# Unwarranted Hierarchy: The Supreme Court's Failure to Explain the Differential Treatment of Rights in the Constitutional Fact Doctrine

STEPHEN A. SIMON, J.D., PH.D.*



* Associate Professor of Political Science, and Philosophy, Politics, Economics, and Law (PPEL), University of Richmond

## I. INTRODUCTION

Standards of review can dramatically impact case outcomes, as they govern the intensity with which appellate judges examine the record and reasoning underlying trial court findings. Appellate judges generally review issues of fact with great deference to the trial court's conclusions,[1] interfering only in cases of clear error.[2] By contrast, appellate courts review issues of law de novo, applying their own independent judgment without deference to the trial court,[3] unconstrained by the determinations below. Unlike de novo review, a deferential standard often requires judges to affirm holdings with which they disagree, so long as the trial court's conclusions crossed some minimal threshold of support in the record.

However, the United States Supreme Court developed the constitutional fact doctrine ("CFD") during the last century, and it represents a significant departure from the usual practice. Under that doctrine, appellate courts may exercise de novo review of factual issues when they are vital to the disposition of cases involving constitutional rights.[4] The doctrine is of particular interest because it implicates both the protection of constitutional rights and the allocation of power among different judicial decision makers.

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1. *See* J. Jonas Anderson, *Specialized Standards of Review*, 18 STAN. TECH. L. REV. 151, 152 (2014).

2. *E.g.*, Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563 (2014).

3. *E.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1988).

4. *E.g.*, Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 505 (1984) (holding that the Court must apply independent review in determining whether the evidence in a defamation case satisfies the "actual malice" standard established in N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)); Culombe v. Connecticut, 367 U.S. 568, 604 (1961) (exercising independent review in assessing the voluntariness of a confession under the Due Process Clause of the Fourteenth Amendment); Chambers v. Florida, 309 U.S. 227, 228–29 (1940) (same). Although the Supreme Court has not itself used the term "constitutional fact doctrine," it serves as a convenient shorthand for the practice. The origin of the term has been credited to a law review article by the scholar John Dickinson, published in the early 1930s. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 231 n.17 (1985) (noting Dickinson's article as the first use of the term); John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 UNIV. PA. L. REV. 1055, 1067–72 (1932).

Early cases establishing the doctrine often used sweeping language suggesting that it applied across the board in all constitutional rights cases.[5] Over time, however, the Court applied the doctrine unevenly to different rights, invoking it often in some kinds of constitutional rights cases but not at all in others.[6] Given the significant influence that standards of review can have on the outcome of cases, the practice of heightening review for a subset of constitutional rights claims requires an explanation of its underlying rationale and scope of application. Nevertheless, to a remarkable and troubling degree, the Justices have failed to articulate the reasoning behind the doctrine's operation.[7]

In itself, there is nothing exceptional about the Court showing greater solicitude for some classes of rights than others. Indeed, contemporary constitutional jurisprudence is deeply hierarchical, in the sense that a number of vital doctrines treat rights differentially based on the relative importance assigned to various categories of rights claims. Two of the most notable examples are (1) the multi-tiered framework of review—from rational basis review to strict scrutiny—for assigning substantive burdens of persuasion to different kinds of rights cases; and (2) the selective incorporation of Bill of Rights protections against the states.[8]

Examination of the Court's rights jurisprudence reveals a striking contrast between the CFD, on the one hand, and the strict scrutiny and incorporation jurisprudence, on the other, with respect to the Court's articulation of the reasons underlying hierarchical rights classifications. While the bodies of case law on strict scrutiny and incorporation, respectively, offer relatively detailed guidance regarding the methods of analysis underlying the Court's differential classifications,[9] the jurisprudence on the CFD evinces nothing close to the same degree of insights into the Justices' reasoning.[10]

To underscore the problematic nature of the Court's failure to justify the CFD, let us engage in a brief counterfactual thought experiment. Suppose that in early opinions developing the strict

5. *See infra* Part II.
6. *See infra* Part III.
7. *See infra* Part V.
8. *See infra* Part IV.
9. *See infra* Part IV.
10. *See infra* Part V.

scrutiny test, the Court indicated that it would apply strict scrutiny review in all constitutional rights cases. However, in this imagined scenario, let us further suppose that the Court began applying the strict scrutiny test selectively only in a subset of constitutional cases, while offering virtually no explanation of this differential treatment. Presumably, such a situation would have generated a great deal of controversy and many observers—quite rightly—would have deemed it intolerable. In reality, the CFD has attracted interest and criticism from scholars.[11] Nevertheless, it has not provoked the kind of Sturm und Drang one might expect to have arisen in the posited counterfactuals. As some recent commentators have observed, the CFD remains grossly underappreciated, failing to attract attention commensurate with its significance for constitutional law.[12]

Notwithstanding the disproportionately slight attention that the doctrine has generally occasioned, this Article contends that the CFD seriously undermines the integrity of rights adjudication by differentiating between types of rights claims with little or no explanation. Whether or not particular hierarchical approaches to constitutional adjudication are normatively appealing, at a minimum they should furnish justifications for their prioritization of some rights over others, thereby facilitating other legal actors to meaningfully engage with the judiciary on the subject. In fact, however, the CFD superimposes classifications on the Court's more broadly hierarchical approach to guaranteeing constitutional protections without adequately articulating the underlying support for these classifications. In sum, the Article shines a light on problematic features of the doctrine, which

11. *E.g.*, Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 229 (2015) (noting that the "Court has applied the doctrine intermittently, and . . . [the] precise demands of the doctrine are somewhat hazy"); Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 634 (2004) (observing that the doctrine "has been inconsistently invoked and applied by appellate courts" and that "the Supreme Court has been nothing if not schizophrenic in its application of the doctrine"); Randolph E. Paul, Dobson v. Commissioner*: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753, 824–31 (1944); Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 70–72 (1944).

12. Amanda Reid, *Fructifying the First Amendment: An Asymmetric Approach to Constitutional Fact Doctrine*, 11 FED. CTS. L. REV. 109, 116 (2019); Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 289 (2017).

the Court could rectify only by either jettisoning the doctrine completely or establishing it on a foundation adequately accounting for its authority.

Part I of this Article examines the CFD's roots, beginning with cases reviewing fact-finding by administrative agencies in the 1920s, and leading to its subsequent expansion to appeals from state and lower federal courts. Part II highlights grossly underdeveloped features of the Court's case law on the doctrine, particularly regarding its basis of authority and scope of applicability and its manner of distinguishing between issues of law and fact. Part III places the doctrine within the broader context of the Court's fundamentally hierarchical approach to rights adjudication. In particular, through a contrast with the Court's jurisprudence on strict scrutiny and selective incorporation, this Part critiques the dearth of explanations from the Justices regarding the basis and application of the CFD. Summarizing the Article's findings, the concluding section contends that if the doctrine is to be retained at all, it should be established on footing that justifies its existence and enables litigants to more meaningfully engage discourse over its principles and implementation.

## II. ROOTS AND EMERGENCE OF THE CONSTITUTIONAL FACT DOCTRINE

While theoretical debate over the relation between facts and law traces to ancient philosophers[13] and continues to provoke scholarly discourse,[14] the subject also has far-reaching implications for legal practice. Indeed, the distinction between facts and law has long played an important role in the contestation of legal disputes.[15] One of the

13. *E.g.*, PLATO, THE REPUBLIC OF PLATO bk. 1, at 336b–354c (Allan Bloom ed. & trans., Basic Books, 2d ed. 1991) (c. 375 B.C.E.); ARISTOTLE, THE NICOMACHEAN ETHICS bk. 5, at 92–94 (Joe Sachs ed. & trans., Focus Philosophical Library 2002) (c. 384 B.C.E.).

14. *E.g.*, David Enoch & Kevin Toh, *Legal as a Thick Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW 257 (Wil Waluchow & Stefan Sciaraffa eds., 2013); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. UNIV. L. REV. 1769 (2003); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

15. *E.g.*, Sioux City & Pac. R.R. v. Stout, 84 U.S. 657, 663–64 (1873); *see also* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 378–79 (1999); George C. Christie, *Judicial Review of Findings of Fact*,

most significant ways that the distinction impacts litigation concerns the standards of review that appellate courts exercise when they decide whether to adopt or reject the findings of trial courts.[16] As has been noted, the CFD departs from the usual rule that appellate review is highly deferential to the trial court's factual findings but not deferential at all to its statements about the content of the law. Under the doctrine, appellate courts exercise de novo review even with respect to certain factual issues in cases where constitutional rights are at stake.

### *A. Origins Within the Jurisdictional Fact Doctrine*

Broadly speaking, the practice of courts subjecting certain issues of fact to a heightened form of review dates at least to the seventeenth century in English common law.[17] Rooted in concerns about containing the reach of royal authority, judges reviewed executive actions to assess whether they rested on a proper jurisdictional basis.[18] Centuries later, in the 1920s, the United States Supreme Court introduced a practice in the context of reviewing actions by administrative agencies that shared conceptual similarities with the earlier English practice. The prevailing American rule at the time was that appellate courts reviewing agency actions accepted the fact-finding determinations made by administrative bodies. However, under the emerging practice—often referred to as the "jurisdictional fact doctrine"[19]—courts hearing appeals from administrative proceedings would conduct de novo review of agency findings relating

87 NW. UNIV. L. REV. 14, 15 (1992); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1867 (1966).

16. Standards of review are not the only aspect of litigation influenced by the distinction between law and fact. For example, the distinction also plays a major role in determining whether particular trial issues are to be decided by juries or judges. *See, e.g.*, Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1125 (2003); William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 WISC. L. REV. 931, 932–33 (2001).

17. Harrington, *supra* note 15, at 378.

18. *Id.*

19. *See, e.g.*, *Labor Law—National Labor Relations Act—Board Order Against Dissolved Subsidiary Held Unenforceable Against Parent Corporation for Lack of Jurisdiction*, 54 HARV. L. REV. 342, 343–44 (1940).

to facts that were critical to the question of whether the agency had jurisdiction over the contested matter in the first place.[20]

One of the earliest cases establishing the doctrine arose from a water company's lawsuit objecting to allegedly confiscatory rates set by the Pennsylvania Public Service Commission.[21] After a lower state court overturned the agency's actions, the Supreme Court of Pennsylvania reversed, chiding the lower court for having substituted its own judgment for that of the agency. According to the state Supreme Court, when hearing challenges to agency determinations, appellate courts should apply a deferential standard, inquiring only whether the agency's conclusions amounted to an abuse of discretion. In its landmark decision overturning the state court ruling, *Ohio Valley Water Co. v. Ben Avon Borough*,[22] the U.S. Supreme Court insisted that the application of an abuse-of-discretion standard of review was unacceptable given the nature of the case. Since the lawsuit involved a constitutional claim—that the agency confiscated the water company's property without compensation—the plaintiff was entitled to an "independent judgment" from a court "as to both law and facts."[23] Under the Fourteenth Amendment, excessive deference to the administrative agency violated the plaintiff's right to due process of law by depriving it of a "proper opportunity for an adequate judicial hearing as to confiscation."[24]

Two years later, the Court reached a similar conclusion in the context of a federal habeas proceeding. In *Ng Fung Ho v. White*,[25] foreign-born children of American citizens challenged their deportation in administrative proceedings on the grounds that they, like

20. Although the Court itself has not used the terms "jurisdictional fact doctrine" or "constitutional fact doctrine," both have been used by observers in referring to the general practice discussed here. Since the terms have often been used without clarity regarding the distinction between them, for convenience this Article will use "jurisdictional fact doctrine" exclusively in discussing the administrative context. By contrast, the term "constitutional fact doctrine" will be reserved for the practice that is the principal subject of this article, which pertains specifically to standards of review employed when appellate courts hear challenges to state and lower federal court findings.

21. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

22. *Id.* at 289.

23. *Id.* at 289.

24. *Id.* at 291.

25. 259 U.S. 276 (1922).

their parents, qualified as citizens. As in *Ben Avon*, the Justices focused on the degree of deference that the judiciary owed to agency fact-finding. In light of the constitutional rights at issue and the gravity of the personal stakes for the litigants—the case implicated not only their property, but "all that makes life worth living"[26]—the Court held that U.S. residents were entitled to a judicial hearing on questions bearing on their possible deportation.[27] Even an ostensibly fair hearing before the administrative agency would not suffice. At its core, the case concerned the allocation of decision-making authority between the branches of government because the executive's power of deportation hinged on the "essential jurisdictional fact" of whether those challenging deportation were citizens.[28] In the Court's view, agency proceedings in themselves simply could not provide the same "security" for the litigants as did judicial review.[29]

The Court offered its clearest articulation of the jurisdictional fact doctrine a decade later in *Crowell v. Benson*.[30] The pivotal factual issue in *Crowell* concerned whether an individual seeking to recover workmen's compensation under a federal act was acting within the scope of employment at the time of his injury. Although the worker prevailed in the agency proceedings, the federal district court reversed after conducting a de novo hearing on the issue. The Court gave its blessing to the district court's exercise of independent judgment, explaining that de novo review of agency findings was proper with respect to factual issues that were "fundamental or 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme."[31] The Court reasoned that the status of the employee relationship was "indispensable to the application of the statute" because Congress's constitutional authority to legislate on the subject depended on it.[32]

While *Crowell* remains one of the decisions most prominently associated with the jurisdictional fact doctrine, only four years later the

26. *Id.* at 285.
27. *Id.*
28. *Id.* at 284.
29. *Id.*
30. 285 U.S. 22, 54 (1932).
31. *Id.*
32. *Id.* at 55.

