substantially affects interstate commerce.[43]

In fact, the model helps make clear that the Court often introduces doctrinal change at the Step 5 level of rulification of the Legal Standard. This might be a judicial artifice to cloak doctrinal change; for example, by retreating to Legal Standards articulated in earlier cases, the *Parrish* and *Lopez* Courts could implicitly claim continuity with precedent. Viewed less cynically, changes at Step 5 might reflect the judiciary's institutional rule-of-law based preference to minimize disruption of precedent.

C. Identifying the Most Modest Arguments That Can Achieve a Desired End

In addition to clarifying subtle doctrinal changes, the model's spotlighting of Step 5—doctrinal changes assists students (and, indeed, lawyers) in identifying the arguments that can achieve their client's desired outcome in a manner that minimizes the disruption of precedent—an important skill to develop insofar as rule-of-law commitments typically lead courts (including the Supreme Court) to seek continuity with precedent to the extent possible.[44] Imagine, for instance, that a civil lawsuit were filed against President Bush for alleged misdoings that occurred before he became President. The applicable Legal Standard announced in *Clinton v. Jones*[45] is to inquire whether permitting such lawsuits to go forward against a sitting President would "rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions."[46] Attorneys arguing for the President might suggest that a wholly new Legal Standard is appropriate,

41. *Id*. at 558–59.

42. 592 U.S. 598 (2000).

43. *See id*. at 609–17 (discussing *Lopez*).

44. *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997) (identifying multiple conceptions of the "Rule of Law").

45. 520 U.S. 681 (1997).

46. *Id*. at 702.

but they should not neglect to include the argument most minimally disruptive of precedent: that the appropriate Legal Standard is the test from *Jones* but that history shows that *Jones*'s rulification of the Legal Standard was mistaken.

D. Facilitating Multi-Case Doctrinal Synthesis

The model also is useful because it illuminates how cases in a single doctrinal context relate to one another. As shown above in relation to *Parrish* and *Lopez*, the model helps identify significant doctrinal changes that can be difficult to spot.[47] Equally as important, the model highlights the phenomenon of seminal cases that identify the basic Legal Standard and satellite cases that rulify the seminal case's Legal Standard. In this respect, the model helps students to synthesize the doctrine that emerges from the interaction of several cases.

One example of this is the discussion above concerning the ways that *Laidlaw* helped rulify *Lujan*'s tripartite test.[48] To show a few more, the aggregation principle emerging from *Wickard v. Filburn*[49] is best understood as part of the rulification of *Jones & Laughlin*'s "substantial relation" standard. *Wickard*'s principle serves the same function in contemporary law's *Lopez* test, though the Court has further rulified the aggregation principle in *United States v. Morrison*[50] by suggesting that aggregation is appropriate only where the regulated activity is "economic in nature."[51] Similarly, *City of Philadelphia v. New Jersey*[52] is a seminal case that lays out the two-part rule that protectionist state legislation is virtually per se invalid whereas evenhanded legislation is subject to *Pike* balancing,[53] and a case such as *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*[54] rulifies a part of *Philadelphia*'s legal standard by helping to concretely define protectionism.[55]

47. *See supra* notes 35–43 and accompanying text.

48. *See supra* notes 28–32 and accompanying text.

49. 317 U.S. 111, 127–28 (1942) (illustrating the principle: "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.").

50. 529 U.S. 598 (2000).

51. Though *Morrison* declines to adopt a "categorical rule against aggregating" in such circumstances, it avers that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id*. at 613.

52. 437 U.S. 617 (1978).

53. *Id*. at 624 ("Where the statute regulates evenhandedly . . . it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . .") (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

54. 511 U.S. 383 (1994).

55. *See id*. at 390.

