THE FOURTEEN FACES OF NARROWNESS: HOW COURTS LEGITIMIZE WHAT THEY DO

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I. INTRODUCTION

Of all the central legal concepts the judicial system relies on, which are the most crucial to its effectiveness as an institution? The following concepts might all be thought of as somehow crucial to the legal system: justiciability;[1] jurisdiction;[2] adversariness;[3] predictability;[4] incrementalism or holding and dicta;[5] enforceable liability;[6] reasonableness, objectivity, and the reasonable person standard;[7] stare

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1. *See, e.g.*, Peter Gordon Ingram, *Justiciability*, 39 AM. J. JURIS. 353 (1994).

2. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION (2d ed. 1994); Perry Dane, *Jurisdictionality, Time, and the Legal Imagination*, 23 HOFSTRA L. REV. 1 (1994).

3. *See, e.g.*, Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

4. *See, e.g.*, Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651 (1995); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

5. *See, e.g.*, Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771; Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

6. *See, e.g.*, Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

7. *See, e.g.*, KENT GREENAWALT, LAW AND OBJECTIVITY (1992); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994); Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994).

decisis;[8] reviewability;[9] separation of powers;[10] federalism;[11] impartiality, neutrality, or due process;[12] consent;[13] fundamental rights, possibly including autonomy or property rights;[14] compelling governmental interests;[15] equal protection of the laws;[16] privacy;[17] personhood;[18] liberty interests;[19] responsibility;[20] efficiency;[21] republicanism or constitutionalism;[22]

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8. *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031 (1996).

9. *See, e.g.*, William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382 (1993); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992).

10. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991).

11. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971); *Symposium: The New Federalism After* United States v. Lopez, 46 CASE W. RES. L. REV. 635 (1996).

12. *See, e.g.*, 18 NOMOS: DUE PROCESS (J. Roland Pennock & John Chapman eds., 1977); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981).

13. *See, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993); Onora O'Neill, *Between Consenting Adults*, 14 PHIL. & PUB. AFF. 252 (1985); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995).

14. *See, e.g.*, LAWRENCE HAWORTH, AUTONOMY (1986); JOHN STUART MILL, ON LIBERTY (David Spitz ed., W.W. Norton & Co. 1975)(1859); JOSEPH RAZ, THE MORALITY OF FREEDOM (1986); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); ROBERT YOUNG, PERSONAL AUTONOMY: BEYOND NEGATIVE AND POSITIVE LIBERTY (1986).

15. *See, e.g.*, Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917 (1988).

16. *See, e.g.*, THOMAS NAGEL, EQUALITY AND PARTIALITY (1991); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMEND-MENT (1994); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

17. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

18. *See, e.g.*, R.S. DOWNIE & ELIZABETH TELFER, RESPECT FOR PERSONS (1969); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990); DEREK PARFIT, REASONS AND PERSONS (1984); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

19. *See, e.g.*, ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); MILL, *supra* note 14.

and state action.[23]

These concepts arise in different contexts and at differing levels of generality. Some are mainly institutional, operational, or procedural—others mainly substantive, normative, and outcome-oriented. The legal system itself uses all of these concepts internally, as opposed to concepts such as sovereign authority[24] and legitimacy,[25] which might be used to describe or judge the legal system from the outside.

Although important concepts, none of them satisfactorily links the workings and outcomes of the legal system to the system's legitimacy. Certainly, due process and consent help to legitimize legal outcomes. But they cannot do all the necessary work. Some of the concepts actually perform little legitimizing work by themselves. For example, pointing out that the judicial system commonly features incremental decision-making hardly sells the judicial system to the public. It invites the question of what makes incrementalism a good thing. Other concepts, such as fundamental rights or compelling governmental interests, may be formally or logically basic. Fundamental rights certainly sound important. But these concepts are simply too abstract and, until fleshed out, too empty to be practically crucial in

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20. *See, e.g.*, JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1970); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW (1993); Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990).

21. *See, e.g.*, ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); Russell Hardin, *Magic on the Frontier: The Norm of Efficiency*, 144 U. PA. L. REV. 1987 (1996); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

22. *See, e.g.*, 20 NOMOS: CONSTITUTIONALISM (J. Roland Pennock & John W. Chapman eds., 1979); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1993); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

23. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 49-71 (1996).

24. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); 12 NOMOS: POLITICAL AND LEGAL OBLIGATION 218 (J. Roland Pennock & John W. Chapman eds., 1970); Kai Nielsen, *State Authority and Legitimization*, *in* ON POLITICAL OBLIGATION (Paul Harris ed., 1990); Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991).

25. *See, e.g.*, JURGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., Beacon Press 1975) (1973); Nielsen, *supra* note 24; Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984).

legitimizing the legal system. Other, less obviously central legal concepts must instead do this crucial legitimizing work, and it is these less celebrated legal concepts that in practice turn out to be crucial for the legal system's legitimacy.

The legitimization project may start with concrete and substantive concepts, such as due process, consent, autonomy, privacy, efficiency, or equal protection. These, however, can only carry the system-legitimizing process so far. While these concepts are sufficiently concrete or normative, they are openly, notoriously, and perhaps irresolvably controversial. These concepts thus cannot complete the work of legitimizing the legal system. The public divides over the proper normative value of ideas such as autonomy[26] and efficiency,[27] and consciously realizes that it disagrees on the proper scope or meaning of the rights of privacy[28] and equal protection of the laws.[29]

The public is too keenly aware of its divisions on these concepts and of the persisting, if not intractable, character of the debate. At this point, genuinely novel and widely convincing broad arguments regarding these legal concepts are difficult to construct. Many consider the courts, even the United States Supreme Court, as merely one more participant, albeit an unusually powerful one, in these ongoing debates. At least to those unsympathetic to the results, courts may appear to have the last word, but rarely the best word, on these matters.

Typically, courts relying on overtly controversial visions of autonomy, privacy, equal protection, and the like do not convince many of the power of the courts' arguments. The courts' discussion of these categories does not commonly legitimize or cast authority over their decisions. Other concepts, therefore, must crucially complete the work of judicial legitimization. Here, the humble, mundane legal concept of breadth and narrowness often performs the crucial work in legitimizing the legal system.

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26. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM (1993).

27. *See* sources cited *supra* note 21.

28. *See* sources cited *supra* notes 17, 26.

29. *See, e.g.*, Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE (1996); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (1997); ALBERT G. MOSLEY & NICHOLAS CAPALDI, AFFIRMATIVE ACTION: SOCIAL JUSTICE OR UNFAIR PREFERENCE? (1996).

II. LEGITIMIZATION AND THE IDEAS OF BREADTH AND NARROWNESS

A. The Process of Legitimization

The idea of legitimization is understandable in plain terms. For example, as one writer phrases the issue: "The question of legitimacy is, quite simply, why should the nation—lawyers or laypeople—continue to respect and follow the constitutional meanings articulated by as few as five individuals who happen to sit on the Supreme Court?"[30] The following discussion of legitimacy includes not only constitutional decisionmaking, but also other forms of judicial decisionmaking and the legal system as a whole. The discussion will not focus on the normative question of whether the judicial system is really legitimate or deserves its authority. Rather, the focus is on the descriptive question of how the judicial system generates its perceived legitimacy. In other words, how does judicial decisionmaking succeed, rightly or wrongly, in seeming legitimate or rationally and morally justified?

The process of constructing judicial legitimacy involves both intentional and unintentional elements. Legal actors may consciously seek to legitimize the judicial system and its effects. However, legal actors may also generate legitimacy through mechanisms whose effects the actors may not have intended or even fully grasped.

Concepts such as privacy, autonomy, equality, and efficiency can do some of the work of legitimization but remain too overtly controversial to do all of the work. Admittedly, these concepts also have some descriptive element. One can imagine drawing on both the descriptive components of these ideas and on their normative components. In practice, however, the courts can only rarely support an interesting judicial result involving, for example, privacy issues by reference solely to descriptive aspects of privacy. The public is only too keenly aware of this unbridged gulf between observable descriptive fact and the normative legal outcome.

Probably no legal concept really allows for the rigorous drawing of interesting judicial outcomes from purely descriptive or observable

30. Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV. 363, 364; *see also* Olsen, *supra* note 25, at 951 ("In the context of law, [legitimization] is the process by which laws and the coercion exercised in their name come to seem fair.").

phenomena.[31] But the crucial point is that some legal categories provide a smoother, less recognizable illusion in this regard than others. Thus, while all transitions from description or observation to a normative legal conclusion involve some sleight of hand, not all concepts equally lend themselves to this process with credibility.

Legitimacy calls for the least jarring transition from judicial description to evaluation, and here, ideas such as privacy and autonomy help little. Indeed, they wave the red flag of controversy. Instead, the smoothest transition from judicial description to judicial result relies on other sorts of categories entirely. For a smoother transition from description to judicial rule, one would instead rely on concepts that seem readily and uncontroversially measurable, but which also have some normative bite, though not of an immediately recognizable or controversial sort. The most generally serviceable and most important of these are the concepts of narrowness and breadth.

Before focusing on narrowness and breadth, the practical importance of making the least conspicuous transitions from the observable to the valuable deserves emphasis. A legal system could seek legitimacy by endlessly trumpeting the moral superiority of its decisions. This strategy may hold some value, but decreasingly so in a society of increasing moral pluralism. A few concepts, such as courage in battle for example, may seem to combine neatly the descriptive and the evaluative, but legal concepts neatly combining description and evaluation do not seem common or central. A better strategy, whether consciously chosen or not, would begin with seemingly uncontroversial empirical observations and would continue by drawing out apparently well-founded normative legal implications. How long this kind of illusion can persist depends upon many factors, including the subtlety and apparent innocence of the necessary transitions.

The process of legitimization is not about outmuscling, outvoting, or outshouting anyone else. Rather, it attempts to appear unobjectionable or as close to unobjectionable as possible. What is objectively describable or measurable is normally considered real. Theories approximating some underlying reality often receive greater acceptance.[32] At the very least, theories receive ratings based on

31. Such a skeptical belief is famously associated with the philosopher David Hume. *See* DAVID HUME, A TREATISE OF HUMAN NATURE bk. III, pt. 1, § 1, at 507 (Ernest G. Mossner ed., Penguin ed. 1969); *see also* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 535 (1981) (discussing the distinction between facts and values).

32. *See, e.g.*, GERALD HOLTON, EINSTEIN, HISTORY, AND OTHER PASSIONS (1995); PHILIP KITCHER, THE ADVANCEMENT OF SCIENCE: SCIENCE WITHOUT

their empirical adequacy.[33] One has confidence in something repeatedly seen and measured. If an inference follows logically from what is seen or measured, one also has confidence in that inference.

Thus, the legitimacy of a judicial system crucially depends on inconspicuous, typically uncontested transitions from the supposedly observable or the measurable to conclusions with more obvious evaluative import. In the judicial system, this transition is made most smoothly and most commonly through the concepts of narrowness and breadth.

B. The Metaphors of Narrowness and Breadth

Narrowness and breadth are concepts relied on throughout the law. Narrowness and breadth in the law are, of course, metaphors.[34] But they are obvious, natural, and typically uncontroversial metaphors. What they are built upon—the more literal narrowness and breadth of, for example, lines or areas—is the uncontroversiality of simple geometry, road construction, pen line widths, land surveying, bottle openings, real estate lots, and surface area measurements.[35] There are optical illusions and unsystematic errors in measuring narrowness and breadth, even with sophisticated instruments. But for the most part, determinations of breadth and narrowness in the literal, geometrical context are uncontroversial. Normally, claims that A is narrower than B in the literal, Euclidean geometrical setting do not generate conflicting and unresolved schools of thought.

