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Saying What the Law Should Be

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Recent years have seen a resurgence of the view that the role of the federal courts is to declare what the law is, not what the law should be. Scholars and judges, including a majority of the current U.S. Supreme Court justices, have expressed this view that the law is fixed at its creation and the function of courts is to declare its meaning. But this view is inaccurate. Descriptively, federal courts often say what the law should be. Judges fashion common law, inject their views into interpretations, and issue opinions that do not merely describe the law but have independent legal authority. Moreover, various legal doctrines—such as Chevron deference and rational basis review—operate on the assumption that the law is not fixed but can be changed by courts and others. The saying is also normatively inaccurate. Federal courts often should make law. For example, the primary role assigned to the Supreme Court is to settle the meaning of unclear law, and often that settlement depends on evaluations of what the law should be rather than merely what it "is." Persisting with the fiction that the role of the courts is "to say what the law is"—instead of actually acknowledging the lawmaking role of the judiciary—undermines judiciary legitimacy, encumbers the judicial lawmaking process, and unduly shifts accountability to others for judicial decisions.

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INTRODUCTION

The role of the federal courts is to "say what the law is, not what the law should be."[1] So said Justice Kavanaugh in 2016. He is hardly the first to say something of this sort. Many justices from both sides of the aisle—including Chief Justice Roberts, and Justices Gorsuch, Sotomayor, Kagan, and Barrett—have made similar statements,[2] as

1. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016). *See also* Brett M. Kavanaugh, *The Judge as Umpire: Ten Principles*, 65 CATH. UNIV. L. REV. 683, 685 (2016) (hereinafter "*Judge as Umpire*") ("At its core, in our separation of powers system, to be an umpire as a judge means to follow the law and not to make or re-make the law—and to be impartial in how we go about doing that."); *see generally* ROBERT A. KATZMANN, JUDGING STATUTES (2014).

2. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States*: *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr.), https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf ("Judges are like umpires. Umpires don't make the rules, they apply them. . . . [A]nd I will remember that it's my job to call balls and strikes, and not to pitch or bat."); Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 909 (2016) ("[I]t seems to me those who would have judges behave like legislators, imposing their moral convictions and utility calculi on others, face an uphill battle when it comes to reconciling their judicial philosophy with our founding document."); *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 70 (2009) (hereinafter "Nomination of Sonia Sotomayor") (statement of J. Sonia Sotomayor) ("[J]udges must apply the law and not make the law."); *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary*, 111th Cong. 220 (2010) (hereinafter "Nomination of Elena Kagan") (response of Elena Kagan to Sen. Al Franken, S. Comm. on the Judiciary) (noting that Congress makes the law and the Court must apply the law); Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 3

have other judges and commentators.[3] Opinions of the Supreme Court have also expressed similar sentiments. Statements proclaiming that "it is not the proper role of the courts to rewrite the laws passed by Congress and signed by the President,"[4] and expressing fear of "transforming [courts] from expounders of what the law *is* into policymakers choosing what the law *should be*[]" are common.[5] They reflect the view that courts should not make law, but instead should only apply what others have enacted.[6]

This view—that courts only declare what the law is, not what it should be—is the modern version of the traditional "declaratory theory," under which courts discover the law but do not create it.[7] The declaratory theory stands in contrast to the "realist theory," which posits that courts do create law through their decisions.

Today's claims that the role of the courts is only to say what the law is are used in different ways. Sometimes, the claims are normative. Their context suggests that federal courts *should* only

(2016) (adopting "the position that the original public meaning of the Constitution is the law."). *See also* Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. F. 24, 27 (2016) (stating that Justice Scalia "was apt to say that his reading of the law had always been the right one, whatever the Court might have said in the past.").

3. *See, e.g.*, Boule v. Egbert, 998 F.3d 370, 378 (9th Cir. 2021) (Bumatay, J., dissenting from denial of rehearing en banc) ("[A]s federal judges, our limited role is 'to say what the law is,' and nothing more."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994) (endorsing originalism because original meaning "alone is [the] law"); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292–93 (2007) (claiming that the Constitution's original meaning is "binding law"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1130 (2003) ("The meaning of the words and phrases of the Constitution as law is necessarily fixed as against private assignments of meaning."). The statement also is part of the mission of the Federalist Society. *See* THE FEDERALIST SOCIETY, *About Us*, https://fedsoc.org/about-us (last visited Oct. 5, 2022) ("[The Society] is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.").

4. Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020).

5. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018).

6. Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts - One Judge's Views*, 51 DUQ. L. REV. 3, 18 (2013) ("The shibboleth that judges apply law rather than make it is deeply engrained in the judiciary, in Congress and other legislatures (legislators like to think of themselves as the only lawmakers), and in the legal profession as a whole.").

7. Samuel Beswick, *Retroactive Adjudication*, 130 YALE L.J. 276, 299 (2020) ("The idea that common-law principles or right interpretations of statutes might preexist their articulation in judicial decisions is associated with Blackstone's natural-law tradition."); Learned Hand, *The Speech of Justice*, 29 HARV. L. REV. 617, 617 (1916) (recounting the tradition that the judge is a "passive interpreter" and "should have no aim but to understand the law as he finds it").

say what the law is, and judges accordingly should aspire to refrain from making law.[8] Other times, the claims are descriptive. They suggest that, even when courts appear to be making law, they *actually* are only saying what the law is instead of making it.[9]

But both the descriptive and normative senses of the claims are wrong. Descriptively, federal courts do not simply discover law when adjudicating cases. Since *Erie*, it has been commonly accepted that federal courts do not discover common law; they make it.[10] There have also been many decisions in which federal judges have interpreted written laws, statutes, and the Constitution, in ways that cannot easily be said to reflect efforts to enforce the "true" meaning of the law. The creation of qualified immunity as a defense to actions under 42 U.S.C. § 1983, the expansive common-law-like decisions interpreting 28 U.S.C. § 1331, the Sherman Act, and the many decisions implementing the Due Process Clause are obvious examples.[11]

Federal courts also make law insofar as their opinions have legal authority separate from the common law or written laws that they implement. Their opinions are binding on lower courts—they are not merely evidence of the law for the lower courts to consider. Moreover, their opinions can change legal liabilities, such as when an opinion clearly establishes law that precludes future assertions of qualified immunity.[12]

There are also various doctrines whose internal logic or operation depends on the realist theory of the law. These doctrines do not depend on the realist theory simply in the sense that they are the product of aggressive interpretations. Instead, the realist theory is built into the doctrine. One example is *Pullman* abstention. Under that doctrine, if a federal court faces an uncertain question

8. *See Judge as Umpire*, *supra* note 1, at 685 (2016) (arguing that separation of powers demands that judges not make law).

9. *See* Danforth v. Minnesota, 552 U.S. 264, 271 (2008) (stating that when the Court identifies a new constitutional rule, "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law" and therefore "the underlying right necessarily pre-exists [the Court's] articulation of the new rule").

10. Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1076 (1999) (arguing that the theory "that the common law had a positive source independent of judicial decisions . . . has no modern adherents.").

11. *See infra* notes 71–84 and accompanying text.

12. *See* Mullenix v. Luna, 577 U.S. 7, 12 (2015) (quoting Ashcroft v. Al-Kidd, 563 U.S. 731, 741 (2011)) (stating that a law is clearly established if "existing precedent [has] placed the statutory or constitutional question beyond debate.").

of state law whose resolution would obviate the need to decide a constitutional question, the federal court should refrain from deciding the case and let the state courts resolve the state law issue. A premise underlying *Pullman* is that state law does not have a set meaning for federal courts to find—otherwise the federal courts would simply try to discover that state law—but instead state courts set the meaning of state law. A wide range of other doctrines, ranging from *Chevron* deference to *Miranda* warnings, likewise rest on the realist theory of the law. The variety and importance of these doctrines undercut the claim that the role of the courts is simply to say what the law is, instead of what it should be.

In addition to being descriptively inaccurate, the claim that the role of the judiciary is to say what the law is instead of what it should be is normatively wrong, given the current structure of the federal judiciary. One of the major functions of the federal judiciary is to expound on the law and to fashion doctrine to implement that law. Indeed, performing these tasks is the primary function of the U.S. Supreme Court. These doctrines and interpretations often inevitably depart from the "true" meaning of the law, if for no other reason than that the law is too vague to administer directly.[13] Thus, although the "true" meaning of the law plays an important role in expounding law and developing doctrine, other considerations—such as administrability, predictability, institutional competences, and conservation of resources—inevitably play a role in many cases.[14] These considerations reflect judicial determinations of what the law should be, instead of what it is.

Persisting with fiction that the role of the federal courts is to merely say what the law is, when their role often is actually to say what the law should be, has negative consequences. The fiction unduly obscures the lawmaking process by artificially treating legal doctrines as foreordained instead of articulating the factors that courts actually consider in fashioning doctrine. The misdirection threatens judicial legitimacy, and it results in litigants having less information about the arguments they should make to influence doctrine and lower courts having less guidance about the factors they should consider when fashioning doctrine. The fiction

13. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997) (arguing that some laws embody norms that "are too vague to serve as rules of law").

14. *Id.* at 62 (arguing that "the Supreme Court must take account of empirical, predictive, and institutional considerations" in fashioning doctrine).

also undermines accountability. It results in judges disclaiming responsibility for the doctrines they fashion, and instead incorrectly placing the responsibility on Congress or the people.

This Article challenges the claim that the role of the federal judiciary is simply to say what the law is, not what it should be. It argues that the claims are descriptively and normatively off target. Descriptively, the Article does not simply reiterate the commonly made observation that courts make common law.[15] It illustrates that courts legislate in all fields of decisions, including even when they purport to be only interpreting written law. It also demonstrates that the operation of various doctrines depends on the notion that courts legislate at least sometimes. Normatively, it argues not only that judicial lawmaking is desirable to handle legal indeterminacies but also that we have structured our judiciary system in a way that rests on the assumption that appellate courts ought to say what the law should be. In making these claims, the Article focuses on the federal judiciary. Although similar statements espousing the declaratory theory have been made about state judiciaries,[16] this Article takes no position on the states, whose allocations of government power, judicial systems, and judicial doctrines widely vary.

Demonstrating the inaccuracy of the claim that courts do not, and ought not, make law is particularly important in today's climate, as the declaratory theory has increasingly gained traction in legal opinions and legal culture. It underpins the increasing ascendancy of originalism and textualism,[17] and it has become so ingrained that judicial nominees of all stripes agree with it in the confirmation hearings.[18]

The Article proceeds in four parts. Part I describes the declaratory and realist views of law. It then explains that the statement that the role of the court is simply "to say what the law is" embodies a

15. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 186 (1986) ("The essence of common law is that the law itself is made by the judges.").

16. *E.g.*, Wisconsin v. Lickes, 960 N.W.2d 855, 857 n.4 (2021) (stating that the role of the "court . . . is limited to saying what the law is and not what [the court] may wish it to be").

17. *See, e.g.*, Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 686 (2009) (describing the rise of originalism, which treats the meaning of the Constitution's provisions as fixed); John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 752 (2017) (arguing that textualism aims to ensure that judges avoid "making law on their own account").

18. *See supra* note 2.

declaratory view. Part II argues that these declaratory statements are descriptively inaccurate. To that end, it points to various decisions and doctrines that rest on a realist view of the law. Part III turns from the descriptive to the normative claim. As it explains, the declaratory view is normatively untenable given the way that we have structured the federal judicial system. A major function of federal courts, and in particular the Supreme Court, is to elaborate and clarify the law, and performing that task inevitably results in judges opining on what the law should be. Part IV argues that stating that courts cannot make law when courts actually are making law interferes with transparency and undermines accountability. Although the fiction may serve several useful functions—such as setting aspirational norms and providing a basis for desirable doctrines—those benefits do not outweigh the costs, and they warrant at most maintaining the fiction in only a small set of circumstances.

In short, courts regularly make law—not only when adjudicating common law but also when interpreting statutes and constitutions—and we should recognize that it is often desirable for them to do so.

I. THE NATURE OF FEDERAL JUDICIAL DECISIONS

To understand the importance of the statement that the role of the judiciary is to say what the law is instead of what the law should be, it is useful to begin with a discussion of the nature of judicial decisions and how the federal judiciary has viewed its decisions. To that end, this Part begins by describing the two basic theories about the nature of judicial decisions. The declaratory theory posits that courts do not create law but instead merely declare its meaning through their decisions. In contrast, the realist theory states that courts create law through their decisions. The statement that the role of the judiciary is just to say what the law is rests on a declaratory theory of the law. This Part then discusses the way in which the federal judiciary has viewed its decisions over the years.