Court signaled its demise. Like the case that inaugurated the doctrine,[33] *Saint Joseph Stock Yards Co. v. United States*[34] involved an allegation that administratively established rates—maximum rates for stockyard services—confiscated property without compensation. However, in contrast with the earlier cases discussed, the Court here refused to engage in de novo review of the agency's fact-finding. Instead, the Court prescribed a highly deferential standard for reviewing administrative determinations. Appellate judges, the Court indicated, should apply "a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing."[35] Thus, review would be limited to ensuring that the agency provided a "fair hearing" and acted "upon evidence and not arbitrarily."[36]

Although the *Crowell* line of cases has never been overruled, *Saint Joseph Stock Yards Company* and later cases dealt it a blow from which it never recovered. Practitioners, scholars, and the Court itself have observed that the Court abandoned the jurisdictional fact doctrine.[37] In its place, the Justices adopted a general practice of reviewing agency fact-finding deferentially, aiming to guarantee only that its determinations were supported by evidence and did not clearly lead to rights violations.[38]

The jurisdictional fact doctrine focused specifically on the review of agency determinations by the federal judiciary. It was rooted in differences between the branches of government, as the judiciary was institutionally positioned to offer greater security in the protection of constitutional rights.[39] Given deficiencies built into the administrative context as a locus for hearing objections to government actions—such as the presentation of arguments before the very bodies responsible for the challenged actions—*Crowell* and like cases held

33. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

34. 298 U.S. 38 (1936).

35. *Id.* at 51.

36. *Id.*

37. *E.g.*, Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1245–46 (1996); Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 348 (1951).

38. *E.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–32 (1944); S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 260–61 (1940); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46–47 (1937).

39. Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922).

that due process of law[40] required de novo judicial review of agency actions when questions of constitutional authority and rights were at issue.[41]

### *B. Emergence of the Constitutional Fact Doctrine*

Around the same time as it launched the jurisdictional fact doctrine the Court also began establishing the practice that is the main subject of this Article: de novo review of facts found not by agencies, but by state and lower federal courts. Indeed, just a year after *Ben Avon*, the Court in *Truax v. Corrigan*[42] laid down core elements of what would be more fully developed during the 1930s and 1940s into the CFD.[43] In that case, restaurant owners alleged that a state law allowing picketing interfered with their property rights in violation of the Fourteenth Amendment's Due Process Clause. In reversing the state court's dismissal of the complaint, the Court identified two ways in which it would, in cases implicating constitutional rights, depart from the usual practice of according great deference to lower court fact-finding. First, in reviewing lower courts' determinations on factual issues generally, the Justices would "go behind the finding to see whether it is without substantial support."[44] Second, even less deference would be accorded to lower court fact-finding with respect to a particular class of factual issue: namely, "when the conclusion of law and findings of fact are so intermingled as to make it necessary, in

40. In federal cases, due process challenges are based in the Fifth Amendment, which applies directly only against the federal government, while in state cases they are based in the Fourteenth Amendment, which by its terms applies against the states.

41. Crowell v. Benson, 285 U.S. 22, 60–61 (1932). In addition to the due process line of argument, *Crowell* also found a constitutional basis for the de novo review requirement in separation of powers concerns embodied in Article III's assignment of judicial power to the courts, generally, and in the protection of constitutional rights in particular. *Id*. at 56. However, the reliance on Article III in this context was a rare exception, with the main run of cases resting this line of jurisprudence on the due process guarantee.

42. 257 U.S. 312 (1921).

43. As mentioned, for purposes of this Article, the term "jurisdictional fact doctrine" refers specifically to appellate review of agency findings, while the term "constitutional fact doctrine" refers to our main subject: appellate review of findings by state and lower federal courts. *Supra* note 20.

44. *Truax*, 257 U.S. at 324.

order to pass upon the question to analyze the facts."[45] With respect to such issues, the Court would be free to reason anew to its own conclusions; it would "analyze the facts as averred and draw its own inferences as to their ultimate effect."[46] This heightened standard of review was an "incident of [the Court's] power to determine whether a federal right has been wrongly denied."[47]

Six years later, the Court similarly applied heightened review of lower court fact-finding in a free-speech case. In *Fiske v. Kansas*,[48] a labor organizer challenged his conviction under the state's Criminal Syndicalism Act for alleged offenses in connection with his union advocacy. The Court reversed on Fourteenth Amendment grounds, finding that the conviction violated the defendant's due process right to liberty because the evidence failed to establish that he had advocated violence. Reaffirming the standards of review it adopted in *Truax v. Corrigan*, the Court stated:

> [T]his Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.[49]

The emergence of the CFD occurred during roughly the same period as the shift in emphasis from economic to non-economic rights. The difference in the rights at issue in *Truax* and *Fiske* foreshadowed the CFD's long-range trajectory in regards to the doctrinal areas in which it played the largest role. In this respect, the development of the CFD resonated with a broader shift around the same time regarding the types of rights held to have the highest priority. Prominent cases during the Court's infancy life like *Calder v. Bull*,[50] and *Fletcher v. Peck*,[51]

45. *Id.* at 325.
46. *Id.*
47. *Id.* at 324.
48. 274 U.S. 380 (1927).
49. *Id.* at 385–86.
50. 3 U.S. 386 (1798).
51. 10 U.S. 87 (1810).

signaled the Court's early emphasis on constitutional protections involving property rights. When the Court began entertaining challenges to state action under the Fourteenth Amendment's Due Process Clause in the late nineteenth century, it continued to predominantly focus on lawsuits alleging violations of rights that were economic in character.[52] However, by the late 1920s and 1930s, the Court was increasingly demonstrating interest in the protection of non-economic rights.[53] This intensified concern manifested through the gradual application of Bill of Rights provisions against the states, a process ultimately leading to the incorporation of almost all of the rights identified in the Constitution's first eight amendments.[54] It was around the same time—particularly in the middle to late 1930s—that the Court began indicating that it would no longer show the same solicitude for economic rights as it had up until that time.[55] The two developments were interconnected, as the Court would apply the CFD predominantly in cases involving non-economic rights, such as the Fourteenth Amendment's right to equal protection of the laws,[56] the right against self-incrimination,[57] and the freedom of the press.[58]

As the Court continued to review factual issues less deferentially across a variety of constitutional rights claims during the twentieth century, the Court did not consider the context of individual cases or particular doctrinal areas. For instance, the Justices frequently

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52. *E.g.*, Williams v. Standard Oil Co., 278 U.S. 235, 238 (1929) (addressing the constitutionality of a state statute regulating gasoline prices); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 510–11 (1924) (addressing the constitutionality of a state statute regulating the weight of bread offered for sale); Lochner v. New York, 198 U.S. 45, (1905) (analyzing the constitutionality of a state statute regulating work hours for bakery employees); Allgeyer v. Louisiana, 165 U.S. 578, 579–580 (1897) (addressing the constitutionality of a state statute regulating marine insurance companies).

53. *E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 300–301 (1940); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 342–343 (1938); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 701–04 (1931); Stromberg v. California, 283 U.S. 359, 360 (1931).

54. *See infra* Part IV.B.

55. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–400 (1937); Nebbia v. New York, 291 U.S. 502, 537–38 (1934).

56. *E.g.*, Pierre v. Louisiana, 306 U.S. 354, 358 (1939); Norris v. Alabama, 294 U.S. 587, 589–90 (1935).

57. *E.g.*, Chambers v. Florida, 309 U.S. 227, 228–29 (1940).

58. *E.g.*, Pennekamp v. Florida, 328 U.S. 331, 333–34 (1946).

cited precedents that involved different kinds of rights claims than the one in the case at bar.[59] Nevertheless, the Court's case law raised basic questions about the doctrine's contours that to this day it has yet to adequately address, subjects to which we turn in the next two Parts.

## III. BASIC FEATURES IN THE DOCTRINE'S OPERATION

A great deal of confusion surrounds the CFD because the Justices have failed to provide definitive, clear, or consistent answers to even basic questions regarding the doctrine.[60] This Part shines a light on significant gaps and inconsistencies in the CFD as the Court has articulated and applied it, particularly regarding the doctrine's basis of justification and scope of applicability and its manner of assigning a standard of review to mixed issues of fact and law. While this Part predominantly focuses on characterizing the Court's approach to basic questions regarding the CFD's applicability and operation, the next Part will turn specifically to critiquing deficiencies in the Justices' discourse on the doctrine.

### *A. The Doctrine's Basis of Justification and Scope of Applicability*

Because the CFD represents a substantial and impactful departure from the usual principles governing appellate standards of review, it raises a host of questions, none more pressing than its underlying basis. That is, what justifies the doctrine in the first place?

The Court's opinions addressing this question can be seen as falling broadly within either of two major approaches. One approach has spoken of the CFD as grounded in the Court's general role with respect to the protection of constitutional rights. This strand in the Court's cases was particularly pronounced during the first few decades

59. For example, in *Chambers*, a case alleging the improper use of a confession, the Court cited *Norris* and *Pierre* (both of which involved equal protection challenges to the composition of juries). *Chambers*, 309 U.S. at 229 n.4. In a similar vein, in *Craig v. Harney*, a case centered on claims based in the freedom of speech, the Court cited not only *Chambers*, *Norris*, and *Pierre*, but also *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), another case challenging the prosecution's alleged improper use of a confession. Craig v. Harney, 331 U.S. 367, 373–74 (1947).

60. A number of commentators have criticized the Court's lack of clarity in discussing the doctrine. *E.g.*, Redish & Gohl, *supra* note 12, at 307; J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 486 (1985).

of the doctrine's development. For example, in a case involving the defendant's allegation that his conviction rested on an improperly obtained confession, the Court observed that failure to exercise independent review of the record would overlook its "ultimate authority to redress a violation of constitutional rights."[61] In justifying the CFD, the Court has used language emphasizing not only its power, but also its responsibility to safeguard constitutional rights. In this vein, the Court stated in *Smith v. Texas*—an equal protection case reversing a conviction on the grounds that the prosecution had illegitimately excluded blacks from the grand jury—that the presence of constitutional rights claims invoked the Court's "responsibility to appraise the evidence."[62] Reinforcing the point, a decision two decades later—reversing a conviction because the prosecution failed to correct incriminating testimony known to be false—rested the CFD on the Court's "solemn responsibility for maintaining the Constitution inviolate."[63] Similarly, to explain why they were bound to examine the relevant evidence for themselves in a case reversing the conviction of a journalist held in contempt for criticizing a judge, the Justices appealed both to their responsibility and "final authority to determine the meaning and application" of constitutional rights provisions.[64]

Other cases explicitly linked the Court's Article III prerogatives with heightened standards of review. One decision stated, for example, that "[n]o more restricted scope of review would suffice adequately to protect federal constitutional rights."[65] In another opinion applying the CFD, the Court observed that the Court "would fail of its purpose in safeguarding constitutional rights" if when such a right was at issue it did not exercise more searching review. Specifically, the Court would "inquire not merely whether [the right] was denied in express terms but also whether it was denied in substance and effect."[66]

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61. Gallegos v. Nebraska, 342 U.S. 55, 61 (1951); *see also Pennekamp*, 328 U.S. at 345 (stressing the Court's "ultimate power" to resolve "constitutional controversies").

62. Smith v. Texas, 311 U.S. 128, 130 (1940).

63. Napue v. Illinois, 360 U.S. 264, 271 (1959); *see also* Pierre v. Louisiana, 306 U.S. 354, 358 (1939) (referring to the Court's "solemn duty to make independent inquiry and determination of the disputed facts").

64. *Pennekamp*, 328 U.S. at 335.

65. Culombe v. Connecticut, 367 U.S. 568, 605 (1961).

66. Norris v. Alabama, 294 U.S. 587, 589–90 (1935).

Of course, whatever is offered as a rationale for the CFD inevitably has ramifications for its scope of applicability—that is, the range of cases that would call for its employment. Predicating the doctrine on the Court's charge to preserve constitutional rights generally implies that its applicability is coextensive with every constitutional right. At times, the Court has indeed asserted such a capacious arena of operation for the doctrine. For example, in *City of Houston v. Hill*,[67] the Court stated that "independent review of the record is appropriate where the activity in question is arguably protected by the Constitution."[68]

At the same time, a second significant strand in the Court's jurisprudence has stressed not the Court's institutionally assigned role in protecting constitutional rights generally, but, rather, the special importance of particular rights. The Court's decision in *Craig v. Harney*[69] was an early example of the Court's indication that the CFD's scope might be more restricted, turning on the nature of the rights at stake in a given case. The decision relied on the freedoms of speech and press to overturn the conviction of a journalist who had been held in contempt for criticizing a court's handling of particular litigation. In discussing its application of a heightened standard of appellate review, the Court wrote that it had been required to make "an independent examination of the facts" because the case involved a "fundamental right secured by the Constitution."[70] Similarly, in a decision involving the use of a confession allegedly induced by administration of a drug, the Court stated that "[w]here the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record."[71]

Other decisions in this strand of the Court's CFD jurisprudence have emphasized the significance of the particular right at issue, noting the tremendous stakes for the individuals challenging government actions. A good illustration is *Pierre v. Louisiana*,[72] a case in which

67. 482 U.S. 451 (1987).

68. *Id.* at 458 n.6 (striking down as overbroad a city ordinance that prohibited interference with a police officer's duties).

69. 331 U.S. 367 (1947).

70. *Id.* at 373.

