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Carolyn Shapiro

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Carolyn Shapiro*

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* Assistant Professor of Law, Chicago-Kent College of Law; J.D., 1995, University of Chicago; M.A., 1993, University of Chicago; B.A., 1986, University of Chicago. Thanks are owed to many people whose comments and support helped make this Article possible, including Robin Lenhardt, Joshua Karsh, Richard Posner, Neal Katyal, Jeremy Waldron, Elizabeth Magill, Sarah Harding, Nancy Marder, Harold Krent, Michael Scodro, Katharine Baker, Mark Rosen, Steven Heyman, Martin Malin, Alexander Tsesis, Michael Pardo, Kevin Banks, Timothy Holbrook, and Sungjoon Cho, as well as participants in faculty workshops at both Chicago-Kent College of Law and Northwestern University Law School. Special thanks are due to Ted Newman of the Clerks' Office for the Northern District of Illinois, who provided me with invaluable data for Part I of this Article, and to Tara Crean, one of Shelley Weinstock's lawyers, who first alerted me to that case, also discussed in Part IV. Research on this Article was supported by a Chicago-Kent College of Law research grant and by the school's stellar librarians, most notably Thomas Gaylord. Excellent research assistance was provided by Patrick Spangler, Jenny Jamiolkowski, Meghan Dolan, and Steven Garden.

I. Introduction

Docket control and the contraction of jurisdiction are consistent themes of Supreme Court history. The Court has struggled throughout its existence to control the flow of cases it decides on the merits. It has repeatedly and successfully lobbied Congress to reduce its mandatory jurisdiction. It has actively discouraged litigants from bringing cases that raise no more than a question about the correctness of lower court decisions. Only in the last ten years has the Court achieved a caseload that is consistently small enough to allow a new question: In its efforts to control its docket, are there ways in which the Court has gone too far? Are there types of cases that would benefit from the Court's involvement but that generally escape its review?

Answering these questions must begin by examining the Supreme Court's current role. As part of the Court's long struggle to control its caseload and to avoid being (or being viewed as) a court whose primary role is to correct errors made by lower courts, it directs its attention to matters of particular national importance and, the focus of this Article, to maintaining uniformity in the law. The Court's primary mechanism for maintaining uniformity is to resolve "circuit splits"—areas of law in which different federal courts of appeals (and state supreme courts) disagree about what rule or standard governs. In

resolving these circuit splits, the Court often announces rules and standards to be applied by the lower courts. The Court's mission to promote uniformity does not generally extend to examining how the lower courts apply those rules or standards, nor does the Court itself routinely apply the rules and standards it announces. Instead, the Court has cast itself in an "Olympian" role—announcing rules and standards from on high.[1]

In fact, however, applying legal standards sometimes can be even more difficult than pronouncing them. Nonetheless, Supreme Court Rule 10, which sets forth the Court's certiorari criteria, explicitly states that the Court is generally not interested in "the misapplication of a properly stated rule of law."[2] Because the Court does not focus on application, it tolerates significant inconsistency and unpredictability, both between and within circuits—inconsistency that sometimes rises to a level that should be intolerable under the rule of law. As this Article will show, this aspect of the Court's practice is misguided, and the Court would better fulfill its role if it acknowledged and addressed the unpredictability and inconsistency arising from such misapplication of standards.

Such unpredictability and inconsistency are more likely to be found in areas of law governed by standards than in areas of law governed by rules, simply because standards generally provide much more discretion to judges than do rules. Rules, such as mandatory sentences for certain crimes, are relatively easy to apply once the underlying facts are known. Standards, on the other hand, allow for greater flexibility, as they allow judges to take into account competing interests and a wider range of facts. An example of a standard-based area of law is a sentencing regime that provides the judge with sentencing ranges and factors to consider but grants discretion in determining the final sentence.[3]

There is a longstanding debate over the relative advantages and disadvantages of rules and standards.[4] Rather than enter into this debate, this

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1. *See* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 433 [hereinafter Hellman, *Shrunken Docket*] (exploring various explanations for the Supreme Court's smaller docket in recent years).

2. SUP. CT. R. 10.

3. See *infra* at Section III for more detailed definitions of rules and standards.

4. *E.g.*, Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992) (offering "an economic analysis of the extent to which legal commands should be promulgated as rules or standards"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (examining "the Justices' divisions over rules and standards . . . [in the 1991 Term] and their bearing on the Court's apparent centrism"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV.

Article argues that regardless of which type of legal regulation is preferable as a theoretical matter, the United States Supreme Court can and should sometimes calibrate its role to provide different types of guidance depending on whether an area of law is governed largely by rules or by standards.

Specifically, this Article contends that the Court could more effectively promote consistency and uniformity in standard-governed areas of law if it returned to techniques of common law judging such as the explanatory power of analogy and the gradual process of closing in on a rule, or at least making a standard more specific or easier to apply. The Court could also more deliberately harness its unique ability to signal the lower courts through the types of cases it chooses to decide. With all of these techniques, the Court can best provide guidance by deciding a series of cases in which it deliberately applies standards.

The Article proceeds in four major Parts. Part II provides historical and institutional context on the Court and its operation, explaining how the Court's role has evolved. Specifically, Part II describes the Court's long struggle to control its caseload and to avoid being a court of error correction. The Part describes in detail the ways the Court has circumscribed its role.

Part III examines some of the implications of the Court's current approach. It explains how and why the Supreme Court, in an attempt to avoid engaging in error correction, neglects areas of the law that are governed by standards even when those areas of law are chaotic and unpredictable, and it explains why the Court's approach has different consequences for standard-governed areas of law than it does for areas that are rule-governed. Finally, this Part explores some of the problems created by the Court's absence from such standard-governed areas of law.

Part IV provides an extended concrete example of the shortcomings of the Court's approach: summary judgment in employment discrimination cases. The Part demonstrates how a general standard, coupled with the Supreme Court's certiorari policy and inattentiveness to standards, sows inconsistency and unpredictability for litigants and lower courts.

Finally, Part V provides a preliminary vision for how a different approach to standards might operate. The Part suggests several mechanisms through which the Court could provide better guidance to the lower courts by deliberately applying standards to facts in a series of cases. The Part also addresses some of the potential advantages and pitfalls of this different

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1175, 1176 (1989) (exploring the "dichotomy between 'general rule of law' and 'personal discretion to do justice'").

approach to standards. The Article concludes by discussing some avenues for future research.

II. Docket Control, the Imperial Court, and Error Correction

Any critique of the Supreme Court's current role must be placed in historical and institutional context. The Court's approach to its job is in large measure the result of its long history of trying to contain its caseload and its parallel attempts to position itself as a source of structure, guidance, and uniformity, not as a traditional court of appeals that reviews the correctness of lower court opinions. Descriptions of these efforts by both the Court and its observers have often focused in particular on the case selection process and criteria. The Court's efforts to define itself, however, have had a significant impact on its approach to cases it hears on the merits as well. At both the certiorari stage and on the merits, the Court has created an excessively narrow approach that—particularly today, with the Supreme Court caseload at a historic low and lower federal and state court caseloads at growing and unprecedented levels[5]—leaves many areas of the law in disarray and deprives lower courts and litigants of valuable guidance.

A. The Rise of Discretionary Certiorari Jurisdiction

For most of its history, the Supreme Court has struggled with overwhelming caseloads. When Congress created the Court in 1789, cases came to the Court as of right.[6] The Court did not have the power to decide which cases it would hear. Today, in contrast, the Court's docket is almost exclusively discretionary.[7]

Discretionary review in the Supreme Court was born of necessity. With exclusively mandatory jurisdiction, the numbers of cases pending before the Court increased dramatically during its first century, and with ill effect. In its first five years, beginning in 1790, the Court handled approximately twenty-

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5. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 35–36 (2005).

6. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 13 (1928) (citing Act of Sept. 24, 1789, § 25, 1 Stat. 73, 80–85 (permitting no discretion)).

7. *See id.* at 187 ("Perhaps the decisive factor in the history of the Supreme Court is its progressive contraction of jurisdiction.").

five cases.[8] But in 1850, there were 253 cases pending before the Court.[9] By the beginning of the 1890 term, there were 1,816 pending cases, and it took three years for a case to be heard.[10] In 1891, Congress responded by giving the Court discretionary certiorari jurisdiction over a few types of cases.[11] Several more times in the early 20th century, and most significantly in the 1925 Judges' Bill, Congress gave the Court more and more control over its docket, cutting back on the Court's mandatory jurisdiction and expanding the Court's discretion about and control over what cases to hear.[12]

Nonetheless, caseload pressures in the Supreme Court continued in the modern era.[13] From 1971 through 1988, the Court handled approximately 150 cases per year[14]—and the effect of this caseload was the source of much

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8. *See* ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 137, tbl.9 (1978) (listing the number of opinions per Court term).

9. FRANKFURTER & LANDIS, *supra* note 6, at 60.

10. *Id.* at 60, 257.

11. Evarts Act, 26 Stat. 826, 828 (1891). *See* FRANKFURTER & LANDIS, *supra* note 6, at 99 (noting that the result of the Evarts Act was that a "flood of litigation . . . [was] shut off"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 219 n.2 (8th ed. 2002) [hereinafter STERN & GRESSMAN] (noting that the "use of the discretionary writ had its inception in § 6 of the Circuit Court of Appeal Act"). The Evarts Act also made another significant reform of the federal judicial system intended to alleviate the Supreme Court's burden. It created the first comprehensive system of intermediate appellate courts. *See* Evarts Act, 26 Stat. 826, 826–28 (1891) (establishing circuit courts). *See also* FRANKFURTER & LANDIS, *supra* note 6, at 107 (noting that the Evarts Act established intermediate courts); BENNETT BOSKY & EUGENE GRESSMAN, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 83 (1988) (same). Congress was also partly to blame for the caseload crisis as it periodically expanded the Court's jurisdiction. *Id.* at 84–85.

12. *See, e.g.*, Act of Sept. 6, 1916, Pub. L. No. 258, 39 Stat. 726 (describing the Act as amending the Judicial Code and further defining the jurisdiction of the Supreme Court); Judges' Bill, Pub. L. No. 415, 43 Stat. 936 (1925) (amending and defining the jurisdiction of the circuit courts and the Supreme Court); FRANKFURTER & LANDIS, *supra* note 6, at 210–13, 260–72, 280 (describing various legislation that affected the Supreme Court's jurisdiction); BOSKY & GRESSMAN, *supra* note 11, at 83–84 (same).

13. The Court's caseload did fluctuate over the years. In the 1950 term, for example, the Court heard only eighty-six cases. Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 202 (2004) [hereinafter Cordray & Cordray, *Calendar of the Justices*].

14. *See* Hellman, *Shrunken Docket*, *supra* note 1, at 403 (noting that the Court heard an average of 147 cases per term during those years). The numbers of certiorari petitions also grew dramatically after the enactment of the Judges' Bill. In 1935, for example, there were only 938 cases brought before the Court. By 1972, there were 3,794. BLAUSTEIN & MERSKY, *supra* note 8, at 91 (citing Gerhard Casper & Richard A. Posner, *A Study of the Supreme Court's Caseload*, 3 J. LEGAL STUD. 339, 340 (1974) (illustrating the dramatic increase in the number of cases filed with the Supreme Court)).

concern.[15] Some commentators, for example, worried that the caseload prevented the Court from taking cases that needed its attention, such as cases that might resolve conflicts between courts of appeals.[16] Likewise, Justice White, despite wanting the Court to resolve more circuit splits, did not believe that it could handle more cases per year.[17] Others believed that the Justices were stretched too thin to give adequate attention to each case.[18] Justice Brennan worried that the justices were "tax[ing] that [human] endurance to its limits."[19]

In response to these concerns and again at the Justices' urging,[20] in 1988, Congress eliminated most of the remaining mandatory jurisdiction.[21] Today, the Court's docket of argued cases is at a modern low. The Court hears argument in only about ninety cases per term.[22] No one today seems concerned that the Court is overburdened by its caseload. If anything, today's concerns

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15. *See* Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1093 (1987) (noting the "extraordinary growth" in the Supreme Court's docket); William T. Coleman, Jr., *The Supreme Court of the United States: Managing Its Caseload to Achieve Its Constitutional Purposes*, 52 FORDHAM L. REV. 1, 2 (1983) (addressing the "immediate and serious problem" of the Supreme Court's caseload); Arthur Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 802 (1983) (discussing the problems associated with "nine mortal men and women" having to provide "authoritative guidance for millions of transactions governed by the ever-expanding reach of the national law").