Whether one patch of grass is narrower than another is thus typically a matter of a quick visual inspection that any number of persons can perform equally well. In such a case, alternative geometries do not come into play. Measurements of geometrical narrowness and

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LEGEND, OBJECTIVITY WITHOUT ILLUSIONS (1993); THOMAS NAGEL, THE LAST WORD (1997); JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

33. *See, e.g.*, BAS C. VAN FRAASSEN, THE SCIENTIFIC IMAGE (1980).

34. For the suspiciousness of legal metaphors in general, see David A. Anderson, *Metaphorical Scholarship*, 79 CAL. L. REV. 1205 (1991) (reviewing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935); Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 331 & nn.36-37 (1992) (citing Justice Cardozo in *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926).

35. For discussion of related metaphors, see GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 29 (1980) (discussing the metaphorical use of the idea of land area) and GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 517 (1987) (referring to the metaphor of discourse space as physical space).

breadth are so commonly done that they do not automatically raise suspicions about the use of the terms narrowness and breadth throughout the law. The usage seems familiar and, if only an analogy, still an uncontroversial and untroubling one. Accordingly, courts maintaining that one legal rule, holding, or interpretation is narrower than another, do not immediately raise suspicions. Courts may make mistakes, and fudging even occurs occasionally, but narrowness and breadth in the law ordinarily do not provide grounds for principled contest.

The lulling effect of the analogy to uncontroversial literal measurements of geometric width explains this reaction. However, this analogy to geometrical width is, in reality, deeply flawed. Judicial judgments of relative breadth and narrowness are often in themselves richly value-laden. Narrowness and breadth in the law typically involve much more than an incontestable counting or measurement. Instead, legal judgments that one rule is narrower than another often depend crucially on what should be hair-raisingly controversial normative judgments and on deep evaluations that are not remotely akin to observations. This holds true even assuming that empirical observations and physical measurements involve some limited degree of value judgment and normative choice. To the extent that the public does not consciously recognize this whenever it occurs, the public itself is involved in the legal system's self-legitimization.

Typically, one patch of ground is unequivocally narrower than another. The value judgments, if any, involved in such measurements are of modest import. This familiar result cannot typically be carried over into the law. Determining whether one possible legal rule is narrower than another requires more than a yardstick. Rather, the determination often requires practically important value assumptions that might well be controversial. Rule A may be narrower than Rule B on what seem, arguably, decisive criteria. But in light of different and perhaps equally interesting criteria, it may also be equally possible to argue that Rule B is actually narrower than Rule A. Often, this possibility remains unseen because of the misleading character of the metaphor of breadth and narrowness.

Until there exists some agreed-upon set of normative and descriptive rules, legal judgments of narrowness and breadth will remain largely arbitrary and susceptible to conscious or unconscious manipulation. Judicial legitimization occurs when arbitrariness and bias close the unrecognized gap between the analogy of largely objective measurement and the deeply value-laden legal outcome.

Without those subjective normative judgments, legal breadth and narrowness are indeterminate. Thus, a determinate legal outcome is often reached only through judicial arbitrariness.[36]

The suppressed evaluative nature of legal narrowness and breadth will be discussed below. For now, it is understandable how the metaphor of narrowness and breadth leads to the oversimplification of legal issues. Thinking about a patch of ground, for example, does not ordinarily include thinking of the patch changing its breadth over time. However, it will sometimes be quite sensible to think of a rule's relative breadth changing with time and circumstance.

More important, however, is the tendency of the narrowness and breadth metaphor to suppress recognizing the need for value judgments. The very ideas of breadth and narrowness each direct attention to scope, area, counting, and numbers. These concepts suffice for measuring geographical width, but not for most legal inquiries. Yet this basic point is typically overlooked.

In a way, this mistake is understandable. In reality, the elements of legal breadth and narrowness are surprisingly complicated when compared with the simplicity of most area measurements. Legal breadth may be considered in any number of respects. The most obvious approaches would consider the total number of cases within the scope of the rule, the different kinds of cases and probabilities within the rule, the difference between actual and potential cases, and the significance or seriousness of the cases. It is unclear, for example, whether a rule encompassing many cases is actually broader than a rule encompassing fewer cases, if the latter rule sweeps in a greater number of different parties, a greater variety of parties, or a greater number of kinds of cases.

For example, which is broader, a rule affecting many persons of a single kind, or a rule affecting fewer persons of varying and unpredictable types? Concretely, which is broader, a rule encompassing 600 major league baseball players, or a rule encompassing 500 randomly selected federal income tax payers? Is Professor Fred Schauer correct in stating that the rule "'Write thank you notes' is less general than 'Show appreciation for social kindnesses?'"[37] This is certainly correct if writing thank you notes is merely one way of showing appreciation. But what if thank you notes are sometimes intended to

36. For a brief discussion of the link between indeterminacy and legal legitimacy, see Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 285-87 (1989) and Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481 (1995).

37. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 639 (1995).

solidify a relationship, enhance the likelihood of a job offer, wangle a future invitation, and so forth? Is the relationship of greater and lesser generality still clear?

It becomes important not to lose sight of the bigger picture amid this complexity. Mere quantitative approaches to legal narrowness and breadth are complicated, but additional complexity and controversy is suppressed if the legal system is allowed to submerge the valuational aspects of legal narrowness and breadth.[38] There may be a substantial payoff in legitimacy through pretending that judicial judgments of narrowness and breadth are indeed quantifiable.

In contrast, a legal system sometimes tries to legitimize itself through "mystification," or pretending that its work is more complex than it really is. Accordingly, the ersatz complexity tends to render the legal system immune from outside critique. At other times, a legal system tries to legitimize itself by pretending that its work is simpler, more straightforward, and less contestable than it really is. Here, the concern for the manipulation of breadth and narrowness comes into play.

One final preliminary clarification: one might be tempted to generalize that courts legitimize themselves through narrow rulings rather than broad rulings, because narrow rulings arguably reflect judicial institutional competence and avoid usurping democratic authority. Conversely, legislatures might be thought to legitimize themselves with broad statutes, on the theory that breadth in statutes promotes equality and helps avoid favoritism and partiality.

There are important exceptions to the generalization that courts legitimize themselves through narrowness and legislatures through breadth. For example, a court that insists on a series of narrow holdings in racial equality cases involving public schools could well undercut, rather than enhance, its legitimacy. Case holdings on racial equality that are narrow and contextualized may suggest that the court simply does not grasp or accept the broad principles of racial fairness. In contrast, a broad statute in many contexts may appear crude, ill-considered, unduly ambitious, or insensitive.

In any event, contrasting judicial and legislative roles is not the

38. For a brief discussion of the relative "ease" of supposedly observation-based—as opposed to overtly evaluative and controversial—legal judgments, see Lawrence Lessig, *Post Constitutionalism*, 94 MICH. L. REV. 1422, 1447 (1996) (reviewing ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995)). For a brief reference to the jeopardizing of legitimacy through controversial constitutional value judgments, see Jacobs, *supra* note 30, at 365-66.

central point. Searching for an optimal or ideal level of narrowness or breadth in judicial holdings is not the point either. Rather, the point is simply that whether courts issue narrow or broad rulings, they can use the very concepts of narrowness and breadth to add a bogus objectivity to their analysis. The metaphors of narrowness and breadth encourage the belief that courts measure uncontroversially or objectively, when instead they actually make and rely upon important, potentially controversial value judgments.

III. THE FOURTEEN ASSOCIATIONS OF BREADTH AND NARROWNESS

To grasp how narrowness and breadth are useful for legitimization, exploring how this concept is used in various legal contexts becomes important. Some of these uses and associations are flawed or questionable. But even so, they shed light on how narrowness and breadth actually function in the law. The fourteen associations of breadth and narrowness are set out immediately below. Some of these associations will receive further development in Section IV.

To begin, narrowness is often associated with uncontroversiality, consensus, or nonintrusiveness.[39] Narrow grounds are often perceived as uncontroversial grounds. Thus, the narrowest of various opinions issued in a case would be perceived as the tamest, most evidently legitimate, or most widely acceptable opinion.

Second, narrowness is sometimes linked with clarity. For example, one scholar states that "[t]he plain meaning rule expresses the principle that where the statute is narrowly and tightly drawn, the courts have considerably less interpretive flexibility than when the statute is phrased in vague or general terms."[40] Here, narrowness

39. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) (decision on narrower and non-constitutional grounds as avoiding explosive "clashes" between branches of government); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133-34 (6th Cir. 1994); Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1016 (1994) (discussing the logic of *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341-48 (1936) (Brandeis, J., concurring)); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 434 (1992) (discussing consensus in the logic of *Marks v. United States*, 430 U.S. 188, 193 (1977)). Perhaps it is differences in the relative controversiality of the rules that lead Dean Edward Levi to conclude that an invitee or implied warranty theory is narrower than a theory that an object is or is not imminently dangerous. *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 16 (1949).

40. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990

does not necessarily equate with clarity or precision, but rather asserts some loose association. Of course, some very broad general rules—as found in high school science—can be stated with great precision, and it is possible to imagine narrow, limited rules that are remarkably vague, ambiguous, and create many borderline cases. Sometimes, a narrow case holding merely preserves an already existing state of legal confusion and uncertainty. Anyone who denies that narrow rules can be vague, and general rules precise, may be relying on their own definitions of these terms, rather than observing how the courts and the legal community use these terms.

Some standard manipulations of constitutional law and statutory interpretation allow courts to pare down apparently broad grants of authority to much narrower proportions.[41] Much of this narrowing is uncontroversial. For example, the command "close the door" is usually interpreted as the narrower command to "close the door now, reversibly, and without unnecessary noise." Narrowing apparently broad grants of authority is sometimes more controversial, but still defensible by an appeal to widely shared values. In other cases, the narrowing process sacrifices the intent of the statutory drafters to the values of the narrowing judges. It is wrong to suppose that a move from broad language to narrow language gains precision and clarity, and increasingly limits any interpreting judge's scope of discretion. Statutory narrowness and breadth do not respectively constrain and free judges. Instead, judges manipulate the categories of narrowness and breadth to reach and legitimize judicial outcomes.

Third, some presume that a connection exists between liberal or progressive politics and the breadth of a judicial interpretation.[42] Admittedly, a familiar canon of statutory construction urges a broad

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WIS. L. REV. 1179, 1199. For a discussion of the idea of the breadth of legislative delegation through the concept of vagueness or amorphousness, see David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1224-25 (1984). Also, the idea of narrowness is sometimes associated with reducing vagueness in the context of the death penalty. *See* People v. Bacigalupo, 6 Cal. 4th 457, 465, 862 P.2d 808, 812, 24 Cal. Rptr. 2d 808, 812 (1993) (en banc). For the utterly equivocal relation between the narrowness of a case holding and the resulting clarity of the law, see *Webster v. Reproductive Health Services*, 492 U.S. 490, 535 (1989) (Scalia, J., concurring in part).

41. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Kent v. Dulles, 357 U.S. 116 (1958).

42. For discussion, see Geoffrey Marshall, *Theorizing About the Judicial Role*, *in* LEGAL THEORY MEETS LEGAL PRACTICE 73-78 (Anne F. Bayefsky ed., 1988). Of course, breadth of interpretation is sometimes also equated with liberality in a non-political sense. *See* JOHN BELL & GEORGE ENGLE, STATUTORY INTERPRETATION 32 n.3 (2d ed. 1987).

or liberal interpretation to effect the statute's purpose.[43] However, this argument depends on a world view that assumes statutes tend to be politically liberal or progressive in comparison with the results that judges and juries would otherwise reach. This view oversimplifies a world in which statutory welfare reform and immigration reform currently mean validating middle class grievances.