71. Townsend v. Sain, 372 U.S. 293, 316 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

72. 306 U.S. 354 (1939).

the Court employed the doctrine in reversing the conviction of a man who had been sentenced to death on a charge of murder. The grounds for reversal were that the prosecution had systematically excluded blacks from membership on the grand jury in violation of the defendant's Fourteenth Amendment right to "equal protection of the laws."[73] The Court stated that the doctrine applied where a "citizen whose life is at stake has been denied the equal protection of the country's laws on account of his race . . . for equal protection to all is the basic principle upon which justice under law rests."[74]

The Court similarly highlighted the stakes for the parties involved in *Chambers v. Florida*.[75] Based on the prosecution's use of an improperly obtained confession, the Court reversed four convictions carrying death sentences, reasoning that "[t]o permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."[76] The Court linked the CFD with due process rights even more explicitly in another self-incrimination case nearly a decade later, *Watts v. Indiana*,[77] stating flatly that the doctrine was "especially . . . important" when a case "aris[es] under the Due Process Clause."[78]

Within the strand of the Court's CFD jurisprudence suggesting the prioritization of some rights over others, an enduring line of cases has singled out one particular class of rights above all as deserving of special solicitude—those secured by the First Amendment. For instance, when the Court expanded its free speech protection to allegedly obscene materials in *Jacobellis v. Ohio*,[79] it characterized the principles underlying the doctrine as "particularly true"[80] in "cases . . . involving rights derived from the First Amendment guarantees of free expression."[81] In such cases, the Court maintained, it "cannot avoid making an independent constitutional judgment on the facts of the case

73. U.S. CONST. amend. XIV, § 1.
74. *Pierre*, 306 U.S. at 358.
75. 309 U.S. 227, 240 (1940).
76. *Id.*
77. 338 U.S. 49 (1949).
78. *Id.* at 51.
79. 378 U.S. 184 (1964).
80. *Id.* at 189.
81. *Id.* at 190.

as to whether the material involved is constitutionally protected."[82] The same year, in *New York Times Co. v. Sullivan*[83]—the landmark decision recognizing limitations on the ability of public officials to initiate defamation lawsuits—the Court stated that it would apply the CFD "in proper cases," and that this was "particularly" true in cases alleging "trespass 'across the line between speech unconditionally guaranteed and speech which may legitimately be regulated.'"[84]

Closer to the present day, the Court applied the doctrine in a case challenging a city ordinance restricting the operation of "adult businesses" on First Amendment grounds, maintaining that "we have an 'obligation to exercise independent judgment when First Amendment rights are implicated.'"[85] Similarly, in assessing whether state campaign regulations violated the freedom of speech, Justice Breyer's opinion in *Randall v. Sorrell* explained that, in light of the rights at stake, "we see no alternative to the exercise of independent judicial judgment."[86] Appellate courts in such a case, the opinion continued, "must review the record independently and carefully with an eye toward assessing" the challenged statute's consistency with the First Amendment.[87]

Still more recently, in a 2011 decision upholding the Westboro Baptist Church's right to demonstrate outside a military service member's funeral, the Court coupled affirmations of the special importance of the rights at stake in the case with recognition of its duty to exercise heightened appellate review.[88] After observing the "profound national commitment" to the importance of robust public debate,[89] and that speech on public affairs was the "essence of self-government,"[90] Chief Justice Roberts's opinion for a seven-member majority stated, "[a]s in other First Amendment cases, the court is

82. *Id.*

83. 376 U.S. 254 (1964).

84. *Id.* at 285 (quoting Speiser v. Randall, 357 U.S. 513, 525 (1958)).

85. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 440 (2002) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (plurality opinion)).

86. Randall v. Sorrell, 548 U.S. 230, 249 (2006).

87. *Id.*

88. Snyder v. Phelps, 562 U.S. 443, 453–54 (2011).

89. *Id.* at 452 (quoting Sullivan, 376 U.S. at 270).

90. *Id.* (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

obligated 'to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."'"[91]

Whatever may be the comparative merits of the two strands in the Court's jurisprudence—one applying the CFD in all constitutional rights cases, and the other applying it in a more restricted fashion—there can be no doubt that the latter has been the Court's actual practice. That is, the Justices have applied heightened appellate review within only a subset of protected rights. Indeed, one struggles to identify more than a small number of doctrinal areas in constitutional rights jurisprudence where the Court has applied the CFD in recent decades. Along with the First Amendment's protection of free expression, other issue areas in which we find relatively clear examples of the doctrine's application include: whether an award of punitive damages was consistent with due process;[92] whether law enforcement officers had probable cause under the Fourth Amendment to conduct a search;[93] and whether a criminal financial penalty violated the Eighth Amendment's prohibition on the imposition of excessive fines.[94] Moreover, in cases involving rights claims outside the limited areas in which the Court has invoked the CFD, it has often explicitly denied the doctrine's applicability. In a recent case in which voters charged a state's Board of Elections with racial gerrymandering in violation of equal

91. *Id.* at 453–54 (quoting Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485, 499 (1984); *see also* Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 744 (2011) (noting that in evaluating the constitutionality of a state's public campaign financing law the Court was required to review "[t]he record in this action . . . in its entirety").

92. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003) (requiring appellate courts to conduct de novo review of a trial court's determination of whether an award of punitive damages violated the Fourteenth Amendment); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (same).

93. Maryland v. Pringle, 540 U.S. 366, 371 (2003) (conducting the Court's own examination into the facts to determine whether the police had probable cause to search a car's backseat); Ornelas v. United States, 517 U.S. 690, 696 (1996) (holding that appellate courts should review de novo a trial court's finding as to whether police had reasonable suspicion for a stop and probable cause for a search).

94. United States v. Bajakajian, 524 U.S. 321, 336 n.10 (1998) (holding that "the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate").

protection, for instance, the Court stated that appellate review in such cases should disturb lower court findings of fact only in cases of clear error.[95] Thus, both through its explicit reliance on the CFD in First Amendment cases due to the special importance of the rights at stake and its application of the doctrine in practice to only a small subset of constitutional rights cases, the Court has indicated its adoption of a selective approach to the heightened appellate review of factual findings. Strikingly, the Court has never provided a justification for adopting such an ad hoc approach to the vitally significant issue.

### *B. Distinguishing Fact and Law in Employing the Doctrine*

The previous section focused on the specific right underlying the claims in which the Court applied the CFD. This section turns to a different question about the doctrine's scope of applicability, one that concerns not different classes of cases, but, rather, the particular kinds of issues before the Court in a given case. The question is critical because the CFD is built around the distinction between the different types of issues with which courts are confronted. Because it is has long been established as a general matter that the Court exercises de novo review over issues of law, the salient aspects of the Court's jurisprudence govern specifically the standards under which questions involving factual issues are to be reviewed.

While issues of law and issues of fact are the most familiar issue types, American jurisprudence has long recognized a third class of

95. Bethune-Hill v. Va. State Bd. of Elections, 580 U.S. 178, 195 (2017); *see also* Harris v. Ariz. Indep. Redistricting Comm'n, 578 U.S. 253, 259–60 (2016) (indicating that a deferential standard of review on appeal applied to litigation challenging a state's legislative redistricting plan violated equal protection because of the inequalities of population between districts); Glossip v. Gross, 576 U.S. 863, 881 (2015) (applying a clear error standard of review in a case involving a death row inmate's charge that the state's planned method of execution would be excessively painful in violation of the Eighth Amendment's prohibition of "cruel and unusual punishment"); Snyder v. Louisiana, 552 U.S. 472, 477 (2008) (applying a clear error standard of review in a case involving a defendant's challenge of his conviction on the grounds that the prosecution had pretextually excluded blacks from the jury in violation of equal protection).

issues, often referred to as "mixed" issues of law and fact.[96] Some of the Court's early cases developing the CFD included broad language, which, taken alone, seemed to suggest that the Court exercised its own independent review over all issues that encompassed matters of fact.[97] If the Court's CFD jurisprudence had followed such an approach, the distinction between pure issues of fact and mixed issues of law and fact might not be critical to an understanding the doctrine as enforced in particular cases. Over time, however, the Court's jurisprudence increasingly stressed that the CFD assigned different standards of review to issues of fact as opposed to mixed issues of law and fact.[98] In particular, the Court's approach called for a deferential appellate standard of review for pure issues of fact.[99] An important caveat was that the Justices would not "be bound by findings wholly lacking support in evidence."[100] That qualification aside, in a variety of linguistic formulations, the Court emphasized the preeminent role of trial courts in resolving disputed questions of fact, as when it stated that questions of fact would be considered by the Court as "definitely determined" by the trial court, to whom the "ascertainment" of the facts "belongs."[101] In equally resounding language, the Court has stated that "all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for

96. *E.g.*, Ross v. Day, 232 U.S. 110, 116–17 (1914); Evans v. Eaton, 20 U.S. 356, 391 (1822); *see also* J.L. Clark, *A Mixed Question of Law and Fact*, 18 YALE L.J. 404, 404 (1909).

97. *E.g.*, Pierre v. Louisiana, 306 U.S. 354, 358 (1939) (stating that when "a citizen whose life is at stake has been denied the equal protection of the country's laws on account of his race," it is the Court's "solemn duty to make independent inquiry and determination of the disputed facts"); Norris v. Alabama, 294 U.S. 587, 590 (1935) (asserting that in a case implicating a constitutional right, it is the Court's "province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect," and, "[i]f this requires an examination of evidence, that examination must be made"); Pennekamp v. Florida, 328 U.S. 331, 345 (1946) (noting the Court's "ultimate power . . . to ransack the record for facts in constitutional controversies").

98. *E.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435–36 (2001); *Bajakajian*, 524 U.S. at 336 n.10; *Ornelas*, 517 U.S. at 697.

99. *E.g.*, Cooper Indus., 532 U.S. at 435–36; *Bajakajian*, 524 U.S. at 336 n.10; *Ornelas*, 517 U.S. at 697.

100. Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

101. *Id.*

reconsideration by this Court," adding that "[o]bservance of this restriction . . . calls for the utmost scruple."[102] At the same time, the Court's approach has allowed for independent examination where mixed issues of law and fact were involved.[103] Such a differentiation of standards for factual as opposed to mixed issues places center stage questions regarding the means of distinguishing between pure issues of law, pure issues of fact, and mixed issues of law and fact.

But how are the lines between these issue types to be drawn? When the Court has said anything at all about the distinctions between issue types, its analysis has generally been superficial, especially with respect to issues of law, where its cursory statements have reflected the commonsensical view that such issues pertain to the general rules governing the outcome of disputes.[104] By contrast, the Court has spoken of issues of fact as concerning "happenings,"[105] things that transpire at particular times and places. Accordingly, in discussing the purview of factual issues, the Justices have used phrases like "what actually happened";[106] "the events which occurred";[107] and "the crude historical facts, the external, 'phenomenological' occurrences and events."[108] Once factual issues, are determined, "the scene is set and the players' lines and actions are reconstructed."[109] The Court has made clear that any kind of potential metaphysical distinction between physical and mental existence is not pivotal, as it has explicitly included mental states and events within the factual realm.[110] Thus, as expressed in these descriptions, the Court's understanding of facts suggests a central focus on the distinction between questions about events, which are factual, and questions about the standard used to assess those events, which are legal.

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102. Watts v. Indiana, 338 U.S. 49, 50–51 (1949).

103. *Id.*

104. *E.g.*, *Thompson v. Keohane*, 516 U.S. 99, 112 (1995); *Miller v. Fenton*, 474 U.S. 104, 113–14 (1985).

105. *Culombe*, 367 U.S. at 605.

106. Gallegos v. Nebraska, 342 U.S. 55, 61 (1951).

107. Ornelas v. United States, 517 U.S. 690, 696 (1996).

108. *Culombe*, 367 U.S. at 603.

109. *Thompson*, 516 U.S. at 111–12.

110. *Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("[T]hat an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact.").

The Court has at times spoken of issue types as though they fall on a spectrum, with the clearest instances of legal issues on one end and the clearest instances of factual issues on the other.[111] In that vein,

111. *See id.* at 114 (discussing instances in which an issue "falls somewhere between a pristine legal standard and a simple historical fact"). It should be noted that the discussion in *Miller* regarding the appropriate standard for reviewing the voluntariness of a confession arose in the legal context of interpreting 28 U.S.C. § 2254(d), a statutory provision that requires judges in federal habeas proceedings to presume the correctness of state court fact-finding in the absence of certain enumerated exceptions. Nevertheless, nothing in the Court's opinion suggested that the analysis hinged on whether the case was one subject to § 2254(d). Indeed, in supporting its position, it freely cited precedents that were not subject to that provision. *Id.* at 109–17. Like *Miller*, a number of other decisions discussed herein were subject to § 2254(d), but, likewise, nothing in their reasoning indicated that the analysis of the appropriate standard of review depended on this. *E.g.*, *Thompson*, 516 U.S. at 111–13; Wainwright v. Witt, 469 U.S. 412, 429 (1985); Strickland v. Washington, 466 U.S. 668, 697 (1984); Patton v. Yount, 467 U.S. 1025, 1038 (1984); Sumner v. Mata, 455 U.S. 591, 597 (1982). The Court has also analyzed the appropriate standard of review for mixed questions of fact and law in various constitutional cases that were subject to another legal provision, Rule 52(a) of the Federal Rules of Civil Procedure, which provides that in cases tried before a judge, "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." FED. R. CIV. P. 52(a). Although the Rule speaks directly to standards of review for factual issues, the Court has stated that it does not interfere with or supersede the CFD since "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 (1984). The Court also minimized the potential tension between the rules, noting that the "conflict between the two rules is in some respects more apparent than real." *Id.* at 499. An additional legal mandate regarding the standards of review for factual issues is found in the Constitution itself, as the Seventh Amendment states: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. Notwithstanding the Amendment's explicit limitation on federal review of fact-finding by state courts, the Justices have not perceived a conflict with the CFD, since there is no violation when the Court reviews issues "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." Fiske v. Kansas, 274 U.S. 380, 385–86 (1927). As one commentator has observed, the Court has rarely even mentioned the Seventh Amendment in the context of its CFD jurisprudence. Lee Levine, *Judge and Jury in the Law of Defamation: Putting the*

it has also recognized that some questions about issue types are relatively straightforward. Some issues fall all the way on the fact side of the spectrum, and these are often referred to as "basic" and "primary"[112] or "simple historical fact[s]."[113] Other issues fall all the way on the law side of the spectrum, such as whether a court has subject matter jurisdiction to hear a case[114] and whether a claim is barred by the doctrine of issue preclusion.[115] However, there are also many instances in which issues of fact and law are interrelated in such a way that it becomes difficult to sort out the one from the other. One way in which issues of fact and law are commonly interwoven is through judicial determinations that dictate final outcomes by applying the governing law to the facts of particular cases.[116] Because law application involves measuring the circumstances and events of a particular dispute against the relevant general principles, it cannot be accomplished without simultaneous consideration of both legal and factual issues. With respect to these "mixed questions of law and fact," the Court has observed that "the issue is whether the facts satisfy the [legal] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[117] As the Justices have noted, such inquiries often represent the "very issues" that are the reason for the Court's review in the first place.[118]

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*Horse Behind the Cart*, 35 AM. U. L. REV. 3, 43 (1985). It is especially telling that in referring to the CFD, the Court itself cited cases like *Miller* and *Bose Corp.*, which arose under § 2254(d) and Federal Rule of Civil Procedure 52(a), respectively. U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Mgmt. LLC v. Vill. at Lakeridge, 583 U.S. 387, 396 n.4 (2018).