A. The Theories of Judicial Decisions

There are two general theories about the nature of judicial decisions on law.[19] The first is the declaratory theory, also known as the "legalist" or "formalist" theory.[20] Under this theory, courts do not create law through their decisions; instead, law exists independent of judicial decisions. The role of courts is to discover the law and apply that discovered law to resolve cases.[21]

This declaratory theory of the law was prominent in early England. In 1625, Francis Bacon stated that the judge's "office is *jus dicere,* and not *jus dare;* to interpret law, and not to make law, or give law."[22] Other commentators, such as Hale and Blackstone, espoused similar views that judges discovered law but did not create it.[23]

Under this view, judicial opinions themselves do not have legal authority. As Blackstone put it, opinions are merely "evidence" of

19. Posner, *Legal Formalism*, *supra* note 15, at 180 (discussing the two theories); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

20. *See* Richard A. Posner, *Realism About Judges*, 105 NW. U. L. REV. 577, 578 (2011) (using these terms).

21. *Id.* (explaining that under this theory, judges "are transmitters of law, not creators, just as the Oracle at Delphi was the passive transmitter of Apollo's prophecies").

22. BACON, ESSAYS, CIVIL AND MORAL, *in* 3 HARVARD CLASSICS 130 (C. Eliot ed., 1909) (1625).

23. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., 1971) (1713) ("Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a Law between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do)"); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 69–70 (1765) (calling judges the "oracles" and "depository of the laws"). *See also* DAINES BARRINGTON, OBSERVATIONS ON THE STATUTES, CHIEFLY THE MORE ANCIENT, FROM THE MAGNA CARTA TO THE TWENTY-FIRST OF JAMES THE FIRST 116 (3d ed. 1769) ("[L]et the inconveniences of a statute be what they may, no judge . . . can constitutionally dispose with them; their office is *jus dicere* and not *jus dare*."); Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1559 (2009) (describing the Blackstonian view). Coke also opposed the idea of courts creating law, but his concern appears to have rested more on the injustices that could result if they had that power. 1 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 41 (E&R Brooke ed. 1797) (1642) (recounting the horrors resulting from a law conferring discretion on the courts to define defenses as a "good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law, and not to the incertain and crooked cord of discretion.").

that law[24]—they are data points useful for discerning the law,[25] but they are not law themselves.[26] Even when overturning prior decisions, courts do not create law. Instead, the court merely "vindicate[s] the old [law] from misrepresentation."[27]

The other theory is the realist view of law. In stark contrast to the declaratory view, the realist theory says that law does not have set content external to adjudication.[28] Instead, law develops and changes through adjudication.[29] Courts therefore do not engage in a process of law discovery when adjudicating. Instead, when a court issues a decision that announces a new legal principle, it creates that principle through judicial legislation.[30] Decisions are not merely evidence of the law; they announce law.[31]

Discussions about the two theories of the law often focus on the common law, both because common law most obviously presents the circumstances in which a judge might be seen to be creating law and because *Erie*, the case which most prominently

24. 1 BLACKSTONE, *supra* note 23, at 69 ("[J]udicial decisions are the principal and most authoritative *evidence,* that can be given, of the existence of such a custom as shall form a part of the common law.") (emphasis added); 2 EDWARD COKE, COKE UPON LITTLETON 254(a) (1st ed. 1853) (noting that reported decisions are "the best proofs [of] what the law is").

25. Beswick, *supra* note 7, at 299 ("The idea that common-law principles or right interpretations of statutes might preexist their articulation in judicial decisions is associated with Blackstone's natural-law tradition."); 3–4 G. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35 129 (1988) ("[C]ommon law doctrines, as articulated by judges, were seen as principles that had been discovered rather than new laws that were being made.").

26. 1 BLACKSTONE, *supra* note 23, at 69 (stating that the judicial power was not "to pronounce [a] new law, but to maintain and expound the old one"); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 346 (5th ed. 1956) ("[T]he Year Books themselves . . . were not regarded as collections of authoritative or binding decisions."); THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 91 (4th ed. 1868) ("[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases.").

27. Harper v. Virginia Dep't of Tax'n, 509 U.S. 86, 107 (1993) (Scalia, J., concurring); *accord* 1 BLACKSTONE, *supra* note 23, at 69–70.

28. Posner, *Legal Formalism*, *supra* note 15, at 181 (describing the realist method of interpretation).

29. *See* JEREMY BENTHAM, OF LAWS IN GENERAL 166–68, 184–95 (H.L.A. Hart, ed., Althone Press 1970); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 8 (E.H. Burns & H.L.A. Hart, eds., 1879).

30. *See* Posner, *Realism About Judges*, *supra* note 20, at 578 (describing the realist theory "cast[s] judges in a legislative role").

31. Beswick, *supra* note 7, at 308 (describing the realist view that judges are "lawmakers").

discusses the issue, involved a question of common law.[32] But the two theories apply beyond the common law. They extend to statutes, ordinances, constitutions, and other written laws.

Under the declaratory theory, courts do not create law when they interpret written laws. The content of those laws is independent of interpretation.[33] Courts merely discover the law created by the written laws in their decisions. Judicial decisions interpreting written laws describe the requirements of those laws instead of establishing them.

By contrast, under the realist theory, judicial interpretations are not simply descriptions of the meaning of statutes. Those interpretations establish the meaning of statutes. The content of written law is not fixed *ex ante*. Judicial decisions can adjust the scope and reach of the written law. The interpretations rendered in decisions have legal authority in their own right.[34]

B. The Declaratory Theory in the Federal Judiciary

The statements of various justices and commentators about the appropriate role of the court—that the role of the federal judiciary is to say what the law is, instead of what the law should be—align with a declaratory theory of the law. They suggest that federal courts do not have a role to play in making law (saying what it should be). Instead, the judiciary's function is simply to identify the law and say what it is.

32. Erie R.R. v. Tompkins, 304 U.S. 64, 77–78, 90 (1938). *See* Notes, *Judicial Takings, Judicial Federalism, and Jurisprudence: An* Erie *Problem*, 134 HARV. L. REV. 808, 827 (2020) ("*Erie* embraced a purely realist conception of the common law in which the decisions of state judges themselves establish law").

33. Great N. Ry. Co. v. Sunburst Oil & Refin. Co., 287 U.S. 358, 365 (1932) ("[T]he ancient dogma that the law declared by . . . courts had a Platonic or ideal existence before the act of declaration . . . ."). This declaratory theory does not require that the law necessarily preordained the outcome in every case. A law may confer discretion in application, which requires the court to exercise judgment based on principles. *See* United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d) (Marshall, C.J.) ("[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.").

34. The lawmaking power of judges under the realist theory is more limited when judges interpret written laws than when a judge creates common law. A judge can potentially create common law in any case; by contrast, a judge can create law through interpretation only in the smaller set of cases in which there is a written law to interpret. Lawmaking in the latter case, in other words, is contingent upon the existence of a written law.

But this view has not always prevailed in the federal courts. Over the years, the dominant view of the federal courts has vacillated between the declaratory and realist theories. To grossly generalize, the basic history is as follows: Early federal decisions tended to reflect a more declaratory view of the law.[35] In the early twentieth century, the realist position gained more of a foothold.[36] But beginning in the 1980s, the declaratory position saw a resurgence that persists today.

One might think that the declaratory and realist views have been tied to particular ideologies—in particular, conservatives favor the declaratory view and liberals the realist view. That is true to some degree. Progressives were the major advocates of realism in the early 20th century[37] and modern conservatives, such as Justice Scalia and Judge Bork, are largely responsible for the resurgence of the declaratory view in the 1980s.[38] But it is not true as a rule. Some conservatives have pressed for more realist theories—for example, Professor Vermeule has advocated for a version of living constitutionalism to advance conservative goals.[39] At the same time, various liberals, such as Justices Sotomayor and Kagan, have voiced support for the declaratory view.[40]

35. *See, e.g.*, VanHorne's Lessee v. Dorrance, 2 U.S. 304, 308 (C.C.D. Pa. 1795) (Patterson, J.) ("The Constitution is certain and fixed . . . ."); *see also* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 107 (1993) (Scalia, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) ("The conception of the judicial role that he possessed, and that was shared by succeeding generations of American judges until very recent times, took it to be 'the province and duty of the judicial department to say what the law is,' not what the law shall be.") ; *cf.* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 668 (1999) ("State court decisions of the founding era often adopted declaratory views. . . .").

36. *See* Hand, *supra* note 7, at 617 (stating that the declaratory view is the traditional view).

37. Greene, *supra* note 17, at 676 ("Progressive Era thinkers, judges included, were comfortable applying the metaphor of evolution to the Constitution.").

38. *See id.* at 681–82 (describing the rise of originalism, which treats the Constitution as fixed); *see also, e.g.*, Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that the Constitution is fixed).

39. *See, e.g.*, Adrian Vermeule, *Beyond Originalism*, THE ATLANTIC (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ (arguing for a living constitutionalism approach to achieve conservative goals); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 550 (1991) (O'Connor, J., dissenting) ("[B]ecause this Court has 'the power "to say what the law is," Marbury v. Madison, 1 Cranch 137, 177 (1803)," ante, at 549 (Scalia, J., concurring in judgment),' when the Court changes its mind, the law changes with it.").

40. S*ee* Nomination of Sonia Sotomayor, *supra* note 2, at 70 (statement of Sonia Sotomayor) ("[J]udges must apply the law and not make the law."); Nomination of Elena

Sometimes, the statements that the courts' role is only to declare the law are made in a normative sense. They are stating that courts *should* not make law.[41] This normative view rests on a traditional view of the separation of powers. The theory is that the Constitution does not confer on the federal judiciary the power to fashion policy.[42] Article I empowers Congress to enact policy through legislation, and the people may create policy through constitutional amendments. By contrast, the role of the Article III judiciary is simply to resolve disputes by applying the laws enacted by others.[43]

The normative view that courts should not make law provides the foundation for arguments that courts should not recognize new rights in the Constitution,[44] create implied rights of action,[45] or remedy unconstitutional statutes through expansive statutory rewriting.[46] It also underlies various interpretative theories. For example, textualists argue that laws should be interpreted according to the way that the text of a law would have been understood at its enactment.[47] The primary justification given for textualism is

Kagan, *supra* note 2, at 220 (response of Elena Kagan to Sen. Al Franken) (noting that Congress makes the law and the Court must apply the law).

41. *See* Eric J. Segall, *Originalist Fiction as Constitutional Faith*, 2020 U. CHI. L. REV. ONLINE 1 (2020) (arguing that "[m]any law professors, judges, court commentators and media pundits still argue that originalism," which relies on a declaratory theory, "should be a determiner of case outcomes whether it has been or not").

42. *See, e.g.*, SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1358 (2018) ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

43. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1631 (2018) (internal quotation marks omitted) (quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396–97 (1951) (Jackson, J., concurring)) ("It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute [w]e do not inquire what the legislature meant; we ask only what the statute means."); *see* KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 12 (1930); *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–75 (7th ed. 2015) (describing the "dispute resolution" model of adjudication).

44. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (arguing that "crafting new individual rights" conflicts with the judicial role of exercising "mere judgment").

45. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) ("[F]inding that a damages remedy is implied by a provision that makes no reference to that remedy may upset the careful balance of interests struck by the lawmakers.").

46. United States v. Booker, 543 U.S. 220, 309 (2005) (Scalia, J., dissenting) ("The question is, when the Court has *severed* that standard of review (contained in § 3742(e)), does it make any sense to look for some congressional 'implication' of a *different* standard of review in the remnants of the statute that the Court has left standing? Only in Wonderland.").

47. Elena Schiefele, *When Statutory Interpretation Becomes Precedent: Why Individual Rights Advocates Shouldn't Be So Quick to Praise* Bostock, 78 WASH. & LEE L. REV. 1105, 1117

that it ensures that courts do not make law but instead only ascertain the meaning of the law and apply it.[48] Likewise, originalists argue that the meaning of the Constitution was fixed at ratification and is immutable except by amendment.[49] In their view, courts do not have the power to alter the meaning of the Constitution (as fixed at the original meaning); their role is simply to uncover that original meaning and apply it.

In addition to reflecting an aspirational view of how courts should function, the statements that the role of the court is only to declare the law are sometimes descriptive. They assert not simply that courts *should* confine themselves to saying what the law is. They go further to say that the courts *actually* do not make law but merely say what the law is.

Several doctrines are based on this assertion that courts merely say what the law is. The most prominent example is the doctrine of retroactivity. Under the retroactivity doctrine, when a court changes the interpretation of a written law, that new interpretation applies to conduct that occurred before the court rendered that interpretation.[50] In other words, if a person acts at time *X*, and a court announces a new interpretation at time *X*+*Y*, that new interpretation applies to person who acted at time *X*—even though the person acted before the court announced its new interpretation.[51] Thus, for example, if a defendant is convicted based on a broad interpretation of a criminal law, and a court subsequently narrows that interpretation, retroactivity would

(2021) ("[T]he most fundamental principle of new textualism" is "that only the statutory text itself, as understood at the time of its enactment, carries the force of law.").

48. *See, e.g.*, Manning, *Justice Scalia*, *supra* note 17, at 752 (arguing that Justice Scalia's textualism aimed to implement a theory of proper judicial behavior, under which judges avoid "making law on their own account").

49. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 Nw. U. L. Rev. 1243, 1271–76 (2019); Barrett & Nagle, *supra* note 2, at 7–8 ("[M]ost originalists cast the theory as a claim about what the law is."); Christopher R. Green, *Originalism as Faithfulness*, 2019 U. CHI. L. REV. ONLINE 1, 2 (2019) (arguing for originalism on the ground that "fidelity to the Article VI oath" is "to support 'this Constitution'").

50. Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

51. By contrast, under a prospective approach, new interpretations apply only to conduct that occurs *after* the court renders its decision—in other words, it applies only to conduct performed after time *X*+*Y*.

allow that defendant to benefit from the new interpretation and seek habeas relief.[52]

The Court has explicitly based this federal retroactivity doctrine on the declaratory theory.[53] It has said that new interpretations of the law do not create law; instead, those interpretations merely identify the actual meaning of the law.[54] As the Court put it, "A judicial construction of a statute is an authoritative statement of

52. Bousley v. United States, 523 U.S. 614, 620 (1998) (relying on the declaratory theory to apply changes of the criminal law retroactively, stating that failure to apply it retroactively would result in punishment for "an act that the law does not make criminal" (internal quotation marks omitted)). Retroactivity is also the reason that, when a court adopts a new interpretation of a law in a case, that new interpretation applies to the person in whose case the new interpretation was announced—after all, that person acted before the court announced the new interpretation. Griffith v. Kentucky, 479 U.S. 314, 323 (1987) (stating that retroactivity is necessary to apply the new interpretation to the case in which it is announced).

53. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312–13, 313 n.12 (1994) ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law."). Aside from a brief period in the late twentieth century, federal courts have consistently applied interpretations retroactively. Traditionally, federal and other courts steadfastly applied new interpretations retroactively. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years."); *see also* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT § 37, at 308–10 (2016). In the 1960s, the Supreme Court abandoned this historical approach, holding that courts could create doctrines that operated prospectively, applying only to conduct that occurred after the decision was rendered. *See* Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971) (civil cases); Linkletter v. Walker, 381 U.S. 618 (1965) (criminal cases). But in the late 1980s, the Court returned to the historical retroactivity doctrine. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 107 (1993) (civil cases); Griffith v. Kentucky, 479 U.S. 314 (1987) (criminal cases).

54. Am. Trucking Ass'ns, v. Smith, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("[P]rospective decision making is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."); *accord* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548 (1991) (Scalia, J., concurring in the judgment); *see also* De Niz Robles v. Lynch, 803 F.3d 1165, 1170 (10th Cir. 2015) (Gorsuch, J.) ("[T]he presumption of retroactivity attaching to judicial decisions was anticipated by the Constitution and inheres in its separation of powers.").

The Court has also made clear that retroactivity of constitutional decisions is not simply a function of Article III; instead, it inheres in the law. If it were just an Article III function, state courts would not be obliged to apply constitutional rulings retroactively, because state courts are not bound by Article III. ASARCO Inc. v. Kadish, 490 U.S. 605, 617 (1989) ("We have recognized often that the constraints of Article III do not apply to state courts. . . ."). But in *Montgomery v. Louisiana*, the Court rejected that view, holding states must retroactively apply constitutional determinations that immunize particular conduct from criminalization. Montgomery v. Lousiana, 577 U.S. 190, 201–02, 204 (2016). In so holding, the Court explicitly relied on the declaratory theory. It stated that, if the Court determines that the constitution immunizes particular conduct from punishment, the Constitution *always* immunized that conduct from punishment. *Id.* at 204.

what the statute meant before as well as after the decision of the case giving rise to that construction."[55]

Although the declaratory theory underlies the retroactivity doctrine, justifying doctrine in opinions is not the typical context in which one finds the modern statements that the role of the judiciary is only to say what the law is. More often, they appear in articles, testimony, and speeches on the federal judiciary.

II. PREVALENCE OF THE REALIST THEORY

The statements espousing the declaratory theory for federal courts—that the role of the federal courts is to say what the law is instead of what it should be—do not accurately capture the state of things. The realist theory of the law pervades federal courts.[56] Federal courts regularly fashion common law according to what they believe the law should be. They also routinely interpret statutes and the Constitution in ways that rather clearly reflect the courts' view of what the law should be instead of what it is.

55. Roadway Express, Inc., 511 U.S. at 312–13; *see also* Danforth v. Minnesota, 552 U.S. 264, 271 (2008) (stating that when the Court identifies a new constitutional rule, "the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule[]"). Even though new interpretations apply retroactively, those retroactive interpretations may not entitle a litigant to a remedy. For example, when a court announces a rule of criminal procedure that was not "dictated" by prior decisions, a prisoner whose conviction became final before the court announced the new rule cannot seek habeas relief based on that new rule. Edwards v. Vannoy, 141 S. Ct. 1547, 1555 (2021). But the reason for this limitation is not that the new rule does not apply retroactively. To the contrary, when the Court announces a new rule of procedure after a person has been convicted, that rule does indeed apply before the conviction was entered. Danforth, 552 U.S. at 291. ("A decision by this Court that a new rule does not apply retroactively . . . does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts."). Instead, it is a limitation on the *remedy*. *Id.* at 290–91. "It is important to keep in mind that our jurisprudence concerning the 'retroactivity' of 'new rules' of constitutional law is primarily concerned, not with the question whether a constitutional violation occurred, but with the availability or nonavailability of remedies." *Id.* The court that entered the conviction erred by not applying that rule, but that error was not a ground for awarding the remedy of habeas to the prisoner. *Id.*

56. *See* Green, *supra* note 49, at 1 ("[I]t is hard to evade the general conclusion that all of the justices, professing originalists included, sometimes make things up."); *see generally* ERIC J. SEGALL, ORIGINALISM AS FAITH (2018) (gathering significant numbers of cases demonstrating that decisions regularly reflect judicial value choices). Observers noted the lawmaking function centuries ago. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 103 (J.P. Mayer ed., George Lawrence trans., 1969) ("[A judge] "only pronounces on the law because he has to judge a case, and he cannot refuse to decide the case."); *The Case of* Gelpcke v. Dubuque, 4 HARV. L. REV. 311, 318 (1896) ("[I]t is impossible to exercise the judicial function without such incidental legislation.")

Moreover, various doctrines implementing statutes and the Constitution implicitly depend on a realist theory of the law.

A. Common Law

Since the 1938 decision of *Erie R.R. Co. v. Tompkins*,[57] the Court has consistently held that courts create common law through their decisions. *Erie* overturned the century-old decision *Swift v. Tyson*,[58] which took the position that courts discovered common law instead of creating it. *Erie* rejected the view that the common law is "a transcendental body of law" waiting to be discovered by the courts.[59] Instead, it said that common law is a creation of the courts—that judges make common law just as legislatures write statutes.[60]

To be sure, the Court has tightly circumscribed this federal common law power. Federal courts can make common law only in areas that raise unique federal interests[61]—areas such as admiralty and interstate disputes,[62] as well as matters involving the military and the liability of the United States and its contractors.[63] They lack the power to create general common law,[64] and they cannot make criminal common law.[65]

Moreover, in recent years, the Court has curtailed the power of federal courts even further. For example, although courts traditionally had the power to create common law actions to vindicate violations of federal rights, the Court has limited the power of federal courts to do so. In *Alexander v. Sandoval*, the Court

57. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

58. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

59. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

60. *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 533 (2019).

61. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" (internal citations omitted)).

62. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1945 n.1 (2021) ("'[E]nclaves' in which federal courts develop legal principles in a common-law fashion include, for example, the areas of admiralty law, disputes between States, and some aspects of federal labor law.").

63. *Boyle*, 487 U.S. at 504 (discussing military common law and creating common law immunity for federal contractors).

64. *Erie*, 304 U.S. at 78 ("There is no federal general common law.").

65. United States v. Hudson & Goodwin, 11 U.S. 32, 32 (1812); *see* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 979–83 (2019).

held that federal courts cannot create common law causes of action to enforce federal statutes that do not provide their own cause of action,[66] and in *Hernandez v. Mesa*, it indicated that federal courts presumptively should not recognize new actions to vindicate violations of constitutional rights.[67]

Still, although these decisions limit the power of the federal courts to make common law, they do not eliminate the judiciary's power to create it. Federal courts still have the power to do so in the areas raising unique federal interests.[68]

B. Written Law

The realist theory is prevalent in decisions involving statutes and other written laws as well.[69] Courts often state their view of what the law should be when interpreting written laws. Moreover, there are several doctrines implementing written laws whose operation depends on the realist theory of the law. These doctrines are not simply products of expansive or restrictive interpretations of a particular law. Instead, the realist theory is instrumental to these doctrines because their logic depends on the realist theory. At a more general level, the realist theory underlies decisions about which method to employ when interpreting a written law.

66. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

67. Hernandez v. Mesa, 140 S. Ct. 735, 742 (2020) (stating that, in determining whether to recognize a damages remedy, the "watchword is caution").

68. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1945 (2021) (reaffirming the federal common law power); *see also* Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421–22 (1964) (discussing the power to make federal common law).

69. The power of the courts to create common law does not imply the power to create law when implementing statutes and other written laws. J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 928 (1988) ("Of course, the idea that common law judges do make law was not generally accepted before this century, and the fiction that judges discovered eternal legal principles served to obscure the obvious tension between the tasks of statutory interpretation and common law adjudication."). After all, courts may make common law only if there is no other law to apply, Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1120 (2010) (discussing the judiciary's power to make federal common law), and therefore, one might argue, creating law does not usurp the role of those charged with making law. Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.").

The decision signifies a choice by the court about how the law should be interpreted.

This section first identifies instances where judges have interpreted the law according to what they think the law should be, rather than just stating what the law is. It then discusses how the choice of methodology used to interpret the law might actually reflect the judge's decision of what the law should be.

1. Interpretation

Although federal judges often interpret laws according to their honest assessment of what the written law requires, they do not always do so. Instead, federal judges routinely interpret and implement written laws according to what they think the law should be. To start with the obvious, there are various statutes that directly authorize courts to make common law. For example, the Sherman Act has been understood to confer on the courts the power to develop a common law of antitrust.[70] Courts may change the contours of the Sherman Act as often as necessary to meet changes in our economic system.[71]

Along the same lines, there are many decisions in which it is difficult to say that the courts sought to glean the "true" meaning of the law that they were interpreting instead of saying what the law should be.[72] Consider qualified immunity. Under 42 U.S.C. § 1983, anyone who "under color of" state law violates a person's constitutional or other federal rights is liable to that person for

70. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute.").

71. *Id.* ("Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions.") (alterations in original). One may argue that, contrary to the Court's view, implementing the Sherman Act involves interpretation instead of fashioning common law. But in the end, the result is the same: courts make law in the name of the Sherman Act. For another example of a statute authorizing the creation of common law, see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957) (holding that § 301 of the Labor Management Relations Act of 1947, "authorizes federal courts to fashion a body of federal law for the enforcement of [] collective bargaining agreements . . . .").

72. William N. Eskridge Jr., Brian G. Slocum & Stefan T. Gries, *The Meaning of Sex: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1531 (2021) (arguing that the interpretation of long-standing statutes is inherently dynamic); *see also* WILLIAM N. ESKRIDGE JR., DYNAMIC STATUTORY INTERPRETATION 48–49 (1994) (arguing that some statutes inevitably will be interpreted according to what the court thinks the law should be).

damages caused by the violation.[73] Although the text of § 1983 creates a categorical right to recovery, the Supreme Court has limited recovery through qualified immunity, which shields an official from damages unless the right violated was "clearly established."[74] The doctrine is widely recognized not to reflect a faithful interpretation of § 1983, but instead constitutes a judicially created defense aimed at reducing § 1983 liability.[75]

Finding other examples of courts interpreting laws according to what they think the law should be is easy to do.[76] Even in the mundane area of federal jurisdiction, courts have fashioned the law according to suit their vision. Take 28 U.S.C. § 1331, the federal statute conferring jurisdiction on district courts over cases "arising under" federal law.[77] Virtually all of the Supreme Court's decisions applying that law have turned on the justices' personal views about the appropriate role of the federal judiciary and the need to conserve judicial resources[78]—though occasionally the Court half-heartedly says that those conclusions reflect Congress's goals instead of the justices' own.[79] The result has been an elaborate, complicated doctrine restricting jurisdiction to most suits that allege a federal cause of action[80] and suits that

73. 42 U.S.C. § 1983 ("Every person who, under color of any [law] of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .").

74. *E.g.*, City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019); Kisela v. Hughes, 138 S. Ct. 1148, 1152 (2018) (per curiam).

75. *See* F. Andrew Hessick & Katherine C. Richardson, *Qualified Immunity Laid Bare*, 57 WAKE FOREST L. REV. (forthcoming 2022) (manuscript at 12) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3808164) (stating that qualified immunity is a judge-made doctrine that has "evolved over time").

76. William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1243 (2001) (giving examples of the Civil Rights Act and the Endangered Species Act).

77. 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

78. F. Andrew Hessick III., *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. Rev. 895, 897 (2009).

79. *See* Gunn v. Minton, 568 U.S. 251, 258 (2013) (suggesting that the doctrines implementing federal question jurisdiction enforces the "federal-state balance approved by Congress").