16. *See* Strauss, *supra* note 15, at 1093 (commenting that the Court may "bypass questions" that it should hear).

17. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 421 n.157 (2004) [hereinafter Cordray & Cordray, *Philosophy*].

18. *See* Strauss, *supra* note 15, at 1094 (indicating a concern for the quality of each opinion given the scarce resources); Coleman, *supra* note 15, at 2 (same).

19. William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231 (1983).

20. *See* Chief Justice William H. Rehnquist, Address at St. Louis University, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System* (Apr. 7, 1983), *in* 28 ST. LOUIS U. L.J. 1, 7 (1984) (noting that "[i]t is to the Congress that we must look to scale back the jurisdiction of the federal courts"); Brennan, *supra* note 19, at 232 (noting that "Congress could afford the Court substantial assistance" in regard to the caseload problem).

21. *See* Act of June 7, 1988, Pub. Law. No. 100-352, 102 Stat. 662 (providing "greater discretion to the Supreme Court in selecting cases it will review").

22. *See Statistical Recap of Supreme Court's Recap During Last Three Terms*, 73 U.S.L.W. 3044 (2004) (noting that ninety-one cases were argued before the Court during the 2003–04 term); *Statistical Recap of Supreme Court's Recap During Last Three Terms*, 70 U.S.L.W. 3060 (2001) (indicating that the Court heard eighty-six arguments during the 2000–01 term).

focus on whether the Court is hearing enough cases, or enough of the right kinds of cases,[23] or whether the light caseload encourages the Justices to indulge an unhelpful penchant for writing separate opinions.[24] Many of the proposals to address the "caseload crisis" of the 1970s and early 1980s, such as the suggestions of a national court of appeals or intercircuit committee "to resolve questions important (but not too important)" and arguments for specialized appellate courts,[25] appear dated today. Whatever concerns most observers now have about the functioning of the Supreme Court, an overloaded docket of argued cases is not among them. Today's historically low caseloads, therefore, create an opportunity to reassess the Supreme Court's way of doing business.[26] Are there ways that it could do better, even at the price of a modest increase in caseloads? Are there ways that, in its efforts to control its docket, it has gone too far? This Article explores these questions.

B. Eschewing Error Correction

Along with the trend towards an almost exclusively discretionary docket came the Court's attempt to define its role not as the court of last resort for unhappy litigants, but as a forum to resolve issues of broader concern. The Court and its members have long insisted that the Court "is not, and has never been, primarily concerned with the correction of errors in lower court decisions."[27] Error correction implies reversing lower court judgments

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23. *Infra* note 93.

24. *See, e.g.*, Ted Gest, *The Court: Deciding Less, Writing More*, U.S. NEWS & WORLD REP. 24, June 28, 1993 (quoting Eugene Gressman's criticism of the Court's "ungodly fractured opinions").

25. Strauss, *supra* note 15, at 1094. *See* Brennan, *supra* note 19, at 232–35 (discussing potential resolutions to the caseload crisis and quoting Justice White's suggestions for specialized national courts); Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1417 (1987) (discussing the possibility of an intercircuit panel as a means to "achieve greater uniformity and coherence in the application of federal law[]").

26. *Cf.* Cordray & Cordray, *Calendar of the Justices*, *supra* note 13, at 203 (arguing that given current low and apparently stable caseloads, "the time is opportune for the Court to consider whether it would be beneficial to make any alterations in its calendar or internal administration").

27. Chief Justice Fred M. Vinson, Address to the American Bar Association: Work of the Federal Courts (Sept. 7, 1949), *in* 69 S. Ct. v, vi (1949); *see* Associate Justice William J. Brennan, Jr., Address to the Pennsylvania Bar Association: State Court Decisions and the Supreme Court (Feb. 3, 1960), *in* 31 PA. B. ASS'N Q. 393, 402 (1960) ("Very often I have voted to deny an application when I thought that the state court's result was very wrong."); *see also* Magnum Co. v. Coty, 262 U.S. 159, 163 (1923) (insisting that the Supreme Court's role is not "merely to give the defeated party in the Circuit Court of Appeals another hearing").

simply because they are wrong. It implies supervising the outcomes of individual cases to ensure that the lower courts are always stating and applying the law correctly. The Supreme Court, in contrast, has cast itself not as a source of justice for individual litigants or the forum to correct aberrations in the application of law, but rather as providing the structure and guidance necessary for the lower courts to correct or avoid errors. Necessarily, then, the Court must sometimes forego involving itself in cases where, although the result may be wrong, the case presents no issues of larger concern.

Even before Congress began to give it control over its docket, the Court worked hard to avoid error correction, by, for example, applying deferential standards of review. Thus, in *Newell v. Norton*,[28] an 1865 admiralty case involving a steamboat collision, the Court summarily affirmed the verdict for the plaintiff without engaging in a searching review of the lengthy record. Instead, the Court affirmed on the basis that there was "ample testimony to support the decision."[29] In addition, long before the Court achieved the almost completely discretionary docket that it enjoys today, the Court began to treat even mandatory appeals "in a summary fashion that was largely indistinguishable from the Court's disposition of petitions for certiorari."[30]

The Court and its members also directly appealed to members of the bar. In *Newell*, for example, the Court explained its refusal to delve into the detailed record:

> [E]ven if we could make our opinion intelligible, the case could never be a precedent for any other case. . . . [In] such cases, parties should not appeal to this court with any expectation that we will reverse the decision of the courts below . . . . Parties ought not to expect this court to revise their decrees merely on a doubt raised in our minds as to the correctness of their judgment, on the credibility of witnesses, or the weight of conflicting testimony.[31]

Or as Chief Justice Vinson put it in a 1949 speech to the American Bar Association:

> To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have

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28. Newell v. Norton, 70 U.S. 257, 268 (1865).

29. *Id.* at 267.

30. Cordray & Cordray, *Philosophy*, *supra* note 17, at 394 & n.28; Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751–58 (2001) [hereinafter Cordray & Cordray, *Plenary Docket*].

31. *Newell*, 70 U.S. at 267–68.

> immediate importance far beyond the particular facts and parties involved.[32]

Not surprisingly, therefore, once it gained the power to limit the number of cases coming before it, the Court was, quite deliberately, "chary of action in respect to certiorari."[33] As early as 1897, it announced narrow criteria for when certiorari would be appropriate:

> [The certiorari] power . . . will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.[34]

This understanding of what cases are appropriate for certiorari remains largely unchanged. Indeed, it has been codified in Supreme Court Rule 10, Considerations Governing Review on Certiorari.[35]

C. Defining Error Correction

The contraction of mandatory jurisdiction and the Court's desire to decide only cases of particular import do not tell the whole story, however. The

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32. Vinson, *supra* note 27, at vi.

33. Forsyth v. Hammond, 166 U.S. 506, 513 (1897).

34. *Id.* at 514–15.

35. SUP. CT. R. 10. Supreme Court Rule 10 explicitly explains that certiorari is both discretionary and is limited to particularly compelling circumstances. It says in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Court's particular understanding of error correction is not the only possible understanding. This section examines the Court's understanding of error correction and describes how this understanding has led the Court to take on what has been described as an "Olympian role."[36] This role is apparent not only in the Court's certiorari practice but also in the way it decides cases on the merits, as the Court demonstrates both an unwillingness to provide guidance to the lower courts except by pronouncement and a high tolerance for nonuniformity in the lower courts.

In the late 1940s and the 1950s, the Supreme Court took on a series of cases involving the validity of jury verdicts, primarily in Federal Employers' Liability Act (FELA) cases. Over and over again, the Court considered whether a plaintiff had been improperly denied the right to a jury trial, or whether a jury verdict for a plaintiff was justified or unwarranted and should be upheld or overturned.[37] The Court's persistence in taking these cases generated a lively debate among the Justices. Justice Frankfurter was vociferous in arguing against taking these cases, which were, in his view, not of national importance and of little or no interest to anyone beyond the litigants themselves.[38] On the other side, Justice Douglas argued that these cases were worthy of the Court's attention, both because of the importance of the jury right and because the Court had an obligation to correct an anti-plaintiff and anti-jury trend in the law that the Court itself had helped to develop.[39]

At the heart of Douglas's argument is the belief that the Court can and sometimes should look at the overall development of the law in certain areas. He believed that the law was going astray and that the Court should correct that trend, even if doing so required taking on a number of cases. Yet although Justice Douglas won the battle—between 1929 and 1952, the Court took approximately seventy FELA cases[40]—Justice Frankfurter won

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36. Hellman, *Shrunken Docket*, *supra* note 1, at 433.

37. STERN & GRESSMAN, *supra* note 11, at 251.

38. Frankfurter dissented repeatedly from the Court's grants of certiorari in these cases or wrote separate opinions in which he argued that the cases should never have been granted. *See, e.g.*, Wilkerson v. McCarthy, 336 U.S. 53, 65–68 (1949) (Frankfurter, J., concurring) ("I don't think . . . [the Court] should take cases merely to review facts already canvassed by two and sometimes three courts."). These opinions culminated in a lengthy and extensively documented dissent in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 447–62 (1959).

39. *See Wilkerson*, 336 U.S. at 69 (Douglas, J., concurring) (arguing that these cases should be heard by the Court).

40. *See* Fowler V. Harper & Arnold Leibowitz, *What the Supreme Court Did Not Do During the 1952 Term*, 102 U. PA. L. REV. 427, 453 n.137 (1954) (listing the number of FELA cases the court heard between 1929 and 1952). Many of these cases were decided summarily. Overall, the Court's approach to the FELA cases was both scattershot and ineffective at least in

the war.[41] The Supreme Court's certiorari criteria are much as he articulated.

In fact, in recent years, the Court has essentially codified Frankfurter's view. In 1995, the Court amended Rule 10, the Rule governing considerations on certiorari, by adding the following sentence to the end of the Rule: "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."[42] Interestingly, this amendment generated relatively little discussion by commentators.[43] Nor did it come with an explanation from the Court itself, most likely because the new language, while "considerably more restrictive," was "in accord with the Court's recent practice."[44]

But as Arthur Hellman has argued, the amendment is actually part of the development, beginning in the mid-1980s, of an Olympian court. In his 1996 article, *The Shrunken Docket of the Rehnquist Court*, Hellman argues that the dramatic reduction in the Court's caseload from the mid-1980s to the mid-1990s cannot be explained solely by the 1988 legislation eliminating most of

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part for reasons discussed *infra*, at 321.

41. As the leading Supreme Court treatise puts it:

> A majority of the Court is no longer strongly committed to the policy reflected in the earlier civil jury-trial cases [most of which were FELA cases]. Today, a petition that presents no more than a question whether the evidence was sufficient to support the jury verdict for the plaintiff stands little or no chance of being granted, as reflected in the current language of Rule 10.

STERN & GRESSMAN, *supra* note 11, at 252.

42. *See* Rules of the Supreme Court of the United States, 515 U.S. 1197, 1204 (1995) (adding the final sentence to Rule 10). Rule 10 was otherwise unchanged. It now consists of the language quoted in note 35, *supra*, followed by the new sentence quoted in the text.