112. *Thompson*, 516 U.S. at 109–10 (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963), *overruled on other grounds by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).

113. *Miller*, 474 U.S. at 114.

114. GAF Bldg. Materials Corp. v. Elk Corp. of Dallas, 90 F.3d 479, 481 (Fed. Cir. 1996).

115. Markman v. Westview Instruments, Inc., 517 U.S. 370, 391 (1996).

116. *E.g.*, Baumgartner v. United States, 322 U.S. 665, 670–71 (1944).

117. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); *see also Townsend*, 372 U.S. at 309 n.6 (distinguishing issues of fact from "mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations").

118. Watts v. Indiana, 338 U.S. 49, 51 (1949).

Relatedly, in many instances, elements of both fact and law are woven together within the terms or phrases that figure crucially in the disposition of cases. Consequently, the resolution of issues that might initially be thought of as factual frequently requires the rendering of judgments that are also largely legal in character.[119] Outcomes in many kinds of cases hinge on determinations about whether an individual engaged in a particular action "voluntarily," including, for example, whether a defendant was unconstitutionally coerced into a confessing of criminal activity. As the Court has observed, the "notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes."[120] As a result, the question of whether an action such as a confession was voluntary presents neither an issue of pure fact nor one of pure law. Similarly, whether a suspect was "in custody" at the time of an interrogation by police officers presents a mixed question of law and fact because it requires analysis not only of the underlying events and circumstances but also the application of legal standards to those historical facts.[121]

The recognition that courts confront questions that are neither wholly legal nor wholly factual poses a significant challenge: how should such mixed questions be treated for purposes of assigning standards of appellate review? While our interest is specifically in the CFD, it must be noted that attention to standards of appellate review for mixed questions predates the doctrine[122] and continues to generate controversy quite apart from it.[123] Nevertheless, the problem presents itself with distinctive significance in the context of the CFD because

119. *See* Culombe v. Connecticut, 367 U.S. 568, 604–05 (1961) (explaining why the voluntariness of a confession presents a mixed question of fact and law).

120. *Id.* at 605.

121. Thompson v. Keohane, 516 U.S. 99, 112 (1995).

122. *E.g.*, Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 457 (1899); James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 169 (1890).

123. *See* Monasky v. Taglieri, 140 S. Ct. 719, 730 (2020); U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Mgmt. LLC v. Vill. at Lakeridge, 583 U.S. 387, 395–96 (2018); Pullman-Standard v. Swint, 456 U.S. 273, 287–93 (1982); Pierce v. Underwood, 487 U.S. 552, 560 (1988); *see also* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005); Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235 (1991).

the mark of that doctrine is the Court's linking of heightened appellate review with the presence of stakes involving the potential violation of constitutional rights.[124] Thus, even though courts have long engaged the appropriate standard of appellate review for mixed questions of law and fact regardless of the CFD,[125] the Justices have indicated that the analysis may be different when constitutional rights are at stake.[126] Indeed, the CFD may be characterized as having been applied when an appellate court reviews a mixed issue of law and fact de novo because of the constitutional stakes involved; that is, when it would not have done so otherwise. After all, if the Court in constitutional cases always simply applied its normal methodology for deciding when to review questions de novo, there would be nothing left of the CFD. In this regard, it is notable that in describing the CFD, the Court itself has noted that appellate courts should normally exercise deferential review with respect to mixed questions that "immerse[d]" them "in case-specific factual issues,"[127] but that in "the constitutional realm . . . the calculus changes."[128] The Court has often held that the role of appellate courts "'in marking out the limits of [a] standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record."[129]

However, as the Justices themselves have acknowledged, the jurisprudence on when to review mixed questions de novo has been far from pellucid.[130] Most importantly for our purposes, the Court's statements on the subject have been particularly difficult to read with

124. *U.S. Bank Nat'l Ass'n*, 583 U.S. at 398 n.4 (noting that the Court's analysis of mixed questions of law and fact is different in cases involving constitutional issues, where the Justices will be more heavily inclined to exercise de novo review than they would be in non-constitutional cases).

125. *E.g.*, *Monasky*, 140 S. Ct. at 730; Baumgartner v. United States, 322 U.S. 665, 673 (1944).

126. Warner, *supra* note 123, at 143.

127. *U.S. Bank Nat'l Ass'n*, 583 U.S. at 396.

128. *Id.* at 396 n.4.

129. *Id.*

130. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 113 (1985) (noting that the judiciary's "methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive"); Thompson v. Keohane, 516 U.S. 99, 110 (1995) (recognizing that the "Court has not charted an entirely clear course" regarding the distinction between issues of fact and law).

respect to how the presence of constitutional issues might alter the usual analysis for deciding when to review mixed questions de novo. Overall, the case law on the subject may be described as suggesting a number of factors that might apply in unpredictable ways to determinations on the proper standard for reviewing mixed questions in constitutional cases. One factor that the Court has spoken of as potentially salient concerns "the nature of the inquiry itself."[131] For example, in deciding to review the voluntariness of confessions de novo, the Court observed that, "[a]lthough sometimes framed as an issue of 'psychological fact,'" the question "has always had a uniquely legal dimension."[132] To support this claim, the Court drew a distinction between two different kinds of questions that might impinge on the ultimate determination regarding the voluntariness of a confession. One question concerned "whether the defendant's will was in fact overborne," while another concerned "whether the techniques for extracting the statements . . . are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means."[133] The latter, unlike the former, implicated a "complex of values," which, in the Court's view, counted in favor of treating the voluntariness inquiry as an issue of law, and, accordingly, as one to review de novo.[134]

Notwithstanding its acknowledgement that whether an issue was "analytically more akin to a fact or a legal conclusion"[135] may sometimes be pertinent, the Court's approach to determining the appropriate standard of review for mixed questions has predominantly appealed to factors that are frankly functional. That is, the Justices have focused primarily on pragmatic considerations regarding the relative capacities of different institutional decision makers. In the Court's words, determining the standard of review for mixed issues of fact and law has been "as much a matter of allocation as it is of analysis."[136] The decision of whether to employ a deferential or de novo standard of review "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better

131. *Miller*, 474 U.S. at 115.

132. *Id.* at 115–16 (quoting Culombe v. Connecticut, 367 U.S. 568, 603 (1985)).

133. *Id.* at 116.

134. *Id.* (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

135. *Id.*

136. *Id.* at 113–14.

positioned than another to decide the issue in question."[137] Thus, the assignment of a standard of review may turn on the relative institutional strengths of trial and appellate courts to decide particular kinds of disputes.

Some functional considerations concern the superior position of the trial court to assess certain kinds of evidence. A quintessential example is the extent to which an issue hinges on assessments of the witnesses' credibility, especially through observation of their demeanor.[138] Since only the trial court has a first-person vantage on testimony offered in court, the relevance of assessments to the case's disposition weighs in favor of deference to the findings below.[139] This factor was critical, for instance, in the Court's decision to apply deferential review to issues concerning the impartiality of prospective jurors, since they "involve[] credibility findings whose basis cannot be easily discerned from an appellate record."[140]

While the centrality of credibility assessment cuts in favor of deferential review, a functional factor that cuts in favor of de novo review comes into play where a "relevant legal principle can be given meaning only through its application to the particular circumstances of a case."[141] The assumption underlying this preference evidently is that there are some instances in which the relevant standard has sufficiently specific or clear meaning on its own terms to provide guidance apart from the facts of any particular dispute. To illustrate, suppose a statute prescribes a maximum height for buildings, and various individual lawsuits require courts to discern whether particular buildings violate the legislation. In this sort of dispute, one might presume that the language of the statute provides reasonably precise guidelines even apart from its previous application to any particular cases. By contrast, the Court has noted that certain legal standards fail to furnish ex ante guidance of a similarly precise character. For example, the Justices have explained that the "reasonable suspicion" and "probable cause"

137. *Id.* at 114.

138. *Id.*

139. *Id.*

140. Wainwright v. Witt, 469 U.S. 412, 429 (1985); *see also* Patton v. Yount, 467 U.S. 1025, 1038 (1984) (reviewing deferentially whether a juror was biased because "the determination is essentially one of credibility[] and therefore largely one of demeanor").

141. *Miller*, 474 U.S. at 114.

standards for evaluating the reasonableness of police interactions with suspects are "commonsense, nontechnical conceptions," relating to everyday affairs and judgments.[142] They must be stated at high levels of generality, and, consequently, do not lend themselves to more precise articulation in the form of detailed guidelines set forth in advance of and apart from any particular disputes.[143] In the Court's words, the relevant standards are "not readily, or even usefully, reduced to a neat set of legal rules" and must "take their substantive content from the particular contexts in which the standards are being assessed."[144] Based in part on this observation, the Court has treated cases centered on whether these standards were satisfied as raising mixed questions of law and fact that merit de novo review on appeal.[145]

The Justices have also deemed it a factor in favor of de novo review if appellate review is likely to generate precedents that would play a salutary role in guiding later decisions. For instance, the Court has distinguished disputes over whether a defendant was competent to stand trial—which tend to rest on considerations limited to the individual case—from disputes about whether a defendant was "in custody" during interrogation, which was more likely to involve the kind of "law declaration" that helps to "guide police, unify precedent, and stabilize the law."[146] A related consideration lent additional support to the Court's exercise of de novo review with respect to the issue of whether a police officer had probable cause to conduct a search.[147] Noting that "de novo review tends to unify precedent," the Court concluded that a more deferential standard "would be inconsistent with the idea of a unitary system of law" as it would undermine the ability of appellate courts "to maintain control of, and to clarify, the legal principles."[148] Fuller articulation of the relevant principles would benefit not only judicial actors but also law

142. Ornelas v. United States, 517 U.S. 690, 695 (1996).

143. *Id.* at 696.

144. *Id.* at 695–96.

145. *Id.* at 697.

146. Thompson v. Keohane, 516 U.S. 99, 115 (1995).

147. *Ornelas*, 517 U.S. at 697.

148. *Id.*; *see also* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (applying de novo review to cases involving the constitutionality of punitive damage awards in part on the basis that such review tends to unify precedent and stabilize law).

enforcement officers, as it would enable them "to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."[149]

## IV. THE WEALTH OF ARTICULATED RATIONALES FOR OTHER DOCTRINES

The previous section examined basic aspects of the Court's CFD case law that have generated a great deal of confusion. With these elements as a central focus, this section turns to critique of the Court's jurisprudence. The central difficulty is that the doctrine superimposes a hierarchical methodology onto constitutional jurisprudence without adequate justification or explanation.

The overarching approach to constitutional analysis that is prevalent today is deeply hierarchical in the sense that certain classes of rights are accorded greater protection on the grounds that they enjoy a special status or importance. This hierarchical character is manifested in a variety of doctrines including heightened substantive standards for assessing the government's defense of challenged policies and procedural norms that make it easier for parties to bring certain kinds of claims than would otherwise be the case.[150] Earlier, we noted two of the most far-reaching hierarchical aspects of constitutional jurisprudence: (1) the strict scrutiny test, or, more broadly, the tiered framework for assigning substantive burdens in assessing claims that starts with "rational basis" review at the most permissive end of the spectrum and ends with "strict scrutiny" at the opposite end; and (2) the "selective incorporation" of Bill of Rights protections against the states.[151] Using these two well-established and more familiar components of constitutional jurisprudence as an illustrative contrast, this section criticizes the CFD for failing to sufficiently address even the most basic questions about its basis and application.

The aim in considering hierarchical aspects of constitutional law other than the CFD is neither to defend nor critique them; entering debate on the substantive merits of the strict scrutiny test or the incorporation doctrine lies beyond the scope of this Article. Rather,

149. *Ornelas*, 517 U.S. at 697–98.

150. Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 358–59 (2006).