80. *Id.* at 257 (stating that "a case arises under federal law when federal law creates the cause of action" but admitting that there are "rare exceptions") (citing Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916)).

allege state causes of action that turn on a sufficiently important question of federal law.[81]

The phenomenon is not limited to statutory interpretation. Judges also interpret the Constitution according to their vision of what they think the law should be. One example is Justice Douglas's opinion in *Griswold v. Connecticut* stating that provisions of the Constitution create penumbras that protect activity outside the provisions.[82] The Fourth Amendment provides many other examples. In *Maryland v. Wilson*, for instance, concern about officer safety led the Court to authorize officers to order all passengers out of a vehicle during a traffic stop, regardless of whether the officer has any reason to think that the passengers were engaged in wrongdoing or that the passengers posed a danger to the officer.[83] In both cases, the justices interpreted the Constitution in ways that implemented their policy preferences.

To reiterate, none of this is to suggest that judges always interpret laws in a way that reflects what the judges think the law should be. Judges often interpret laws based on their assessment of what the law is, as opposed to what they think it should be. The point is that they do not always do so. They often interpret the law according to what they think it should be.

81. *Id.* at 258 (authorizing federal jurisdiction over a state law claim that raises a federal issue if the federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress"); *see also* Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562, 1569 (2016) (reaffirming *Gunn*'s approach). Another, potentially more extreme, example is United States v. *Booker*, 543 U.S. 220 (2005). There, the Court held that the Sentencing Reform Act was unconstitutional insofar as it made the Federal sentencing guidelines mandatory. To remedy the constitutional defect, the Court excised the provisions making the Guidelines mandatory. *Id.* at 259. But it also decreed that sentences imposed by district courts would be subject to appellate review for reasonableness. Although no provision in the Act provided for such review, the Court stated that it would infer reasonableness review from the structure of the statute to retain some level of uniformity in sentencing. *Id.* at 261–62. Although these are good reasons for reasonableness review, it is hard to avoid the conclusion that reading reasonableness review into the statute involved judicial lawmaking instead of an effort to find the "actual" meaning of the law.

82. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

83. Maryland v. Wilson, 519 U.S. 408, 413–14, 417 n.2 (1997).

2. *Choosing Methods of Interpretation*

At a more abstract level, courts make decisions about what the law should be when they choose how to approach interpreting a statute. There are a number of methodologies for interpreting written laws, such as textualism, purposivism, intentionalism, and pragmatism.[84] The differing approaches of these methodologies can lead to different interpretations. For example, textualists interpret written law based on how a reasonable person would have understood the text at the time it was written,[85] while pragmatists also consider the social utility of one interpretation over another.[86]

Federal law does not prescribe a particular method of interpretation.[87] Nor does the declaratory theory itself imply a particular method of interpretation. The declaratory theory is only that the law is set before interpretation, waiting to be discovered by judges and others. It does not dictate what constitutes the substance of the law or how to find it. Instead, judges choose which methodology to employ. That choice itself results in a form of judicial lawmaking. The choice of method is not a decision about what the content of the law should be. Instead, it is a decision about *how* the court should approach interpretation to glean the content of the law. But because the choice about methodology determines how the law will be interpreted, the choice carries with it a determination of what the law should be. The law should mean *X*, because method *Y* (which I chose) says it should mean *X*. In other words, even if the role of the court is to say what the law is, one cannot say what the law is without first making a choice about how to go about determining the meaning of the law.

84. *See* F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1074 (2021).

85. John F. Manning, *What Divides Texualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 (2006) (arguing that modern textualists discern meaning from the words used as viewed through the lens of the community's shared linguistic conventions).

86. Hessick & Morley, *supra* note 4, at 1081 ("Pragmatists contend that, because most legal texts are indeterminate, courts should simply select the construction that achieves the greatest social benefit.").

87. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2089 (2002) (noting the lack of interpretive laws); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872 (2008) (noting that doctrines of statutory interpretation do not have stare decisis effect). To be sure, a legislature *could* prescribe a method of interpretation. If it did so, courts would not make law in choosing to follow the method prescribed by the statute.

Of course, adherents to one methodology or another may argue that their methodology does conform to the declaratory theory because their method aims to find the law according to its actual meaning. For example, purposivists might argue that the "actual law" is the text, read against the policies and reasons why the legislature enacted the statute.[88] Likewise, textualists might argue that "the law" is how a reasonable person would understand the text of the statute, considering only the semantics of the language and not the policies that drove the enactment of the statute.[89] And originalists might argue that the understanding of constitutional provisions at the time of ratification constitute "the Constitution."[90]

But these arguments simply reflect different positions regarding what "the law is." For purposivists, it is the purpose that motivates the legislation; for textualists, the most likely semantic understanding of the text; for originalists, the original public meaning of the text. These are not the only possible definitions of "the law." For example, many early-English commentators who subscribed to the declaratory theory of the law believed that statutes were written against an overarching principle of equity.[91] This view led them to conclude that courts should construe penal statutes narrowly,[92] but they did not think that judges were creating law when they did so. Instead, they thought that the equity constraining the criminal law was *part of* the law.[93]

88. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1374–81 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958). By contrast, purposivists argue that the purpose of the legislation, as envisioned through the eyes of a hypothetical "reasonable legislator" informs the meaning of the text.

89. Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 929 (2020) ("Under that view, statutory textualism is baked into the constitutional scheme."); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012) (justifying textualism on the ground that "[n]othing but the text has received the approval of the majority of the legislature and of the President . . . .").

90. Barrett & Nagle, *supra* note 2, at 3 (adopting "the position that the original public meaning of the Constitution is the law").

91. 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 649 (3d ed. 1770) ("In some Cases the Letter of an Act of Parliament is restrained by Equity; in others it is enlarged; and in others the Construction is contrary to the Letter.").

92. *See* Eyston v. Studd, 2 Plowd. 459, 465, 75 Eng. Rep. 688, 695–96 (K.B. 1574) (reporter's note) (stating that through equity, courts could "correct[] the law" to cure "any deficiency" by "enlarg[ing] or diminish[ing] the letter . . . .").

93. In 1988, Judge Easterbrook condemned as ahistorical the possibility that the "true" law may be different from the text, saying that the "principle that the written word is just evidence of the law, rather than the law itself, is novel." Frank H. Easterbrook, *The Role*

The disagreement about methodologies suggests that there is no easy answer to what constitutes "the law." There are only arguments for why one method should be treated as identifying the true law, and each method rests on reasonable arguments. Choosing to employ a particular method—be it purposivism, textualism, or something else—therefore signifies a choice by the judge about how courts *should* approach interpretation.

C. Binding Nature of Precedent

Another more general example of the acceptance of the realist theory in the federal judiciary is that the opinions of the Supreme Court and circuit courts have legal authority. This is apparent in at least two ways.

First, the opinions of those courts have legal authority because they are binding. Lower courts are legally obliged to follow the holdings of courts higher in the judicial hierarchy.[94] Moreover, since the 1958 decision in *Cooper v. Aaron*, non-judicial officials must follow Supreme Court pronouncements on the meaning of the Constitution.[95] The reason these opinions are binding is that the law makes them binding.[96] It is not that earlier opinions should be followed because they are the best evidence of the law—which is the basis for adhering to precedent under the

of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988). Not so. In 1574, the King's bench said that the "words" of a statute "are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes." Partridge v. Strange, 1 Plowd. 78, 82, 75 Eng. Rep. 123, 130 (1553). The theory of text being only evidence of the law might have been novel in 1553, but certainly not in 1988.

94. Rivers v. Roadway Express, Inc., 511 U.S. 298, 312 (1994) ("It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.").

95. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.'" (citation omitted)); *see also* Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 1002 (1987) (arguing that executive officials are "bound by law to conform to established Supreme Court precedent").

96. Ramos v. Louisiana, 140 S. Ct. 1390, 1416 (2020) (Kavanaugh, J., concurring in part) ("[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with 'one supreme Court.' U. S. Const., Art III, § 1. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.").

declaratory theory.[97] Lower courts and officials cannot ignore a binding decision by claiming they believe it is only evidence of the law and it can therefore be discounted if they find other evidence more compelling.

To be sure, the binding nature of precedent is not absolute. A court that issues a decision is not bound by its own earlier decision. For example, the Supreme Court can overturn its own interpretations.[98] Nor is the Supreme Court bound by a circuit opinion.[99] But these scenarios do not suggest that opinions lack legal authority. They reveal only that courts can change the law through new opinions, just as Congress can change the law through new statutes.

Second, opinions have legal authority because they can establish new liabilities. Qualified immunity provides an example. Recall that qualified immunity shields an officer from liability for damages under § 1983 for a constitutional violation unless the constitutional right was "clearly established" at the time the right was violated.[100] According to the Court, only holdings issued by the Supreme Court or a circuit in which the violation occurred can clearly establish the law.[101] Other sources that could clearly delineate the law's requirements—such as treatises, articles, district court opinions, circuit decisions from other circuits, and dicta from

97. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 475–76 (O.W. Holmes, Jr. ed., 12th ed., Little, Brown, & Co. 1873) (1826) (justifying stare decisis on the ground that prior opinions are "the highest evidence which we can have of the law applicable to the subject").

98. Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 138 S. Ct. 2448, 2478 (2018) (quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009)) ("'Stare decisis is not an inexorable command.'"). The arguments for when courts should depart from precedent widely vary, especially in the constitutional context. Some argue that courts should adhere to stare decisis in some circumstances even when the courts think the prior decision was wrong; others argue that courts should overturn any prior decision that misinterprets the Constitution. *See* Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 457–58 (2018) (summarizing the different views); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1883 (2013) (ascribing to Justice Thomas the view that "many or most deviations from the Constitution's original public meaning as, at most, only weakly constraining").

99. *E.g.*, District of Columbia v. Heller, 554 U.S. 570, 693 (2008) (Breyer, J., dissenting) ("[W]e are not bound by a lower court's interpretation of federal law.").

100. City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019).

101. Mullenix v. Luna, 577 U.S. 7, 11 (2015) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)) (stating that a law is clearly established only if "'existing precedent . . . [has] placed the statutory or constitutional question beyond debate'").

the Supreme Court—do not suffice.[102] Under this scheme, holdings in certain opinions have legal authority that establish rules that can trigger liability in the future.[103]

D. Doctrinal Dependence on Law Creation

Another category of doctrines that rely on the realist theory are those that operate on the assumption that the law is not fixed. These doctrines are not simply instances in which courts adopted an expansive or restrictive interpretation of written laws or created law through interpretation. Instead, these are doctrines where the logic of the doctrine depends on the realist theory. Several examples of these doctrines follow.

1. Pullman Abstention

Under *Pullman* abstention, when a federal court is faced with an uncertain question of state law and the resolution of that state law question would obviate the need to decide a constitutional question, the federal court should refrain from deciding the case and let the state courts resolve the state law issue.[104] The logic underlying the doctrine involves two steps. First, federal courts should avoid deciding constitutional questions unnecessarily. Second, federal courts should avoid resolving uncertain state law because doing so is the responsibility of state courts.[105] Thus, *Pullman* abstention rests on the theory that federal courts are not equal to state courts when interpreting state law.

Pullman abstention implicitly rests on a realist theory. A premise underlying *Pullman* is that state law does not have a set

102. *See* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("Many Courts of Appeals therefore decline to consider district court precedent when determining if constitutional rights are clearly established for purposes of qualified immunity.").

103. Qualified immunity is not unique in this regard. A similar scheme occurs in 28 U.S.C. § 2254(d)(1), the statute that authorizes federal courts to grant habeas corpus to state inmates. Under that statute, federal courts may grant habeas corpus relief for defendants convicted of state offenses if the state court decision violates "clearly established Federal law, as determined by the Supreme Court of the United States[.]" Only Supreme Court holdings may clearly establish the law under this statute. Howes v. Fields, 565 U.S. 499, 505 (2012) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

104. R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 501 (1941).

105. *Id.*

meaning, but instead can be fashioned by state courts. [106] If state law had a correct meaning that the federal courts could identify, federal judges could discover that meaning because judges are, as a general matter, good at discovering law. Deference would thus be unnecessary because federal courts would typically come to the same conclusion as the state courts.[107] But if state courts make law,

106. In that light, it may be that *Pullman* deference is inappropriate for cases involving the law of some states. Whether state law follows a declaratory or realist approach is a question of state law. The Supreme Court recognized this point long ago, stating that the states may choose to "hold to the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration," or they may treat their judicial decisions as creating new law. Great N. Ry. Co. v. Sunburst Oil & Refin. Co., 287 U.S. 358, 365 (1932); *see also* Lincoln v. Gen. Motors Corp., 586 N.W.2d 241, 260 (Mich. Ct. App. 1998) (recognizing that states may adopt the realist or declaratory theory for state law), *aff'd*, 607 N.W.2d 73 (Mich. 2000). Some state courts have followed a realist theory, *see, e.g.*, Findley v. Findley, 629 S.E.2d. 222, 227–28 (Ga. 2006); Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 518 (Tex. 1992), while others have been more declaratory, *see* Stroh Brewery Co. v. Dir. of N. M. Dep't of Alcoholic Beverage Control, 816 P.2d 1090, 1096 (N.M. 1991) (following a more declaratory theory); Washington v. Guest Servs., Inc., 718 A.2d 1071, 1079 (D.C. 1998); *see also* Blair Moody, Jr., *Retroactive Application of Law-Changing Decisions in Michigan*, 28 WAYNE L. REV. 439, 441 (1982) (arguing for a declaratory theory for Michigan). For states in the latter category, the justification for *Pullman* abstention is weaker.