43. A search of the law review database on Westlaw revealed only a handful of articles that even mention this new sentence of Rule 10, and none of those argue that the Court was doing something dramatic and new. In the latest edition of Stern & Gressman, the leading treatise on Supreme Court practice, the authors merely added the phrase "as reflected in the current language of Rule 10" to an otherwise unchanged passage discussing how unlikely the current court is to grant certiorari to consider "whether the evidence was sufficient to support the jury verdict." *Compare* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 191 (7th ed. 1993) *with* STERN & GRESSMAN, *supra* note 11, at 252. Only one commentator suggested anything negative about Rule 10. *See* Diane P. Wood, *Justice Harry A. Blackmun and the Responsibility of Judging*, 26 HASTINGS CONST. L. Q. 11, 13–14 (1998) (wondering if the "Court's mandate to accept only cases of broad precedential value" makes the Court more likely to become inappropriately activist).

44. Bennett Bosky & Eugene Gressman, *The Supreme Court's New Rules—Model 1995*, 164 F.R.D. 80, 90 (1995). *See also* STERN & GRESSMAN, *supra* note 11, at 62 ("It is questionable whether these Rule 10 amendments are anything more than admonitions to counsel.").

the remaining mandatory jurisdiction.[45] Instead, Hellman argues, the critical factor was a change in the Court's view of its role.[46] The Rehnquist Court, he argues, was "less concerned about rectifying isolated errors in the lower courts . . . . [T]hey believe that a relatively small number of nationally binding precedents is sufficient to provide doctrinal guidance for the resolution of recurring issues."[47] Others might argue that the causation runs the other way: large caseloads led the justices to develop a high tolerance for inconsistency in the application of the law[48]—and this in turn has led to a ratcheting up of certiorari criteria, which eventually contributed to today's lower caseloads.

In any event, although the 1995 amendment to Rule 10 may not have announced a significant change in the criteria the Court was already using, it did codify one particular understanding of the meaning of error correction, one that Frankfurter likely would have approved. But as this Article contends, in many ways, both Douglas and Frankfurter were right. Frankfurter's overall vision makes sense for the Court. The Court cannot take cases simply for the sake of setting their results right. Nonetheless, the Court's approach to its role is too narrow. Even when all courts articulate the same legal standard, there may sometimes be a need for Supreme Court involvement. Otherwise, there may be no way to ensure that the overall trend of the law is in the right direction (as Douglas argued), to restore order in areas of law that have become unpredictable or chaotic, or to provide guideposts that lower courts can look to and analogize from when applying even well-established standards, particularly in fact-intensive areas of the law.[49] The Rule 10 amendment, in contrast,

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45. *See* Hellman, *Shrunken Docket*, *supra* note 1, at 408–12 (concluding that the elimination of mandatory jurisdiction had little or no effect on caseload size); *see also* Posner, *supra* note 5, at 70 (noting that by 1988, the Court was already treating most mandatory appeals as "the equivalent of petitions for certiorari").

46. Hellman, *Shrunken Docket*, *supra* note 1 at 430–31.

47. *Id.* at 430–31. Hellman attributes this shift to a change in court personnel. *Id.* at 430. Six new justices came on the Court in the decade following the 1983–84 term, and he argues convincingly that those justices, in contrast to their predecessors, have a more restrictive view of the Court's role. *Id.*; *see also* Cordray & Cordray, *Plenary Docket*, *supra* note 30, at 776–90 (supporting Hellman's thesis with empirical analysis).

48. *See* Strauss, *supra* note 11, at 1095 (describing various ways in which the Supreme Court's limited resources may influence the development of doctrine). *See also* Posner, *supra* note 5, at 35 (observing that the enormous ratio of lower court to Supreme Court cases means that "it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations—the patient, incremental method of the common law, and it must perforce act legislatively"); *id.* at 37 (explaining the relationship between caseloads and the need for the Court to avoid engaging in error correction). *Cf.* Michael E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457, 1473–79 (2005) (questioning whether the Supreme Court's shrunken docket has had a significant effect on its ability to monitor state courts).

49. One of Frankfurter's more unpersuasive arguments was that the Court should not take

manifests a belief that examining the application of a standard is never more than error correction and that articulating the law and applying it can be distinguished.[50]

D. The Role of the Cert Pool

As the previous section demonstrates, the Supreme Court's longtime efforts to control its docket have led it to conflate error correction with the misapplication of a correctly stated rule of law. This trend is exacerbated by another institutional feature—the "cert pool," in which eight of the nine justices participate.[51] The nine thousand or so petitions for certiorari filed annually are divided among those eight chambers, and within each chamber, among the law clerks. In other words, each petition is assigned to a law clerk. That law clerk then researches the issues in the petition (when necessary) and drafts a memo, distributed to all eight justices in the pool, discussing the case and making a

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any of the civil jury cases because:

> [w]e could not possibly review all the [civil jury] cases sought to be brought here. But if we occasionally review such a case, we discriminate against the others, since no rational classification can justify taking one but not all.

Dick v. N.Y. Life Ins. Co., 359 U.S. 437, 456 n.28 (1959) (Frankfurter, J. dissenting). The same argument, of course, can be made about any decision the Court makes about whether to grant or deny certiorari in an area of law in which there are many cases. And in fact, the Justices have largely accepted this reality. As Chief Justice Vinson put it:

> Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country.

Vinson, *supra* note 27, at vi. Being this class representative can come at a high cost. For example, respondents who lose have to pay the other side's costs—even though their particular case, for reasons over which they have no control, may have been picked out of a number of equally appropriate candidates for the Court's attention on a particular matter. *See* SUP. CT. R. 43.2 ("If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.").

50. This is so even though Rule 10—despite being labeled a "rule"—is actually a set of discretionary criteria that are not mechanically applied. Certiorari is a highly discretionary process. Cordray & Cordray, *Philosophy*, *supra* note 17, at 401–02.

51. Justice Stevens is not a member of the cert pool. Nor were Justices Brennan, Douglas, Stewart, or Marshall. *See* Cordray & Cordray, *Plenary Docket*, *supra* note 30, at 791 (noting the Justices who were never members of the cert pool). Thus the personnel change that Hellman highlights came with an increase in the institutional importance of the cert pool. It remains to be seen whether Chief Justice Rehnquist's death and replacement with Chief Justice Roberts and Justice O'Connor's retirement, and replacement with Justice Alito, will affect the workings of the cert pool or other aspects of the Court.

recommendation as to what action the Court should take. Although these recommendations are not automatically accepted, they are nonetheless influential.[52]

Law clerks in the cert pool are trained to look for particular types of cases, and, equally important, to make short work of most others. Law clerks are generally very stingy with their grant recommendations, in part out of a desire to preserve their credibility and political capital with the Justices and other law clerks. Most law clerks review petitions for certiorari with a presumption against granting coupled with a kind of checklist of reasons *not* to grant.[53] Is there a "vehicle problem," such as waiver of a key argument or a jurisdictional impediment to reaching the merits? Deny. Is the petition requesting only factbound error correction? Deny. Is there an independent state law ground for the lower court judgment? Deny. Error correction remains one of the most ubiquitous reasons to deny a petition.[54]

To the extent that law clerks do occasionally encourage the Court to take cases that could be described as mere error correction, they tend to save those recommendations for hot-button areas of the law—voting rights, abortion, and capital cases, for example.[55] Neither the Court's culture nor its certiorari criteria encourage a law clerk to say, "although all the lower courts agree on the appropriate standard for this area of law, the application of that standard is so inconsistent that Supreme Court involvement is warranted." To the contrary.

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52. As a practical matter, recommendations to deny generally receive more deference than recommendations to grant, which tend to elicit careful scrutiny. *See* H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 64 (1991) (noting the difficulty in "overturning a recommendation in the pool to deny").

53. *See id.* at 64, 218–19 (describing law clerks' "predisposition against granting").

54. A certiorari petition labeled "factbound error correction" or "fact specific" by the law clerk who reviews it is virtually guaranteed to be denied with little if any further consideration. *See id.* at 224 ("To say it was 'fact specific' was the kiss of death."); Wood, *supra* note 43, at 13 ("I am sure that every person here who clerked for Justice Blackmun (or any other member of the Court, for that matter) evaluated many a petition for a writ of certiorari with the words 'lower court wrong, but nothing certworthy here.'"). *See also* STERN & GRESSMAN, *supra* note 11, at 459 ("The Supreme Court does not ordinarily grant review in such 'fact bound' cases," where findings of fact are at issue).

55. *See* Stephen R. McAllister, *Practice Before the Supreme Court of the United States*, 64 J. KAN. B. ASS'N 25, 27 (1995) (noting law clerks and Justices' interest in "sexier" issues such as "religion, speech, and due process"); Kenneth Starr, *Rule of Supreme Court Needs a Management Revolt*, WALL ST. J., Oct. 13, 1993, at A23 (arguing that the current Supreme Court often ignores important issues in lieu of more popular issues and suggesting ways the Court could improve its docket); *see also* David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert Denials Suggest an Unfolding Agenda*, A.B.A. J., Dec. 1995, at 42 (noting the limited number of cases that the Supreme Court hears and the topics they do not review).

In addition to the new language of Rule 10 and a culture that discourages grant recommendations, a sense exists among Justices and law clerks alike that if an issue is really important, it will "come back."[56] In practice, this attitude translates to a belief that harm rarely results from an inappropriate denial of certiorari; or, put another way, that there are very few denials that are truly inappropriate.

The Court's reliance on the cert pool likewise increases the likelihood that chaotic areas of the law may be given short shrift, due to the law clerks' and Justices' unfamiliarity with more mundane areas of the law. Law clerks are, as a rule, relatively recent law school graduates with a year or two of clerking behind them and sometimes a year or two of practice as well. They may be very bright, passionate, and deeply engaged with the law, but they are not, by any definition of the word, experienced lawyers or jurists. They can, in fact, be remarkably naive about what actually happens when a case is litigated or about what issues are pressing as a practical matter.[57] As a result, their ability to recognize when an area of the law is in need of some extra guidance may be limited. And their limited tenure—generally a single term—makes them unlikely to recognize recurrent themes.

Moreover, the cert pool insulates the Justices themselves from the daily life of the lower courts, from the ordinary but perhaps quite messy areas of law that are litigated every day.[58] Recurrent instances of the misapplication of settled law, for example, may never be noticed by the Justices. Even though a Justice who reads all the cert pool memos herself might recognize recurrent themes, the structure of the memos—beginning with a very short and formulaic summary paragraph that contains the reasons for the clerk's recommendation—may deter such a Justice from delving deeper into the thousands of recommended denials.[59]

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56. PERRY, *supra* note 52, at 221.

57. Starr, *supra* note 55; McAllister, *supra* note 55, at 27–28 (commenting on the clerks' lack of experience in actual practice and their preference for scholarly issues over practical ones).

58. Other people have criticized the Court's distance from the daily work of the lower courts. *See* Ashutosh Bhagwat, *Separate But Equal? The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967 (2000) (arguing that the Supreme Court has changed into a rule-making body rather than a forum for dispute resolution); Hellman, *Shrunken Docket*, *supra* note 1, at 430–31.

59. McAllister, *supra* note 55, at 27–29. Justice Stevens, while not a member of the cert pool, is not able to change the Court's overall approach to certiorari. And Justice Stevens, like all the Justices, does not himself review most of the petitions, leaving that task to his law clerks. To be clear, I am not arguing that the cert pool affects the overall *rate* of grants—a controversial proposition. *See, e.g.*, Cordray & Cordray, *Plenary Docket*, *supra* note 30, at 790–93 (arguing that the cert pool has not caused the caseload decline). Nor am I arguing in this Article that the

III. The Supreme Court's Approach to Rules and Standards

Part II explained the historical and institutional pressures that have led the Court to equate the misapplication of a properly stated rule of law with error correction—part and parcel of the Court's Olympian approach. Part III explores the implications of this approach, which extend beyond case selection. Just as the Court bases its certiorari decisions largely on whether lower courts are articulating the relevant legal standard correctly and consistently, the Court often acts as if by articulating a rule or standard, its job is done. Sometimes that may well be the case. But applying that rule (or, more likely, that standard) may be even more difficult and important than merely articulating it.