151. *See supra* Part I.

comparative discussion is used to illuminate the striking failure of the Court's CFD opinions to adequately articulate its underpinnings. We need not render normative evaluations of the Court's strict scrutiny and incorporation jurisprudence to observe the extent to which the Justices' case law in those areas explicitly offered lines of justificatory reasoning, engagement with opposing views, and explanations for doctrinal adjustments. After considering the strict scrutiny test and incorporation in this part's first two sections, respectively, we turn to examination of the CFD itself in the third section.

### *A. The Strict Scrutiny Test*

The development of the strict scrutiny test—and, more generally, of a multi-tiered framework for assigning presumptions and burdens of persuasion to govern the substantive assessment of constitutional rights claims—was closely linked with the shift in emphasis from economic to non-economic rights that crystallized during the early parts of the twentieth century.[152] Before this shift, judges did not necessarily encounter a reason to differentiate classes of rights, as they had adopted approaches suited to assessing the various rights claims that occupied the greater part of the judiciary's attention up to that point.[153] However, the shift regarding the kinds of rights perceived as most significant meant that the Court would be engaged in explicitly elevating the status of some rights at the same time that it was demoting the status of others.[154] One of the most impactful ways that the Justices effectuated this reordering of constitutional jurisprudence was through the adoption of different rubrics for assessing rights claims.

By the late 1930s, the Court had adopted a highly permissive standard for assessing challenges to government policies claiming that such policies violated economic rights. In one of the cases that most definitively signaled the demotion of economic rights, *West Coast Hotel Co. v. Parrish*,[155] the Court considered the constitutionality of a state minimum wage law. An employer and one of its employees

152. STEPHEN A. SIMON, UNIVERSAL RIGHTS AND THE CONSTITUTION 33–34 (2014).

153. *Id.* at 29–33.

154. *Id.* at 33–35.

155. 300 U.S. 379 (1937).

challenged the law on the grounds that it violated economic liberty—in particular, the "freedom of contract"—by restricting the ability to conduct their affairs according to mutually acceptable terms. The Court had previously invalidated similar laws, stressing that legislative abridgement of the important freedom of contract could "be justified only by the existence of exceptional circumstances."[156] In justifying the reversal, the Court engaged in roughly ten pages of analysis regarding the nature of the right at stake in relation to society's interest in regulation.[157] Making clear that it would apply a permissive standard, the Court upheld the challenged regulation because it bore a "reasonable relation to a proper legislative purpose."[158]

No single decision captured the spirit of the shift in jurisprudence that was just emerging more clearly than *United States v. Carolene Products Co.*,[159] which was issued just a year after *West Coast Hotel*. On the one hand, *Carolene Products* reaffirmed the permissiveness of the standard to be employed with respect to "regulatory legislation affecting ordinary commercial transactions."[160] As Justice Stone wrote in his opinion for the majority, the "existence of facts supporting the legislative judgment" in cases challenging regulatory legislation "is to be presumed" and must not "be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[161] Under such a standard, not surprisingly, the Court had no difficulty upholding an act regulating the ingredients used in the commercial production of milk.

At the same time that *Carolene Products* reinforced a permissive standard for assessing economic rights claims, it also suggested rationales for adopting more rigorous standards when different kinds of rights were at stake. In the decision's famous fourth footnote, Justice Stone identified classes of rights claims which might

156. Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 546 (1923), *overruled by* West Coast Hotel Co., 300 U.S. 379 (1937).

157. *West Coast Hotel Co.*, 300 U.S. at 389–98.

158. *Id.* at 398 (quoting *Nebbia*, 291 U.S. at 537).

159. 304 U.S. 144 (1938).

160. *Id.* at 152.

161. *Id.*

call upon the Justices to engage in "more exacting judicial scrutiny."[162] One of these classes of claims involved challenges to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," such as those involving the freedom of speech and the right to vote.[163] Another class of claims that might require more intense scrutiny concerned "statutes directed at particular religious . . . or national . . . or racial minorities"—as Justice Stone noted, "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[164] While earlier cases had suggested growing judicial interest in non-economic rights,[165] *Carolene Products* more specifically presaged the coming development of new doctrinal tests imposing heightened burdens on the government to justify interference with prioritized classes of rights.

Indeed, in the decades following *Carolene Products*, the Court developed a rich jurisprudence linking the priority of certain classes of rights with heightened forms of judicial scrutiny. This body of law as a whole eventually evinced sufficient similarities across doctrinal areas that it became useful to adopt a general term—"strict scrutiny"—for the most rigorous standard of assessment, applicable to those rights accorded the highest priority.[166] Under the strict scrutiny standard, government policies interfering with the rights at issue could only pass constitutional muster if the government showed that the challenged acts were "narrowly tailored" to "further compelling governmental interests."[167] By contrast, under the overarching tiered framework of analysis established by the Justices, rights not accorded priority status were subject to a much more permissive standard, which upheld laws so long as there was a "rational relationship" between the challenged

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162. *Id.* at 152 n.4.

163. *Id.*

164. *Id.*

165. *See supra* Part II.B.

166. *See generally* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268, 1270 (2007).

167. Johnson v. California, 543 U.S. 499, 505 (2005) (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

acts and "some legitimate governmental purpose."[168] Between these standards, the Court has also adopted a variety of tests—referred to generally as "intermediate scrutiny"—applicable to rights accorded status that is higher than those occupying the lowest run on the ladder but not quite so elevated as those meriting the full protection of strict scrutiny.[169] In *Craig v. Boren*,[170] for example, the Court indicated that it would uphold laws imposing gender classifications only if the government showed that they were "substantially related to [the] achievement" of "important governmental objectives."[171]

The strict scrutiny test—which has been applied across a wide range of rights, including in many cases arising under the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment—as well as the tiered framework of which it is a part, have a significant impact on the substantive analysis of many constitutional controversies.[172] Our interest here, however, principally concerns the extent to which the Court, in developing this body of jurisprudence, has engaged in discourse regarding its underpinnings. In contrast with its cases developing the CFD, in its strict scrutiny jurisprudence the Justices on many occasions substantially articulated the rationale for employing heightened degrees of scrutiny to some rights claims but not others.

*Thomas v. Collins*,[173] issued less than a decade after *Carolene Products Co.*, is a good example. In that case, the Court explained the analytical approach it employed in overturning the conviction of a labor organizer for activities it found to fall within the protection of the First Amendment. As "indispensable democratic freedoms secured by the First Amendment," Justice Rutledge wrote in his majority opinion, the freedoms of speech, press, assembly, and petitioning for a redress of grievances occupied a "preferred place" within constitutional law.[174] Though distinct, these "cognate rights" were so deeply interrelated as to be "inseparable," united in their emphasis within a democratic

168. Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quoting Heller v. Doe *ex rel.* Doe, 509 U.S. 312, 319–20 (1993)).

169. Fallon, Jr., *supra* note 166, at 1273.

170. 429 U.S. 190 (1976).

171. *Id.* at 197.

172. Fallon, Jr., *supra* note 166, at 1273.

173. 323 U.S. 516 (1945).

174. *Id.* at 529–30.

society on "allow[ing] the widest room for discussion."[175] Importantly, the opinion explicitly linked a heightened standard of assessment with the special nature of the rights, noting that the standard had to be governed by the "character of the right."[176] As the rights at issue in the case "rest[ed] on firmer foundation," they enjoyed a "sanctity and a sanction not permitting dubious intrusions."[177] The permissive standard applicable in ordinary cases—including the "usual presumption supporting legislation" and the mere requirement of a "rational connection between the remedy provided and the evil to be curbed"—was not appropriate in cases involving rights of such high priority.[178] Instead, the Court determined, government acts restricting these preferred freedoms could only be "justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[179] Even more stringently, Justice Rutledge stated, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[180]

While the strict scrutiny test had not yet been articulated in its now-familiar, mature form—including the ideas of a compelling government interest and narrow tailoring—even at this early stage the Court established the idea that certain kinds of rights had a higher priority than others, and consequently, merited greater protection.[181] Moreover, in cases like *Thomas v. Collins*, the Court made explicit its reason for according special status to the particular rights at issue, as well as how this special status related to the application of a heightened standard of judicial scrutiny. In a long succession of cases, the Court has not only reaffirmed the special status of First Amendment rights but also developed a body of case law that differentiated types of expression that fell within the Amendment's protection from those that did not.[182]

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 529–30.

179. *Id.* at 530.

180. *Id.*

181. Siegel, *supra* note 150, at 401.

182. Even before *Thomas v. Collins*, for instance, the Court in *Chaplinsky v. New Hampshire* explained that the First Amendment's protection did not encompass certain kinds of expression because they formed "no essential part of any exposition

In addition to the First Amendment, substantive due process is another area in which the Court's jurisprudence has included many cases articulating the reasoning behind the Court's application of strict scrutiny. One of the Court's best-known decisions, *Roe v. Wade*,[183] illustrates the point. Justice Blackmun's opinion for the seven-member majority explained why a woman's decision whether to terminate a pregnancy qualified as a fundamental right entitled to the protection of heightened scrutiny.[184] The broad right at issue was that of "personal privacy," which, Justice Blackmun noted, encompassed a variety of "activities relating to marriage . . . procreation . . . contraception . . . family relationships . . . and child rearing and education."[185] Justice Blackmun's opinion provided a number of considerations in support of its conclusion that the personal decision at issue in *Roe* fell within the right to privacy, focusing in particular on the impact that denial of the right would have for affected individuals. The potentially detrimental effects of the challenged legislation included medical and psychological harm, implications for mental health, various distresses associated with carrying an unwanted pregnancy to term, and social stigma.[186] It is no less salient to the present discussion that Justice White, in an opinion joined by Justice Rehnquist, also articulated the

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of ideas, and [were] of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). These unprotected categories included "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—as well as the "[r]esort to epithets or personal abuse." *Id.* Later cases introduced additional nuance to the reasoning behind the Court's according of special status to certain types of speech but not others, as in a number of cases assessing regulations concerning obscenity, *e.g.*, Miller v. California, 413 U.S. 15, 23–26 (1973); hate speech, *e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382–86 (1992); and commercial speech, *e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566–67 (1980).

183. 410 U.S. 113 (1973), *modified*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

184. *Id.* at 152–53.

185. *Id.*

186. *Id.* at 153.

reasoning behind his view that heightened scrutiny should not be applied to laws touching on the abortion decision.[187]

When the court overturned *Roe* almost a half century later in *Dobbs v. Jackson Women's Health Organization*, the opinions again provided substantial insights into the Justices' reasoning.[188] The bulk of Justice Alito's 45-page majority opinion—accompanied by a 15-page appendix setting forth additional historical background—was devoted to elaborating various lines of argument supporting the decision to overturn *Roe*, and its application of strict scrutiny to review of legislation regulating abortions. Concurring, Chief Justice Roberts explained at length why he voted to uphold the challenged abortion regulations but would have done so without overruling *Roe*.[189] At the same time, a joint dissenting opinion filed by Justices Breyer, Kagan, and Sotomayor provided over thirty pages of analysis spelling out why they would have continued applying a heightened standard of review to abortion regulations.[190] Nor was the disagreement among the Justices overlooked by the majority opinion, which explicitly acknowledged and responded to many of the arguments advanced both in the dissent and Chief Justice Roberts's concurrence.

It is notable that the Court's opinions regarding the application of strict scrutiny in substantive due process cases, as in other areas, has included considerable discourse not only on whether particular kinds of rights claims should trigger heightened review but also more broadly on the appropriate methodology for making such determinations. Even though the Court unanimously held in *Washington v. Glucksberg*[191] that substantive due process did not include a right to assisted suicide, for instance, the Justices nevertheless engaged in an informative debate over the factors that ought to figure in the analysis. Chief Justice Rehnquist's opinion for a five-member majority emphasized the importance of grounding substantive due process in "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[192] Relying heavily on Justice

187. *Id.* at 221–23 (White, J., dissenting).

188. 597 U.S. 215 (2022).

189. *Id.* at 347 (Roberts, C.J., concurring).

190. *Id.* at 359 (Breyer, Kagan, and Sotomayor, J., dissenting).

191. 521 U.S. 702 (1997).

192. *Id.* at 720–21 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

Harlan's opinion in *Poe v. Ullman*,[193] Justice Souter's concurrence called for an approach that was more flexible and evolutionary.[194] A central focus for Justice Souter was that the Fourteenth Amendment's Due Process Clause barred laws effecting "arbitrary impositions" or "purposeless restraints" on persons subject to their force.[195] Though not eliminating history from the analysis, Justice Souter's methodology would frame the analysis around a balancing of the interests at stake from the twin perspectives of the government enforcing the challenged policies and the individuals whose liberty was allegedly infringed by them.[196] Just as important as Justice Souter's opinion itself was the majority's engagement with it, as Chief Justice Rehnquist countered that Justice Souter's proposed balancing framework would be unnecessarily complex while injecting excessive subjectivity into the process of judicial decision making.[197]

Equal protection is another major area in which strict scrutiny has come to play a central role. In the development of equal protection jurisprudence, the Court has established two potential grounds for application of heightened scrutiny: one based in a law's interference with rights deemed fundamental[198] and another based in whether a law disadvantages a "suspect class."[199] Although *Skinner v. Oklahoma ex rel. Williamson*[200] was handed down prior to elaboration of the strict scrutiny test in its mature form, Justice Douglas's opinion for a unanimous bench articulated basic elements of the rationale underlying the fundamental rights branch of equal protection analysis. The decision invalidated a state law allowing the compulsory sterilization of individuals convicted three or more times of specified categories of crime. The Court accorded special priority to the claims at issue in the

193. 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

194. *Glucksberg*, 521 U.S. at 765–73 (Souter, J., concurring).