107. One might argue that, if the Court actually holds a realist view as suggested by *Pullman* abstention, federal courts arguably should always abstain whenever faced with difficult and uncertain questions of state law. But in *Meredith v. City of Winter Haven*, the Court rejected this argument holding that federal courts typically have a duty to address all issues that arise in diversity. Meredith v. City of Winter Haven, 320 U.S. 228, 234–35 (1943). Indeed, although *Meredith* did not rely on a declaratory theory in stating that federal courts typically have an obligation to resolve state issues, one might argue than an implication of *Erie* is that the declaratory theory necessarily underlies federal interpretations of state statutes. The theory would be that one of the consequences of *Erie* is that federal courts have no authority to proclaim what the law "should be" when interpreting state statutes; instead, they must apply the law as determined by the states.

This is true to some degree. Some courts, for example, have refused to recognize novel torts based on *Erie*. *See, e.g.*, Johnson v. Sawyer, 47 F.3d 716, 729 (5th Cir. 1995) ("As there is currently no Texas law creating a common law cause of action for a statutory violation for which violation there is an express and comprehensive statutory cause of action, we will not undertake to . . . create such a Texas common law cause of action.").

At the same time, other arguments push against a declaratory theory. For instance, decisions by the circuits on state law do constitute law insofar as they are binding on lower federal courts. *See In re* Watts, 298 F.3d 1077, 1082–83 (9th Cir. 2002) (holding that circuit interpretation of a state law is binding until a state indicates the interpretation is incorrect). Most important, *Erie* no more implies the declaratory theory than separation of powers does. *Erie* stands only for the proposition that federal courts cannot create state law. That same argument holds for federal judicial interpretations of federal statutes. Just as states have sole authority to create state law, Congress has the sole authority to create federal law, and therefore federal courts should always interpret federal statutes according to what the law should be. But federal courts do not always take that approach. Although federal courts may—as an empirical matter—try to minimize lawmaking more in the federalism context,

Pullman abstention makes sense because it protects the federalism principle that states should determine the content of their laws.

2. Chevron Deference

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, the Court established a two-part deferential scheme for how courts review an agency's interpretation of its own statutes.[108] If the statute is unambiguous, the court must give effect to the unambiguous intent of Congress. But if the statute is ambiguous, the court must defer to the agency's interpretation, so long as that interpretation is a reasonable construction of the statute.[109]

The current justification for *Chevron* deference is that, in directing an agency to administer a statute, Congress assigns interpretive authority to that agency. Courts must defer to agency interpretations because those interpretations are controlling.

By that reasoning, *Chevron* is incompatible with a declaratory theory of the law. The declaratory theory is not simply a limitation on judicial power; it is a theory about the nature of law. It posits that written law has a platonic meaning. It therefore exists independent of interpretation—by anyone, courts or agencies. *Chevron* deference breaks with this theory. It takes the position that the meaning of an ambiguous statute is not set at the moment of enactment; instead, agencies may establish and even change the requirements of the law through their interpretations, and courts are bound to obey those new interpretations if they are reasonable.[110]

There is little reason to think that agencies themselves seek to interpret statutes according to their "true" meaning. The reason to assign interpretive power to agencies is to allow agencies the discretion to implement their own policies through interpretation,[111]

they do not always do so. *See, e.g.*, Doe v. Mckesson, 945 F.3d 818, 829 (5th Cir. 2019) (recognizing new state liabilities), *cert. granted, judgment vacated*, 141 S. Ct. 48 (2020).

108. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

109. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute[.]").

110. *Id.* at 982.

111. Frank H. Easterbrook, *Judicial Discretion in Statutory Interpretation*, 57 OKLA. L. REV. 1, 3 (2004) ("These days even the judges most attracted to the Hart and Sacks legal process school, which urged interpreters to find and extend the legislation's spirit, disclaim entitlement to rely on personal, and perhaps idiosyncratic, views of wise policy. Yet 'good'

and agencies are likely to interpret statutes in that way instead of tying their hands by trying to ascertain the "true" meaning of statutes.[112]

Chevron deference would not pose a problem under the declaratory theory if the interpretations rendered by agencies actually *made* law instead of merely *interpreted* a statute.[113] Nor would *Chevron* pose a problem under the declaratory theory if the agency determination receiving deference was not an *interpretation* of an ambiguous statute, but instead was a separate *policy* created by the agency to implement an ambiguous statute. In both cases, *Chevron* deference would not result in the meaning of the law changing; instead, in the former case, it would recognize that the law itself changed, and in the latter, it would merely uphold a policy promulgated by an agency. But the Court has not characterized *Chevron* in these ways. Instead, it has held that *Chevron* is only a doctrine of interpretation.[114]

Although *Chevron* deference relies on a realist view, other types of deference are consistent with a declaratory view. An example is

outcomes are exactly what an agency sets out to achieve when exercising discretion.") (footnote omitted).

112. F. Andrew Hessick, *Remedial* Chevron, 97 N.C. L. REV. 1, 7 (2018) ("*Chevron* deference reflects the pragmatic conclusion that agencies are better suited than courts to resolve ambiguities in statutes that they are charged with administering. When the tools of statutory interpretation run out, the resolution of ambiguity in a statute is no longer simply a legal question. Rather, interpreting the statute also calls for value-laden judgments.") (footnote omitted); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 635 (1996) (arguing that statutes that "create and regulate administrative agencies" are "habitually vague and indefinite" to afford agencies policy flexibility).

113. *See* Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1027–37 (2015) (discussing various consequences of treating *Chevron* as a rule of authorizing lawmaking instead of deferring to interpretations).

114. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001). Legislative rules promulgated by agencies potentially raise a similar problem under the declaratory theory. Legislative rules have the force of law, but the Court has insisted that they are not laws because only Congress has the power to make laws. Instead, the Court has said agency rules are exercises of the executive power that state how the law will be executed. INS v. Chadha, 462 U.S. 919, 953 n.16 (1983); Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1606 (2018) ("[W]hen agencies promulgate legislative rules, they are executing the law, not making it.").

If a regulation is simply an implementation of a statute instead of itself a law, enforcing the regulation itself would be inconsistent with a declaratory view. The regulations themselves would not impose any legal obligations. Only the statute that the regulation implements imposes obligations. A regulation implementing a statute is simply evidence of the statute's requirements. Violating the regulation, accordingly, would not be a basis for relief; instead, it would simply be evidence of a violation of a statute.

Skidmore deference.[115] *Skidmore* applies when an agency interprets a statute that the agency is not charged with administering or does not meet the procedures necessary to trigger *Chevron* deference.[116] Courts must give non-binding deference to those agency interpretations.[117] Because the deference is not binding, however, courts have the ultimate authority to determine the meaning of the statute. The agency's interpretation is merely evidence of the statute's meaning.[118] Under a declaratory theory, a court may consider an agency interpretation only to the extent that it helps the court determine the "true" meaning of the law.

3. Prophylactic Rules

Some constitutional doctrines do not precisely implement the Constitution but instead impose requirements that go beyond what the Constitution actually requires.[119] These "prophylactic" constitutional rules also conflict with the declaratory theory.

Miranda warnings provide an example. Under *Miranda v. Arizona*, government officials interrogating suspects in custody must inform the suspects of their right to remain silent, the possibility that statements they make may be used as evidence against them, their right to an attorney, and their right to have an attorney appointed if necessary.[120] Although *Miranda* implements the Fifth Amendment privilege against self-incrimination, the warnings go beyond the requirements of that Amendment.[121]

115. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

116. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (stating that, even when *Chevron* does not apply, "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form").

117. *Id.* (stating that *Skidmore* entitles agencies to "some deference").

118. *Skidmore*, 323 U.S. at 140 (stating that courts give weight to an agency interpretation commensurate with "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

119. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1303–06 (2006) (discussing the development of these doctrines); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988).

120. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

121. Dickerson v. United States, 530 U.S. 428, 450 (2000) ("[A]ny conclusion that a violation of the *Miranda* rules *necessarily* amounts to a violation of the privilege against compelled self-incrimination can claim no support in history, precedent, or common sense, and as a result would at least presumptively be worth reconsidering even at this late date."); *see also* Vega v. Tekoh, 142 S. Ct. 2095, 2101 (2022) (reaffirming that *Miranda* reaches beyond the requirements of the Fifth Amendment).

The Fifth Amendment does not require officials to issue *Miranda* warnings; instead, the reason for the warnings is to ensure that suspects have a "full opportunity" to exercise the privilege.[122] Instead of being part of the privilege against self-incrimination, *Miranda* is a judicially created rule to protect the privilege—or as the Court has put it, *Miranda* is a "prophylactic rule."[123]

Although *Miranda* is a prophylactic rule, the Court has also held that *Miranda* is a "constitutional decision" that established a "constitutional rule."[124] Thus, according to the Court, *Miranda* is a constitutional rule that goes beyond the requirements of the "actual" Constitution.

Miranda is hardly the only example of a prophylactic rule implementing the Constitution.[125] Other examples include the requirements for a police lineup,[126] the exclusionary rule,[127] and the presumptive invalidity of content-restrictions on speech.[128]

These prophylactic doctrines rest on a realist theory of the law. The doctrines are judge-created law to implement the Constitution but are not required by the Constitution itself. They have independent legal authority that over enforces the values in the provisions they implement.[129]

122. *Miranda*, 384 U.S. at 467.

123. Michigan v. Tucker, 417 U.S. 433, 439, 444 (1974) ("[The] procedural safeguards" [required by Miranda] [are] "not themselves rights protected by the Constitution but . . . measures to insure that the right against compulsory self-incrimination was protected" to "provide practical reinforcement for the right."); Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."); *see also* Chavez v. Martinez, 538 U.S. 760, 770 (2003) (plurality) ("[W]e have created prophylactic rules designed to safeguard the core constitutional right protected by the Self–Incrimination Clause.").

124. *Dickerson*, 530 U.S. at 432, 438–39.

125. *See* Strauss, *supra* note 119, at 190 ("[C]onstitutional law consists, to a significant degree, in the elaboration of doctrines . . . that have the same 'prophylactic' character as the *Miranda* rule."); Henry P. Monaghan, *The Supreme Court, 1974 Term – Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 10–26 (1975) (providing examples of "federal common law" implementing constitutional provisions).

126. United States v. Wade, 388 U.S. 218, 239 (1967) (stating that the lineup requirement can be replaced by a substitute procedure that also prevents undue risk of abuse).

127. Monaghan, *supra* note 125, at 40 ("[Supreme Court] decisions indicate that [the] exclusionary rule is no longer considered part and parcel of the underlying fourth amendment right nor a necessary remedy for it.").

128. *See* Strauss, *supra* note 119, at 203 ("[T]he strong hostility to content-based restrictions that the Court showed in *Mosley* cannot plausibly be justified in any way other than as a prophylactic rule designed to minimize the possibility that improperly-motivated legislation will be upheld.").

129. *Id.* at 207–08.

The importance of the realist theory to these prophylactic rules becomes apparent when one tries to justify them under the declaratory theory.[130] Consider *Miranda.* Under a declaratory theory, there is no space between the true meaning of a law and the doctrine implementing it. In other words, correctly fashioned doctrine implementing the Constitution is the Constitution. Under this theory, *Miranda* would not be a prophylactic rule of constitutional common law. Instead, it would be *the* Constitution (though, of course, a declaratorist might conclude that those doctrines are erroneous).

That position would have provided a more robust justification for the Court's conclusion that *Miranda* is a "constitutional rule" that Congress must obey. It also would affect the remedies available for *Miranda* violations. Because *Miranda* is a prophylactic rule, the violation of Miranda Rights does not carry the full panoply of remedies typically available for violations of constitutional rights. For example, in *Vega v. Tekoh*, the Court refused to recognize a § 1983 action for damages for violations of *Miranda*, stating that, because Miranda is "prophylactic," a violation of *Miranda* "does not constitute the deprivation of [a] right . . . secured by the Constitution.."[131] But a declaratory theory would allow recovery. *Miranda* would not be prophylactic; it would simply be part of the Fifth Amendment.

4. Underenforcing Doctrines

Just as some doctrines establish prophylactic rules that over enforce constitutional provisions, other doctrines underenforce the Constitution.[132] These underenforcing doctrines demand less than what the Constitution actually requires.[133] These doctrines are

130. This is not to say that *Miranda* or other prophylactic rules could not be adopted under a declaratory view. An adherent to the declaratory theory does not preclude courts from implementing laws through rules that go beyond the text of the laws. The "true" meaning of a written law may be something other than what is written in the text. *See supra* notes 91–93 and accompanying text.