Fourth, some link is often assumed between administrative adjudication and narrowness on the one hand, and between administrative rulemaking and breadth on the other. However, upon inspection, this association unravels quickly. The results of administrative agency rulemaking typically may indeed seem broader than the results of administrative agency adjudications or case holdings.[44] But narrow agency rules and broad agency case holdings are also easily envisionable. Which is narrower, a statute or rule affecting the taxation of only a few past transactions in a single concentrated industry, or the adjudication known as *Brown v. Board of Education*?[45] One could, however, just as easily make the opposite error, and believe that agency rules are narrower than adjudications.[46] Instead, one should simply recognize that the legal forms of adjudication and rulemaking do not significantly constrain the judge's choice between narrow and broad legal outcomes.

Fifth, narrowness and breadth are often associated with the vertical level or rank in the structural hierarchy of the law of a particular legal holding. For example, a decision based on statutory or administrative regulatory grounds is presumed narrower than a decision on constitutional grounds. Justice Brandeis' concurrence in *Ashwander v. Tennessee Valley Authority*[47] exemplifies this understanding. Section IV below further discusses *Ashwander*, but it suffices for the

43. *See* 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §§ 58.04, 58.06 (5th ed. 1992).

44. This assumption appears in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). *See also* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 682 (D.C. Cir. 1973) (discussing the logic of the plurality opinion in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)) (discussing adjudication as focusing narrowly on the behavior of particular parties).

45. 347 U.S. 483 (1954). Further, the brief per curiam opinions issued on the strength of *Brown* cover facilities that are utterly unrelated to public school education. *See, e.g.*, Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (discussing the desegregation of city golf courses).

46. *See National Petroleum*, 482 F.2d at 690. ("[R]ules, as contrasted with the holdings reached by case-by-case adjudication, are more specific as to their scope.").

47. 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring).

moment to point out that a broad statutory holding can be broader than a narrow constitutional holding, even assuming that statutes are narrower than the constitutional provisions that authorize them.

Office of Personnel Management v. Richmond[48] provides instruction in this regard. The *Richmond* Court apparently could have decided the case on the narrow equitable grounds that Richmond's particular circumstances did not give rise to estoppel against the government.[49] Instead, the Court decided the case on constitutional grounds, invoking the Appropriations Clause.[50] Interestingly, the Court characterized the constitutional route as the "narrower ground of decision."[51] Arguably, a potentially broad equitable rule is indeed broader than a constitutional rule construing the modest, if not obscure, Appropriations Clause. But this debate again demonstrates the manipulability of such judicial judgments, which the descriptive character of the concept of narrowness and breadth supposedly constrains.

Sixth, narrowness is commonly linked to the sheer number of statutes or other laws that a given judicial decision affects. The narrowest ruling is said either to uphold or strike down the fewest laws in the face of a constitutional challenge.[52] This idea requires, first, settling upon a relevant time period for counting, and second, actually counting the affected laws. Does 42 U.S.C. section 1983 count as one law? Is Title VII of the 1964 Civil Rights Act one law? Which then is narrower: striking down section 1983 on constitutional grounds or striking down several different sections of a state's securities code on the same constitutional grounds? Even if the counting problems are solved, should not the importance or triviality of the laws in question be considered? Narrowness and breadth in the law is not just a matter of counting but of significance as well.

Seventh, sometimes the idea of narrowness may actually play only a small role in the statements which invoke it. In such cases, the reference to narrowness is close to redundant, in that it is not obvious how the statement would be affected by deleting its reference to narrowness. Take, for example, the familiar rule of lenity in construing

48. 496 U.S. 414 (1990).
49. *See id.* at 423-24.
50. *See id.* at 424; *see also* U.S. CONST. art. I, § 9, cl. 7.
51. *Richmond*, 496 U.S. at 423.
52. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 47 (1993); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 880-82 (1930) (discussing various statutory interpretation methods).

criminal statutes. A court might formulate the rule along these lines: the statute will be interpreted narrowly so as to avoid holding a defendant's conduct within its scope.[53] But what really changes if the word 'narrowly' is struck from the rule? How is this rule different from merely interpreting the statute to exclude the defendant's conduct? The idea of narrowing itself seems superfluous here because a court can exclude the defendant through a statutory interpretation that broadly and unnecessarily includes many more future defendants.

Eighth, breadth is sometimes linked explicitly to the idea of importance. A delegation of legislative authority to an agency, for example, may be thought improperly broad if the powers bestowed are considered too important to delegate.[54] Whatever its defects, this view highlights the value elements of legal breadth, beyond those of mere quantity. As a result, this view is actually less useful for purposes of judicial legitimization.

Ninth, narrowing and broadening are techniques which the courts use to move away from the legal baseline they have been given or have chosen in a given kind of case. In death penalty cases, for example, the judicially chosen baseline currently is one of broad eligibility of defendants for death, with the class of eligibles then subsequently narrowed.[55] Courts do not start with the presumption that no one should be executed and then rebut that presumption through broadening. The number of executions thus reflects not only the initial eligibility baseline, but the degree to which the courts order or permit narrowing or broadening from that baseline.

The Supreme Court has sometimes read congressional grants of authority more narrowly than Congress might have intended. In some cases, the Court's narrowing technique leads to attractive case results without technically raising any constitutional issues. Thus, by deft narrowing of apparently broad congressional language, the Court has expanded the rights of aliens to seek federal civil service

53. *See, e.g.*, United States v. Brummels, 15 F.3d 769, 772-73 (8th Cir. 1994). For similar usages, see *Weaver v. USIA*, 87 F.3d 1429, 1432 (D.C. Cir. 1996) and Judith Resnick, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1715 (1991).

54. *See, e.g.*, Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 62 (1976) (discussing the views of Alexander Bickel).

55. *See* People v. Bacigalupo, 6 Cal. 4th 457, 862 P.2d 808, 24 Cal. Rptr. 2d 808 (1993) (en banc).

jobs[56] and has limited the grounds upon which citizens can be denied passports.[57] While the Court in these cases is undeniably making interesting, important value judgments, it is claiming merely to ascertain and describe congressional intent. Thus, the Court largely avoids potentially divisive battles over the scope and value of constitutional rights, and thereby enhances judicial legitimacy.

Tenth, narrowness is often associated with both an inclusive set of assumedly relevant case facts and a rule that is merely a subset of some broader rule. A narrow rule, for example, is sometimes a lesser rule entirely included within some broader rule. While the broader rule may encompass the narrower, the opposite cannot be true. Accordingly, if one accepts the broader rule, it is thought that one must, as a matter of logic, accept the included narrower rule. Of course, competing possible rules often do not fall into this neat relationship. Commonly, competing possible rules only partially overlap. The most interesting cases are those in which an apparently lesser included rule is in fact not entirely so included, such that a judge could accept the putative broad rule while quite sensibly rejecting what is alleged to be the narrower included rule.[58] The potential for judicial manipulation, and for fallacy-ridden legitimization, can be dramatic in such cases.

Eleventh, narrowness is famously associated with a degree of tailoring or fit. A remedy is thought "narrowly tailored" if it matches or corresponds to the contours of the problem. Such a remedy ideally addresses all aspects of the problem, but does not extend beyond the scope of the problem. The underinclusiveness and the overinclusiveness of the remedy are minimized.[59] Here, it should be obvious how the geographic "area" metaphor can seriously mislead. It is

56. *See Hampton*, 426 U.S. at 113 n.46 (1976) (requiring a clearer congressional or presidential statement of broad authority for the Civil Service Commission before the adverse impact on aliens' interests can be found legitimate).

57. *See* Kent v. Dulles, 357 U.S. 116, 129 (1958) (presuming only a narrow grant of authority to deny passports, given the significance of the right to travel, without technically reaching the controversial issue of the scope and importance of a constitutional right to travel).

58. Classically, for example, John Locke argued that the alleged right to take a soldier's personal property was not a "narrow" right included within the presumed "broader" right to order the certain death of that soldier. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 139 (Second Treatise) (Peter Laslett ed., Cambridge Univ. Press 1988) (1698). For a careful discussion of narrowing, broadening, and overruling in terms of additions, deletions, and clarifications of assertedly relevant facts, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 19-25 (1989).

59. *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1786 (1996).

questionable, for example, whether underinclusiveness and overinclusiveness are always equally bad. Additionally, imagine trying to determine which of two possible rules is more narrowly tailored where Rule A involves some underinclusiveness and overinclusiveness, but not as much as Rule B. Does that lead to the conclusion that Rule A is more narrowly tailored?

The answer is no. This geographic metaphor has not yet taken into account the values, and in particular the moral seriousness or constitutional severity, of the issues that underinclusiveness or overinclusiveness may be involved in determining. Rule A may unfairly cost a dozen innocent victims their jobs or their lives, while Rule B costs a hundred somewhat less innocent victims a dollar each. This does not seem irrelevant to the degree of tailoring of these rules. And it remains unresolved whether burdens on constitutionally protected rights—and not on other important practical interests—represent the only factors in the narrow tailoring determination. If courts are allowed to pretend that narrow tailoring is only a matter of largely value-free measuring and comparison, their decisions can avoid the deepest sorts of criticism.

Twelfth, the spatial metaphor of narrowness and breadth has implications for the dimension of time involved in judicial decisionmaking. Given popular recognition of the close relationship between physical space and time, it is not surprising that narrow judicial decisionmaking often tends to shift decisionmaking power into the future or to other actors, where broader rulings tend to shift the balance of decisionmaking power to the present.[60] On the other hand, unnecessarily broad rules may beg to be overruled in their entirety, thereby limiting their own influence over time.[61]

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60. *See* Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 555 (1996) ("Justice Stevens properly recognizes that deciding cases according to broad rules necessarily involves deciding cases prematurely."); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 591 (1987) (arguing that broad precedents have greater constraining power); Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 301 (1996) ("[n]arrow rulings may give more deference to administrative decisionmakers or other constitutional interpreters, thus promoting a sharing of power.").

61. *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 741-43 (1993). By contrast, narrow incremental rule changes may set up slippery slopes eventually carrying us great distances. *See generally* BERNARD WILLIAMS, MAKING SENSE OF HUMANITY 213-23 (1995); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985) (discussing logical and empirical presuppositions of slippery slope arguments).

Further, narrow rulings may have broad and serious effects. Suppose the Supreme Court accepts a case involving thousands of prisoners alleging Eighth Amendment violations, but then, as its term is concluding, dismisses the case on narrow procedural grounds quite apart from the underlying merits. This may mean that the prisoners suffer another year of unconstitutional treatment—a more severe effect than any number of broad prisoners' rights holdings on the merits might have caused, even over time. The Court's decision to decline hearing a case on narrow grounds can sometimes exert enormous power—albeit disguised as judicial modesty.[62]

Thirteenth, narrowness and breadth lie at the heart of the judicial choice between abstract, generalized descriptions of case facts as opposed to concrete, detailed, or perhaps selective fact descriptions. By manipulating the narrowness and breadth of a description, and thus the level of generality, an event can be made to seem either reasonably foreseeable or wildly improbable.[63] A defendant's liability in negligence may depend on this typically unacknowledged judicial choice. As well, the choice between broad or narrow descriptions is sometimes crucial at the constitutional level,[64] as seen in the debate between Justices Brennan and Scalia over how generally or specifically to formulate litigants' interests before characterizing their constitutional status.[65] In the absence of a dissenting opinion on point, a judge can manipulate the outcome of one case to seem "natural" by deftly characterizing the interests at stake. Similarly, a judge's degree of concern for the facts of particular cases may also affect the breadth or narrowness of the opinion in cases involving statutory interpretation.[66]

Finally, narrowness is sometimes associated not only with judicial modesty and deference to future decisionmakers, but with sheer indeterminacy. For example, Ronald Dworkin refers to "the narrow-

62. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (the Court's narrowly justified establishment of a broad power of judicial review).