E. Understanding Differences Among the Justices

The model also clarifies the varying relationships that exist among majority, concurring, and dissenting opinions. For example, all Justices in *Laidlaw* accept the validity of *Lujan*'s tripartite test for standing; none believes that standing *in toto* is an inappropriate doctrine or advocates an alternative Legal Standard.[56] *Laidlaw*, hence, is an instance of disagreement at the level of Step 5. By contrast, the plurality and dissenting opinions in the dormant Commerce Clause case of *Kassel v. Consolidated Freightways Corp.*[57] exemplify Step 4 disagreement (i.e., dispute as to the applicable legal standard): the plurality opinion adopts a balancing test[58] whereas the dissenters apply a rational basis test.[59] Discord among Justices reaches a pinnacle in *Printz v. United States*:[60] Justice Stevens in dissent rejects the very existence of the Constitutional Principle (the anti-commandeering principle) on which the majority rests its holding,[61] meaning that the Justices diverge at the level of Step 2.

Understanding with precision at what doctrinal points Supreme Court Justices disagree not only provides analytical clarity but also facilitates predictions as to a legal doctrine's likely stability and provides strategic guidance in the development of legal arguments. For example, upon recognizing that all Justices accept *Lujan*'s tripartite test, a litigator should understand that it would be difficult to convince the Court to accept a wholly new Legal Standard that discarded the "injury in fact," traceability, and redressability requirements;[62] accordingly, litigation energies likely are best spent arguing at the Step 5-level of how these Legal Standards should be rulified. By contrast, the dissents in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[63] and *Stenberg v. Carhart*[64] show that Justices disagree at the foundational Step 2-level as to whether there even exists a Constitutional Principle in relation to abortion.[65] The model thus helps explain why there is a greater likelihood of significant doctrinal change in the context of abortion rights than standing.

56. *See* Friends of the Earth, Inc. v. Laidlaw Envtl Services, Inc., 528 U.S. 167, 180–81, 195–98 & 205 (2000) (all opinions filed either citing *Lujan* with approval or concurring without disagreement on the point).

57. 450 U.S. 662 (1981).

58. *Id*. at 670–71.

59. *Id*. at 691 (Rehnquist, J., dissenting).

60. 521 U.S. 898 (1997).

61. *Id*. at 939–40 (Stevens, J., dissenting).

62. *See supra* note 26 and accompanying text.

63. 505 U.S. 833 (1992).

64. 530 U.S. 914 (2000).

65. *See Casey*, 505 U.S. at 979–80 (Scalia, J., dissenting); *Stenberg*, 530 U.S. at 982 (Thomas, J., dissenting).

F. Recognizing Patterns and Variations Across Legal Doctrines

Importantly, the model highlights important patterns and relationships across legal doctrines. Identical Legal Standards can be found in different doctrinal contexts (e.g., strict scrutiny can be found in equal protection, due process, and pre-*Smith* free exercise cases), and some Legal Standards that bear unique names operate similarly (e.g., strict scrutiny and the dormant Commerce Clause's near per se rule of invalidity for protectionist statutes).

Conversely, the model helps identify important differences across legal doctrines that can readily escape scrutiny. For example, the fact that the Court most always chooses from among a small set of Legal Standards makes it all the more intriguing when the Court adopts a *sui generis* Legal Standard (for example, the "undue burden" standard in the abortion context).[66]

Similarly, by focusing attention on Legal Standards, the model helps students to see variations across doctrines that demand explanation. For example, why does Chief Justice Rehnquist forcefully advocate a formal Legal Standard in the Commerce Clause context[67] but reject formalism in favor of a functionalist Legal Standard in the separation-of-powers context?[68] There quite possibly is a good explanation that can be provided, but the Chief Justice's opinions for the Court in *Lopez* and *Morrison v. Olson* do not provide one.

G. Legal Tests in Constitutional Doctrine

More generally, the model focuses attention on the ubiquity of Legal Tests in constitutional law. This is important for several reasons.

1. *The Relevance of Facts*. First, the model helps students to see that in a jurisprudence characterized by Legal Tests,[69] facts are not legally significant in and of themselves. Rather, a fact's legal significance is entirely a function of the applicable Legal Test. Consider the case of *Kassel v. Consolidated*

66. *See Casey*, 505 U.S. at 874.