131. *Vega*, 142 S. Ct. at 2106; *see also* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality) (stating that "violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person).

132. *See* Fallon, *Judicially Manageable*, *supra* note 119, at 1299–1303; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219–20 (1978) (identifying various underenforced provisions).

133. Sager, *supra* note 132, at 1235 (arguing that these doctrines enforce constitutional provisions to less than their "full conceptual limits").

typically the product of institutional concerns such as avoiding judicial displacement of policy decisions by elected officials or the inability of the courts to fashion workable tests to enforce the Constitution in full.[134] Accordingly, as with prophylactic doctrines, underenforcing doctrines rest on a realist theory of the law. The doctrines do not purport to implement the actual requirements imposed by the Constitution. Instead, they are judicial doctrines that self-consciously demand less than the Constitution requires.

The rational basis test provides an example. Article I of the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying" out the powers enumerated in the Constitution.[135] To assess whether legislation is constitutional under this Necessary and Proper Clause, courts have developed the rational basis test.[136] That test requires courts to sustain the constitutionality of federal legislation so long as the legislation is rationally related to implementing one of Congress's enumerated powers.[137] The test is extremely deferential. Courts are not limited to considering Congress's actual motivation for enacting a law. They will sustain a law so long as there is a conceivable set of facts that could justify the legislation.[138]

The rational basis test underenforces the requirements of the Necessary and Proper Clause.[139] Although that clause confers broad

134. *Id.* at 1217 ("In the most general of terms, the claims for restraint typically turn on the propriety of unelected federal judges' displacing the judgments of elected state officials, or upon the competence of federal courts to prescribe workable standards of state conduct and devise measures to enforce them." (footnotes omitted)).

135. U.S. CONST. art. I, § 8.

136. *See* United States v. Comstock, 560 U.S. 126, 134 (2010) ("In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.").

137. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993).

138. *Id.* ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 463 (1988) ("In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" (citing Vance v. Bradley, 440 U.S. 93, 97 (1979))).

139. *See* William D. Araiza, *Arming the Second Amendment – and Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801, 1853 (2017) ("[R]ational basis review . . . is best understood as resulting in an underenforced constitutional norm."). Of course, one can conceptualize the test as over enforcing the Constitution, by "giving" extra power to Congress, *see* Strauss, *supra* note 119, at 205–06 (calling rational basis review a "prophylactic rule"), instead of underenforcing it by failing to cabin Congress's power to that conferred by the Constitution.

power on Congress to legislate, [140] that power is narrower than the power recognized under the rational basis test.[141] The clause empowers Congress to enact legislation only if it deems the legislation actually necessary and proper to carrying out an enumerated power; it does not authorize Congress to enact legislation for reasons other than pursuing those legitimate powers.[142]

Thus, the reason for this deference is not that the Necessary and Proper Clause requires it; it is that courts should not second-guess legislators—be it because Congress is better equipped to make the factual determinations necessary to justify legislation, or because in a democratic society unelected judges should defer to policy determinations made by elected officials.[143]

If the Necessary and Proper Clause did actually require Congress to comply only with the rational basis test, Congress could opt to enact legislation that was not aimed at implementing one of Congress's enumerated powers simply by asking whether it could come up with other, hypothetical justifications for the law that could possibly fall within one of those powers.[144]

But the distinction does not undermine the point that the rational basis test does not embody the requirements of the Constitution itself.

140. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310, 315–16 (1993) (stating that the Fourteenth Amendment "reflects the simple but far-reaching principle . . . that government cannot be arbitrary" and "that government must pursue its ends by reasonable means.").

141. Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1446 (2018) (arguing that the doctrine "seems to fall back upon reasons for deference to a legislature, rather than a reading of the Constitution itself"); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 464 (2000); Fallon, *Implementing*, *supra* note 13, at 65 n.51; *see also* Oregon v. Mitchell, 400 U.S. 112, 247 (1970) (Brennan, J., dissenting in part and concurring in part) ("[A]s we have consistently held, [rational basis review] is a limitation stemming, not from the Fourteenth Amendment itself, but from the nature of judicial review.").

142. The rational basis test is just one example of a doctrine that underenforces constitutional norms. *See* Fallon, *Implementing*, *supra* note 13, at 150 ("On the whole, the Court's selection of tests has produced doctrines that tend more to underprotect than to overprotect constitutional norms.").

143. *Constitutional Law – Equal Protection – Eleventh Circuit Upholds Statute Limiting Constitutional Amendment on Felon Reenfranchisement* – Jones v. Governor of Florida, *975 F.3d 1016 (11th Cir. 2020)*, 134 HARV. L. REV. 2291, 2296 (2021) (quoting Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 323 (1987)) ("[I]n a democratic republic, unelected judges should tread carefully before overruling the judgments of elected representatives."); Ponomarenko, *supra* note 141, at 1446 ("[T]he Court refuses to consider the legislature's purpose on rational basis review" [because of] "institutional concerns . . . .").

144. *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 595 (1975) ("It is pointless for a legislator to query whether a bill furthers some conceivable objective.").

Federal legislation would just become an exercise in dreaming up pretexts. For the clause to make any sense, the *actual* reason for the legislation must be legitimate.[145] As Justice Holmes put it, "Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power."[146]

The rational basis test accordingly rests on a realist view of the law. It does not reflect a conclusion of what the "law is." Instead, it rests on the Court's conclusion about what the law "should be" because of institutional constraints on the judiciary.

Other doctrines that underenforce the Constitution because of institutional considerations about the judiciary likewise rest on a realist view of the law. Take the non-delegation doctrine. Article I delegates the legislative power to Congress. The Court has radically underenforced this provision authorizing only congressional lawmaking. It has held that delegations will be upheld so long as they satisfy the anemic "intelligible principle" doctrine—with the consequence that virtually all delegations of lawmaking power to agencies are upheld.[147] As Professor Fallon has compellingly argued, this underenforcement is likely due to difficulties in fashioning a test that satisfactorily enforces Article I.[148] Accordingly, as with the rational basis test, the intelligible principle test does not reflect what the law is; it instead reflects the Court's view of what the law should be given institutional limitations of the courts.[149]

145. *See id.* ("The important question is whether it furthers his objectives or those of his fellow legislators.").

146. Maxwell v. Bugbee, 250 U.S. 525, 543 (1919) (Holmes J., dissenting). For cases supporting this proposition, see W. Union Tel. Co. v. Foster, 247 U.S. 105, 114 (1918), Pullman Co. v. Kansas, 216 U.S. 56 (1910), and W. Union Tel. Co. v. Kansas, 216 U.S. 1 (1910).

147. *See* Watts, *supra* note 113, at 1013 (arguing that courts regularly uphold delegations of legislative power to agencies).

148. Fallon, *Judicially Manageable*, *supra* note 119, at 1302–03 ("The most cogent explanation includes considerations of judicial manageability: the Supreme Court has felt unable to devise a meaningful test that would yield both predictable and practically acceptable results.").

149. Delegation of Article III powers provides another example. Although Article III vests the judicial power in the Article III courts, U.S. CONST. art. III, § 1, the Court has recognized a handful of situations when non-Article III tribunals may exercise federal judicial power. *See* F. Andrew Hessick, *Federalism Limits on Non-Article III Adjudication*, 46 PEPP. L. REV. 725, 729–31 (2019) (listing the six circumstances under which non-Article III tribunals may exercise judicial power). At least some of the exceptions to Article III rest on the practical view that courts should not always insist that Article III be enforced. *See, e.g.*, CFTC v. Schor, 478 U.S. 833, 851 (1986) (balancing,

III. THE NORMATIVE EMBRACE OF THE REALIST VIEW

Although the claim that federal courts do not make law is descriptively inaccurate, one might say that it is normatively desirable. Even if federal courts do sometimes make law, they should not do so. But this normative claim is off the mark.

To start, the sheer number of decisions and doctrines identified in Part II that rely on the realist theory suggests that the concept that courts make law is firmly embedded in our legal system. They suggest that we think that federal courts should make law.[150]

More important, the design of the current federal judicial system reflects the conclusion that federal courts should make law. Unlike its historic ancestors, the role of the current federal judiciary is not simply to decide disputes according to law.[151] Instead, the

inter alia, the degree of intrusion on Article III "and the concerns that drove Congress to depart from the requirements of Article III.").

150. Of course, one might respond that these realist decisions and doctrines are bad and should be overturned. And some advocates for the declaratory view have challenged some of these doctrines, such as qualified immunity, Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (expressing "growing concern with our qualified immunity jurisprudence" because it involves judicial lawmaking), and *Miranda*, Dickerson v. United States, 530 U.S. 428, 448 (2000) (Scalia, J., dissenting) (arguing that *Miranda* was the product of unwarranted judicial lawmaking). But they have not raised serious challenges to other decisions and doctrines that rely on the realist theory, such as the rational basis test, *Pullman* abstention, or the approach to implementing the Sherman Act. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (reaffirming the common law approach to interpreting the Sherman Act); *see also* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 828 (2014) (Thomas, J., dissenting) (same). Justice Thomas has called for abandoning some of the complicated doctrines associated with federal question jurisdiction under § 1331, but he has done so not on the ground that the Court shouldn't be creating law, but instead on the ground that the law the Court has made is insufficiently clear, *see* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 321 (2005) (Thomas, J., concurring), and the other justices appear committed to those doctrines, *see, e.g.*, Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562, 1569 (2016) (reaffirming the federal question doctrine). Moreover, although many have suggested that *Chevron* should be overturned, they have not done so based on the declaratory theory; instead, the typical argument is that *Chevron* violates Article III because only the judiciary should have the power to declare what the law is. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring) ("'It is emphatically the province and duty of the judicial department to say what the law is.' And never, this Court has warned, should the 'judicial power . . . be shared with [the] Executive Branch.'" (citations omitted) (alterations in original)); Michigan v. EPA, 576 U.S. 743, 762 (2015) ("[*Chevron*] is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.").

151. *See* FALLON, ET AL., *supra* note 43, at 72. Of course, courts could expound on the law in the course of resolving disputes, but that exposition was only incidental to deciding the case.

judiciary has been designed to perform both dispute resolution and lawmaking. Those functions are divided among different courts.

Dispute resolution is the primary function of the district courts. Those courts decide cases by applying law to fact, and their opinions do not constitute binding precedent.[152] By contrast, the role of the Supreme Court is not to decide disputes but rather choose whether to exercise jurisdiction to review a case and to determine precisely which legal questions to address.[153] Making sure that a dispute has been correctly decided is typically not a basis for review.[154] Instead, the reason for this discretionary jurisdiction is to allow the Court to focus on providing guidance on legal questions.[155] Thus, the primary role of the Court has shifted from adjudication to law proclamation.[156] A decision by the Court to review a case signifies a choice to settle the meaning of a law.[157]

152. Of course, district courts may render opinions to explain the basis for decision. But those opinions are only persuasive authority—evidence of the law—for others to consider in the future. Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d], (3d ed. 2011)) ("A decision of a federal *district court* judge is *not binding* precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (emphasis added).

153. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1715–16 (2000). The circuit courts also have discretion whether to hear a case, but it is more limited. *See, e.g.*, David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545–61 (1985) (listing various ways in which courts have discretion to avoid exercising jurisdiction).

154. SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

155. *See* SUP. CT. R. 10 (listing as grounds for review a decision by a circuit court or state's highest court that conflicts with decisions of other circuits or state high courts, a decision that raises an important question of federal law that should be settled by the Court, and a decision that conflicts with Supreme Court precedent).

156. Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 5 (1984) ("[T]he Supreme Court possesses discretionary jurisdiction, designed so that the Justices may concentrate on creating rules for the guidance of others. Today cases often are just excuses for the creation or alteration of rules."). Moreover, although only holding constitutes binding law, the definition of holding has expanded in some ways. For example, although holding traditionally consists of the analysis necessary to the decision, Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405, 421–22 (1964), the Court has expanded holding to include reasoning that is not necessary to the decision. For example, in suits asserting qualified immunity for constitutional violations, determinations about constitutional rights constitute holding, even if the court ultimately denies relief on the ground that the right was not clearly established and therefore that the officer is entitled to qualified immunity. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

157. The shift in function through discretionary jurisdiction is particularly important in decisions assessing the constitutionality of federal statutes. Historically, the basis for judicial review was that the courts were obliged to decide all cases and accordingly had to

Performing that function inevitably involves stating what the law should be instead of what it is. Most issues that the Court decides involve hard questions that do not have clear answers and that have spawned disagreement in the lower courts.[158] A major reason for this lack of clarity is that the legal provisions at stake are vague and protect multiple values.[159] For example, the Due Process Clause does not specify what process is due, and it protects a range of competing values. The uncertainty and indeterminacy in the "true" meaning of these provisions prevents courts from administering them directly. Even when courts can ascertain the true meaning of a provision, it may not be possible for courts to administer that provision according to its true meaning because the law may embody norms that are simply too amorphous to operate as a rule of decision or that are empirically too difficult to apply directly.[160]

Judicial doctrine translates these provisions into tests that courts can administer in a more consistent and predictable way.[161] But the benefit of the administrability of these doctrines comes at the cost of deviating from the "true" meaning of the law.[162] The very

pass on constitutional questions presented to them. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 68–71 (1962). Discretionary jurisdiction removed that justification for judicial review. *See* Hartnett, *supra* note 153, at 1717 ("If asked, 'Why did you exercise the awesome power to declare an Act of Congress unconstitutional?' the Justices of the Supreme Court can no longer say, 'Because we had to.' Instead, they must say, 'Because we chose to.'"). For this reason, Alexander Bickel offered a different justification for judicial review by the Supreme Court. He argued, "The constitutional function of the Court is to define values and proclaim principles." BICKEL, *supra* at 68. That view forms the basis for the "special functions," or law declaration, model of federal courts. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1368–71 (1973).