63. *See* J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 212-15 (1990).

64. *See* Anderson v. Creighton, 483 U.S. 635 (1987) (stating that the clarity of an area of law depends upon the narrowness or breadth of the principles sought); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1514 (1985) (discussing the difficulties of defining a level of generality for use by the court).

65. Contrast the opinions of Justices Brennan and Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

66. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1081 (1989).

est decision in *Roe*: that the Texas statute was unconstitutional."[67] Merely holding a state statute unconstitutional is narrow in a sense, because such a holding does not commit the Court to any particular theory should the Court evaluate similar statutes from other states. But such a holding may just as easily be characterized as merely unclear or indeterminate as to its scope. It is compatible with any number of possible rulings and rationales, of varying breadth, in future cases.

After all, even a narrow holding aspires to rationality. Even a narrow holding covers not only the case at bar, but by implication, all other relevantly similar cases. A narrow holding does not tell us how to treat many other sorts of circumstances. If a holding is really thought to cover only the immediate case, and no other determinate or indeterminate set of relevantly similar cases, it is not a reasoned decision. It is instead a logically isolated act—like an impulsive preference for a walnut ice cream cone without any suggestion that one would again prefer walnut ice cream under any particular circumstance.

All judicial decisions that pretend to rationality must therefore aspire to some breadth, however indeterminate. A narrow decision of the sort that Dworkin describes can be viewed not only as an act of judicial modesty and self-restraint, but as merely playing one's cards close to one's judicial vest. The Court's narrow holding today may be an investment in the Court's own freedom of decisionmaking tomorrow.

IV. THE FOURTEEN FACES IN CONTEXT

A. Some Lessons From the Free Speech Cases

The legitimization of the judicial system through the concept of breadth and narrowness occurs in many contexts. This does not suggest that judicial use of breadth and narrowness always seeks to dampen or avoid potential public controversy over a court's results. Sometimes, a court clearly intends its use of narrowness and breadth to bear much of the weight of a controversial decision. *McCulloch v.*

67. Ronald Dworkin, *Unenumerated Rights: Whether and How* Roe *Should be Overruled*, 59 U. CHI. L. REV. 381, 428 (1992); *see also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-1200 (1992) (discussing issues of principle, prudence, and strategy regarding the breadth of *Roe*).

Maryland[68] represents perhaps the best known example of this kind of case. In *McCulloch*, the Court used narrowness and breadth not to disguise or oversimplify a controversy, but to articulate it forthrightly.[69] The Court opted for a broad meaning of "necessary" in the Necessary and Proper Clause, but conceded the existence of narrower, stricter, more literal meanings of the term.[70] The choice of the former meaning embodies value judgments, but here, the Court was not pretending that mere description replaces normative judgment.

More commonly, though, judicial use of breadth and narrowness serves a system-legitimizing function. Frequently, the supposedly neutral descriptions of relative narrowness and breadth mask both complexity and potential controversiality.

Consider some of the most important uses of narrowness and breadth in the law. To begin, narrowness and breadth are embodied in some important rules of constitutional law. For example, a restriction of speech may violate the First Amendment unless a court holds the restriction to be sufficiently narrowly tailored.[71] Similarly, a government policy affecting racial groups differently may deny the equal protection of the laws unless it is held sufficiently narrowly tailored.[72]

As a spatial metaphor, narrowness and breadth in the free speech area, as in other areas, lead to the supposition that the crucial legal inquiry consists primarily of observing empirical fact or measurement.[73] Determining that one rule is more narrowly tailored than another thus seems largely a matter of the relative "size" of the rules, or of the number of cases they affect. Narrowness, whether absolute or relative, is therefore characterized as descriptive and not primarily normative.[74] In this sense, the narrow tailoring inquiry should not entangle a court in evaluations.

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68. 14 U.S. (1 Wheat) 316 (1819).

69. *See id.*

70. *See id.* at 413-15.

71. *See* 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510-12 (1996); R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992); Board of Trustees v. Fox, 492 U.S. 469, 480-81 (1989); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2424 (1996).

72. *See* Adarand Constructors v. Pena, 115 S. Ct. 2097, 2117 (1995); Richmond v. J.A. Croson Co., 488 U.S. 469, 506-11 (1989) (plurality opinion); Texas v. Hopwood, 78 F.3d 932, 955 n.50 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781 (1996).

73. *See* Volokh, *supra* note 71, at 2424.

74. *See id.*

In reality, though, the narrowness metaphor merely disguises that a court is often making crucial and almost unconstrained normative choices when it decides whether a given restriction on speech is narrowly tailored. It is one thing to say that a literal six-inch strip of ground is narrower than a ten-inch strip. It is an entirely different thing to say that one speech restriction is narrower than another.

For example, consider the principle that a restriction on commercial speech must be at least reasonably narrowly tailored to serve the governmental interest that the restriction promotes.[75] This principle aims to avoid too great a mismatch between the scope of the restriction and the government interest promoted by the restriction. The restriction need not be perfectly tailored, in the sense of affecting all but only those cases in which the government interest is really at stake. Some underinclusiveness and overinclusiveness of restriction can be tolerated. Indeed, the reviewing court undertakes a loose, intuitive balancing process. The scope of the restriction on commercial speech cannot be grossly excessive in light of the government interest; it must be "in proportion to the interest served."[76]

The point is not that this test may overprotect or underprotect commercial speech. Rather, the point is that this test for narrow tailoring is both readily manipulable and inherently crucially normative. It is far removed from comparing the width of two strips of land.

Consider some of the following possible narrow tailoring issues that the uncontroversial-measurement-of-width model does not hint at. Does the degree of importance of the government interest affect the degree of narrow tailoring required? How so? Are overinclusiveness and underinclusiveness within the scope of the restriction equally undesirable? How, precisely, should a court consider that not all restrictions on a person's commercial speech are equally burdensome? Which is worse—a restriction that reduces an audience, or a restriction that distorts a message to some degree? Which is worse—a restriction that reduces an audience, or one that leaves the size of the audience unchanged, but delivers a less affluent or less interested audience? Which is worse—a restriction that worsens the size or composition of an audience, or one that makes reaching the intended audience more financially expensive?

Where do non-free speech and even non-constitutional values fit into the narrow tailoring problem? How, for example, should courts

75. *See Fox*, 492 U.S. at 480.
76. *Id.* (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)).

assess the tailoring of an alternative rule that does not directly impair commercial speech but that in practice will likely drive a number of commercial speakers out of business? Commercial speakers and their shareholders typically conduct business to make a profit rather than to maximize their free speech rights. What if a business can maximize its profits by convincing a court to adopt a genuinely more speech-burdensome, but less expensive, restriction? Some commercial speakers may have an incentive to portray their free speech interests falsely, particularly where profit maximization suggests such a course. Should a court consider the effect of these incentives? Is the power to restrict a corporation's speech "narrower" than, and thus included within, the power to abolish that corporation entirely?[77]

Narrow tailoring inquiries typically consider real or hypothetical alternatives to the regulation in question. Who should bear the burden of proving the availability of supposedly more narrowly tailored regulations? Should courts be satisfied with merely hypothetical alternative regulatory schemes? When and how should a court conclude that a supposedly narrower regulation would be unworkable in practice, or even too costly, and hence may be ignored?[78] Should a court guess whether an apparently more narrowly tailored restriction could muster enough political support to be enacted and then effectively enforced in practice? Will a commercial speaker always admit whether it, or some other group, has the political clout to kill the

77. In *44 Liquormart*, the plurality repudiated the idea that the government's power to restrict commercial speech is "narrower" than and indeed included within or logically inferable from the government's assumed police power to simply close down the commercial enterprise at issue on appropriate grounds. *See* 116 S. Ct. at 1512. *But cf.* Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 345-46 (1986) (assuming the contrary). The *44 Liquormart* plurality was doubtless right to do so, but this repudiation itself shows that relations of narrower and broader cannot simply be uncontroversially read off legal or social reality. Relations of "lesser inclusion" also occur in the "unconstitutional conditions" case law. *See Unconstitutional Conditions Symposium*, 26 SAN DIEGO L. REV. 175 (1989). For a further example of what appears to be a questionable "broader includes the lesser" argument, see *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) (stating that congressional power to create and abolish an executive office implies congressional power to reserve a role in the removal of such officer). What counts as truly "lesser included" in a supposedly "broader" category is often of general interest. *See* sources cited *supra* note 58.

78. The Court in *44 Liquormart* may have held the speech restriction insufficiently narrowly tailored based in part on a "narrower" and less burdensome alternative—a public education campaign on excessive drinking—that it implicitly recognized might not be effective in practice. *See 44 Liquormart*, 116 S. Ct. at 1510.

court's hypothetical, more narrowly tailored regulation? There is certainly no guarantee that if a government enacts one restriction on commercial speech, it will also be able to enact any and all more narrowly tailored restrictions.

How should courts deal with the possibility that an alternative restriction may be more narrowly tailored and less burdensome to the present plaintiff, but far less narrowly tailored and more burdensome to a number of other commercial speakers not before the court? More generally, how should courts trade off the number of commercial speakers and audience members burdened by a restriction and, with regard to both speaker and audience, the degree or severity of the burden? Certainly one restriction may burden fewer persons but may burden those few more severely than the alternative restriction. Is the degree of concentration or spreading of the burden relevant to narrow tailoring?

For the sake of simplicity, assume that the government has only one interest that its commercial speech restriction promotes. Perhaps even a complex function of goals, traded off at different rates under different circumstances, can be viewed as one single government interest. What should courts do about the obvious possibility that different restrictions on commercial speech may promote the assumed government interest to different degrees? For example, what should a court do if persuaded that a somewhat more tailored alternative will promote the government's interest ninety percent as well as the challenged restriction? What about eighty percent—does that still promote the "same" government interest? Should the courts consider not just efficiency in this sense, but also differences in financial cost for the government? What if a more narrowly tailored alternative would likely not promote the specified government interest terribly well but would promote effectively a government interest similar to, or arguably more important than, the interest promoted by the challenged regulation?

Can, or should, courts resist the temptation to just try, in some mysterious fashion, to weigh all the interests of all affected persons and trade them off against one another? One voice, arguably that of common sense, advocates balancing the degree to which two possible regulations burden commercial speech, in the aggregate, against the degree to which they promote something like the cited government interest. Restrictions on commercial speech differ in their burden, and state interests differ in their degree of importance. Should a court sacrifice the degree of tailoring, or severity of the burden, if

necessary, to promote an especially important and otherwise unattainable state interest? Should the courts trade the degree of narrow tailoring required for the degree to which a given state interest is promoted?

These narrow tailoring issues in the context of commercial speech regulation could be multiplied. The point, however, is clear enough: the model of uncontroversially observing whether one strip of ground is narrower than another is of little use in coping with narrowness inquiries in the commercial speech context. The uncontroversial-measurement-of-width model does, however, help disguise courts' enormous, nearly unconstrained discretion in this area. Use of the model helps suppress controversy through the pretense of judicial reliance on observation and essentially neutral description, rather than value judgments at every point in the analysis.