67. For compelling arguments that the Supreme Court's approach in its new Commerce Clause jurisprudence is appropriately characterized as formalistic in character, see United States v. Morrison, 529 U.S. 598, 644-46 (2000) (Souter, J., dissenting); Donald H. Regan, *How To Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 562 (1995). Chief Justice Rehnquist, of course, authored both the *Lopez* and *Morrison* majority opinions.

68. *See* Morrison v. Olson, 487 U.S. 654, 689–90 (1988).

69. This is not the only type of possible jurisprudence. It has been argued, for example, that early Supreme Court cases utilized a jurisprudence of analogical reasoning from precedent and that such an approach eschewed Legal Tests and instead directly engaged the facts. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 96 (2004) (attributing this view to Charles Fried and helpfully elaborating upon it). Contemporary constitutional law, however, overwhelmingly utilizes Legal Tests rather than purely analogical reasoning. *See id*.

Freightways Corp.[70] Of what relevance to analyzing the constitutionality of Iowa's ban on sixty-five-foot double tractor trailers is the undisputed trial evidence that such trucks are as safe as the sixty-foot twins that Iowa and adjacent states allowed on their highways? In my experience, students instinctively believe such evidence to be of obvious significance, but whether such facts in fact are legally relevant turns entirely on the chosen Legal Standard. Evidence that sixty-five-foot doubles and sixty-foot twins are equally safe was dispositive under the plurality opinion's balancing test,[71] but irrelevant under the dissent's rational basis test, under which the legal question was only whether banning trucks more than sixty feet in length was rationally related to the objective of highway safety (and did not call for an assessment of the comparative safety benefits of a sixty-foot limit versus a sixty-five-foot limit).[72]

2. *Normative Criteria for Judging Case Law*. The model's focus on Legal Tests also sheds light on appropriate normative criteria for analyzing Supreme Court opinions. Consider Justice Scalia's opinion for the Court in the case of *Printz v. United States.*[73] The opinion's persuasiveness must be measured against two distinct questions: (1) the model's Step 2 query of to what extent the majority's arguments substantiate the existence of an anti-commandeering principle as applied to state executive officials and (2) the Step 4 question of to what extent the opinion's arguments support the particular Legal Standard that the majority opinion embraces.[74] *Printz* adopts the categorical Legal Standard that "no case-by case-weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[75] Even if the majority's arguments justify a Step 2 anti-commandeering principle,[76] it is difficult to conclude that they support the Court's categorical Legal Standard insofar as a federal statute enacted in 1793 (and still on the books) directs state executive officials to undertake specific

70. 450 U.S. 662 (1981).

71. The balancing test asked whether local benefits exceed costs on interstate commerce. *Id*. at 670–71. If the evidence adduced at trial were correct, then the local benefit of Iowa's proscription of sixty-five-foot doubles in addition to sixty-foot twins would have been zero. There would have been interstate costs to Iowa's ban on sixty-five-foot doubles, however, because adjacent states permitted such trucks. The balancing test hence would conclude that the interstate costs outweigh the local benefits. *Id*.

72. *See id.* at 696 (Rehnquist, J., dissenting) (posing the legal question as being "whether the Iowa Legislature has acted rationally in regulating vehicle lengths and whether the safety benefits from this regulation are more than slight or problematical").

73. 521 U.S. 898 (1997).

74. For a similar argument, see Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?,* 111 HARV. L. REV. 2180, 2182–83 (1998).

75. *Printz*, 521 U.S. at 935.

76. Justice Stevens argues against this proposition. *See Printz*, 521 U.S. at 939–70 (Stevens, J., dissenting).

acts.[77] An alternative to the majority's categorical Legal Standard, for example, would be a requirement that Congress can commandeer state executives only for compelling governmental reasons.