158. *See, e.g.*, Eric Berger, *When Facts Don't Matter*, 2017 BYU L. Rev. 525, 575 ("Supreme Court cases often present difficult issues about which reasonable people can disagree.").

159. *See* Fallon, *Implementing*, *supra* note 13, at 56 ("The need for doctrine arises partly from uncertainty about which values the Constitution encompasses and how protected values should be specified."); *see also* RICHARD A. POSNER, HOW JUDGES THINK 272 (2008) ("Constitutional provisions tend also to be . . . vague because when amending is difficult, a precisely worded constitutional provision tends to be an embarrassment . . . .").

160. Fallon, *Implementing*, *supra* note 13, at 56–57 ("Even when general agreement exists that the Constitution reflects a particular value or protective purpose, questions of implementation often remain. . . . [T]he norms reflecting purposes such as these are too vague to serve as rules of law . . . .").

161. *Id.* at 56 ("Among the most important functions of the Supreme Court are to craft and apply constitutional doctrine.").

162. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989) (arguing that it is preferable to have a rule "even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision").

reason that a doctrine implementing a difficult-to-administer law is administrable is that it is different from "what the law is."

Doctrines announcing rules illustrate this point. A rule states that a person may not do *X*, such as drive faster than 65 mph. Such doctrines establish a bright line for when they are triggered. Rules typically are more easily administered and predictable than the vague or indeterminate laws that they implement. For example, a rule that searches incident to arrest are always constitutional is easier to administer and more predictable than the Fourth Amendment's provision that only reasonable searches are constitutional.[163] But a rule implementing a vague or indeterminate law is bound to be under or overinclusive, if not both.[164] Some searches incident to arrest may be unreasonable, and many searches conducted without an arrest are reasonable.[165]

By fashioning doctrine to make law administrable, a court determines what the law should be instead of what it is. This is not only because fashioning doctrines signifies a deliberate departure from what the law is in order to create a more administrable law but also because courts have significant discretion in fashioning doctrine.[166] There is a wide range of different types of tests available to implement a law. There are purpose tests, effects tests, and balancing tests—to name only a few.[167] Choosing one type of test over another reflects a decision by the court about the relative desirability of the test for that circumstance.

There are other factors that may drive courts to develop law that departs from its "true" meaning. Examples include political,

163. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]").

164. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 907 (2006).

165. The phenomenon is not limited to the Fourth Amendment. Courts regularly develop rules implementing other constitutional standards, *see, e.g.*, Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (prohibiting death sentences for juveniles); Graham v. Florida, 560 U.S. 48, 74–75 (2010) (prohibiting life without parole for juveniles convicted of crimes other than murder), as well as standards created by statutes, *see* Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 757 (2021) (discussing the rulification of statutory standards).

166. Bright line rules also avoid the need for the Court to address the matter again. *See* Hartnett, *supra* note 153, at 1732 ("[W]ould the Supreme Court have incorporated the Fourth, Fifth, Sixth, and Eighth Amendments if it were obliged to review every state judgment that upheld a criminal conviction or sentence over a defendant's objection based on one of these Amendments?").

167. *See* Fallon, *Implementing*, *supra* note 13, at 67–73 (cataloguing the different types of tests to implement the Constitution).

institutional, and empirical considerations.[168] These considerations reflect that the judiciary is not typically well-equipped (or at least less well-equipped than the legislature) to make empirical and predictive determinations relevant to policy matters. Even when the judiciary can make equivalently good determinations, it should defer not only for normative reasons—such as allowing the decisions of elected officials in a democratic system to prevail—but also for instrumental reasons—such as that overturning political determinations may lead to backlash against the judiciary. For example, the rational basis test reflects a judgment by the Court not to interfere with economic or cultural decisions rendered by the political branches.[169] The test does not reflect the true meaning of the Constitution, but instead is a self-conscious choice by the Court not to enforce the law completely.

None of this is to suggest that the Supreme Court or circuit courts engage in wide-ranging lawmaking every time they apply a law. Sometimes the text of a statute is clear enough that its meaning can be applied directly.[170] Even when the Court seeks to implement values other than the "true" meaning of the law, the "true" meaning of the law—as the Court can best determine it—is still an important consideration.[171] In some instances, it may be only at the margins that law depends on the Court's view of what the law should be.

Lawmaking is not an inevitable feature of the Supreme Court. One could imagine a Supreme Court whose decisions do not constitute binding precedent. That Court could make law no more than the district courts do today. But we have not followed that path. We have instead embraced the view that the Court should make law.

168. *Id.* at 62.

169. *See supra* notes 135–146 and accompanying text.

170. *See* Posner, *Legal Formalism*, *supra* note 15, at 188 (explaining that even for realists the text can sometimes be sufficiently clear to preclude lawmaking).

171. *See* Fallon, *Judicially Manageable*, *supra* note 119, at 1284 (arguing that "any judicially manageable standard that emerges as an output of the judicial process may not diverge too far from the meaning of the constitutional guarantee that it implements. Although close enough is good enough, too much disparity will not do").

IV. THE DECLARATORY CLAIM AS FICTION

What should be clear by now is that it is not true that the role of the courts is simply to say what the law is. Courts often *do* say what the law should be, and they often *should* say what the law should be. Pronouncements espousing the declaratory theory typically do not grapple with these points.[172] They just ignore the lawmaking role of the courts.

However, there are a few advocates of the declaratory view who acknowledge the lawmaking function. For example, Justice Scalia stated that he was "not so naive . . . as to be unaware that judges in a real sense 'make' law." But he argued that courts should maintain the fiction of the declaratory view by acting "*as though* they were 'finding' [the law]."[173]

This fiction has serious costs. Among other things, it undermines transparency, debilitates legal arguments, and interferes with accountability. And while the fiction may have some benefits—for example, it may help legitimate the judiciary, provide an aspirational norm, and provide support for some doctrines—these benefits do not justify the blanket claims that the role of the court is to say what the law is, not what it should be.

A. The Costs of the Fiction

The declaratory-theory fiction has several significant downsides. To start, the fiction may stagnate the development of law. Our legal system relies on the judiciary to make at least some law.[174] But in an effort to maintain the fiction that courts do not make law, judges may be reluctant to change obsolete or harmful doctrines quickly, instead preferring a slow, incremental approach. Worse, constantly stating that judges should not make law may

172. For example, none of the statements of the various Supreme Court hearings discussed in *supra* note 2 addressed these points.

173. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). Consistent with this view, Scalia used scare quotes to denote that courts were not to be making law even while they were making law. *See id.* ("I am not so naïve (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."); Scalia, *supra* note 162, at 1177 ("[C]ourts have the capacity to 'make' law."); *see also* Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1380–81 (N.M. 1994) ("Justice Scalia holds (or pretends to hold) a conception of the nature of law as something fixed and nearly immutable, to be discovered and, when correctly perceived, vindicated in declaring the true version or correcting an old misapprehension.").

174. *See supra* note 150–171 and accompanying text.

encourage judges who do not realize it is a fiction to be highly resistant to reconsidering precedent.[175]

The fiction also undermines transparency and obscures the lawmaking process. When judges make law, many different considerations may inform the content of that law. Judges may consider administrability, separation of powers, federalism, safety, judicial resources, efficiency, and other factors.[176] Stating that a judge simply finds the law—as opposed to creating law based on these sorts of considerations—obscures the decision-making process, and it may undermine judicial legitimacy. The legitimacy of courts depends in part on convincing the public through their opinions.[177] Dishonesty in opinions threatens that legitimacy, if for no other reason than it may result in loss of credibility.

Lack of transparency in judicial opinions may have other effects. They provide less guidance to lower courts about the kinds of factors to consider when interpreting laws. Likewise, they leave litigants less informed about the inputs that may influence the judge's legal determinations in the future. Consequently, litigants are more likely to shift their arguments to identifying the "true" law (however that is defined) and give less attention to other important considerations, such as the consequences of adopting a particular interpretation, that may affect the decision.

The fiction also interferes with accountability. A judge who announces an unpopular doctrine, or renders an unpopular interpretation of the law, can disclaim responsibility for his conclusions. He can say that he did not have any choice in the matter;

175. Posner, *Judicial Opinions*, *supra* note 6, at 18 ("Actually believing that judges do not make law, however, dulls the judges' critical faculties, even as the slow pace (a result of trying to maintain stability) of legal change leaves many obsolete legal doctrines in place too long.").

176. *See, e.g.*, Fallon, *Implementing*, *supra* note 13, at 62–67 (providing examples of these influences on doctrine); Aaron Tang, *Reverse Political Process Theory*, 70 VAND. L. REV. 1427, 1468 n.219 (2017) (noting that "national economic efficiency, separation of powers, and federalism" underlie some doctrines); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 76 (2012) ("Although framing their decisions in terms of whether a threat is speculative or not, courts may actually base their standing decisions on matters such as separation of powers, federalism, efficiency, docket size, or some other concern.").

177. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1333–39 (2008) (stating that written opinions contribute to the legitimacy of the judicial system); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1372 (1995) (explaining that writing opinions "reinforce[s] our oft-challenged and arguably shaky authority to tell others—including our duly elected political leaders—what to do").

the law made him do it.[178] To be sure, those statements would not entirely insulate the judge. Lawmakers and the public may nevertheless hold a judge responsible for his legal conclusions despite his statements, but the statements at least cloud the issue.

Given the salary and tenure guarantees of Article III, one might argue that judges should not be held accountable for their decisions creating law.[179] But protecting judges for lawmaking was not the reason for those protections.[180] The reason for judicial independence is so that judges do not shy away from making unpopular decisions when the facts and law call for it. It is not to allow the judges to create law without fear of repercussion. [181] To the contrary, as noted in Federalist 47, one of the aims of the Constitution was to separate the legislative and judicial power.[182] While that ambition is not possible given the structure of the courts, the second-best option is to ensure that courts are held accountable for their lawmaking.

In any event, the problem is not simply that a judge can avoid accountability for his decision. By claiming that his hands are tied by the law—that the law requires an outcome—a judge foists responsibility for his legal creations onto the lawmaker.

Of course, the realist theory has its own set of objections. They range from the practical argument that courts are ill equipped

178. Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 536 (2012) (arguing that those who think a Constitutional question has a demonstrable right answer should have the motto "the Constitution made me do it").

179. U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.").

180. Moreover, the Constitution does not entirely insulate judges for the obvious reason that complete independence would create a situation in which a judge who abuses his power cannot be controlled. Instead, although it provides significant protection for the judges, the Constitution contains various mechanisms for policing the judiciary. These include congressional control over jurisdiction and the composition of the courts, congressional oversight through hearings, the appropriations process, the threat of impeachment, and the process for appointing and confirming judges. These mechanisms suggest that judges should be held accountable to some degree for their decisions.

181. *See* MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 34 (Chicago 1981) (noting that "lawmaking and judicial independence are fundamentally incompatible"); *see also* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) ("While the Supreme Court's independence from the electorate is ideal to preserve individual rights against majority sentiment, that same detachment renders the Court a poor factfinder and policymaker as compared to Congress and the Executive.").

182. FEDERALIST NO. 47 (James Madison) ("Were the power of judging . . . would be exposed to arbitrary control, for the judge would then be the legislator.").

to making determinations about what should be the law to the more structural argument that allowing courts to implement popular views circumvents the various protections we have against implementing popular views. These protections include regional elections, the bicameralism and presentment requirement for statutes, and the supermajority requirements for amendments.[183] These are serious objections. But they do not undermine the point that, as a descriptive matter, we *do* have doctrines that rely on the realist theory and, as a normative matter, the Supreme Court (and to a lesser degree the circuits) should make law given the role we have assigned to it. And it is against those realities that the declaratory fiction must be assessed.

B. The Benefits of the Fiction

Despite its costs, there are some benefits to maintaining the fiction that courts are merely declaring the law when they are actually making it. The rhetoric of the declaratory theory legitimates the judiciary, articulates an aspirational norm, and provides support for operationalizing doctrines that depend on the declaratory theory.