Not surprisingly, both rules and standards can be found in the Supreme Court's jurisprudence.

> A legal directive is 'rule'-like when it binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts. Rules aim to confine the decisionmaker to facts, leaving irreducibly arbitrary and subjective value choices to be worked out elsewhere.[60]

An example of a rule, as found in Supreme Court precedent, is that a police officer may, as a matter of course, order a passenger out of a car during a routine traffic stop.[61]

> A legal directive is 'standard'-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation. . . . Standards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances. Thus, the

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cert pool should be abolished. Rather, I am arguing that the cert pool, combined with norms for law clerk evaluations of petitions for certiorari and the Court's explicit criteria for certiorari, affects the mix of cases taken by the Court directly through the recommendations made by the law clerks and indirectly by insulating the Justices from information about incoherence in standard-governed areas of law.

60. Sullivan, *supra* note 4, at 58. For purposes of this Article, I adopt Professor Sullivan's definitions of rules and standards. I also acknowledge her caveats: "These distinctions between rules and standards . . . mark a continuum, not a divide. . . . All kinds of hybrid combinations are possible. A strict rule may have a standard-like exception, and a standard's application may be confined to areas demarcated by a rule." *Id.* at 61. Sullivan also describes two other types of regulation: categorization, which is rule-like, and balancing, which is standard-like. *Id.* at 59–60. *See also, e.g.*, James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 776 (1995) (arguing that a series of forms of doctrines exists on the spectrum between rigid rules and flexible standards); Cordray & Cordray, *Philosophy*, *supra* note 17, at 424–25, 429 (identifying an incrementalist approach, epitomized by Justice White, and distinguishing between it and a standards-based approach). Despite these caveats, for purposes of analysis, like Professor Sullivan, I will treat rules and standards as the two principal and distinct types of regulation.

61. Maryland v. Wilson, 519 U.S. 408, 415 (1997).

> application of a standard in one case ties the decisionmaker's hand in the next case less than does a rule—the more facts one may take into account, the more likely that some of them will be different the next time.[62]

An example of a standard is that a court should grant summary judgment if, taking all inferences in favor of the non-moving party, a reasonable jury could not find for that party.[63]

Despite the ubiquity of rules and standards in law and the prominence of the academic debates over which type of regulation is preferable,[64] the Court does not appear to calibrate its role depending on the type of regulation at issue. In other words, the Court's decisions about whether to grant certiorari and about whether to *apply* the rules or standards announced in cases it decides on the merits do not appear to be systematically linked to the nature of the regulation.[65] This Part explores how the Olympian Court's failure to take the type of regulation into account when determining whether and how to act often does a disservice to the judicial system.

A. Rules and Standards on Certiorari

On certiorari, the Court's inattention to the differences between rules and standards means that its decision to involve itself in an area of law may turn less on the level of chaos and unpredictability in that area of law and more on whether the chaos and unpredictability can be convincingly described as different courts announcing or using different rules or standards. Consider the following scenarios:

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62. Sullivan, *supra* note 4, at 58–59.

63. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

64. *Supra* note 4.

65. Individual justices, of course, may calibrate their actions in various ways. Justice Scalia, for example, is more likely to try to resolve cases by announcing a rule, while Justice O'Connor is more interested in standards that allow for fact-intensive analysis. *See* Scalia, *supra* note 4, at 1178–81 (describing the advantages and disadvantages of developing rules of law and arguing that the advantages outweigh the disadvantages); Cordray & Cordray, *Philosophy*, *supra* note 17, at 432 (commenting on Justice O'Connor's balancing approach). And there is some evidence that, on certiorari, the Justices' relative sympathy for a rule-based or standard-based approach is related to the rate at which they vote to grant certiorari, with Justices who prefer rules voting for certiorari less often than those who favor standards. *Id.* at 426. Moreover, the Cordrays hypothesize that Justices like Scalia, who favor rules, are inclined to "favor areas that are more susceptible to the articulation of clear legal rules." *Id.* at 427. To the extent this hypothesis is correct, it suggests that the Supreme Court's absence from areas of law governed by standards may be deliberate. This Article argues that such deliberate abstention is inappropriate when unpredictability and chaos in the lower courts could be ameliorated by the Supreme Court's involvement.

> (1) Some lower courts hold that a police officer may order a passenger out of a car during a legal traffic stop only if the police officer has a reasonable belief that the passenger poses a threat to him or that the police officer could otherwise subject the passenger to a *Terry* stop;[66] others hold that the police officer may order the passenger out of the car as a matter of course.

This scenario presents a square circuit split over which legal rule or standard governs police conduct. Under current practice, it is almost certainly certworthy—and indeed, the Court granted certiorari under similar circumstances in *Maryland v. Wilson*.[67]

> (2) The Supreme Court has articulated a set of legal standards for summary judgment in employment discrimination cases. Lower courts consistently and correctly announce these standards, but they apply them inconsistently to similar but not identical factual situations.

Under current practice, certiorari is unlikely to be granted here. So long as the lower courts agree on how to articulate the legal rule or standard at issue, the Supreme Court is likely to see any inconsistencies or odd trends as the "misapplication of a properly stated rule of law," which Rule 10 explicitly says is generally not certworthy. In other words, on certiorari, the Court generally treats areas of law governed by standards as if they were governed by rules.

Treating these types of regulation as if they were the same may be sensible enough when the lower courts are in disagreement over which particular rule or standard should govern a particular situation. But the underlying policies of certiorari are not served by not distinguishing between the *application* of rules and standards. The application of a standard—unlike a rule—provides judges a fair amount of discretion, which leads to a certain amount of inconsistency and unpredictability.[68] However unavoidable some inconsistency might be—and however valuable the flexibility provided by standards might be—at some point too much inconsistency crosses into a realm of chaos at worst and subjectivity at best. And just as inconsistently articulated rules of law warrant Supreme Court intervention, if an area of law becomes deeply unpredictable within one or more circuits, or if certain circuits or judges are noticeably friendlier to plaintiffs or defendants in the application of a particular standard, many of the reasons for granting certiorari apply.[69] The lack of a clean and easily

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66. Terry v. Ohio, 392 U.S. 1 (1968) (allowing warrantless searches and seizures on reasonable suspicion).

67. Petition for Writ of Certiorari, Maryland v. Wilson, 1996 WL 33413835, at *10–15.

68. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 41 (2004) ("A law of standards—with few narrow opinions—leaves room in which judges at all levels retain considerable space in which to maneuver.").

69. *See* Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of*

articulated circuit split does not necessarily make Supreme Court review any less pressing or important.

B. Rules and Standards on the Merits

This Court's apparent lack of consciousness about the differences between rules and standards also affects cases decided on the merits. The Court appears to have virtually no criteria for when it applies a rule or standard and when it simply announces it. It sometimes resolves cases by applying the rule or standard that it has announced, but sometimes, it remands to the lower court to apply its holding. At times, a remand is necessary because the factual record is simply insufficient.[70] And where the Court has announced a rule, application of that rule on remand is likely to be relatively straightforward, involving primarily factual determinations, such as whether the litigant was actually a passenger in the stopped car.[71]

Applying standards to a particular set of facts, however, may be as difficult or important as articulating the standard itself. But sometimes it appears that the Court does not want to be bothered to do the hard work of showing how the standard operates in application. Instead, the Court often acts as if announcing the standard, no less than announcing a rule, solves whatever legal problem has been presented, and it fails to recognize that application of the standard on remand—as well as in other cases raising the same issue—may be complicated or difficult.[72]

A recent example of the Court's apparent disinterest in applying the standards it announces arose in *Johnson v. California*.[73] The petition for

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Unresolved Intercircuit Conflicts, 56 U. PITT. L. REV. 693, 772–73 (1995) (describing intolerable conflicts); *see also* Scalia, *supra* note 4, at 1179 (promoting uniformity and predictability as important aspects of the rule of law).

70. Compare, for example, the Court's treatment of the consolidated cases of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), and *Consolidated Rail Corp. v. Carlisle*, 512 U.S. 532 (1994). In those cases, the Court held that emotional distress damages were cognizable under FELA only under the common law zone of danger test. *Id.* at 557. In *Carlisle*, the Court held that the injuries alleged were outside those that were recognized at common law and simply reversed the lower court's ruling granting relief. *Id.* at 558. In *Gottshall*, on the other hand, the Court remanded because "[t]he question was not adequately briefed or argued before us." *Id.*

71. Maryland v. Wilson, 519 U.S. 408, 415 (1997).

72. Perschbacher & Bassett, *supra* note 68, at 44 ("[T]he actual scope of a doctrinal formulation is learned through its applications and not through the words chosen to express the doctrine.").

73. Johnson v. California, 125 S. Ct. 1141 (2005).

certiorari, which was granted in full, contained two "Questions Presented." The first asked the Court to clarify the appropriate standard for evaluating the constitutionality of racial segregation of prison inmates: should it be the strict scrutiny applied to virtually all other racial classifications, or should it be the much more deferential standard generally applied to prison regulations? The second question asked the Court to apply whichever standard it selected: under the appropriate standard, does the routine racial segregation of state prisoners for at least sixty days violate the Equal Protection Clause?[74]

The Supreme Court granted the petition in full[75] and both questions were fully briefed and discussed at oral argument.[76] But the Court entirely ignored the second question in its ruling. Explaining why the Court granted certiorari, Justice O'Connor's opinion for the Court stated simply, "[w]e granted certiorari to decide which standard of review applies."[77] And rather than apply the strict scrutiny standard the Court imposed, it "remand[ed] the case to allow the [lower courts] . . . to apply it in the first instance."[78]

The Court gave no further explanation for its decision not to apply the standard and to remand for the lower courts to do so. It did not discuss the state of the record. Its only additional guidance to the lower courts was to comment that the special dangers present in prisons could be taken into account and, even under strict scrutiny, might "justify racial classifications in some contexts."[79] In other words, the Court suggested that strict scrutiny in the prison context might lead to different results than it would in other situations. But it declined to consider whether the facts in *Johnson* might warrant approval of race-based segregation of inmates.

Members of the Court have criticized this hands-off approach in specific cases. Then-Justice Rehnquist, for example, colorfully deplored the Court's failure to apply the standards it announced with respect to summary judgment in areas of law (like libel) that carry a heightened burden of proof:

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74. Petition for Writ of Certiorari, Johnson v. California, 2004 WL 1248853, at *i.

75. Johnson v. California, 540 U.S. 1217 (2004).

76. *See, e.g.*, Brief for Petitioner, 2004 WL 1248853, at *32–44 (discussing the second question and arguing that the practice is unconstitutional); Brief for Respondent, 2004 WL 1790881, at *28–44 (arguing that the consideration of race when deciding temporary cellmates is constitutional); Oral Argument Transcript, 2004 WL 2513566, at *11–13, *17–18, *40–44 (discussing the constitutionality of routine, but temporary, racial segregation, as well as the standard under which this issue should fall).

77. Johnson v. California, 125 S.Ct. 1141, 1146 (2005).

78. *Id.* at 1152.

79. *Id.*

> The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.[80]

But such criticisms have not caused the Court to change systematically the way it does business.