Relatedly, the model's disaggregation of Legal Tests into Steps 4 and 5 also helps students (as well as scholars) avoid common pitfalls in the normative analysis of constitutional doctrine. For instance, does the country's experience with Ken Starr as independent prosecutor vindicate Justice Scalia's doctrinal approach in his dissent in *Morrison v.* Olson?[78] Not necessarily. Assuming that the final years of the Clinton presidency demonstrate that the Ethics in Government Act of 1978 was not just bad policy but was, in fact, unconstitutional, it is crucial to recognize that the functionalist Legal Standard adopted by the *Morrison* majority could have led to the conclusion that the 1978 Act was unconstitutional. The question under the majority's approach was whether the Ethics in Government Act's limitation of the President's control over the independent counsel "interfere[s] impermissibly with [his] constitutional obligation to ensure the faithful execution of the laws,"[79] and the majority's ultimate conclusion can be criticized as a problematic rulification of its Legal Standard (Step 5), rather than an indictment of the Legal Standard itself (Step 4). Indeed, many of Justice Scalia's strongest arguments were legally relevant under the majority's Legal Standard,[80] and a strong case can be mounted that the best application of the majority's Legal Standard (even in 1988) would have led to the conclusion that the 1978 act was unconstitutional.

3. *Foundational Questions Concerning Various Societal Actors' Roles in Determining What the Constitution Requires*. The model's focus on Legal Tests helps identify foundational questions concerning the Supreme Court's role in constitutional law. The model makes clear that much of the time

77. As the majority opinion in *Printz* itself recognizes, the Extradition Act of 1793, which was enacted pursuant to the Extradition Clause in Article IV requires the "executive authority" of a state to cause the arrest and delivery of a fugitive from justice upon the request of the executive authority of the state from which the fugitive had fled. *See Printz*, 521 U.S. at 906.

78. 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting).

79. *Id*. at 709.

80. For example, Justice Scalia stated:

> Besides weakening the Presidency by reducing the zeal of his staff, it must also be obvious that the institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naïve, ineffective, but, in all probability, "crooks". And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution.

Id. at 713 (Scalia, J., dissenting). Although the fact that Justice Scalia's formalistic approach to separation-of-powers could be said to have yielded the correct ultimate conclusion does not necessarily mean that the Legal Standard he championed is superior to the majority's, one might ask whether the majority's approach can be consistently applied by the judiciary.

Justices ostensibly agree that a Constitutional Principle exists (Step 2) and concur as to its Goal (Step 3) but disagree in respect of the appropriate Legal Standard. This raises many important questions. To begin, how does the Court know which Legal Standard to use in any given doctrinal area? As a purely descriptive matter, it is uncontroversial that constitutional text alone does not answer this; there are no textual hints for most of the Legal Standards discussed above (e.g., strict scrutiny, balancing tests), and to the extent there are textual hints, the Court almost always eschews the Legal Standard that is most strongly implied by the text (i.e., categorical rules).[81] Nor do historical materials typically point to Legal Standards. Yet not even the strictest of the Court's strict constructionists argue that judicial creation of Legal Standards is illegitimate. Why not?

The answer presumably is that there is unanimous agreement among the Justices that fashioning Legal Standards to operationalize Constitutional Principles is one of the Court's tasks. Assuming this to be true, as I think it is, what are the appropriate criteria for choosing among the different possible Legal Standards? Remarkably, the Court most often does not explicitly discuss this, and in the few contexts where it has, its explanations have not been fully satisfactory.[82] Given Legal Standards' ubiquity and practical importance (insofar as the chosen Legal Standard often is outcome determinative), it is surprising how little judicial and scholarly attention has been given to them. Though this fortunately appears to be changing,[83] much work remains to be done.

The model's focus on Legal Standards also highlights the role that societal institutions apart from the Supreme Court play in determining what the Constitution requires. As is widely recognized, many Legal Standards at their core are methods for varying the degree of deference that the Court gives to other governmental institutions (contrast, for instance, rational basis and strict scrutiny). This fact underscores the role that governmental actors apart from the Court de facto play in determining whether there has been compliance with Constitutional Principles, for most of the Court's Legal Tests are at least partly deferential to the constitutional judgments made by other governmental actors. This in turn raises the question of *why* non-judicial governmental actors play such a role in making such determinations. What precisely are the institutional

81. For instance, although the First Amendment announced that "Congress *shall make no law* . . . abridging the freedom of speech," the Court's doctrine allows the regulation of large swaths of speech, even political speech. *See* Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809–19 (1999); *see also* U.S. CONST. amend. I.