This point is not restricted to commercial speech cases. Consider a yard sign regulation case, in which the government is considering two possible rules.[79] The first rule limits the property owner to displaying only two signs, but the signs may be large, close to the street, and permanent. The second rule allows the property owner to display any number of signs, but the signs must be small, far from the street, and only temporary.[80] Through uncontroversial observation or otherwise, is the second rule more narrowly tailored, or even much more narrowly tailored, than the first? If so, is this not a matter of a complex evaluation that could easily conclude otherwise, rather than just a simple measurement?

Even the simplest and apparently clearest analogies to other forms of narrowness can be misleading. The set of letters A through E is mathematically narrower than the set of letters A through J. This can be shown through uncontroversial, one-to-one matching of the corresponding elements of the two sets, with some elements of only the latter set going unmatched. The first set is a proper subset of, and therefore narrower than, the second. But what does this really say about apparently similar legal cases?

Imagine two alternative anti-discrimination ordinances. The first prohibits discrimination or hate speech on the grounds of race and sex. The second prohibits discrimination or hate speech on the

79. This hypothetical is based on *Arlington County Republican Comm. v. Arlington County, Virginia*, 983 F.2d 587, 594 (4th Cir. 1993). *See also* Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 388 (6th Cir. 1996) (referring to *Arlington County*, 983 F.2d at 594).

80. *See Arlington County*, 983 F.2d at 593.

grounds of race, sex, and veteran status but otherwise mirrors the first. Is the first alternative clearly and unequivocally narrower than the second? If the answer is yes, it is largely because the analogy of matching elements of the two sets is misleading.

One problem with the element-matching analogy involves the tensions among enforcement priorities. Suppose that the resources available for enforcement are limited. In practice, is barring discrimination or hate speech on the grounds of race and sex merely a proper subset of, and hence narrower than, barring discrimination or hate speech on the grounds of race, sex, and veteran status? What if adding protected categories dilutes—assuming it does not perhaps enhance—enforcement of the prior categories? If it does, then it can hardly be said that the protection of the prior categories remains intact.

Less obviously, adding protected categories in the hate speech context changes, in subtle ways, the overall governmental policy conveyed. The extent to which protected categories are added to hate speech legislation may suggest a broad message of universal equality of respect among persons. As a policy of universality of respect and tolerance is approached, the policy, generally and with respect to each particular protected group, may gain coherence, power, and conviction. On the other hand, not all potential targets of hate speech are in all respects similarly situated. Some groups may genuinely require distinctive recognition and special consideration because of their history or current circumstances. Such groups may pay a price when hate speech legislation falsely treats their situation the same as any number of other groups.

It is difficult to argue that all groups that have ever suffered historical stigma have done so equally, or that their current vulnerabilities are precisely the same. It is true, for example, that both Irish Americans and African Americans have at one time been subject to some degree of ethnic-based invective, hate speech, and employment discrimination.[81] Both groups might cross some minimum historical

81. For reference to employment signs reading "No Irish Need Apply," once common in the eastern United States, see Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 4 (1995); Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 323 (1986); Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 577 (1995); Mitchell Kurfis, Note, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 151 (1995).

baseline. Their present circumstances, however, obviously differ quite significantly.

It may well be that to add protection for Irish Americans to protection for African Americans is not *merely* to add such protection; adding such protection may diminish the protection available to African Americans and change or dilute the message and focus of the protecting statute. The broader a protected class becomes by adding marginally deserving claimants such as current Irish Americans, the greater the eventual public temptation to reduce the depth or degree of legal protection. If the underlying analogy to sets of letters were to hold, it would be as though adding the letter "e" to a set of letters changed the nature or status of the set itself, or of its prior members. In such a case, the initial set of letters could not properly be considered merely a narrower set, or a proper subset, of the set now including the letter "e."

This is not a merely hypothetical point. It goes to the heart of the Supreme Court's reasoning in *R.A.V. v. City of St. Paul*.[82] The *R.A.V.* majority explicitly concluded, without argument, that a broader hate speech ordinance "would have [had] precisely the same beneficial effect"[83] on St. Paul's compelling interests. But this need not be so. Adding new protected classes may, on balance, either help or hurt those already protected. Adding protected classes may heighten the city's moral seriousness, logical consistency, and overall sense of purposeful conviction. On the other hand, adding protected classes may increase competition for attention and enforcement and may encourage us falsely to equate different group experiences and circumstances. Either way, the alternative ordinances cannot be described as simply narrower or broader but otherwise the same in their effects.[84]

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82. 505 U.S. 377, 395-96 (1992); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (discussing *R.A.V.*).

83. *R.A.V.*, 505 U.S. at 396.

84. The courts have occasionally shown interest in exploring some of the complexities of narrowness and breadth in the area of free speech. Chief Justice Phillips of the Texas Supreme Court, for example, has observed that

> [i]n the free expression context, . . . a constitutional provision may be 'broad' or 'narrow' on at least six axes, including: 1) the types of expression deemed protected, 2) the range of potential infringers against which the provision is operable, 3) the range of potential persons and entities who may invoke the protection, 4) the type of permissible restrictions and sanctions on free expression, 5) the degree of importance necessary for a competing interest or right to restrict free expression, and 6) how narrowly the infringement on free expression must be tailored to accommodate that competing interest or right.

B. *Some Lessons from Equal Protection and the Law of Discrimination*

Equal protection cases provide some of the most interesting problems of narrowness and breadth, beginning with the real narrowness or breadth of any category protected against discrimination. Any statutorily or constitutionally protected category, such as race, sex, age, or national origin, will inevitably overlap or correlate, loosely or tightly, with other categories perhaps less legally protected. Thus, race may correlate to one degree or another with complexion; sex to height or realistic susceptibility to pregnancy; pregnancy itself to the need for extended leave; ethnicity to noncitizenship, accent, or preferred conversational language; and age to seniority, projected retirement, or accumulated benefits. The more protected statuses may be associated with, yet not identical to, the perhaps less protected statuses.

If the courts narrow the scope of protection to precisely the protected category, as opposed to all its distinguishable correlates, they open the door to evasion of the statutory or constitutional protection. Employers so disposed will notice which of the correlate grounds on which they wish to discriminate are not protected. Of course, this requires some subtlety and discretion on the part of the employer. Some correlates of protected categories will have no obvious work-related significance. Thus, a university faculty seeking to limit the hiring of women cannot plausibly introduce a height requirement. But not all such attempts will be so transparent.

The Supreme Court has, for example, ruled that age discrimination

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Ex parte Tucci, 859 S.W.2d 1, 16 (Tex. 1993) (Phillips, J., concurring).

This typology illustrates the gross inadequacy of any measurement-based understanding of narrowness and breadth in free speech law. The sheer indeterminacy of how many "types" the protected expression falls into provides the starting point. Then one can ask which is more important, the number of types of expression protected or the sheer number of speakers or listeners protected. By the time the narrow tailoring issue is reached, it becomes apparent that the "breadth" or burdensomeness of a restriction is surely a function of its severity or overall qualitative impact as much as anything else. Finally, it is possible that beyond some point, "broadening" the protection of free speech may lead courts to reduce the "depth" or strength of free speech protection. The more behaviors counted as speech, or, for example, the wider the range of behaviors classified as religious, the greater the eventual pressure to accord less absolute, preemptive weight to free speech or free exercise of religion. After all, the more loosely one defines the scope of speech or religion, the less important or worthy the incremental cases of speech or religion are likely to be. This may provoke the question of why the public welfare should be sacrificed merely for such a marginal, attenuated instance of speech or religion.

means discrimination on the basis of age, and not any other correlated consideration.[85] But age discrimination in employment often is not a matter of some deep emotional bias against or stereotyping of the relatively old in the work force. Often, an employer is tempted to notice that age may correlate with seniority, and seniority with size of total compensation package. An employer who has now decided that years of employee loyalty or job experience are not as valuable as he once thought can fire his more expensive, if commonly older, workers without discriminating on the basis of age.[86]

To protect only age, in this context, is not to protect age effectively. A statute prohibiting age discrimination in the workplace might well have been intended to reduce fears that accepting the benefits of an employer's gratitude over a period of years may eventually enhance the chances of layoff or dismissal at a vulnerable career point.[87]

The narrowness or breadth of protected classes under the equal protection clause is subject to endless judicial manipulation. Similarly manipulable is the crucial concept of narrow tailoring in equal protection cases. If narrowness of tailoring were merely a matter of uncontroversial counting, observing, and measuring, the potential for judicial manipulation would be reduced. Instead, the idea of narrow

85. *See* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) ("[T]here is no disparate treatment under the [Age Discrimination in Employment Act] when the factor motivating the employer is some feature other than the employee's age."). Of course, employer decisions regarding pension benefits availability may, even if they do not violate the Age Discrimination in Employment Act (ADEA), nevertheless violate the Employee Retirement Income Security Act of 1974 (ERISA). *See id.* at 612.

86. *See id.* at 609.

87. For a sampling of other contexts in which parallel issues arise, see, for example, *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973) (barring noncitizen employees does not inevitably imply national origin discrimination); *Fisher v. Vassar College*, 70 F.3d 1420, 1448 (2d Cir. 1995)

> ("[A] policy may discriminate between those employees who take off long periods of time in order to raise children and those who either do not have children or are able to raise them without an appreciable career interruption. That is not inherently sex specific and does not give rise to a claim under Title VII.");

Troupe v. May Department Stores Co., 20 F.3d 734, 737-39 (7th Cir. 1994) (holding that termination based on employer's fear that employee would not return to work after maternity leave, by itself, was not within the scope of the prohibition of pregnancy discrimination, because the employer might have a broader policy of terminating any employee about to embark on any extended leave); *Marafino v. St. Louis County Circuit Court*, 707 F.2d 1005 (8th Cir. 1983) (distinguishing not hiring pregnant women from not hiring anyone needing a leave of absence soon after hire).

tailoring typically permits the court to reach any preferred result while pretending to engage in some process like careful measuring. To the extent that anyone credits, even subconsciously, the metaphor of measuring, the legal system is to that extent able to purchase legitimacy.

Courts often seek, whether under self-delusion or not, to depict the narrow tailoring determination as a matter of inquiry or of "finding out." The recurring "precision of fit" metaphor depicts the Court trying to match a piece of a jigsaw puzzle against an allegedly corresponding empty outline. For example, in *Adarand Constructors, Inc. v. Pena*,[88] the majority employed strict scrutiny, and hence narrow tailoring, as the appropriate equal protection standard in federal race discrimination cases.[89] The Court embraced the pretense of precision by requiring "the most exact connection between justification and classification,"[90] as though it were examining a carpentry joint under a magnifying glass. Narrow tailoring, for example, might require that a program "'not last longer than the discriminatory effects it is designed to eliminate.'"[91] This creates an image of watching for certain effects, waiting for them to disappear, and then almost simultaneously terminating the remedy for those effects because the remedy is no longer needed. In this situation, the existence of discrimination or a discriminatory effect remains a question that requires evaluation and judgment.

Of course, the courts[92] and commentators[93] recognize that the narrow tailoring inquiry cannot entirely avoid judgments on normative matters. But whether from inattention or by design, courts typically understate the normative elements and the sheer manipulability of the narrow tailoring inquiry.