To be sure, the Court does sometimes apply the standards it has just announced. For example, in *Strickland v. Washington*,[81] the case that announced the standards for ineffective assistance of counsel, the Court explained, "[h]aving articulated the general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles."[82] But the Court has no explicit or otherwise apparent criteria (other than the necessary one of an adequate record) to determine when it announces and applies a standard.

C. Consequences

The Court's lack of awareness about the differences between the two types of regulations and about how the lower courts, as well as litigants and primary actors, are likely to understand and respond to them can leave areas of the law governed by standards without adequate guidance. This subpart explores why.

Although some Justices prefer one form of regulation over another, the use of standards in law, instead of rules, is sometimes unavoidable. Only with "global rationality" and full information could a court (or legislature) "craft a detailed, bright-line rule covering every eventuality, foreseeing every relevant variation on the facts."[83] But human rationality is bounded, not global, and this bounded rationality makes impossible such highly specific rules. Standards will inevitably and always be part of our legal system. Even Justice Scalia, the foremost champion of the use of rules, concedes as much.[84]

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80. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting).

81. Strickland v. Washington, 466 U.S. 668, 698 (1984), *aff'd* 737 F.2d 894 (11th Cir. 1984).

82. *Id.* at 698.

83. Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 1331, 1342 (2003).

84. Scalia, *supra* note 4, at 1186–87.

That same bounded rationality comes into play when it is time to apply a standard to a particular situation, and when, as is often the case, judges are expected to apply that standard in a way that is consistent with a pre-existing body of case law.[85] The larger the body of law and the more fact-intensive the inquiry, identifying all or even most relevant factually analogous cases becomes difficult or impossible. With a mass of precedent from which to choose, judges may well "decid[e] intuitively . . . what is the right result and then scour[] legal texts for the [precedent] that will justify the intuition."[86] One does not have to be a dyed-in-the-wool legal realist to believe that this is how cases, particularly run-of-the-mill cases, are often decided.

Indeed, creative empirical research by Australian law professor John Braithwaite demonstrates that, where there are thousands of rules, decisionmakers do just that. Braithwaite examined nursing home regulation. He explained that "nursing home inspectors cope with the sheer cognitive demands of the enormous number of rules they are expected to be on top of by behaving rather like the way legal realists accuse judges of behaving."[87] Braithwaite was talking about rules, rather than precedent, but each precedent can be seen as a rule that governs the specific facts of that case. And though judges are not nursing home inspectors, there is no reason to believe that judges are immune from the cognitive processes that lead to this behavior.[88]

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85. In this way, judges' roles are quite different from those of juries. Juries are asked to apply a standard to a particular set of facts, and not only are they not expected to consider how other juries have decided similar cases, they are generally prohibited from taking such information into account. *See, e.g.*, Gillen v. Phoenix Indem. Co., 198 F.2d 147, 150–51 (5th Cir. 1952) (holding that it is improper for a judge to instruct a jury on amounts awarded in similar cases).

86. John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47, 63 n.61 (2002). I do not mean to suggest that intuition is always a bad thing in judging. It can, for example, play an important part in developing a standard. *See* Paul Gewirtz, *On "I Know It When I See It,"* 105 YALE L.J. 1023 (1996) (explaining how intuition, emotion, and rhetoric contribute to the decision-making process).

87. Braithwaite, *supra* note 86, at 63.

88. Braithwaite himself draws the analogy:

> Nursing home inspectors perhaps cope in a way that is not radically different from the way the House of Lords copes with the galaxy of rules that constitute British law. "In many cases, and the Law Lords admit this readily enough, they work 'bottom-up', from a basic instinct that the plaintiff or the defendant ought to win . . . ."

Id. at 64 (quoting DAVID ROBERTSON, JUDICIAL DISCRETION IN THE HOUSE OF LORDS 17 (1998)).

One difference between judges and nursing home inspectors, however, is the adversary system. Ideally, judges have before them briefings by the parties that point to the strongest case law and other arguments in favor of their positions. Thus, ideally, judges should have the most important cases brought to their attention. One problem with this ideal, however, is that it is often far from the reality. The quality of briefing varies enormously. Moreover, as judges

The bias that Braithwaite observed is sometimes called "selective search."[89] The problem of selective search is intensified by the fact that judges are often extremely busy. Judges who view cases with recurrent but factually distinct issues as routine may put their limited cognitive and other resources into the cases that they view as presenting more challenging, unusual, or high-profile issues. Prioritizing interesting or difficult work at the expense of work seen as less important is sometimes called "task interference."[90]

The phenomena of selective search and task interference suggest that standard-governed areas of law are most likely to become incoherent and unpredictable when the legal issues arise in a large number of relatively routine cases, making it more likely that judges will see the cases as repetitive and uninteresting and making selective search of precedent more tempting. These phenomena, though unavoidable to some degree, do not support rule of law values. Deciding cases based on selective search and with the limited attention caused by task interference looks discomfitingly like the rule of men, not laws. As Judge Wald explained:

> Escalating caseloads also produce a glut of published precedent which the judge should but cannot always know. Too many opinions produce inevitable inconsistencies within and among courts. Precedent can be found somewhere for almost any proposition; the value of any single precedent is diminished. Courts become less predictable and more quirky.[91]

At the same time, the Supreme Court's absence from standard-governed areas of law leads to "wide gaps [at the Supreme Court level] in the doctrines governing important areas of law,"[92] because as long as the lower courts

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experience "task interference," *supra* note 83, they may at times give short shrift to the cited cases, preferring instead to rely on their intuitions. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 179 n.37 (1996) (arguing that judges appropriately make predictions about whether a plaintiff is likely to win when deciding summary judgment).

89. Hirsch, *supra* note 83, at 1337–38 & nn.25–26 (citing Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 106–07 (1955); HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 55–59 (3d ed. 1996)).

90. Hirsch, *supra* note 83, at 1342–52 & nn.47–49 (describing "task interference") (citing DANIEL KAHNEMAN, ATTENTION AND EFFORT 178–202 (1973); HAROLD E. PASHLER, THE PSYCHOLOGY OF ATTENTION 265–317 (1998); David Navon & Daniel Gopher, *On the Economy of the Human-Processing System*, 86 PSYCHOL. REV. 214, 218–22 (1979); Christopher D. Wickens, *Processing Resources in Attention*, *in* VARIETIES OF ATTENTION 63 (Raja Parasuraman & D.R. Davies eds., 1984); Warren Thorngate, *On Paying Attention*, *in* RECENT TRENDS IN THEORETICAL PSYCHOLOGY 247, 249–50 (Wm. J. Baker et al. eds., 1988)).

91. Patricia M. Wald, *Some Thoughts on Judging as Gleaned From One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 904 (1987).

92. Hellman, *Shrunken Docket*, *supra* note 1, at 434 (mentioning the following areas of

correctly state the standard—however general and amorphous—the Court is unlikely to involve itself. The law reviews are filled with articles pointing to these gaps, describing the consequent inconsistent application of standards in the lower courts, and arguing for more guidance from the Supreme Court in a wide range of areas of law, including, for example, punitive damages, regulatory takings, same-sex harassment, and the *Daubert* standard for the admission of expert testimony.[93] But this is not just an academic concern: "[A]t least one important function of the law [is] to provide reasonably intelligible and reasonably sensible guidelines for consumers of law."[94] Lawyers and their clients need some level of predictability in the law. People need a body of law that is "clear, stable, intelligible and uniform" and that is "reasonably easy to understand, obey and plan for."[95] As will be explained more fully in Parts IV and V, the Court could add enormously to the uniformity of the law and could provide much more valuable guidance to the lower courts

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law as in need of further guidance: preemption of state law claims under section 301 of the Labor-Management Relations Act, "the discretionary function exception to the Federal Tort Claims Act, the government contractor defense, and personal jurisdiction over nondomicilaries"). In the ten years since Professor Hellman wrote *Shrunken Docket*, the Supreme Court has addressed none of these four areas of law, although it had previously resolved the FTCA issue. Hellman attributes this absence from doctrine to the Court's Olympian role. As he describes it, "The Justices seldom engage in the process of developing law through a succession of cases in the common-law tradition." *Id.* at 433.

93. *See, e.g.*, Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 22–24 (1998) (criticizing the Court's opinion in *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998), for failing to provide adequate criteria for determining when same-sex harassment constitutes sex discrimination); Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779 (2004) (exploring the constitutionality of punitive damages); F. Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central*: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 516 (2001) (discussing regulatory takings); Michael Polentz, *Post-*Daubert *Confusion With Expert Testimony*, 36 SANTA CLARA L. REV. 1187 (1996) (discussing the admissibility of expert testimony); Joshua D. Poyer, Note, United States v. Miggins*: A Survey of Anticipatory Search Warrants and the Need for Uniformity Among the Circuits*, 58 U. MIAMI L. REV. 701 (2004) (exploring anticipatory search warrants); *see also* Savage, *supra* note 55, at 40, 42 (reporting corporate lawyers' views that the Court neglects business law and that "the Court ought to place more weight on the importance of an issue, rather than sitting back and waiting for a clear circuit split to develop"). *But see* Glenn W. Reinman, Note, *Sour Grapes or Sound Criticism: Is the Supreme Court Really Not Taking Enough Non-Tax Business Cases?*, 8 U. MIAMI BUS. L. REV. 161 (1999) (arguing that the Court does not neglect business law).

94. Paul M. Bator, *What Is Wrong With The Supreme Court?*, 51 U. PITT. L. REV. 673, 674 (1990); *see also id.* at 674–75 (arguing that although the law has many aspirations, intelligent and uniform rules should be an important goal).

95. *Id.* at 674.

were it to take into account the ways in which standards are different from rules.

IV. Employment Discrimination: An Extended Example

Summary judgment in employment discrimination provides an informative example of how the Court's approach disserves the judicial system. It is an area of law governed by well-established standards, not rules, and the application of those standards requires a fact-intensive analysis of each case. Although a huge number of such cases are decided in the federal courts each year, the Supreme Court has given remarkably little guidance on how to apply the standards that govern them. In part as a result, this area of law is unpredictable and chaotic. Looking at this area of law, therefore, demonstrates at least some of the consequences of the Court's current failure to distinguish between rules and standards and provides a good jumping off point for exploring other approaches the Court might take.

A. Why Summary Judgment in Employment Discrimination?

As explained in Part III, the problems of selective search and task interference are particularly likely to arise in areas of the law with large numbers of factually distinct cases to which courts must apply a fairly general standard. Employment discrimination cases on summary judgment present precisely such a situation.

1. Numbers, Numbers, Numbers

There are an enormous number of summary judgment employment discrimination cases. Every year, thousands of employment discrimination plaintiffs file their cases in federal court. In 2000, for example, 21,032 complaints were filed in employment civil rights cases in the federal courts,[96] accounting for more than half of all civil rights complaints filed that year and

96. "Employment civil rights" is a statistical category tracked by the federal courts. It includes more than just employment discrimination cases. For example, it includes cases alleging that a public employer fired an employee for exercising his First Amendment rights. The overwhelming majority of cases in the "employment civil rights" category, however, are discrimination cases. *See* STATISTICS FROM NORTHERN DISTRICT OF ILLINOIS, provided by Ted Newman of the Clerk's Office for the Northern District of Illinois [hereinafter N.D. ILL. STATISTICS] (on file with the Washington and Lee Law Review).

more than 8% of the total of 259,000 civil complaints.[97] In some districts, the percentage is even higher. In the Northern District of Illinois, for example, the number of employment civil rights cases initiated in 2002 constituted about 10% of all civil cases filed.[98]

Very few of these cases actually go to trial. Nationally, the likelihood of an employment case going to trial was about 9% in 1992 and decreased to 5% by 1996.[99] In the Northern District of Illinois, an employment case has about a 2.75% chance of making it to a jury verdict.[100] The vast majority of these cases, therefore, either settle or are resolved on a motion for summary judgment. In the Northern District of Illinois between 1995 and 2003, about 19% of all such cases were resolved with a grant of summary judgment.[101] National statistics show that 25–35% were resolved on a pretrial judgment,[102] meaning that courts likely granted summary judgment in thousands of cases in 2000 alone.[103] With such a massive number of cases, the potential for selective search is apparent. Moreover, judges undoubtedly experience task interference, viewing cases that involve the application of the same standards as routine or as a distraction from other, more interesting or unusual matters.[104]

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97. Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 2000* (July 2002).