82. For a rare instance where the Court sought to explain the precise level of review it adopted, see *Adarand Constructors v. Pena*, 515 U.S. 200, 226 (1995).

83. *See, e.g.*, Berman, *supra* note 69, at 92–97; FALLON, *supra* note 2, at 47–52.

competencies and drawbacks of the different governmental institutions in respect of answering such constitutional questions?

4. *The Non-Categorical Nature of Virtually All Constitutional Principles*. The model facilitates recognition of the fact that virtually all Legal Standards are non-categorical rules. This raises the question of how Constitutional Principles can be said to be "operationalized" by less than categorical legal requirements. Why, for instance, should the government *ever* be allowed to proscribe political speech?

The answer presumably is that non-categorical constitutional doctrines reflect an understanding that we live in a complex world in which there typically are competing considerations. Furthermore—and this is crucial—the competing considerations that may justify regulation of a constitutional right need not themselves be of constitutional dimension. For example, even though political speech is subject to strict scrutiny, such speech can be regulated if "compelling" governmental interests exist, not only if there are "constitutional" interests.[84]

More generally, the recognition that Constitutional Principles typically give rise to non-categorical rules can helpfully enrich students' understanding of constitutional rights. Most rights do not cordon off a sphere of activity as categorically immune from government regulation but only require the existence of better-than-ordinary reasons for regulation and better-than-ordinary precision in drafting it.[85] The non-categorical character of virtually all Constitutional Principles is a crucial aspect of our constitutional jurisprudence that frequently is overlooked not only by students but also by practicing lawyers and scholars as well.[86] Dislodging the misconception that constitutional rights necessarily give rise to categorical protections is important for reasons beyond analytical precision. Among other things, this misconception gives rise to cramped understandings of the government's powers and can lead students (and lawyers) to exaggerate the strength of constitutional claims.

IV. CONCLUSION

The model discussed in this brief Essay aims to help students to differentiate among the various components that comprise a constitutional holding. The model facilitates several crucial analytical basics: identifying the

84. *See, e.g.*, Burson v. Freeman, 504 U.S. 191 (1992) (upholding state law prohibiting solicitation of votes within 100 feet of entrance to polling place on election day).

85. *See generally* Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–63 (1998).

86. *See id.* (showing that scholars such as Michael Sandel, Allan Hutchinson, Charles Taylor, and Seymour Martin Lipset have mistakenly assumed that constitutional rights give rise to categorical protections).

"black letter" law, determining what subsequent cases add to lawyers' understanding of the law, and ascertaining when and in what respects the Court has made doctrinal changes. The model can help clarify in what respects Justices differ in their approaches to a particular constitutional question, thereby providing tactical guidance in formulating litigation arguments and making clear to what extent a particular doctrinal field is stable or likely open to revision.

Importantly, the model focuses attention on the role of Legal Tests in contemporary constitutional doctrine. Attentiveness to Legal Tests allows students to see important patterns across doctrines that aid the learning of constitutional law. The focus on Legal Tests also facilitates the recognition that sometimes the Court departs from its ordinary practice and chooses to sculpt *sui generis* Legal Tests. The Court's ordinary and exceptional practices with regard to Legal Tests in turn raise the question of how precisely the Court decides on the appropriate Legal Test, what turns out to be a crucial yet largely ignored and undertheorized question. Furthermore, the focus on Legal Tests encourages careful thought about the nature of the Court's role in determining what the Constitution requires. At the same time, because Legal Tests ordinarily grant at least some deference to the decisions of other branches of government, the focus on Legal Tests also encourages thought about the role that societal institutions apart from the Court play in determining what the Constitution allows and requires. Finally, attentiveness to Legal Tests generates important insights into the non-categorical quality of most constitutional rights.