Perhaps the most widely recognized example of this lies in Justice Powell's assumption in *Regents of the University of California v. Bakke*[94] that Harvard's attachment of unspecified weight to racial

88. 115 S. Ct. 2097 (1995).
89. *See id.* at 2117.
90. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 537 (1979) (Powell, J., concurring)).
91. *Id.* at 2118 (quoting *Fullilove*, 448 U.S. at 513 (Stevens, J., dissenting)).
92. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 310 (1986) (plurality opinion) (Marshall, J., dissenting) (describing equal protection narrow tailoring as involving "the smallest possible deviation from established norms").
93. *See, e.g.*, Ayres, *supra* note 59, at 1791 (1996) (stating that affirmative action narrow tailoring involves "less of a burden on constitutional norms concerning racial divisiveness").
94. 438 U.S. 265 (1978).

considerations with respect to every admissions decision was more narrowly tailored than U.C. Davis's policy of setting aside a specific number of places for qualified minorities while entirely ignoring race elsewhere.[95] This conclusion is too quick. Without knowing the weight of the racial considerations, or the number of set aside openings involved, how does one tell in the abstract that one system burdens anyone's interests more than the other? Consider an analogous problem. Are a decathlon entrant's overall chances always better when wearing some unspecified measure of ankle weights for all ten events than when automatically disqualified from competing in one or two events but otherwise unencumbered?

Presumably, Justice Powell did not believe that the Harvard model necessarily maximized the White applicants' chances for admission under an effective affirmative action plan. More likely, he considered the Harvard unspecified-but-uniform-weight approach to affirmative action more narrowly tailored simply because it seemed more refined, more discreet, more subtle, and more genteel.[96] However, this alone fails to resolve the narrow tailoring issue. Denying that discreetness is an element of narrow tailoring is not necessary to deny that discreetness is the very soul of narrow tailoring, especially if the most discreet approach may reduce white acceptance rates below that necessary to achieve affirmative action aims.

Justice Powell's most significant error is not overemphasizing the constitutional status of being discreet. Rather, it lies in his failure to acknowledge the multiple paths of the narrow tailoring inquiry and the inherent manipulability of its outcome. In a recent Title VII affirmative action case, *Taxman v. Board of Education*,[97] Chief Judge Sloviter's dissent agreed with the majority that narrow tailoring requires something like not unnecessarily burdening the interests of non-minorities,[98] or "minimizing any adverse effect [the quota system has] on non-minorities."[99] Interestingly, Chief Judge Sloviter tacitly recognized that the school board's failure to specify a particular numerical goal in seeking workforce diversity could, as a given judge may be inclined, be counted either for or against the narrow tailoring

95. *See id.* at 316-21.

96. *See* Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1875 (1995) (citing JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 469-73, 484 (1994)).

97. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997).

98. *See id.* at 1564.

99. *Id.* at 1575 (Sloviter, C.J., dissenting).

of the school board's plan.[100]

For example, suppose a court resents affirmative action and wishes to strike down affirmative action plans for lack of narrow tailoring. What can such a court do with the presence, or the absence, of a specified numerical goal? A court can use both the presence and the absence of any such goal to find the lack of narrow tailoring. The presence of a numerical goal suggests rigidity. Perhaps a specified number suggests a quota or a quasi-quota. Any number can be portrayed as arbitrarily selected and therefore not narrowly tailored. Whatever the number, a different baseline, a different goal, a different geographical area, and a different underlying population or applicant pool could easily have been selected. All this suggests rigidity and arbitrariness.

Alternatively, if the plan fails to specify a numerical goal, an unsympathetic court can strike down the affirmative action program on similar grounds. The absence of a specified numerical goal suggests arbitrariness, subjectivity, open-endedness in scope and duration, unbounded discretion, and lack of definition. Of course, this example shows not the arbitrariness of the program itself, but rather the availability of the narrow tailoring inquiry to condemn any affirmative action program on equal, opposite, and contradictory grounds.

The argument may be taken a step further. The recent *Hopwood v. Texas*[101] case illustrates how a court can declare any particular affirmative action numerical goal either too high or too low to be considered narrowly tailored to the governmental interest in remedying past state discrimination. The fact that the law school's admissions goal for Mexican Americans was twice that for African Americans troubled the *Hopwood* court, given that the court had found a documented history of state discrimination against the latter, but not against the former.[102] How, then, could it be said that the Texas program was narrowly tailored to remedy past state discrimination?[103]

If a court is so inclined, this presents an unwinnable shell game. If the remedial goal for African Americans is set above any given

100. *See id.* (Sloviter, C.J., dissenting). Chief Judge Sloviter took the absence of any specified numerical target as evidence of the plan's lack of rigidity. *See id.* (Sloviter, C.J., dissenting).

101. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

102. *See id.* at 955 n.50.

103. *See id.* In contrast, a court disposed toward affirmative action could find virtually any actually enacted program to be narrowly tailored as promoting some simple or complex function of partially conflicting long term government interests. *See* Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996).

point, it becomes easier for a court to point to any disparity in paper credentials between the marginal African American admittee and the marginal rejected White or Mexican American, and find disproportion, severity of impact, and lack of narrow tailoring. On the other hand, if the remedial goal for African Americans is set below any given point, the court can still find lack of narrow tailoring. The lower figure indicates a different kind of disproportion. The small number of African American admittees compared to Mexican American and White admittees indicates the state's lack of seriousness with respect to its purported remedial goals. Suppose the state at this point suggests that historic discrimination, at every level and in various forms, has artificially suppressed the percentages of African Americans with the required paper academic credentials and career goals. The court may then simply readdress the question of whether the numerical goals for African Americans are too high under the unfortunate historical circumstances, and thus not narrowly tailored.

Affirmative action programs based on the minority-role-model theory are vulnerable to a similar fate. A court seeking to reject the programs can simply count the role models and find a lack of narrow tailoring. The court may deem one or a few minority role models insufficient to have a demonstrable impact; their presence is thus not narrowly tailored to promote the purposes envisioned by role model theory. However, as the number of minority role models increases, the lack of narrow tailoring may inhere in the apparent open-endedness or unlimitedness of the program in scope and over time.[104] Why is not even one relevant role model sufficient?

By re-characterizing and selectively ignoring or emphasizing the interests and burdens to be weighed, affirmative action programs can be upheld or condemned on narrow tailoring grounds that appear neutral, essentially descriptive, or measurement-based. The judicial system purchases legitimacy to the degree that anyone supposes, because of the narrow tailoring metaphor, that the legal judgment really reflects an empirical measuring process, as opposed to whatever normative predispositions and interests the court may harbor.

C. Ashwander *Narrowness*

Narrowness is the focus of Justice Louis Brandeis' renowned contribution to judicial theory in *Ashwander v. Tennessee Valley*

104. *See Wittmer*, 87 F.3d at 919-20.

Authority.[105] Generally, Brandeis states that a court should avoid constitutional decisions where possible by deciding the case on narrower, nonconstitutional grounds. If a decision on constitutional grounds is unavoidable, the decision should be made on the narrowest constitutional grounds available.[106] In particular, Justice Brandeis urged that a court "not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"[107]

While one could respond to Justice Brandeis' principles in any number of ways,[108] it suffices to state for the purposes of this discussion that narrowness is not as unequivocal as the Brandeis formulae suggest. In some sense, a case decided on the basis of an interpretation of an administrative regulation is narrower than deciding the case on statutory grounds. Similarly, a decision on statutory interpretation grounds is narrower than a decision on a constitutional issue. But there is more to narrowness than this presumed coherent hierarchy of levels of the law—a hierarchy that upon closer examination makes less logical sense than we typically imagine.[109]

Again, narrowness in this context is not merely a matter of presumed levels in a legal hierarchy. Instead, there is also a sense of narrowness that avoids delicate, divisive, or important issues and that avoids intrusive decisions on controversial grounds. For example, Justice Frankfurter indicated that under the *Ashwander* principle, "clashes between different branches of the government should be avoided if a legal ground of less explosive potentialities is properly available. Constitutional adjudications are apt by exposing differences to exacerbate them."[110]

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105. 297 U.S. 288, 341-49 (1936) (Brandeis, J., concurring).

106. *See id.*; Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 72 (1995).

107. *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (citation omitted).

108. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003 (1994); Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 GA. L. REV. 85, 94-111 (1995); Schauer, *supra* note 106. Particularly relevant is Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 5, 7 (1996) (noting the manipulability of the constitutional avoidability doctrine in free speech cases).

109. For some doubts about the hierarchalism of levels of the law, see R. George Wright, *Two Models of Constitutional Adjudication*, 40 AM. U. L. REV. 1357 (1990).

110. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

Nonetheless, the difference between narrower as hierarchically lower and narrower as less controversial or less divisive often passes unnoticed, as a constitutional ruling will typically raise more hackles than a decision on nonconstitutional grounds. Too, there may often exist a fairly good consensus as to whether one possible constitutional ruling is somehow narrower than another constitutional ruling[111]—but not always. Narrowness in the *Ashwander* sense cannot simply be read off of the circumstances of a problem of judicial choice.

For example, which is narrower: deciding a case on the constitutional grounds of mootness or on the basis of a statutory interpretation that will either broadly vitalize or undercut a sweeping, hard-won civil rights statute? Are some cases decided on the grounds of lack of constitutional standing less controversial, and others more controversial, than a decision on the statutory merits? Statutes may be easy or difficult to revise legislatively, just as constitutional mootness and standing problems may be easy, or quite difficult, to overcome. Deciding a case by finally disposing of a moribund, long obsolete, outlying constitutional doctrine may actually be relatively narrow. But such a decision requires a judgment, perhaps in itself controversial, that the constitutional doctrine to be pruned really is moribund. What is moribund to one judge may be unappreciated but sound and enduring to another.

Consider an increasingly important type of problem in which the court must decide whether one constitutional approach is narrower or less intrusive than another. Suppose a court wishes to strike down a state law that is thought to be justified by direct reference to a traditional moral precept. Assume, plausibly, that nonconstitutional means of doing so are unavailable. The court presumably wishes, under *Ashwander*, to rely on the narrowest constitutional grounds. In such cases two obvious possibilities will exist under the equal protection clause. The court may strike down the state law under either minimum scrutiny[112] or under strict scrutiny.[113] But typically, a good case can be made that either approach is narrower than the other.

Striking down the restriction on minimum scrutiny grounds

111. *See, e.g.*, Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996) (applying minimum scrutiny to restrictions burdening the mentally retarded as narrower than applying minimum scrutiny to all nonracial categories).

112. *See, e.g.*, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 601 n.5 (5th ed. 1995) (citing Pennell v. City of San Jose, 485 U.S. 1 (1988)).

113. *See, e.g., id.*, at 601-04 (citing Shapiro v. Thompson, 394 U.S. 618 (1969)).

could well involve a judicial pronouncement that the state law serves no purpose at all, or that the law serves only shameful, invidious, irrational, or illegitimate purposes.[114] The most obvious alternative, the use of strict scrutiny, would involve a judicial determination that the classification at stake is of special constitutional significance, such that the state must show both an overridingly important public interest and that no less restrictive state law could similarly promote that interest.[115]

Which of these approaches is narrower or less intrusive, however, reduces largely to contestable judgments in particular circumstances. Ordinarily, recognizing a new fundamental right or a new suspect classification would represent the very opposite of narrowness. But is it narrower or less intrusive for the courts to tell the states, however correctly, that only embarrassing purposes underlie a range of state statutes? Which approach is "really" narrower?