98. *U.S. District Courts—Federal Court Management Statistics*, www.uscourts.gov/cgi-bin/cmsd 2002.pl (2002); N.D. ILL. STATISTICS, *supra* note 96. I have highlighted the Northern District of Illinois in the text because I was able to obtain statistics about the progress of employment cases in that District. These statistics are not routinely available and are not reported to the Administrative Office. *See supra* note 96 (citing data showing the types of cases initiated and their outcome).

99. MICHAEL FORMAN ET AL., MAINTAINING THE SANCTITY OF THE JURY IN EMPLOYMENT DISCRIMINATION CASES, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, June 2003, at 8 (citing JOHN GOLMANT, STATISTICAL TRENDS IN THE DISPOSITION OF EMPLOYMENT DISCRIMINATION CASES, *reprinted in* THE BUREAU OF NATIONAL AFFAIRS, Vol. 20, No. 18 (April 30, 2003)).

100. N.D. ILL. STATISTICS, *supra* note 96.

101. *Id.* The statistics do not indicate whether the grant is for the defendant or the plaintiff. It is, however, virtually unheard of for a plaintiff to move for, let alone win, a motion for summary judgment in an employment case. Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 560 (2001) (reporting that 98% of employment cases disposed of on pretrial motion are resolved in favor of the defendant).

102. FORMAN ET AL., *supra* note 99, at 9 (citing GOLMANT, *supra* note 99).

103. Pretrial judgment does not necessarily mean summary judgment. A dismissal for want of jurisdiction or for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) is also a pretrial judgment. But as a practical matter, in employment discrimination litigation, summary judgment is where the action is. It is relatively easy to write a complaint that states a claim. *Cf.* Swierkiewicz v. Sorema, 534 U.S. 506, 514–15 (2002) (overruling heightened pleading requirements in employment discrimination cases).

104. *See, e.g.*, *In re* Applin, 108 B.R. 253, 262 n.14 (E.D. Cal. 1989) (admitting the

2. *Fact-Intensive Analysis in Applying Standards*

The standards that courts use to resolve summary judgment motions in employment discrimination cases are well established and largely uncontroversial, and they require judges to engage in a fact-intensive analysis. As in any area of law, there are easy cases—cases that unquestionably warrant summary judgment, on the one hand, or, on the other, cases that clearly require a trial. But in the middle, the general nature of the standards, the factual variation in the cases, and the large number of existing precedents provide judges with enormous discretion in deciding summary judgment motions. This section describes the standards judges use and how those standards interact with the facts and evidence in each case.

As a general matter, courts are supposed to grant summary judgment when, taking all inferences in favor of the nonmoving party, "the moving party is entitled to judgment as a matter of law."[105] In many, perhaps most, cases this determination, which is made by judges, involves an interaction of the summary judgment standard with the underlying substantive law. Employment discrimination law is no exception, and in employment discrimination cases, courts engage in a particularly structured analysis that adds its own substantive legal standards.

In 1973, the Supreme Court announced a framework for analyzing employment discrimination cases in situations where plaintiffs do not have a smoking gun and must rely on circumstantial evidence to prove that defendants acted with discriminatory intent—in other words, in the vast majority of such cases.[106] The framework, first articulated by the Supreme Court in *McDonnell-Douglas v. Green*, and characterized by shifting burdens of production, is as follows: The plaintiff must first establish a prima facie case of discrimination. Here, the term "prima facie case" means a set of facts that give rise to a

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possibility that the court may overlook material facts in a given case due to the high workload, and thus invite meritorious motions to reconsider).

105. FED. R. CIV. P. 56(c).

106. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973). *McDonnell-Douglas* was refined in a later case, *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Not all employment discrimination cases necessarily involve the *McDonnell-Douglas* standard. Some may be harassment cases, for example, or Americans with Disabilities Act cases raising questions of reasonable accommodation and what is a disability. *See* Selmi, *supra* note 101, at 558 (reporting that ADA cases account for a quarter of employment discrimination cases filed). Similar problems with overuse of summary judgment occur in some of these other types of cases, however. *See generally* Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277 (discussing courts' overuse of summary judgment in sexual harassment cases).

rebuttable presumption of discrimination.[107] Once the plaintiff has established this prima facie case, the defendant must articulate a legitimate, nondiscriminatory reason for its employment decision.[108] For example, the defendant might claim that the plaintiff was fired because she was late to work every day. This legitimate reason rebuts the presumption created by the prima facie case.

At this point, the plaintiff must produce evidence to establish pretext—evidence that the reason given is false or was not the real motivator behind the employment decision.[109] For example, the plaintiff could produce evidence that other employees were late as often or more often than she was but were not fired, or she could produce evidence that she was not in fact late and the employer knew it. If the factfinder believes that the employer's reason is pretextual, it can usually—but does not have to—infer that the employer was really motivated by discrimination.[110] In so doing, it can consider other evidence, such as discriminatory remarks made by the defendant, even if those remarks were not made in the context of the employment decision at issue.

On summary judgment, a judge can rule for the defendant at one of a number of points along the way.[111] If the court determines, for example, that

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107. The details of that prima facie case vary depending on the precise nature of the claim at issue (termination, failure to promote, etc.). In general, however, a plaintiff establishes a prima facie case by showing (1) that she is a member of a protected group; (2) that she was qualified for the job, or performing according to her employer's legitimate expectations; (3) that she was terminated or not promoted or suffered some other adverse employment action, and (4) that a similarly situated employee not in the same protected group was not fired, or was promoted, or otherwise was treated better than the plaintiff. *McDonnell-Douglas*, 411 U.S. at 802.

108. *Id.* at 802–03.

109. *Id.* at 804.

110. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 525 (1993).

111. *McDonnell-Douglas* itself was originally applied by judges in bench trials at a time when there was no jury right under Title VII. With the advent of the jury right, however, in 1991, bench trials have become increasingly rare. Selmi, *supra* note 101, at 575; N.D. ILL. STATISTICS, *supra* note 96. *McDonnell-Douglas* is therefore applied more and more often in the context of summary judgment.

In the summary judgment context, where no actual fact-finding is supposed to occur, *McDonnell-Douglas* operates somewhat differently than in trials. For example, a district court judge applying *McDonnell-Douglas* in a bench trial resolves credibility determinations and finds facts, such as whether the defendant's claimed reason is in fact pretextual. On summary judgment, in contrast, the judge is supposed to determine whether a reasonable jury could conclude that the reason given was pretextual.

Likewise, the standard for appellate review varies. If the district court concludes that the defendant's reason was not pretextual during a bench trial, that determination is reviewed for clear error. Apparent inconsistencies in outcomes among cases are understood to be due to different factual findings, contexts, and credibility determinations. But if, on summary

the plaintiff's evidence cannot establish that she was meeting her employer's legitimate expectations—a standards-based question—the plaintiff loses summary judgment. Likewise, if the court determines that the plaintiff's evidence could not support a finding that the employer's reasons are pretextual, or even if pretextual, that a jury could not find discrimination, then the court grants summary judgment. Indeed, courts that rule against employment

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judgment, the court determines that a reasonable jury could not find that the defendant's reason was pretextual, that ruling is reviewed *de novo*. And because a summary judgment ruling is a matter of law, not fact, in theory, the case law arising from summary judgment rulings should be consistent. The main point here, however, is this: when *McDonnell-Douglas* interacts with summary judgment, the standards that courts apply are different than when they apply *McDonnell-Douglas* in bench trials.

Moreover, *McDonnell-Douglas* often has no role whatsoever in factfinding in jury trials. In many circuits, judges are prohibited or discouraged from instructing juries on the *McDonnell-Douglas* burden-shifting framework. *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1016–18 (1st Cir. 1979) (explaining that although the phrase "prima facie case" and other "legal jargon" need not be read to the jury, whether jury instructions should include "the four elements of the *McDonnell Douglas*-type prima facie cases (properly tailored to the circumstances) and that the employer's reason is a pre-text" will depend upon the evidence presented); Cabrera v. Jakabovitz, 24 F.3d 372, 380–82 (2d Cir. 1994) (holding that although a jury instruction included the phrase "prima facie case" and noted that the "defendant's 'burden' of produc[tion]" "created a distinct risk of confusing the jury," in certain instances it would be appropriate to instruct the jury on the elements of a prima facie case); Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221–22 (3d Cir. 2000) (holding that although it is proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown," it is error to instruct the jury on the *McDonnell-Douglas* burden shifting scheme), *cert. denied*, 531 U.S. 1147 (2001); Mullen v. Princess Anne Vol. Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the "shifting burdens of production of *Burdine* . . . are beyond the function and expertise of the jury" and are "overly complex"); Walther v. Lone Star Gas Co., 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age."); *In re* Lewis, 845 F.2d 624, 634 (6th Cir. 1988) (holding there was no error in rejecting the *McDonnell-Douglas* instruction, which serves to "confuse the jurors with legal definitions of the burdens of proof, persuasion and production"); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) ("Once the judge finds that the plaintiff has made the minimum necessary demonstration (the 'prima facie case') and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question—the *only* question the jury need answer—is whether the plaintiff is a victim of intentional discrimination."); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 731 (8th Cir. 1992) (reiterating that "the *McDonnell-Douglas* 'ritual is not well suited as a detailed instruction to the jury'"), *cert. denied*, 506 U.S. 1014 (1992); Costa v. Desert Palace, Inc., 229 F.3d 838, 855 (9th Cir. 2002) (en banc) ("It is not normally appropriate to introduce the *McDonnell-Douglas* burden-shifting framework to the jury."), *aff'd* 537 U.S. 1099 (2003); Messina v. Krobline Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990) ("The *McDonnell-Douglas* inferences . . . are of little relevance to the jury."); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the *McDonnell-Douglas* analysis.").

discrimination plaintiffs on summary judgment frequently hold that the plaintiff has not produced adequate evidence of pretext.

B. An Often Unpredictable and Incoherent Body of Law

Despite the well-established legal standards used by the courts, this area of the law is chaotic and often arbitrary, with some judges willing to grant summary judgment in cases that other judges would find worthy of a trial. Nonetheless, the Supreme Court has provided very little guidance to the lower courts on how to apply these standards. In fact, by the end of October Term 2004, the Court had addressed the application of *McDonnell-Douglas* to defendants' motions for summary judgment exactly once, when it decided *Reeves v. Sanderson Plumbing Products, Inc.*[112] in 2000—nearly thirty years after *McDonnell-Douglas* itself and thirty-six years after the passage of Title VII.

Many commentators, analyzing numerous cases, have decried the misuse of summary judgment in employment discrimination cases, both before and after *Reeves*.[113] These commentators argue that judges all too often resolve

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112. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000). In February 2006, the Supreme Court issued a per curiam opinion in an employment discrimination case. Ash v. Tyson Foods, Inc., 2006 WL 386343 (Feb. 21, 2006). The plaintiffs, who alleged race discrimination in promotions, won a jury verdict. The Eleventh Circuit upheld a grant of judgment as a matter of law despite a jury verdict in favor of one plaintiff, and although it reversed the judgment as a matter of law as to the other plaintiff, it upheld an order for a new trial. The Supreme Court reversed. *Ash* is discussed in more detail, *infra* note 164.