195. *Id.* at 752 (Souter, J., concurring).

196. *Id.* at 765 (Souter, J., concurring).

197. *Id.* at 722; *see also* Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989) (plurality opinion) (arguing that rights must be both "fundamental" and "traditionally protected by our society" to be protected under the Due Process Clause); *id.* at 139–40 (Brennan, J., dissenting) (arguing that rights need not have been traditionally recognized to be protected under the Due Process Clause).

198. Shapiro v. Thompson, 394 U.S. 618, 629–31 (1969).

199. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

200. 316 U.S. 535 (1942).

case, as they involved "one of the basic civil rights of man,"[201] and fell within a "sensitive and important area of human rights."[202] "Marriage and procreation," it noted, were "fundamental to the very existence and survival of the race."[203] Compelled sterilization, the opinion stressed, would have "subtle, farreaching [sic] and devastating effects" on individuals subjected to it.[204] The irreversibility of the procedure meant that the challenged law inflicted "irreparable injury," "forever depriv[ing]" persons "of a basic liberty," and allowing "no redemption for the individual whom the law touches."[205] Moreover, the authorization of compelled sterilization posed dangers at a broader societal level, since "[i]n evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."[206]

In light of the fundamental rights at stake, Justice Douglas wrote, it was "essential" to subject the law's classifications to "strict scrutiny . . . lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws."[207] Demonstrating a link between what would become the fundamental rights and suspect class branches of equal protection, the opinion observed that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[208] Thus, the law's classifications—which applied the law to some crimes, such as grand larceny, while excluding others, such as embezzlement—could not survive strict scrutiny.[209]

Since *Skinner*, the Court has concluded that other kinds of equal protection claims also implicate fundamental rights, warranting the strict scrutiny of classifications imposed by the challenged laws. In

201. *Id.* at 541.
202. *Id.* at 536.
203. *Id.* at 541.
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 541–42.

*Shapiro v. Thompson*,[210] for example, on equal protection grounds the Court invalidated a state law that required one year of in-state residency before new residents could receive welfare payments. Justice Brennan's opinion for a six-member majority explained why the case implicated a fundamental right, and, thus, required strict scrutiny of the law's differential application based on the length of in-state residency.[211] Quoting from a decision rendered in the middle of the nineteenth century, Justice Brennan stressed:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. . . . and, as members of the same community, must have the right to pass and repass through every part of it . . . as freely as in our own States.[212]

Elaborating on the underpinnings of the right at stake, Justice Brennan stated that "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."[213] Given the significance of this right, the standard of review appropriate for review of ordinary or lower tier rights would be inapt. It would not be enough for the government to merely demonstrate a "rational relationship" between the challenged classification and the various "admittedly permissible state objectives" offered to justify it.[214] Instead, the law could only be upheld if it was "shown to be necessary to promote a compelling governmental interest," a standard the state proved unable to satisfy.[215]

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210. 394 U.S. 618 (1969).

211. *Id.* at 629–30.

212. *Id.* at 630 (quoting Passenger Cases, 48 U.S. 283, 492 (1849)).

213. *Id.* at 629.

214. *Id.* at 634.

215. *Id; see also* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969) (explaining that strict scrutiny applied to legislation limiting voter eligibility within school districts to residents with real property or children in public school, because "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government," and may "deny[] some citizens any effective voice in the governmental affairs which substantially affect their lives.").

The Court's opinion in *San Antonio Independent School District v. Rodriguez*,[216] concerning the constitutionality of Texas's method for allocating funds to school districts, is notable not only because of the detailed rationale offered by the majority for its decision not to recognize education as a fundamental right, but also for the extended objection to the Court's entire methodology made by Justice Marshall in a dissent joined by Justice Douglas.[217] In Justice Marshall's view, the Court's approach to settling on a standard of review in equal protection disputes was too rigid, as it framed its analysis around only two possibilities: the application of strict scrutiny in cases involving fundamental rights and the application of rational basis review in cases not touching on such rights.[218] In place of the prevailing methodology, Justice Marshall advocated greater flexibility, "appl[ying] a spectrum of standards."[219] Under the proposed approach, the level of scrutiny would vary with the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[220]

Around the same time that *Skinner* established early foundations of the fundamental rights branch in equal protection jurisprudence, the Court in *Korematsu v. United States* laid down basic elements of the strict scrutiny test for suspect classifications.[221] The *Korematsu* decision itself infamously upheld the mandatory placement of persons of Japanese ancestry into militarily administered internment camps during the Second World War.[222] At the same time, Justice Black's majority opinion contained language acknowledging that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[223] "That is not to say that all such restrictions are unconstitutional," Justice Black continued, but it "is to say that courts must subject them to the most rigid scrutiny. Pressing public

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216. 411 U.S. 1 (1973).

217. *Id.* at 70 (Marshall, J., dissenting).

218. *Id.* at 98 (Marshall, J., dissenting).

219. *Id.* (Marshall, J., dissenting).

220. *Id.* at 99 (Marshall, J., dissenting).

221. Korematsu v. United States, 323 U.S. 214, 216 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).

222. *Id.* at 219.

223. *Id.* at 216.

necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[224]

As in the fundamental rights branch of equal protection, the suspect class branch has also included extensive engagement by the Justices with issues regarding its basis and application. *San Antonio Independent School District v. Rodriguez*,[225] discussed above in connection with its fundamental rights analysis, is also notable for its extensive discussion regarding equal protection. Justice Powell's opinion for the Court, devoting ten pages to the suspect class issues alone, explained why the majority Justices concluded that the challenged classification—concerning the relative lack of wealth of residents in a school district—did not require the application of strict scrutiny.[226] In the majority's view, the allegedly suspect class did not satisfy "the traditional indicia of suspectness," because it had not been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[227]

Justice Powell contended that those challenging Texas's scheme for funding public schools had failed to demonstrate "discrimination against a class of defineably [sic] 'poor' persons,"[228] since the class involved was "large, diverse, and amorphous class, [and] unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[229] Moreover, Justice Powell noted there was "reason to believe that the poorest families are not necessarily clustered in the poorest property districts."[230] The majority further supported its determination by noting that the state funding system "has not occasioned an absolute deprivation of the desired benefit."[231] This point was critical because "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal

224. *Id.*
225. 411 U.S. 1 (1973).
226. *Id.* at 18–29.
227. *Id.* at 28.
228. *Id.* at 22.
229. *Id.* at 28.
230. *Id.* at 23.
231. *Id.*

advantages."[232] As with respect to the majority's fundamental rights analysis, Justice Marshall's dissent offered a substantial explanation of its support for applying heightened scrutiny,[233] including his claim that "the disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests."[234]

In another case evincing the reasoning underlying the Justices' determinations of whether to apply heightened scrutiny in equal protection cases, *City of Cleburne v. Cleburne Living Center*,[235] the Court considered a city's denial of an application to operate a group home for intellectually disabled persons. In response to the majority's extended discussion of its conclusion that the case did not implicate a suspect classification,[236] Justice Stevens's concurring opinion joined by Chief Justice Burger advocated a major change to the Court's overarching equal protection framework, one which would abandon the multi-tiered framework entirely.[237] In Justice Stevens's view, the pivotal distinctions between constitutional and unconstitutional classifications could be drawn simply through the rational basis standard, since, properly understood and applied, it included "elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially."[238] At the same time, Justice Marshall, joined by Justices Brennan and Blackmun, devoted almost all of his 20-page partial dissent to advocating his own approach to determining the appropriate standard of review in equal protection cases and to explaining why it called for heightened scrutiny in the case at bar.[239] Cases like *Cleburne* and others discussed above demonstrate the significant extent to which the Court's jurisprudence developing and applying the strict scrutiny test has been explicit in justifying its conclusions and engaging with opposing views.

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232. *Id.* at 23–24.
233. *Id.* at 117–25 (Marshall, J., dissenting).
234. *Id.* at 123 (Marshall, J., dissenting).
235. 473 U.S. 432 (1985).
236. *Id.* at 442–46.
237. *Id.* at 451–55 (Stevens, J., concurring).
238. *Id.* at 452 (Stevens, J., concurring).
239. *Id.* at 455–78 (Marshall, J., concurring in part and dissenting in part).

### *B. Selective Incorporation of the Bill of Rights Against the States*

The hierarchical character of constitutional jurisprudence is also manifested in cases addressing another basic question regarding the adjudication of rights claims: namely, which constitutional protections are binding not only on the federal government, but also on state and local governments. As discussed in this section, incorporation jurisprudence, like the case law regarding the strict scrutiny test, includes substantial discourse among the Justices concerning the underlying rationale for incorporation and the relation between that rationale and the doctrine's application.

Early in its history, the Court determined that the various protections enshrined in the Bill of Rights only had legal force as a limitation on the scope of federal power, effecting no constraints on state and local government actors.[240] However, the Thirteenth, Fourteenth, and Fifteenth Amendments, enacted in the wake of the Civil War, significantly expanded the extent to which the Constitution operated as a constraint on the states,[241] thus "fundamentally alter[ing] [the] country's federal system."[242] Unlike the First Amendment, which began with the words "Congress shall make no law"[243] but did not reference state governments, the Fourteenth Amendment explicitly applied to the states. Its extraordinarily impactful first section stated, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

240. Barron v. Baltimore, 32 U.S. 243, 247–48 (1833). State actors, of course, were nevertheless constrained by their own state's constitutions, which often included provisions that overlapped with the substance of the Bill of Rights. Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Scholarship and Commentary on the Fourteenth Amendment in 1867—1873*, 18 J. CONTEMP. LEGAL ISSUES 153, 190–91 (2009).

241. *See generally* Thomas C. Mackey, *"An Inestimable Jewel": The Civil War Era Constitutional Amendments and Their Continued Relevance*, 3 ALB. GOV'T L. REV. 676 (2010).

242. McDonald v. City of Chicago, 561 U.S. 742, 754 (2010).

243. U.S. CONST. amend. I.

> deny to any person within its jurisdiction the equal protection of the laws.[244]

Although the first significant decision interpreting the Fourteenth Amendment, the *Slaughter-House Cases*,[245] effectively blocked the Privileges and Immunities Clause as a meaningful check on state power,[246] just a year later the Court indicated a willingness to consider challenges to state acts under the Due Process Clause.[247] In subsequent decades, the Court heard numerous claims by parties seeking to invalidate state legislation on the grounds that the Due Process Clause made various Bill of Rights protections applicable against state governments. While the Court's doctrinal language took myriad forms, broadly speaking the prevailing framework from the late nineteenth century until the early 1960s inquired on a case-by-case basis whether particular state acts violated universal principles of justice.[248] The standards developed by the Court during this period asked, for instance, whether challenged state laws implicated "principle[s] of justice" that were "immutable,"[249] "implicit in the concept of ordered liberty,"[250] or that were necessarily protected "in every free government"[251] such that their violation would "work a denial of fundamental rights."[252]

The Court provided even more substantial justification for the incorporation doctrine in the early twentieth century. In *Palko v.*

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244. U.S. CONST. amend. XIV, § 1.

245. 83 U.S. 36 (1872).

246. *See* Adamson v. California, 332 U.S. 46, 51–53 (1947), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964) (discussing the impact of the *Slaughter-House Cases* in limiting the reach of the Privileges and Immunities Clause).

247. Bartemeyer v. Iowa, 85 U.S. 129, 134 (1873); *see* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 946 (1927).

248. *See generally* SIMON, *supra* note 152, at 31–33.

249. Snyder v. Massachusetts, 291 U.S. 97, 108 (1934).

250. Palko v. Connecticut, 302 U.S. 319, 324–25 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

251. Hurtado v. California, 110 U.S. 516, 536–37 (1884).

252. Maxwell v. Dow, 176 U.S. 581, 605 (1900); *see also* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (seeking to determine whether the rights at issue followed from the "very idea of a government, republican in form").

*Connecticut*,[253] for instance, the Court elaborated on its framework for analyzing incorporation claims and explained its reasoning within that framework for rejecting the defendant's claim that the state had violated his due process rights by trying him twice for the same offense.[254] Unsatisfied with its securing of a conviction of second-degree murder in the initial trial, the state successfully appealed, enabling it to initiate a second trial, which yielded a first-degree murder conviction, punishable by death. The defendant argued that conducting a second trial violated the Fifth Amendment's prohibition on trying an individual twice for the same offense, as made applicable against the states via the Fourteenth Amendment's Due Process Clause.[255] To assess that claim, Justice Cardozo's opinion for the eight-member majority relied on variously expressed universal standards of liberty and justice. In assessing due process claims, Justice Cardozo wrote, the Court should determine whether the right at stake represents the "very essence of a scheme of ordered liberty."[256] Thus, the outcome was necessarily "dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."[257] The nature of justice was also critical, as the analysis would hinge on whether the state's actions violated a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"[258] and on whether "a fair and enlightened system of justice would be impossible" without recognition of the rights asserted.[259] In rejecting the defendant's claim, the Court noted a number of freedoms—including those of thought and speech and the right to be free from a criminal conviction except after a fair hearing—which were "indispensable" and "fundamental" and, thus, within the protection of the Due Process Clause.[260] By contrast, the double jeopardy prohibition—like the rights to a jury trial and the freedom from self-incrimination—was not

253. 302 U.S. 319 (1937).

254. *Id.* at 325–28.

255. U.S. CONST. amend. V. The Amendment states, in relevant part: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." *Id.*

256. *Palko*, 302 U.S. at 325.

257. *Id.* at 326.