D. The Supposed Narrowest Grounds in Plural Opinion Cases

Courts are often called upon to take account of prior appellate cases in which no single holding attracted a majority of the judges. In such cases, must the later court give no special weight at all to the earlier case on the grounds that no majority agreed on any common rationale? The Supreme Court has attempted to resolve this problem in, among other cases, *Marks v. United States*.[116] The Court in *Marks* determined that "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"[117]

Unfortunately, it will often not be clear what "narrowest" means in this context, and this ambiguity opens the door to judicial arbitrariness and manipulation. In locating the narrowest rationale, one must seek something like the most fact-specific, the least controversial, the least ambitious, the least sweeping, or the least general rule;[118] a "least common denominator;"[119] or an opinion most likely to

114. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).
115. *See Shapiro*, 394 U.S. at 637-38.
116. 430 U.S. 188, 193-94 (1977).
117. *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)).
118. *See* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763-64 (1990); Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court*

attract future majority support.[120] But these inquiries are not all the same. They may produce different outcomes. Can it really be said that the most fact-specific opinion is invariably the opinion that a future majority will most likely embrace? Further, none of these criteria is by itself particularly clear and unequivocal.

Suppose one wants to decide how fact-specific an opinion is. Is fact-specificity a matter of the number of plaintiffs affected? The number of defendants affected? Does this number include actual plaintiffs and defendants, or the total number of persons potentially affected? Over what time frame? What if a rule affects fewer people, or fewer cases, but also affects persons in more important ways? Severity of impact should matter—after all, fact-specificity is thought to be partly a matter of relative uncontroversiality.[121] And why should narrowness not also reflect the number of statutes or rules affected?[122] But then, what if an opinion upholds, or strikes down, only a few rules, but those rules were either popular or especially important? This leaves the question: which is narrower, striking down five moribund, trivial rules on statutory grounds or striking down three vital, broad rules on constitutional grounds?

The assumption seems to be that, at least in some cases, the various judicial opinions will nest logically. In such cases, presumably logic will compel a judge who naturally endorses an extreme or broadly sweeping opinion to adopt a milder, narrower, less ambitious holding.[123] Surely, a judge who believes that a certain quantity is less than half a dozen is implicitly committed to the view that the same quantity is less than two dozen.

But how far can this "logical nesting" model really be applied? Suppose a bloc of centrist judges endorses a holding that a defendant should not be convicted of possessing obscene materials if the Oracle at Delphi advises against conviction. In the immediate case, the Oracle has so advised, and the centrist bloc has joined a bloc of First Amendment near absolutists to form a majority for overturning the defendant's conviction. Can oracle consultation then be taken as the

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Plurality Decisions, 42 DUKE L.J. 419, 420-21 (1992).

119. *See* Thurmon, *supra* note 118, at 428.

120. *See id.* at 435.

121. *See id.* at 420-21.

122. *See id.*

123. *See* Ken Kimura, Note, *A Legitimacy Model For the Interpretation of Plurality Decisions*, 77 CORNELL L. REV. 1593, 1603 (1992) (On the "narrowest grounds" model, "[t]he Justices supporting the broader legal rule must necessarily recognize the validity of the narrower legal rule."). The author then critiques this model. *See id.* at 1603-04.

holding of the case? Are the First Amendment near absolutists implicitly committed to it as a narrower- or lesser-included inference from their own broader, more extreme approach?[124]

Not really. A First Amendment near absolutist could quite consistently prefer convicting some defendants to adopting a rule that frees them but only because the Oracle commands it so. A First Amendment near absolutist might find all obscenity convictions degrading, but find even more degrading an acquittal based on abandoning the familiar rule of law in favor of reliance on the Oracle. Or imagine, however implausibly, that a centrist bloc were willing to acquit obscenity defendants on the basis of race. Would it be logical to inflate the legal status of such a view artificially by adding in the votes of First Amendment near absolutists?

Thus far, this discussion has ignored the common requirement that the search for narrowest grounds consider only the opinions of those judges concurring in the judgment.[125] Of course, dissenters typically do not provide a binding rule of law. But in some cases, it would be a mistake to ignore the logic of dissenting opinions in predicting what the court will do in future cases. Suppose a dissenting justice closely tracked the plurality opinion's reasoning but dissented on narrow, unrepeatable, merely procedural, or sheerly idiosyncratic grounds. Realistically, a plurality and a bloc of entirely sympathetic judges who, for instance, dissented solely because the appellant failed to raise a contemporaneous objection at trial or missed the statute of limitations, may comprise the majority.

A deeper complication lies in the reality that sometimes broad rules are more genuinely convincing than related narrower rules by themselves. For example, a reasonable judge could believe in the equal treatment of all persons, while finding no really convincing narrower way to approach the question of whether some particular group of persons, on its own distinctive merits, deserves equal

124. *Compare* King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) ("Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices . . . .") *with* Thurmon, *supra* note 118, at 432, 433 ("Justices Black and Douglas [] would never have accepted the plurality's three-part obscenity test, or any other obscenity test for that matter"). The *King* court itself recognized that not all loosely narrower grounds are proper subsets of all broader grounds. *See King*, 950 F.2d at 781-82.

125. *See Marks*, 430 U.S. at 193; Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 133-34 (6th Cir. 1994).

treatment. Under such a view, there would be no genuinely convincing narrow, independent, and fact-specific reasons why Latvians should receive equal treatment; the broad theory of human equality does all the real work.[126] This complication, though, is in a sense too broad. Its real import calls into question the judicial desire to search for the narrowest grounds of a result.

E. Narrowness and Overbreadth

Concerned that unduly broad restrictions may discourage legitimate, constitutionally protected speech along with constitutionally prohibitable speech, courts have developed the doctrine of overbreadth.[127] Defendants whose speech or symbolic conduct could have been prohibited by a narrower, constitutionally permissible restriction may be allowed to challenge a speech restriction as overbroad for the sake of other, more constitutionally deserving speakers.[128] In light of the countervailing government interests, though, the courts will invoke the overbreadth doctrine in favor of the defendant speaker only where the speech restriction's overbreadth is substantial.[129] The substantiality of the overbreadth must be "judged in relation to the statute's plainly legitimate sweep."[130]

Whether a speech restriction is substantially overbroad thus relates to the breadth of its proper and legitimate application. Unfortunately, courts again emphasize measurement, number, and quantity in deciding whether the overbreadth is substantial. Courts ask whether legitimate speech will be "repeatedly"[131] chilled, whether "many individuals"[132] will be affected, and consider the "number of instances"[133] of protected activity—if not the number of speakers or

126. Professor Cass Sunstein has argued for narrow or minimalist reasoning in many contexts by judges but without denying this point. Indeed, it would be self-contradictory to argue the broad claim that one is never better off endorsing broad claims. *See* Sunstein, *supra* note 111, at 15-20.

127. *See* Gooding v. Wilson, 405 U.S. 518, 521 (1972).

128. *See id.* at 521; New York v. Ferber, 458 U.S. 747, 768-69 (1982).

129. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *Ferber*, 458 U.S. at 770-72.

130. *Broadrick*, 413 U.S. at 615.

131. *Ferber*, 458 U.S. at 772.

132. *Id.*

133. Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1065 (1983); *see* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 863 (1991).

listeners—affected, along with whether "the majority of cases"[134] that a statute affects involve constitutionally prohibitable conduct, or whether the overbroad scope of the restriction amounts to only "a tiny fraction."[135]

Despite the pretense of measurement, the overbreadth doctrine invites important normative and potentially controversial judgments at every turn. Two possible speech restrictions may affect the same number of potential speakers without also affecting an equal number of listeners, or an equal number of instances of either actual speech, potential speech, or criminally prosecuted speech. One speaker—a high volume pornographer, perhaps—may speak much more frequently than another speaker. Surely one would want to consider the severity of the speech restriction on the affected parties or at least on their speech. Does the variety of ideas affected matter? How does one compare the severity of impact on a professional pornographer with the impact on a political speaker caught up in an overbroad statute? Can a court consider either the importance or the categorical "value"[136] of the speech affected or, alternatively, the presumed social value of the restriction?

Some of these considerations surely are relevant to whether the overbreadth of a speech restriction is substantial.[137] Yet these considerations will typically be evaluative and contestable. Though courts may claim to measure overbreadth in fractions, they are in fact deciding overbreadth issues either carelessly or through potentially debatable value assessments. To pretend that the overbreadth doctrine depends crucially on the use of a tape measure is to purchase judicial legitimacy illicitly. If mystification[138] buys legitimacy by pretending that adjudication is a complex process that only the initiated can grasp, buying legitimacy by pretending that plain measuring is actually determining the judicial outcomes is the converse technique.

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134. Redish, *supra* note 133, at 1064.

135. Osborne v. Ohio, 495 U.S. 103, 114 n.11 (1990).

136. For discussion of the idea of differences in categorical value of different kinds of speech, see Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547 (1989), Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1994), and Cass R. Sunstein, *Low Value Speech Revisited*, 83 NW. U. L. REV. 555 (1989).

137. *See* Richard H. Fallon, Jr., *supra* note 133, at 894 ("[T]he question of when overbreadth is intolerably substantial has an irreducible component of policy.").

138. For some discussion of mystification and legal authority, see William McBride, *The Fetishism of Illegality and the Mystifications of "Authority" and "Legitimacy,"* 18 GA. L. REV. 863, 875 (1984).

F. Narrowness and Breadth in the Delegation Doctrine

The delegation doctrine requires that the legislative branch not surrender its authority, however willingly, to the executive branch or to private parties.[139] But because every statutory enactment confers enforcement discretion, it might seem that the delegation doctrine should rule out excessively broad delegations of legislative authority while permitting narrower delegations.[140] Typically, modern courts require only an "intelligible principle"[141] derived from one or more of any number of possible sources[142] to guide an administrative agency's discretion.

Interestingly, in delegation doctrine cases, the courts and commentators do not typically claim that the literal narrowness or breadth of the delegation is decisive.[143] Instead, the courts look more directly to the fundamentality or importance,[144] or to the "significance,"[145] of the powers delegated. But this is curious. Why, in the particular context of the delegation doctrine, do the courts admit that measurements and counting neither explain nor justify their results?

The main answer seems clear. The need to engage in the "reverse mystification" of claiming that the courts are only uncontroversially measuring is greatest when the courts wish to exercise discretion in different directions as the cases appear to them. Courts in general might want to preserve their option of finding a speech restriction or an affirmative action program narrowly tailored or not. At the federal level, however, the courts have for decades shown little interest in resuscitating the delegation doctrine.[146] In the modern

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139. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

140. *See* Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 744-46 (D.D.C. 1971).

141. *Id.* at 746 (quoting Hampton v. United States, 276 U.S. 394, 409 (1928)). The intelligible principle requirement is discussed in *Yakus v. United States*, 321 U.S. 414, 426 (1944) and in Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 569 (1947).

142. *See Amalgamated Meat Cutters*, 337 F. Supp. at 748.

143. *See, e.g., id.* at 745-46.

144. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 161 (Yale Univ. Press, 2d ed. 1986) (1962); Paul Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46, 62 (1976).

145. Gewirtz, *supra* note 144, at 66-67.

146. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 2.7, at 56 (3d ed. 1991). For a more mixed picture, see David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1233 (1985).

regulatory state, broad delegation of authority strikes most federal judges as desirable, if not necessary. The courts need not, therefore, preserve their room to maneuver. The courts need only a test which will ultimately permit delegation. An intelligible guiding principle from one source or another[147]—and a general supporting public belief in the legitimacy of the modern administrative state which need not be induced through the judiciary—would suffice.