113. *See, e.g.*, Frank J. Cavaliere, *The Recent "Respectability" of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment "Prism,"* 41 CLEV. ST. L. REV. 103, 113–44 (1993) (noting the different interpretations concerning summary judgment standards in employment discrimination cases); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 221–42 (1993) (describing how the misuse of summary judgment in civil rights cases has unfairly burdened plaintiffs); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 168–70 (2000) (noting examples of misuse of summary judgment in employment cases); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 592–603 (2001) (describing the misuse of summary judgment despite *Reeves*); Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 540–61 (2001) (noting the continued confusion in the lower courts due to the Supreme Court's lack of guidance); Selmi, *supra* note 101, at 555 (noting that the Supreme Court's unanimous reversal of the lower court in *Reeves* indicates that "something is seriously amiss" with regard to summary judgment as applied to employment discrimination cases); Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159 (2005) (arguing that in applying the summary judgment tests in employment discrimination cases, courts have lost sight of the law); *see also* Arthur R. Miller, *The Pretrial*

issues of fact on summary judgment, including—or especially—issues related to intent, which is supposed to be particularly ill-suited to summary resolution.

To take one recurrent issue as an example, consider how courts handle the question of pretext. What kind of evidence is enough to overcome the defendant's legitimate nondiscriminatory explanation for whatever action it took and to allow a jury to infer discrimination? On this question, the cases are extremely inconsistent. In *Weinstock v. Columbia University*,[114] for example, a female chemistry professor at Barnard was denied tenure by Columbia University's provost despite recommendations in favor of tenure from all levels at Barnard, from the Columbia chemistry department, and from an ad hoc committee formed to review her candidacy.[115] Columbia claimed that the provost denied Weinstock tenure because her scholarship did not meet the standard uniformly applicable within Columbia University.[116] In response, the plaintiff produced evidence that, in fact, Barnard science professors are generally held to a lower standard than Columbia science professors because they have fewer resources available to them.[117] She produced evidence that the provost had expressed his belief that women in the sciences tend not to get promoted because they lack merit.[118] She produced evidence that the provost deviated from regular procedures of tenure review in her case, including soliciting negative comments about her work from professors outside her field but failing to seek additional reviews of her work from people familiar with it.[119] And she produced some evidence that during the discussions of her candidacy, she was described as nice, nurturing, and a pushover.[120] While the opinions in the case do not demonstrate definitively that she was the victim of sex discrimination, they do establish that the plaintiff provided evidence from which a jury could conclude that Columbia's stated reason for the denial of tenure was false and that the provost's decision was motivated by sexism.

Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1016–1134 (2003) (decrying the overuse of summary judgment generally); Thomas J. Piskorski, *The Growing Judicial Acceptance of Summary Judgment in Age Discrimination Cases*, 18 EMP. REL. L.J. 245 (1992) (noting federal courts' increasing comfort with granting summary judgment in age cases).

114. Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000).

115. *Id.* at 37–39.

116. *Id.* at 42–43.

117. *Id.* at 45–46, 51 (Cardomone, J., dissenting).

118. *Id.* at 55 (Cardomone, J., dissenting).

119. *Id.* at 54 (Cardomone, J., dissenting).

120. *Id.* at 39, 48.

Nonetheless, the Second Circuit affirmed the district court's grant of summary judgment.

In contrast, some courts deny summary judgment where the plaintiff's evidence of pretext is both less compelling and less specifically indicative of a discriminatory motive than was Professor Weinstock's. In *Blow v. City of San Antonio*,[121] for example, the plaintiff was an African-American woman passed over for a promotion in favor of a newly-hired white man. The city's legitimate nondiscriminatory reason for its decision was that by the time Ms. Blow applied for the job, the position had been filled.[122] Her evidence of pretext was that her supervisors, who would have known that as a city employee (and possibly as a minority) she would have priority for the job, discouraged her from applying until it was too late and failed to follow proper procedure in the hiring process.[123] On this basis alone, the Fifth Circuit reversed summary judgment.

In other cases, surprisingly similar evidence and arguments lead to different results. In *Feingold v. New York*,[124] for example, the Second Circuit reversed summary judgment. It found sufficient evidence of pretext where the white Jewish plaintiff was ostensibly fired for actions for which African-American employees were not even disciplined.[125] In contrast, in *Bryan v. McKinsey & Co.*,[126] the African-American plaintiff lost summary judgment despite the fact that he established that his white peers were given more supervision, feedback, and opportunities to resolve the same type of performance problems that he had.[127]

The unpredictability is sometimes *within* circuits, as well as between circuits. The Second Circuit, for example, is home to both *Weinstock* and *Feingold*. The Fifth Circuit decided *Blow*, but it also decided *Bryan*. The Seventh Circuit has denied summary judgment in cases like *Curry v. Menard*,[128] where the primary evidence of pretext was that other employees were not disciplined for the same infractions, and *Firestine v. Parkview Health*

121. Blow v. City of San Antonio, 236 F.3d 293 (5th Cir. 2000).

122. *Id.* at 297.

123. *Id.*

124. Feingold v. New York, 366 F.3d 138 (2d Cir. 2004).

125. *Id.* at 153–55; *see also* Curry v. Menard, 270 F.3d 473, 479–80 (7th Cir. 2001) (finding evidence of pretext where an African-American cashier, ostensibly fired for discrepancies in her cash drawer, showed that non-black cashiers were not fired for such discrepancies).

126. Bryan v. McKinsey & Co., 375 F.3d 358 (5th Cir. 2004).

127. *Id.* at 361–62.

128. *Curry*, 270 F.3d at 476.

Systems,[129] where the evidence was also differences in the employer's treatment of violators of a company policy, the fact that the employer changed its story, and the court's own belief that the proffered reason on summary judgment was not "objectively reasonable."[130] But it also has decided cases in which it is much less solicitous of plaintiffs' evidence and much less willing to draw inferences in the plaintiffs' favor. In *Massey v. Blue Cross-Blue Shield of Illinois*,[131] for example, the Seventh Circuit upheld judgment as a matter of law in favor of the defendant after a jury found that the African-American plaintiff had been fired due to race discrimination. Massey presented evidence that her white supervisor gave a white employee more assistance with her work than she gave Massey, that she criticized Massey's written work unreasonably and held it to a higher standard than her own work, and that she assigned the seating in the office the only possible way in which she could avoid sitting next to or in the same row as an African-American.[132] And in *Malacara v. City of Madison*,[133] the majority opinion denied summary judgment in the plaintiff's promotion claim without so much as a discussion of the plaintiff's extensive evidence of pretext, evidence that included test scores showing that the plaintiff was more qualified than the individual promoted, evidence that the plaintiff's experience was more extensive and relevant than defendant claimed (and that the chosen employee's was less so), and specific evidence that other aspects of the defendant's claims were false.[134]

Such intracircuit inconsistency is notable.[135] Intracircuit inconsistency (or inconsistency at the district court level) is generally believed to be a matter of concern

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129. Firestine v. Parkview Health Sys., Inc., 388 F.3d 229 (7th Cir. 2004).

130. *Id.* at 235–36.

131. Massey v. Blue Cross-Blue Shield of Ill., 226 F.3d 922 (7th Cir. 2000).

132. *Id.* at 926.

133. Malacara v. City of Madison, 224 F.3d 727 (7th Cir. 2000).

134. *Id.* at 730–31 (affirming summary judgment after concluding that "[d]efendants established legitimate, nondiscriminatory reasons for not hiring" the plaintiff); *id.* at 730 (Williams, J., dissenting) (criticizing the majority opinion for "rely[ing] solely on defendants' version of the evidence and [giving] little or no credence to Malacara's version"); *id.* at 732–35 (detailing and analyzing evidence of pretext).

135. This is not to suggest that there are no identifiable differences in the ways different circuits apply the standards here. The Fifth Circuit, for example, has been notably more willing to send employment cases to the jury than some other circuits, at least since *Reeves* (perhaps in response to being reversed by the Supreme Court.) *See, e.g.*, Patrick v. Ridge, 394 F.3d 311, 317–18 (5th Cir. 2004); Blow v. City of San Antonio, 236 F.3d 293, 297–98 (5th Cir. 2000). But even in the Fifth Circuit, inconsistencies remain. *See, e.g.*, Bryan v. McKinsey & Co., 375 F.3d 358, 360–62 (5th Cir. 2004). And although in some cases, the Second Circuit essentially continued to require pretext-plus even after *Reeves*, (for example, James v. N.Y. Racing Ass'n, 233 F.3d 149, 154–57 (2d Cir. 2000)), there are other cases in which that court draws inferences in the plaintiffs' favor. *See, e.g.*, Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119–26 (2d Cir. 2004) (finding evidence sufficient to conclude that supervisors were

for the courts of appeals, not for the Supreme Court. Yet despite a significant number of appellate decisions, employment discrimination law on summary judgment remains both stubbornly chaotic and amorphous. Left to their own devices, the courts of appeals are not doing a good job of creating or enforcing uniformity.

Moreover, courts' use of precedent in these cases also suggests that they are either unwilling or unable to do a comprehensive search of the case law. In fact, they frequently do not bother to search at all, relying exclusively on the judges' own intuitions about or analysis of the evidence.[136] There is often no attempt to discuss, distinguish, or analogize to fact patterns and holdings in other cases; often the only citations in discrimination cases are those setting out the broad and uncontroversial outlines of the law. This pattern strongly suggests that courts consider summary judgment motions "paper trials" in which coherence with the law as announced in other cases is of minor importance.

Adding to the chaos of this area of law, the result in these cases may depend at least in part on who the judges are. For example, one study reports that, on appellate courts, Republican-appointed judges have a greater tendency to vote against some discrimination plaintiffs than do Democratic judges.[137] Indeed, some plaintiffs' lawyers say that the most important event of a case is the assignment of the judge the day it is filed, or on appeal, the assignment of the panel.[138]

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motivated by discriminatory attitudes towards women and reversing summary judgment on that basis).

136. *See, e.g.*, Feingold v. New York, 366 F.3d 138, 148–60 (2d Cir. 2004) (holding that sufficient evidence was presented to create a triable question on a disparate treatment claim); *Bryan*, 375 F.3d at 360–62 (holding that insufficient evidence was presented to show that employee's reasons for termination were false).

137. *See generally* Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 319–21 (2003). Sunstein and his co-authors found this bias in sex discrimination, sexual harassment, and disability discrimination cases. For race discrimination cases, however, the difference between Republican and Democratic judges was not statistically significant. *Id.* at 324–25. Whether ideology or political identity is more generally predictive of case results is not uniformly proven. *See* Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 778 (2005) (surveying recent studies and concluding that they verify the claim that "[i]deology is a factor in judging, at least sometimes for some categories of cases and at least to some degree"); Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257 (1995) (finding no effect).

138. The idea that litigants believe that different judges may lead to different results certainly did not originate with me. *See, e.g.*, Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 302 (2005). I practiced plaintiff-side civil rights law for several years, however, and often heard some version of the view that the assignment of the judge is the most important event of the case. I have every reason to believe that defense-side lawyers hold the

Finally, there is statistical support for the view that some courts are eager—perhaps overeager—to grant summary judgment. Between January 1, 1995, and June 30, 2003, there were 2300 summary judgment motions filed in employment cases in the Northern District of Illinois (about 26.4% of all employment cases). Seventy-two percent of them were granted.[139] And these grants of summary judgment are rarely reversed. One national study reported that when plaintiffs in employment cases appeal the dismissal of their claims on a pretrial motion, they succeed in obtaining reversal only 11.7% of the time.[140]

Even more telling, however, is the evidence of what happens to pro-plaintiff jury verdicts on appeal. There is a good chance that such verdicts will not stand, suggesting that appellate courts are willing to grant defendants judgment as a matter of law—which is evaluated by the same standard as summary judgment[141]—with surprising frequency. In a study of cases terminated between 1988 and 1997, Professors Clermont and Eisenberg found that in civil rights employment cases, defendants who appealed trial losses prevailed on appeal 44% of the time.[142] In other words, where a defendant appealed a verdict, there was an almost even chance that the appellate court would reverse the verdict. In contrast, an employment plaintiff who appealed from a pro-defendant verdict had only a 6% chance of prevailing. The overall reversal rate from all civil trials was 18%.[143] These statistics suggest a surprising lack of deference to juries when they rule for plaintiffs in employment cases and a willingness to grant judgment as a matter of law (the equivalent of summary judgment) even in cases where a jury has already found for the plaintiff.[144]

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same view, but I lack the personal experience to assert that they do.