258. *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

259. *Id.*

260. *Id.* at 327.

sufficiently fundamental to merit constitutional protection from state governments.[261]

A little over a decade later, the Court employed the same overarching framework to reaffirm that the Fifth Amendment's privilege against self-incrimination did not apply against the states.[262] Justice Black dedicated the bulk of his 23-page dissenting opinion, which was joined by Justice Douglas and supplemented by a 30-page historical appendix, to leveling a broadside attack on the Court's prevailing methodology for evaluating parties' attempts to restrict state actions via the Due Process Clause.[263] In Justice Black's view, the Court's reliance on broad, universal principles of justices, such as the requirements of "civilized decency" and "fundamental principles of liberty and justice," amounted to an assertion of "boundless power under 'natural law' periodically to expand and contract constitutional standards."[264] This natural law approach, which Justice Black deemed "an incongruous excrescence" on the law itself, effected a constitutional violation "in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."[265] In place of the Court's approach, Justice Black advocated incorporation of the entire Bill of Rights against the states. Based on his reading of the historical sources, Justice Black contended that such an approach would have been faithful to the intentions of those who enacted the Fourteenth Amendment.[266]

The Justices extensively engaged methods for assessing incorporation claims in *Duncan v. Louisiana*, a case addressing whether the Sixth Amendment's right to a criminal jury trial applied against the states.[267] Over the course of roughly ten pages, Justice White's opinion for the seven-member majority developed the arguments in support of incorporating the jury trial right, its rationales ranging from historical sources to analysis of the right's most basic

261. *Id.* at 327–29.

262. Adamson v. California, 332 U.S. 46, 46–54 (1947). The Court had previously so held in *Twining v. New Jersey*, 211 U.S. 78 (1908).

263. *Adamson*, 332 U.S. 69–92 (Black, J., dissenting).

264. *Id.* at 69 (Black, J., dissenting).

265. *Id.* at 75 (Black, J., dissenting).

266. *Id.* at 74–75 (Black, J., dissenting).

267. 391 U.S. 145 (1968).

purposes and role within the American system of justice.[268] Justice Harlan was joined by Justice Stewart in dissent and offered an even lengthier account of his reasoning—upwards of twenty pages[269]—setting forth in detail his reasons for advocating an approach that looked not to whether an asserted protection was included in the Bill of Rights, but, rather, whether it was required by "American standards of fundamental fairness."[270] More recently, Justice Alito's plurality opinion in *McDonald v. City of Chicago*[271] furnished over thirty pages explicating the majority's decision to incorporate the Second Amendment's right to "keep and bear Arms."[272] In doing so, Justice Alito engaged extensively with the reasoning of both dissenting opinions, one by Justice Stevens and another by Justice Breyer, who was joined by Justices Ginsburg and Sotomayor.[273]

Although the Court never adopted the total incorporation approach advocated by Justice Black, it nevertheless effected a number of significant changes to its incorporation methodology beginning in the 1960s. First, instead of assessing the due process implications of a particular governmental act on a case by case basis, the Court began inquiring whether a particular Bill of Rights protection applied against the states as a general matter.[274] Second, in place of the universal standards of justice it had previously employed, the Justices increasingly looked to whether a particular Bill of Rights guarantee was "fundamental to the American scheme of justice."[275] Third, while earlier cases allowed for differences in the detailed enforcement of a particular Bill of Rights guarantee at the state and federal levels, the Court adopted an approach that essentially eliminated such differences in its interpretation of constitutional rights.[276]

Perhaps most significantly from a practical standpoint, selective incorporation, as applied, came to place so much weight on a right's

268. *Id.* at 149–59.

269. *Id.* at 171–93 (Harlan, J., dissenting).

270. *Id.* at 177 (Harlan, J., dissenting).

271. 561 U.S. 742 (2010).

272. U.S. CONST. amend. II.

273. *McDonald*, 562 U.S. at 754–91.

274. *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961).

275. *Duncan*, 391 U.S. at 149.

276. *McDonald*, 561 U.S. at 765; Benton v. Maryland, 395 U.S. 784, 795 (1969).

inclusion in the Bill of Rights that it amounted to an almost irrebuttable presumption in favor of incorporation. Today, only a very few rights identified by the first eight amendments have not been incorporated; they include the Third Amendment's prohibition on the quartering of soldiers, which the Court has never addressed; the Fifth Amendment's grand jury indictment requirement; and the Seventh Amendment's right to a jury trial in civil cases.[277] Nevertheless, the Court's approach to incorporation remains selective, and its approach to identifying which rights apply against the states remains hierarchical. Indeed, as recently as 2019, in determining for the first time that the Eighth Amendment's Excessive Fines Clause applied against the states, the Court did so on the grounds that the protection "secured by the Clause is . . . both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'"[278]

## V. THE DEARTH OF UNDERLYING RATIONALES FOR THE DOCTRINE'S ADOPTION

Two disclaimers must be stressed to sharpen the point of the critique to be advanced in this section. First, the motivation behind contrasting the CFD with strict scrutiny and incorporation case law is not to comparatively evaluate the merits of the Court's jurisprudence in these areas. Rather, the aim is to bring into stark relief a contrast with the Court's CFD jurisprudence in regards to the nature of the Justices' articulation of the reasons underlying its determinations. That is, the focus is not on whether the Court's pronouncements on these subjects are normatively appealing from a doctrinal vantage point but rather on the nature of the Justices' discourse and particularly the extent to which they have substantially articulated the rationales underlying those pronouncements. Strict scrutiny and incorporation both serve well as points of comparison because, like the CFD, they represent critical elements of the Court's hierarchical approach to rights adjudication. All three areas of jurisprudence involve heightened forms of review for particular classes of rights deemed to merit

277. *McDonald*, 561 U.S. at 764–65; Timbs v. Indiana, 139 S. Ct. 682, 690–91 (2019).

278. *Timbs*, 139 S. Ct. at 689 (quoting *McDonald*, 561 U.S. at 767).

prioritized protection.[279] Thus, all three bodies of case law span across a wide range of doctrinal areas within constitutional law. Moreover, the jurisprudence on all three forms of heightened review has been established over the course of a century or more, with considerable overlap in the time periods of their development.[280]

A second clarification is that the criticism of the Court's CFD jurisprudence advanced here is not that the case law includes differences of opinion among the Justices, or that it has changed over time, or that multiple opinions issued in the same case might make the precise import of a particular decision more challenging to discern. After all, it is characteristic of the Court's jurisprudence on highly contested topics that it is often messy in these and other ways. One would expect nothing less from a tribunal of nine opinionated jurists appointed at different times by different presidential administrations who serve on the Court over many years and who may forge strategically motivated compromise solutions. Indeed, it may well be a feature and not a bug of the judicial system that it creates room for vehement disagreements, evolution in interpretations, and even outright reversals in prevailing doctrines. Rather, the criticism advanced in this section concerns the relative paucity of the rationales articulated in support of the CFD. If anything, the problem has not been excessive disagreement among the Justices but insufficient

279. As we have seen, the strict scrutiny test subjects certain kinds of rights claims to more careful review than others, *see supra* Part IV.A; the selective incorporation doctrine makes distinctions between classes of rights to determine which ones fall merit Fourteenth Amendment protection, *see supra* Part IV.B; and, the CFD from its earliest roots has fundamentally concerned which claims should be subjected to more careful appellate review, *see supra* Part II.B.

280. The difference between the Court's CFD and incorporation with respect to the richness of the discourse among the Justices' discussing the doctrines is all the more striking in light of certain commonalities that they share. For instance, references in some of the Court's CFD cases to the fundamentality of rights along with the Court's linking of the doctrine with due process cannot help but evoke the hierarchical approach that the Court developed during the last century for identifying the classes of rights that applied against the states via the Fourteenth Amendment. Indeed, it is notable that the period of the CFD's emergence largely coincided with the period when the Court began incorporating Bill of Rights protections against the states based on standards calling for analysis of their relative significance. Notwithstanding these resonances, the Court developed well-articulated rationales in the realm of selective incorporation, but not with respect to the CFD.

discourse elaborating the reasons supporting both the views of the majority Justices and their opponents.

With respect to strict scrutiny and incorporation, as we have seen in the previous two sections, respectively, the Justices have often articulated in detail the rationales underlying their doctrines and how those rationales were tied to the manner in which the Court applied them. This has in many instances been reflected not only in majority opinions but also in concurring or dissenting opinions elaborating on the reasons for adopting a different approach. The Justices often explicitly engaged with the arguments of those advocating competing approaches. As a crucially important consequence, one investigating the Court's jurisprudence on strict scrutiny or incorporation—whether from the vantage point of litigant, jurist, scholar, or student—can find considerable insights from the Justices on their understanding of the doctrines' bases and application. The contrast in this regard with the Court's CFD jurisprudence is striking. Here, the Court's pronouncements on the doctrine have typically been cursory and conclusory. The case law on the CFD does not furnish anything like the same degree of explanation for changes in the Court's methodology over time. Nor does it provide anything close to the same kinds of insights regarding reasons for disagreements between the Justices. Since the Justices themselves have not adequately explicated the basis of their own pronouncements, their caselaw on the subject does not adequately provide guidance to or facilitate the engagement of those concerned with the doctrine and its implications.

### *A. The Court's Failure to Explain the Doctrine's Basis and Scope*

The Court's dearth of discourse elaborating the basis and meaning of the CFD has generated a great deal of uncertainty regarding the issues that are appropriate for de novo review by appellate courts. The uncertainty is exacerbated by the Court's more general failure to provide sufficient guidance on the difference between questions of fact and law, because it means that the appropriate standard of review is not clear even in cases where the Court applies the CFD. Nowhere is the inadequacy of the Court's CFD jurisprudence more conspicuous or troubling than with respect to the justification of the doctrine and how that justification shapes the scope of its application. As discussed

earlier,[281] the Court has at times stated that the justification for the doctrine lies in the Court's power and responsibility to protect constitutional rights,[282] suggesting that its application extended to all cases involving claims based on such rights.[283] This approach would not generate a hierarchy among constitutional rights but between all constitutional rights, on the one hand, and non-constitutional rights, on the other. In this sense, it would be the equivalent of applying strict scrutiny to all constitutional rights cases and only those cases. Such an approach would certainly call out for explanation. After all, while the Court's charge to rule on constitutional cases is uncontroversial, the link between that power and the CFD is far from obvious. Granted that Article III of the Constitution imbues the Court with the power and responsibility to protect constitutional rights, this observation alone hardly establishes a foundation for the CFD.[284]

Article III does not specify standards for judges to use when exercising the power of appellate review, nor is it clear why constitutional rights cases in particular should bring into play heightened standards of such review. Because the Court also has the power and responsibility to enforce many non-constitutional rights, it is not self-evident why a heightened standard of appellate review should apply exclusively to constitutional rights. Nevertheless, the Court's cases suggesting the use of such an approach have offered only cursory assertions that did not explain the justification for such a differentiation of rights claims.

Without the Court itself having connected the logical dots, we are left with only speculation as to possible explanations. We might imagine as a rationale that independent review is appropriate specifically in constitutional rights cases because of the greater importance associated with them as compared with non-constitutional rights. Such a claim, however, would itself require a rationale, especially as it does not have a great deal of facial plausibility.

281. *See supra* Part III.A.

282. *E.g.*, Gallegos v. Nebraska, 342 U.S. 55, 61 (1951); Pennekamp v. Florida, 328 U.S. 331, 345 (1946).

283. *E.g.*, City of Houston v. Hill, 482 U.S. 451, 458 n.6 (1987); Cassell v. Texas, 339 U.S. 282, 283 (1950).

284. Article III, among other things, establishes the Supreme Court and the federal judicial power to decide cases arising under the Constitution. U.S. CONST. art. III, § 1.

Certainly there are non-constitutional rights, such as those ensured by various anti-discrimination statutes, for example, with tremendous import. At the same time, as reflected in the Court's use of rational basis review in the mine run of constitutional rights cases challenging business or economic regulations, not all constitutional rights have been accorded high priority.

Aside from the question of whether there might be sound unarticulated justifications for application of the CFD to all and only constitutional rights cases, the assertion of such a basis suffers from the serious deficiency that it does not remotely match the Court's actual employment of the doctrine. In practice, the Court has concentrated its use of the CFD largely within just a few principal doctrinal areas, including especially equal protection (above all in cases involving racial discrimination regarding the selection of juries),[285] the use of improperly obtained confessions,[286] the awarding of excessive punitive damages in civil cases, and the First Amendment protections of free speech and press.[287]

Alongside the decisions indicating the CFD's application to all constitutional rights, another strand in the Court's cases has suggested that the doctrine applies in a more restricted fashion to particular kinds of rights claims, sometimes characterized as those involving fundamental rights[288] or with particularly high stakes for the parties challenging the government acts at issue.[289] While these suggestions have been cursory and devoid of elaboration, the Court has more often simply applied the doctrine to a particular type of case without so much as a hint of an account explaining the relevant differences between classes of rights.[290] In applying the CFD, the Court has been most

285. *E.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Norris v. Alabama, 294 U.S. 587 (1935).

286. *E.g.*, Thompson v. Keohane, 516 U.S. 99 (1995); Culombe v. Connecticut, 367 U.S. 568 (1961).

287. *E.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Greenbelt Co-op. Pub. Ass'n v. Bresler, 398 U.S. 6 (1970).

288. *E.g.*, Craig v. Harney, 331 U.S. 367, 373 (1947).

289. *E.g.*, Pierre v. Louisiana, 306 U.S. 354, 358 (1939).