G. Narrowness and Breadth and the Canons of Statutory Interpretation

Narrowness and breadth seem to lie at the heart of typical formulations of many traditional and modern canons of statutory interpretation, as in the maxims that remedial statutes are to be interpreted broadly[148] or that criminal statutes are to be interpreted narrowly.[149] Any number of such canons rely on ideas of narrowness and breadth, and in fact such canons extend far beyond the interpretation of statutes.[150] It has been famously concluded that the actual usefulness of the canons is limited, because on any given occasion a judge may simply find no need for referring to the canons[151] or may

147. *See* SCHWARTZ, *supra* note 146, § 2.8 at 57 (citing Mistretta v. United States, 488 U.S. 361 (1989)).

148. *See* SINGER, *supra* note 43, § 58.04; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983).

149. *See* SINGER, *supra* note 43, § 58.04, at 79; Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 345; Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OX. J. LEGAL STUD. 215, 256 (1987); Posner, *supra* note 148, at 805.

150. For example, insurance coverage provisions are construed broadly, while insurance exclusions are construed narrowly. *See* Francis J. Mootz, *Principles of Insurance Coverage: A Guide for the Employment Lawyer*, 18 W. NEW ENG. L. REV. 5, 27-28 (1996). For a compressed collection of many of the statutory canons, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 506-08 (1989).

151. In *Reves v. Ernst & Young*, the Court interpreted the scope of civil RICO liability. The Court could presumably have drawn upon broadening canons, in light of the statute's remedial purposes, quite apart from the express instructions of Congress to do so. *See* 507 U.S. 170 (1993); *see also* Pub. L. No. 91-452, § 904, 84 Stat. 947, 947-48 (requiring that the statute "be liberally construed to effectuate its remedial purposes"). The Court could instead have deployed narrowing canons, including those favoring individual freedom of action. *See* SINGER, *supra* note 43, § 58.04. Either option would have been open, especially in light of the ambiguities inherent in "an express narrow purpose implemented through expansive statutory language." William V. Dalferes Jr., Reves v. Ernst & Young: *A Blueprint to Limit Civil RICO's Reach*, THE BRIEF, Winter 1995, at 10, 11. Instead, the Court chose neither option, concluding that no recourse to competing

arbitrarily deploy one canon of a matched pair of mutually opposing canons.[152] Moreover, any individual canon can be critiqued on its own merits.[153]

Consider, for example, that most if not all criminal statutes appear as attempts to remedy a public harm. This would suggest the possibility of interpreting a criminal statute broadly in some contexts. Suppose there exists an old criminal statute that prohibits ordinary persons from "laying hands upon" a woman.[154] But the defendant has instead attacked a woman with a weapon, either at a distance or directly. If no other redress is available, how should courts interpret the statute? The impulse to construe the criminal statute narrowly[155] is in this case absent. Instead, a broad construction of the statute is preferable to effectuate its obvious purposes. A narrow reading would trivialize the statute.

However, the point is not that the canons mutually annihilate, or that they are wrong on the merits, but that any reliance on the ideas of narrowness and breadth allows the individual canons to fall into an indeterminacy resolved typically by a court's undefended and even unexpressed normative preferences. This remains obscure only because the concepts of narrowness and breadth often do no real work when the canons formally referring to them are applied. For example, the canon construing a criminal statute narrowly in favor of the defendant may not really depend on the idea of narrowness.[156] What changes if the word "narrowly" is removed from the preceding sentence? In many criminal cases, the judge may simply mean to construe the statute in the defendant's favor. The idea of narrowness may add nothing to the disposition to favor the defendant.

Suppose that an oral proclamation has criminalized the possession of small amounts of mercury but remained ambiguous about whether the government meant to criminalize only holding rocks

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canons was necessary in light of the clarity of the statute "from its language and legislative history." *Reves*, 507 U.S. at 184 n.8. The clarity of the statute, and the superfluousness of any recourse to the canons, was less apparent to Justices Souter and White. *See id.* at 187 (Souter, J., dissenting).

152. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS app. C at 521-35 (1960); Posner, *supra* note 148, at 806.

153. *See* Posner, *supra* note 148, at 806.

154. This statute is loosely suggested by HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1170 (1958) (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

155. *See id.* at 492, 1198.

156. *See* sources cited *supra* note 53 and accompanying text.

from the innermost planet, or instead the chemical element mercury, as commonly found in batteries and thermometers. The first criminal prosecution turns out, remarkably enough, to involve someone caught with soil samples from the planet Mercury. The judge then construes the oral proclamation in the defendant's favor, ordering that the prosecution be dismissed. But this may assume that the government intended one and only one of the two possible references to mercury. One possible reference—to samples of the planet—strikes us as narrow compared to the other possible reference, to the more common chemical element. If the judge concludes that the latter reference was intended, the current defendant's interests have been served but at the cost of tending to establish a broader, rather than a narrower, scope of the prohibition at the expense of future defendants. Future defendants caught with batteries may in turn find a sympathetic judge, but the judge of the first defendant has still opted to assist only that particular defendant by choosing the broader interpretation of the prohibition.

At least in some cases, though, the ideas of narrowness and breadth may perform some real work in applying canons of statutory construction. Even the fanciful example above hints at this possibility. A court may wish less to protect the particular current criminal defendant, than to establish a rule in interpreting an ambiguous statute that protects the greatest number of future defendants, given the rule in the current case as a precedent. A rule that protects the current defendant may well conflict with a rule that protects the most defendants over time. But can it be said that the narrowest rule will protect the most defendants? Should a judge not also consider the possibility that not all interpretations of a statute would inspire equal enforcement? A rule barring Mercury soil samples may affect fewer persons than a rule barring the element mercury, but the latter prohibition might well remain unenforced in practice. The two possible rules may not be equally avoidable by ordinary citizens. Determinations of narrowness and breadth thus require contestable predictive judgments and potentially dubious moral and other evaluative judgments as well. The idea of merely measuring narrowness and breadth obscures all of these possible judgments.

H. A Final Word on the Breadth of Case Holdings

Observers of the judicial system often worry about the proper narrowness or breadth of case holdings. Commentators may urge, for example, something like a rebuttable presumption in favor of

avoiding broad case holdings.[157] Such discussions can shed light on the metaphor of narrowness and breadth. Just as natural space and time can for some purposes be thought of as interwoven,[158] so the metaphorical spatial breadth or narrowness of a case holding can be thought of as shifting judicial power into the future or towards the present.[159]

But given the nature of judicial culture, the narrowness and breadth of case holdings should be expected largely to regulate itself. This should reflect individual judicial self-interest and concerns for judicial legitimacy. Consider, for example, that a narrow holding in a case where the judge does not feel strongly requires the judge to pay only a very limited price. A broader holding might minimally increase the judge's fame and influence, but to no crucial purpose. On the other hand, a broad holding would increase the odds of an embarrassing reversal or of criticism of one's work.

Of course, the judicial culture will expect and encourage broad holdings in some cases. Issues of what the judicial culture views as fundamental human rights constitute one class of examples. Surely, for example, the Court in *Loving v. Virginia*[160] could have struck down Virginia's anti-miscegenation statute on the narrower grounds that it criminalized only racial intermarriages involving a Caucasian.[161] But this narrow holding would itself have been a moral outrage. Crucial intuitions are really not so much at the narrow level of whether a member of a specific racial group should be allowed to marry a member of another specific racial group or at the level of whether a particular anti-miscegenation statute affords one racial group a relatively better deal than another. These issues seem at most secondary. Crucial intuitions really dwell at a broader, more

157. *See* Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 178 (1930); Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 555 (1996) ("[D]eciding cases according to broad rules necessarily involves deciding cases prematurely . . . ."); Sunstein, *supra* note 111, at 4, 6.

158. *See* ALBERT EINSTEIN, THE MEANING OF RELATIVITY 30-31 (Edwin Plimpton Adams trans., 4th ed. 1953) (1922). More dramatically, there may be exotic circumstances under which time assumes some attributes akin to those of space. *See* C. J. Isham, *Quantum Theories of the Creation of the Universe*, *in* QUANTUM COSMOLOGY AND THE LAWS OF NATURE: SCIENTIFIC PERSPECTIVES ON DIVINE ACTION 49, 73 (Robert J. Russell et al. eds., 1993); *see also* STEPHEN HAWKING, A BRIEF HISTORY OF TIME 33 (1992).

159. *See* Schauer, *supra* note 157, at 555.

160. 388 U.S. 1 (1967).

161. *See id.* at 11 (Stewart, J., concurring).

general level, and a broader judicial holding is correspondingly appropriate.[162]

Some judges may be tempted to issue resoundingly broad visionary pronouncements in accordance with their own idiosyncratic tastes. This may earn journalistic favor and attention. But the broader the holding, the redder the flag. Even if the judge assumes, perhaps mistakenly, that the broad precedent will not authorize what that judge would find personally distasteful in unforeseeable future circumstances,[163] the judge considering a broad holding has other concerns. Too broad a holding may be perceived as an invitation to be brought up short or criticized on appeal. And there is a real risk that a future judge who disagrees with a broad holding may not preserve the narrow, more defensible core of that prior holding, but may be provoked by the prior opinion's breadth to disagree with it broadly, or overrule it entirely.

Thus a judge who wishes simply to maximize his or her own personal influence on the law over time has incentives to write what will be perceived as narrow holdings, except in the rare cases in which the legal culture will be genuinely dissatisfied with a narrow holding. And despite the workings of the judicial legitimization process, there will also be a few cases in which a broad holding that is acceptable to the judicial culture nonetheless strains credulity with much of the broader public.[164]

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162. *See id.* at 12-13 (Stewart, J., concurring); *cf.* Kloppenberg, *supra* note 108, at 55 (referring to some of the 1950s free speech cases, "[b]y 'tiptoeing' around speech incursions with the avoidance canon rather than directly condemning them, the Court impoverished us as a polity."). *But cf.* James A. Gardner, *The Ambiguity of Legal Dreams: A Communitarian Defense of Judicial Restraint*, 71 N.C. L. REV. 805 (1993) (arguing generally for the inclusive, non-alienating effects in many cases of avoiding judicial judgments repudiating the vision or values held by particular elements of a diverse society, but without criticizing the breadth of the holding in *Loving*).

163. *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736, 741-42 (1993).

164. While *Dred Scott* was neither uniformly celebrated by judges and commentators, nor uniformly reviled by the broader public, its adverse effect on system legitimacy seems clear. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The authors of a leading casebook note that "[i]t is generally acknowledged that *Dred Scott* is one of the great disasters in the history of the Supreme Court." GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 504 (3d ed. 1996). The casebook authors then suggest that the case could have been resolved on narrower jurisdictional grounds. *See id.* at 504-05.

V. CONCLUSION

A judicial system seeking to legitimize itself need not invariably mystify itself or imply that its work is more difficult and mysterious than it really is. The opposite technique, herein examined, is also available. Instead of seeking to discourage criticism of or resistance to the courts because lay people are allegedly incapable of following judicial reasoning, the courts may promote an opposite public belief. Under this approach, the courts should supposedly not be criticized or resisted because what they are crucially doing—merely counting or empirically measuring—is assumed to be too neutral, too repeatable, and too uncontroversial to attract reasonable objection.

In particular, judicial legitimacy can be constructed without referring to the major, contested battleground concepts of the day, such as liberty, equality, autonomy, and privacy. Indeed, judicial legitimacy is more difficult to build on such obviously contested territory. But judicial legitimacy can be built—however undeservedly or manipulatively—through careful, even unselfconscious use of the uncontroversial but vital notions of narrowness and breadth.