1. Legitimating the Judicial Power

One reason for the declaratory theory is that it legitimizes the judiciary. This legitimating function is clear when courts adjudicate. Those who adjudicate should not have the power to create the rules to be applied in that adjudication. Moreover, precluding the courts from creating law is consistent with the Constitution. A core premise of our representative-democratic system is that policy should be set by officials who are held accountable to the people through periodic elections. Federal judges, who are not elected and have life tenure, should not set policy because they do not represent the people and are not accountable to them. Instead of making policy decisions, the judiciary should merely apply the laws written by others.[184] The declaratory theory implements this view. It declares that the courts

183. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002) (arguing that constitutional structures of these sorts constrain the influence of popular opinion).

184. THE FEDERALIST No. 78 (Alexander Hamilton) (refuting the argument that the judiciary would be able "to substitute their WILL to that of their constituents").

do not create law but instead merely find law that has been enacted by others.

Of course, this would be the benefit if the declaratory theory were accurate—if courts did not make law but instead only applied it. But the declaratory theory is not accurate.

Still, the fictional nature of the theory does not entirely erase its legitimatizing value. Courts often maintain fictions precisely because they legitimate decisions.[185] These fictions do so by expressing important societal values or by papering over decisions that rest on a sophisticated balancing of competing interests that would be difficult to explain.[186] For example, one reason we say that juries understand and follow instructions when they often do not is that the fiction legitimizes the jury system.

The declaratory theory fiction may play this sort of role. Even if untrue, stating that courts do not make law may legitimate the judiciary. The communication glosses over the balance of the competing interests of, on the one hand, having doctrines that are predictable and avoid unnecessary political and institutional pitfalls, and, on the other hand, avoiding undemocratic judicial lawmaking. Saying that courts do not make law rests on the conclusion that the value of the former exceeds the risks of not promoting the latter.

But it is far from clear that the fiction results in net gains for legitimacy. The legitimacy of the courts depends, in large part, on the rationality and candor of their decisions.[187] Needless to say, judicial invocation of the fiction of the declaratory theory does not give confidence about rationality or candor. A court's claims that its decision is required because of "the law" when the

185. Peter J. Smith, *New Legal Fictions*, 95 Geo. L.J. 1435, 1478 (2007) ("Judges often rely on and preserve new legal fictions—even in the face of evidence that they are false—because they serve a legitimating function and because their abandonment might have delegitimating consequences.").

186. *Id.*

187. "[T]he Court's influence depends in large part on the reasoning in its written decisions. When that reasoning suffers from obvious inconsistencies or other shortcomings, the Court itself suffers as an institution—especially where those inconsistencies could potentially be interpreted as a lack of candor on the part of the Court." Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 39–40 (2008) (footnotes omitted).

court is actually making policy determinations threatens to increase cynicism about the courts.[188]

2. Aspirational Norms

Even if courts do inevitably make law, some judges may nevertheless aspire not to make law. They may think that they should do as little lawmaking as possible.[189] The sentiment that courts should only "say what the law is" captures that aspiration, even if it is fictional. Stating these norms may encourage restraint in future cases.[190]

But that goal could be achieved directly by acknowledging that judges do make law and then encouraging judges to exercise restraint. Indeed, that direct approach may be more effective. Stating that judges should exercise restraint instead of proclaiming that they do not make law may result in some judges more frankly and accurately evaluating their own decisions because it explicitly instructs them to consider what they are actually doing and to take responsibility for it.

3. Operationalizing Doctrine

Another benefit of the fiction of the declaratory theory is that it helps justify a set of doctrines dependent on the declaratory theory. Consider the retroactivity doctrine. Permitting at least some retroactive application of the law is essential to the operation of the judiciary. Every case that requires applying a statute to a new set of facts that have already transpired involves a retroactive application.

Retroactivity sits uneasily with a realist view that courts create law. The law disfavors retroactive application of laws that create

188. *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("[L]ack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and of judges.").

189. *See, e.g.*, Manning, *Justice Scalia*, *supra* note 48, at 748 ("Much of his theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint."); Hon. John G. Roberts, Jr., Chief Justice, U.S. Supreme Court, Commencement Address at the Georgetown University Law Center (May 21, 2006) (praising decisions that are "on the narrowest possible ground").

190. This aspiration provides another explanation for why the declaratory view is often mentioned in conjunction with textualism and originalism. One of the arguments in favor of those methods of interpretation is that they more tightly constrain judges than other methodologies. *See* Manning, *Justice Scalia*, *supra* note 48, at 751–54.

new liabilities. There is a presumption against the retroactive application of laws that expand civil liability, and the Ex Post Facto Clause prohibits retroactive applications of new criminal law.[191] If judicial decisions create law, retroactive application of new interpretations in those decisions should face the same restrictions. Those decisions expose citizens to liability for acts that were not illegal when they performed them. Therefore, the restrictions on retroactive laws should apply to new interpretations announced in those decisions.[192]

To meet these restrictions, past decisions approaching retroactivity through a realist lens have been dissatisfying. In *Rogers v. Tennessee*, for example, the Court declared that the Ex Post Facto Clause does not apply to new laws created by courts, relying on decisions from an era when the Court subscribed to the declaratory theory.[193] And to enforce the Due Process Clause, it created a prohibition on retroactive application of new interpretations that changed the law in "unexpected and indefensible" ways—a prohibition that is difficult to administer.

191. Peugh v. United States, 569 U.S. 530, 561 (2013) (quoting 1 BLACKSTONE, *supra* note 23, at 39) (stating that retroactive laws are forbidden because they "deprive citizens of notice and fair warning and are, therefore, an affront to man's "'reason and freewill'").

192. In *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001), the Court rejected an ex post facto argument of this sort by stating that the ex post facto clause in Article I § 0 prohibiting states from enacting ex post facto laws applies only to state legislatures and not the judiciary. That conclusion is dissatisfying. The text of the clause does not apply to only state *legislatures*. It applies to states generally, saying, that "[n]o State shall . . . pass any . . . *ex post facto* Law." U.S. CONST. art. I, § 10, cl. 1. It is possible that the clause was meant only to apply to legislatures and courts because at the founding the legislatures were thought to be the only body that made laws; unlike legislatures, courts merely found law. The federal ex post facto clause, which appears in U.S. CONST. art, I, § 9 and therefore logically applies to Congress, arguably rests on that same assumption. But if courts make law, the restriction on new laws should apply to the courts as well. To be sure, the reasons for prohibiting ex post facto laws may apply more strongly to Congress than the courts. Because of political and other pressures, Congress may be more likely than courts to abuse ex post facto laws by targeting disfavored individuals. But the prohibition on ex post facto laws is not limited to instances when the retroactive law targets political enemies. Instead, the clause prohibits all ex post facto laws. Similar considerations have led to broad interpretations of other provisions that by their text apply only to Congress. For example, although the First Amendment prohibits only "Congress" from enacting laws restricting speech, it has been interpreted to prohibit courts from entering orders unduly infringing speech. New York Times Co. v. United States, 403 U.S. 713 (1971) (holding that injunctions against newspapers violates the First Amendment).

193. *Rogers*, 532 U.S. at 456 (quoting Marks v. United States, 430 U.S. 188, 191 (1977)) ("[The Ex Post Facto Clause] is a limitation upon the powers of the Legislature.").

The declaratory theory of the law avoids this problem. The new interpretation does not create a new law; it merely articulates what the law always required. Retroactive application of new interpretations therefore does not trigger the restrictions on retroactive application of new law, at least under the declaratory theory.

But the declaratory theory does not justify all retroactive applications of law. In particular, it does not justify retroactive application of legal theories that depend on the realist theory—such as those listed in Part II. But courts have applied those doctrines retroactively. For example, in *Bivens*, the Court recognized a new common-law damages action against federal officials for violations of the Fourth Amendment.[194] Likewise, in *Boyle v. United Technologies*, the Court recognized a new federal common-law defense immunizing government contractors from state torts.[195] In both cases, the Court applied the doctrines retroactively by applying them in the cases in which they were announced.

Although the declaratory theory does not justify the retroactive application of those doctrines, the same reasons for needing to be able to apply the laws retroactively remain relevant. The fiction that the declaratory theory applies provides a straightforward justification for the retroactive application of these doctrines.

In a similar vein, more expansively adhering to the declaratory theory could provide a basis for doctrinal changes. Consider the recent attacks on *Chevron* deference. Various commentators and judges who subscribe to the declaratory view have argued that *Chevron* is unconstitutional because it is inconsistent with *Marbury* because it "wrests from Courts the ultimate interpretative authority to "say what the law is," and hands it over to the Executive."[196] As then-Judge Gorsuch put it, *Chevron* invalidly "transfer[s] the job of saying what the law is from the judiciary to the executive."[197]

This argument is off target. In the early 1800s, the common understanding was that all the branches of government had the

194. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971).

195. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988).

196. Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

197. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016); *see also Michigan*, 576 U.S. at 761 (Thomas, J., concurring) ("[*Chevron*] wrests from Courts the ultimate interpretative authority . . . and hands it over to the Executive.").

authority to interpret the law[198]—nothing in Chief Justice Marshall's opinion in *Marbury* deviates from this understanding by suggesting that courts have the exclusive or ultimate power to determine the contents of the law.[199] His statement that "it is emphatically the province and duty of the judicial department to say what the law is" reflected the view that the power to determine the meaning of the law is not the exclusive province of *other* branches, such as Congress—that courts also had the authority to interpret the law and were not obliged to defer to Congress's interpretation of the Constitution.[200]

But if one accepts the declaratory view of the law, Marshall's statement poses a serious challenge to *Chevron*. Under the declaratory view, an agency's interpretation would not set that meaning of the law because no interpretation can set the meaning. Interpretations are only evidence of the law's meaning. If the duty

198. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 922 (2003); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2707–08 (2003) ("[C]ontrary to the mythology that has come to surround *Marbury*, the power of judicial review was never understood by proponents and defenders of the Constitution as a power of judicial *supremacy* over the other branches, much less one of judicial exclusivity in constitutional interpretation."); *see also* THE FEDERALIST No. 49 (James Madison) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers[.]"). Of course, the Founders recognized that a court had the final say in the sense that, if it refused to enforce a law, another branch could not overturn that decision. *See, e.g.*, James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia, 1788*, reprinted in I THE FOUNDERS' CONSTITUTION 402 (Philip B. Kurland & Ralph Lerner eds., 1987) (stating that courts, by "refusing or not refusing to execute a law," would "stamp it with its final character"). But that argument holds equally for the legislature, which could opt not to pass a law, and the executive, which could choose not to enforce it.

199. *See, e.g.*, Paulsen, *Irrepressible Myth*, supra note 198, at 2709 ("Nothing in Chief Justice Marshall's opinion in *Marbury* makes . . . a claim of judicial supremacy either."). To be sure, some perceived the Court as asserting ultimate interpretive authority. *See* Thomas Jefferson to Spencer Roane (Sept. 06, 1819), *in* 3 THE WORKS OF THOMAS JEFFERSON (Paul Leicester Ford, ed. 1905), https://press-pubs.uchicago.edu/founders/documents/a1_8_18s16.html ("My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action[.]").

200. This is apparent when one reads the quotation from *Marbury* in context. The statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is" responded to the argument that the court must defer to the interpretation of the Constitution rendered by Congress. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see* Paulsen, *Irrepressible Myth*, *supra* note 198, at 2707 (explaining that the statement in *Marbury* stood only for the "idea that courts possess an independent power and duty to interpret the law, and in the course of doing so must refuse to give effect to acts of the legislature that contravene the Constitution").

of the court is to identify the law ("say what the law is") and apply it, the court must apply the actual law, not the agency's view of the law.[201] The reason that the courts would not defer but instead exercise independent judgment is not that the judicial power in Article III gives courts special interpretive powers. Instead, it is that the judiciary's role is to apply the law, and there is only one correct meaning of the law—and that meaning does not depend on an agency's interpretation.[202]

Still, this reason for the fiction does not justify invoking the privilege in cases that do not involve doctrines that depend on the fiction. It provides a basis for relying on the fiction only in those cases that turn on doctrines, such as retroactivity, that depend on it.

CONCLUSION

Courts do not simply say what the law is. The lawmaking power of the courts is pervasive. Courts make common law and interpret vague statutes. Opinions of appellate courts are binding because they are treated as law. Many doctrines depend on the theory that law is not fixed at the time of creation but can be changed by decisionmakers, such as courts. Moreover, the judiciary has been designed to foster this lawmaking role.

The persistent claim that courts cannot make law in the face of this reality obscures the actual considerations that go into the lawmaking process and distorts legal arguments. It undermines accountability by ascribing to Congress, and the people, determinations that judges themselves make. It also threatens judicial legitimacy. That legitimacy depends in large part on the candor and persuasiveness of judicial reasoning. Providing a fictional justification for decisions runs contrary to those qualities.

The lawmaking role of courts has a long and storied history. Rather than denying it, we should embrace it.

201. Posner, *Rise and Fall*, *supra* note 178, at 536–37 (arguing that a belief that a law has a correct meaning means one does not defer).

202. In other words, the argument against *Chevron* would not be that the agency encroached on the Article III judicial power. It would be that judicial deference to the agency would violate Article I, insofar as only the law enacted by Congress constitutes "the law."