290. *E.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435 (2001) (applying the CFD in the context of due process challenges to punitive damages award as excessive).

active in cases involving First Amendment claims,[291] and in some of these cases the Justices have explicitly identified this class of rights claims as bringing the doctrine into play.[292] In itself, the notion that the First Amendment might trigger heightened scrutiny is certainly plausible enough. In other contexts, including the Court's strict scrutiny and incorporation jurisprudence, the Court has placed a high priority on the protection of rights relating to the freedom of expression.[293] The difficulty is that the Justices have failed to clearly identify the distinctions between First Amendment rights and other classes of rights that would justify differential treatment under the CFD.

To be sure, it would not be accurate to say that the Court's jurisprudence has been entirely devoid of discourse regarding the basis and scope of the CFD. As noted, a number of opinions applying the doctrine have included brief references to the special importance of First Amendment rights. Nor would it be accurate to say that none of the CFD cases have acknowledged or discussed views opposing majority decisions. For instance, in *Time, Inc. v. Pape*,[294] which reversed the lower court's award of libel damages, Justice Harlan in dissent objected to the majority's exercise of independent review.[295] Acknowledging the Court's power to exercise independent review in cases involving "Fourteenth Amendment freedoms,"[296] Justice Harlan's two-page dissent maintained that the Court should have declined to do so. Given the First Amendment protection afforded by the requirement established in previous cases that a public official demonstrate "actual malice" to prevail on a libel claim,[297] Justice Harlan argued that independent review would not serve any "additional interest."[298] Justice Harlan allowed that independent review might be appropriate in cases involving "unusual factors," such as the "existence

291. *See supra* Part III.A.

292. *E.g.*, Jacobellis v. Ohio, 378 U.S. 184, 189 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

293. *See supra* Part IV.

294. 401 U.S. 279 (1971).

295. *Id.* at 293 (Harlan, J., dissenting).

296. *Id.* at 294 (Harlan, J., dissenting).

297. *E.g.*, *Sullivan*, 376 U.S. at 262.

298. *Pape*, 401 U.S. at 641 (Harlan, J., dissenting).

of a jury verdict resting on erroneous instructions."[299] However, since no such factors were present in the instant case and indiscriminate use of the CFD would overburden the Court, he would have affirmed the lower court's determinations.[300] Thirteen years later, dissenting in *Bose Corp. v. Consumers Union of United States, Inc.*, Justice Rehnquist echoed Justice Harlan's views in *Time Inc. v. Pape*, contending that the Court should defer to lower court findings on "actual malice" in libel cases, especially where the determination turned on the credibility of witnesses who testified at trial.[301] Stressing the factual nature of determinations regarding a particular author's state of mind at a particular time, Justice Rehnquist expressed his thought on the CFD more generally, stating that the doctrine presumably "exists, not so that an appellate court may inexorably place its thumb on the scales in favor of the party claiming the constitutional right, but so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for."[302]

Nevertheless, consideration of the rare opinions containing more than conclusory statements regarding the CFD only reinforce the overall paucity of engaged discourse by the Justices on the doctrine. Consider that the majority opinions in both *Time, Inc. v. Pape* and *Bose Corporation* failed to even mention the dissenting opinions in each of those cases much less acknowledge and respond to their arguments. Indeed, as is typical in the Court's CFD jurisprudence, the majority opinions in both of those cases included only brief, unsupported assertions regarding the appropriateness of applying the CFD.

The discussion in this Part regarding strict scrutiny and selective incorporation has served as a point of contrast to highlight deficiencies pertaining specifically to the CFD. The difference is not a subtle one of degree, turning on minor quantitative disparities in the number of pages or opinions devoted to articulating the rationales for critical doctrines. Rather, attention to the case law on these critical elements of the Court's hierarchical approach to rights adjudication reveals a qualitative gulf in the quality of the discourse. The difficulty is not that the Justices have expressed the CFD's basis and scope in a variety of

299. *Id*. (Harlan, J., dissenting).

300. *Id.* (Harlan, J., dissenting).

301. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 519–20 (1984) (Rehnquist, J., dissenting).

302. *Id.* at 518.

ways, but that they have failed to develop a body of jurisprudence engaging the important issues at stake.

Notably, even in *Time, Inc. v. Pape*, noted as a rare instance in which at least one of the Justices presented more than cursory discussion of the CFD, the majority offered only the vaguest description of the reasons why the doctrine might be applied in one case but not another. First, it referred to the "settled principle"[303] that the doctrine applies to "cases in which there is a claim of denial of rights under the Federal Constitution," where the Court "will reexamine the evidentiary basis on which those conclusions are founded."[304] Here, the Court was referencing the broadest possible interpretation of the CFD—that it applies to all constitutional rights claims—despite the fact that it had long been clear by this point that this did not remotely match the Court's actual practice. Yet, in the next line, the opinion noted:

> [I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff.[305]

This language implicitly acknowledged that the Court did not, in fact, apply the CFD in all constitutional rights cases, but the opinion did nothing to tie application of the CFD to a governing principle. Instead, the Court merely observed that the particular kind of claim involved was one in which the Justices had "frequently had occasion" to apply the CFD.[306] Meanwhile, Justice Harlan's dissent expressed yet another version of the doctrine's scope of application when he argued that the CFD applies to "decisions that allegedly impair or punish the exercise of Fourteenth Amendment freedoms."[307] The problematic feature of the Court's jurisprudence that the case

303. *Pape*, 401 U.S. at 284.

304. *Id.* (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

305. *Id.* (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284–85 (1964)).

306. *Id.*

307. *Id.* at 294 (Harlan, J., dissenting).

exemplifies is not that the case law has included references to different accounts of the doctrine's scope—as noted, disagreement and shifts in prevailing views over time is common and expected—but that the Justices characteristically failed to even acknowledge the multiplicity of accounts, much less engage in discourse articulating the reasons supporting and opposing competing views.

The lacking discourse on the basis and scope of the CFD is exacerbated by the Justices' failure to provide adequate guidance regarding the difference between questions of fact and law. As noted, the Court itself has acknowledged the oftentimes confusing nature of its cases on the subject.[308] What must be stressed here is that on top of the uncertainty relating to the Justices' general approach to distinguishing legal from factual questions—that is, in non-constitutional cases—the Court has failed to explain how the presence of constitutional issues alters the usual analysis. As a result, even assuming that a dispute involves rights claims that the Court is willing to treat as falling within the CFD's scope of application, a great deal of uncertainty remains regarding the particular issues presented that the Justices treat as appropriate for de novo review.

Worse, even assuming that the Justices had offered more help than they have with respect to the review of mixed questions, they have said even less to clarify how the analysis should be affected by the presence of constitutional issues. We know that the presence of constitutional issues must have some effect or the CFD would simply be inoperable, and for the same reason we can assume that in at least some cases it should make appellate courts more likely to exercise do novo review. The cases, however, offer little counsel beyond that. As a result, the CFD in application appears to provide no more direction to appellate courts than that when determining whether to exercise de novo review they may sometimes place a thumb on the scale in favor of de novo review.

### *B. The Lack of Guidance in Applying the CFD to Mixed Questions*

Earlier, we examined various factors that the Court has indicated may be relevant to determining when mixed questions of fact and law

308. *See supra* Part III.B.

are to be treated as questions of law subject to de novo review.[309] Here, we note why the Court's cases addressing the topic fail to provide substantially meaningful guidance regarding the application of the CFD. The difficulty consists in two kinds of considerations. First, the factors identified by the Court for distinguishing questions of law and fact, generally, provide little guidance. Second, and most importantly for the present discussion, even assuming that these factors provided more guidance than in reality they do, the Court has simply not explained how the presence of constitutional issues affects or interacts with the analysis of those factors.

As discussed, the considerations listed by the Court fall broadly into two types.[310] Faced with a mixed question, one type of consideration focuses directly on the "the nature of the inquiry itself."[311] Yet, a puzzling aspect of this purported basis of analysis is that mixed questions by their very nature combine elements of legal and factual inquiry. Presumably, then, the notion of examining the "inquiry itself" presupposes that mixed questions lie on a kind of spectrum, ranging from pure questions of law to pure questions of fact, as the Justices have on occasion suggested.[312] The Court, however, has provided virtually no guideposts for discerning which mixed questions fall closer to one end of the spectrum rather than another, other than reaffirming the basic distinction between issues of fact and law and suggesting that legal issues implicate a "complex of values."[313] But mixed questions characteristically entail application of governing standards to particular events, shaping the disposition of cases, and, thus, inevitably implicating a host of normative considerations. Without a standard that can cut more ice, the cases provide virtually no direction to one seeking to identify those mixed questions that ought to be treated as questions of law rather than fact.

The second type of consideration that the Court has suggested as pertinent to determining whether to review mixed questions de novo is pragmatic or functional in character, focusing not on the inherent nature of the mixed question, but, rather, on the relative capacities of

309. *See supra* Part III.B.

310. *See supra* Part III.B.

311. Miller v. Fenton, 474 U.S. 104, 115 (1985).

312. *E.g.*, *id.*

313. *Id.* (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960)).

the judicial actors involved.[314] It is not clear that this second kind of consideration offers greater guidance than the first. For instance, the Court has suggested that it counts in favor of treating a mixed question as a question of law if de novo review would help to unify precedent.[315] But it is difficult to imagine cases in which this factor would not be applicable. After all, the Court's interventions by their nature have the tendency of settling disagreements that may have arisen in the lower courts. Again, however, even assuming for the sake of argument that the functional considerations provided greater guidance than they do, the larger problem with respect to the CFD in particular is that the Court has not explained how the analysis of mixed questions is affected by the presence of constitutional issues. As a result, we can say little more than that de novo review of mixed questions may be somewhat more likely in constitutional rights cases, though we do not know how or why that might have an impact on any particular case or type of claim.

## VI. CONCLUSION

The constitutional fact doctrine treats some classes of rights claims differently from others. Any time that the law declares that it will furnish rights claims a lesser level of protection than is enjoyed by others, it is vital that an explanation be offered for the differentiation. This is not to say that the fact of drawing such differentiations is in itself unusual or problematic. Indeed, American constitutional law is deeply hierarchical in the sense that it is built around the identification of certain kinds of rights claims as special and deserving of heightened protection. Notable examples of hierarchical elements in prevailing constitutional jurisprudence include the strict scrutiny test, which places more exacting demands on government to justify actions interfering with certain kinds of rights, and selective incorporation, which applies most, but not all, Bill of Rights protections against the states.

Whatever the merits of particular hierarchical elements in rights jurisprudence from a normative standpoint, it is critical that the jurists responsible for their development and application offer explanations for them. This is vital not only because judicial decision makers should

314. *See supra* Part III.B.

315. Thompson v. Keohane, 516 U.S. 99, 114 (1995).

have articulable reasons for their determinations, but also so that other legal actors—and the populace, more generally—can comprehend, meaningfully engage with, and potentially influence the pronouncement and application of judicial doctrines. As this Article has explored, there is a striking contrast between strict scrutiny and incorporation jurisprudence, on the one hand, and CFD jurisprudence, on the other, with respect to the extent to which the Justices have offered rationales for their determinations in these respective areas. In the course of developing its strict scrutiny and selective incorporation standards, the Justices frequently provided detailed accounts of their rationales and how those general rationales connected with the dispositions of particular cases. Just as importantly, the Justices in these areas often acknowledged and addressed opposing arguments not only from counsel and judges below but also from their colleagues on the High Court. The same cannot be said of the Court's CFD jurisprudence. In this arena, when the Justices have articulated principles at all, they have typically been cursory and conclusory in nature, offering little by way of underlying justifications for their determinations. Engagement between majority and other Justices has been notably scant.

The dearth of articulated reasoning is not limited to obscure precincts of the CFD's operation. To the contrary, they concern its most basic elements, including the reason for having such a doctrine in the first place, and its scope of application. Given the Court's failure to explain how the presence of constitutional rights issues interacts with assessments of when to review mixed questions of fact and law de novo, the only potential basis for guidance on the doctrine's scope of operation would be in terms of the classes of cases in which it applies. Here, too, however, the Court has failed to offer adequate guidance. What we can say with the greatest confidence is that First Amendment cases have often been held to fall within the doctrine's scope of operation. But the Justices have said precious little to clarify the salient distinctions between First Amendment rights and other classes of rights cases where they have been less willing to extend the doctrine's application. Even if we knew the classes of rights to which the doctrine applied, we would nevertheless lack an account of why these rights merited greater protection particularly in the form of a heightened degree of appellate review. Are these areas in which appellate judges are more likely to reach the correct answers? If so, is the justification

that it is more important to get the right answers with respect to some kinds of rights claims than others? One investigates the case law in vain for substantial answers to such questions.

While an inquiry into causal explanations for the relative deficiency of articulated rationales in CFD jurisprudence is beyond the scope of this Article, we may briefly mention one possibility. Specifically, we might wonder if the explanation lies in the CFD's central focus on a determination about a question of procedure or allocation of decision-making authority. The pivotal questions regarding the application of the CFD concern the relative roles of different judicial actors in the process of reaching a case's final disposition. By contrast, strict scrutiny and selective incorporation might appear to more directly govern the substantive standards according to which constitutional rights cases are adjudicated. One problem with such a potential explanation, however, is that it is not clear that a distinction between substantive and procedural questions would hold up under further analysis; for instance, selective incorporation has critical implications for the relative roles of state and federal decision makers. That aside, the more fundamental point is that since the CFD governs the intensity with which the Supreme Court and other appellate courts review determinations by factfinders, it may impact the outcomes of cases every bit as much as other hierarchical elements embedded within today's constitutional jurisprudence. In light of the CFD's significance within constitutional rights jurisprudence, the doctrine should either be jettisoned completely, or placed on a foundation that makes clear its reason for being.