139. N.D. ILL. STATISTICS, *supra* note 96.

140. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 967.

141. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–52 (1986).

142. Clermont & Eisenberg, *supra* note 140, at 957.

143. *Id.*

144. Clermont and Eisenberg's data do not say on what basis appeals were made, and undoubtedly some of the reversals were made on the basis of, for example, evidentiary rulings, faulty jury instructions, or questions of law that somehow arose in the case—although there is no particular reason to think that such issues would have such a lopsided effect. Moreover, Clermont and Eisenberg rely on the "civil rights employment" category, which encompasses more than just employment discrimination cases. *Id.* at 967; *see also* Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 EMP. RTS. & EMP. POL'Y J. 63, 66–67 (1997) (concluding that in employment discrimination cases the Seventh Circuit sometimes applies a more deferential standard to post-verdict judgment as a matter of law cases than it does to summary judgment cases but relying only on published opinions).

This situation leads to a variety of negative consequences. If summary judgment is often inappropriately granted, levels of compliance with the antidiscrimination laws are likely depressed, and plaintiffs who have legally cognizable injuries go uncompensated.[145] More important for purposes of this Article, however, is the lack of uniformity and its concomitant unpredictability for both actual and would-be litigants.[146] The rule of law is threatened when flexibility and individualized attention to facts and evidence—allowed for by standards at their best—becomes caprice or personal preference.[147] Cases with extraordinarily similar facts may or may not survive summary judgment depending on who the judge is, or, in the case of an appeal, who the judges on the panel are.[148] And even if lawyers are wrong or (more likely) overstating the

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145. *See* Selmi, *supra* note 101, at 559 tbl.1 (providing "a summary of the various ways in which cases are disposed of in federal court"); N.D. ILL. STATISTICS, *supra* note 96 (citing data showing a range of 67% to 77% in grants of summary judgments between 1995 and 2003). To the extent that summary judgment is being granted inappropriately—and those grants are upheld in the courts of appeals—plaintiffs are being deprived of their right to a jury trial, plaintiffs may often be deprived of a remedy to which they are entitled, and defendants may be getting away with unlawful discrimination. Moreover, the overwhelming likelihood that summary judgment or judgment as a matter of law will be granted for a defendant has effects beyond the cases in which such a motion is actually filed. It likely affects the approximately 70% of cases that apparently settle without anyone ever filing such a motion, *id.*, because the parties' and lawyers' assessments of their chances on summary judgment inevitably affect the size of those settlements. It likely affects the size of settlements in cases that settle in lieu of an appeal after a grant of summary judgment. And it also affects the likelihood that cases are filed in the first place, as plaintiffs' lawyers assess the likelihood of success before agreeing to take on a case.

146. This lack of uniformity is problematic even if one believes that summary judgment should in fact be a difficult hurdle for plaintiffs to overcome. Judge Posner, for example, argues that it is appropriate for judges struggling with large caseloads to make summary judgment a prediction—does the plaintiff have a realistic chance of prevailing at trial? POSNER, *supra* note 88, at 179 n.37. In fact, there are excellent reasons why this approach, which is undoubtedly the one that many judges in fact use, should not be the standard for summary judgment. But even those who argue that judges should rule on this basis should agree that such a standard should be explicitly announced and uniformly applied, rather than—as currently is the case—applied *sub silentio* and perhaps even unconsciously.

147. *See* BMW v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice . . . helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.").

148. *See supra* note 137 (discussing the Sunstein et al. study of ideological voting). *See generally* Miller, *supra* note 113, at 1068. There are many possible explanations for why some judges are eager to grant summary judgment in employment discrimination cases. To some extent, the rise of summary judgment in this area of law is part of the overall trend in federal courts since the 1986 trilogy. *Id.* Some people think that caseload pressures lead judges to grant summary judgment more often than they might otherwise. *See, e.g.*, POSNER, *supra* note 88, at 179 n.37 (suggesting that judges now use the standard of "plaintiff's likelihood of prevailing at trial"). But there are reasons why judges may be particularly eager to grant summary judgment in employment discrimination cases in particular. There is evidence of judicial bias against these kinds of cases. *See, e.g.*, Selmi, *supra* note 101, at 559; Sunstein et

matter when they say that the assignment of the judge is the most crucial event in the case, the perception alone bodes ill for the justice system, particularly in an area of law in which thousands of individual plaintiffs have what is likely their only serious experience with the justice system.[149]

C. *The Supreme Court's Failure To Provide Adequate Guidance*

Despite this chaos, the Court has long neglected summary judgment employment discrimination cases. This is likely because most such employment discrimination cases look exactly like the kind of case the Court does not decide. They do not generally appear to present an unresolved question of law. The lower courts accurately recite the *McDonnell-Douglas* framework and the general standard for summary judgment. Even if the outcomes of some cases are patently wrong, and even when they come with lengthy dissents, as they sometimes do,[150] those cases are probably understood

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al., *supra* note 137, at 316–18; Zimmer, *supra* note 113, at 601 & n.100 (discussing evidence that "federal judges, without regard to their political background, have come to view discrimination as less of a problem than it once was and now only involving the idiosyncratic behavior of a few employers") (referencing Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994); Vicki Schultz, *Telling Stories about Women and Work: Judicial Interpretation of Sex-Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990)). Judges may also be inclined to identify with employers, as opposed to employees, since they are generally employers or managers of staff but are not employees in the traditional sense. McCormick, *supra* note 113, at 191–92 n.155 ("[J]udges are likely to identify with employers as fellow members of an in-group.").

There may also be institutional reasons for judges' behavior in these cases. Since many judges likely view these cases as involving the routine application of an unremarkable legal standard, they may be inclined to give them less attention. *Id.* And Professor David Wilkins has theorized that judges have been reluctant to give up their pre-1991 role as factfinder in Title VII cases, although juries have been factfinding in age cases since well before that. David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1938–39 (1999) (book review). Finally, judges, particularly appellate judges, may be affected by the skewed samples of cases that they see. POSNER, *supra* note 88, at 85. The strongest cases for plaintiffs, in which summary judgment is denied, come before the appellate courts only after a trial, and since very, very few cases are tried, and not all of those are appealed, an extremely small number are seen by the appellate courts. Grants of summary judgment, on the other hand, are much more common than trials, so the appellate courts see many more of the relatively weak cases for plaintiffs. Put another way, the sample of employment discrimination cases that are appealed is necessarily skewed towards the weaker cases for plaintiffs.

149. Scalia, *supra* note 4, at 1178 (discussing the importance of "the appearance of equal treatment" in the judicial system).

150. *See, e.g.*, Weinstock v. Columbia Univ., 224 F.3d 33 (2d Cir. 2000) (including a ten-page dissent by Judge Cardamone); Malacara v. City of Madison, 224 F.3d 727 (7th Cir. 2000) (including a dissent by Judge Williams that is double the length of the majority opinion).

by the Court to involve nothing more than "the misapplication of a properly stated rule of law," and therefore to be unworthy of the Court's consideration. Taking such a case would appear to be mere error correction.

Not surprisingly, therefore, the Supreme Court's major foray into this area of law, in the 2000 case of *Reeves v. Sanderson Plumbing Products, Inc.*,[151] was prompted by a circuit split about a modification some circuits had made to the *McDonnell-Douglas* framework on summary judgment, not by a request that the Court provide general guidance in this particular area of law. The question was whether a plaintiff's jury verdict in an age discrimination case could be upheld where the plaintiff had no particular evidence of discrimination beyond his prima facie case under *McDonnell-Douglas* and evidence that the employer's stated reason for the termination was pretextual.[152] Some circuits had adopted a "pretext-plus" requirement as a matter of law—plaintiffs who had no evidence that discrimination *in particular* was the motivating cause of the adverse employment action lost on summary judgment or saw their jury verdicts reversed as a matter of law. Other circuits had no such absolute requirement, allowing juries to infer from a finding of pretext that the employer had discriminated.

The Supreme Court overruled the pretext-plus requirement, although it declined to establish a rule that when pretext is established, the case must always go to the jury. The Court also repeated an earlier holding that the standard for judgment as a matter of law is identical to the standard for summary judgment, which was one of the other "Questions Presented." Finally, the Court reiterated that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[153] *Reeves* clarified that "although the court should

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151. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140–41 (2000).

152. *See id.* at 140; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 528 U.S. 985 (1999) (granting certiorari without limitation); Petition for Writ of Certiorari, *Reeves*, 1999 WL 33611445, *i (presenting three questions). The questions, as granted, were:

> 1. Under the Age Discrimination in Employment Act, is direct evidence of discriminatory intent required to avoid judgment as a matter of law for the employer?
>
> 2. In determining whether to grant judgment as a matter of law under FED. R. CIV. P. 50, should a District Judge weigh all of the evidence or consider only the evidence favoring the non-movant?
>
> 3. Whether the standard for granting judgment as a matter of law under FED. R. CIV. P. 56 is the same as the standard for granting judgment as a matter of law under FED. R. CIV. P. 50?

Id.

153. *Reeves*, 530 U.S. at 150.

review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe."[154]

The Court could have easily stopped there. It had already answered all the "Questions Presented," and could have remanded for the lower court to apply the standards it had announced, as it did in *Johnson v. California*.[155] In *Reeves*, however, the Court—without explaining why—instead went on to "apply[] this standard [about the evidence to be reviewed] here," analyzed the evidence in detail, and concluded that the Fifth Circuit had been wrong to grant judgment as a matter of law. The Court criticized the Fifth Circuit for failing to consider evidence that the plaintiff provided as part of his prima facie case when deciding whether he had also provided adequate evidence of pretext.[156] It faulted the court of appeals for not taking account of age-related comments directed at the plaintiff by a manager, evidence of different treatment afforded a younger employee by the same manager, and evidence that the manager was the actual decisionmaker behind the firing. The Court reversed the Fifth Circuit without even remanding for further proceedings.[157]

When the court decided *Reeves* in 2000, the case was hailed by many commentators and practitioners as the dawning of a new day for plaintiffs in employment discrimination cases.[158] They have been largely disappointed,

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154. *Id.* at 151.

155. Johnson v. California, 125 S.Ct. 1141 (2005). The difference between the Court's approach in *Johnson* and its approach in *Reeves* does not appear to be either particularly principled or particularly pragmatic. The *Johnson* court did not say, for example, that it could not apply the standard because the factual record was not sufficiently developed. Nor did the *Reeves* Court say that it was applying the standards because, for example, the lower courts were in chaos on this subject and more guidance was necessary. The Court's approach seems scattershot and arbitrary—perhaps decided by the whim of the opinion's author and often driven by a desire not delve into the detailed and often mundane facts that lower courts deal in every day.

156. *Reeves*, 530 U.S. at 142 ("First, the plaintiff must establish a prima facie case of discrimination.") (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252–53 (1981)); *Reeves*, 528 U.S. at 152 (criticizing the Court of Appeals for disregarding "critical evidence favorable to the petitioner—namely, the evidence supporting petitioner's prima facie case").

157. *Reeves*, 528 U.S. at 153–54 ("[W]e see no reason to subject the parties to an additional round of litigation before the Court of Appeals rather than to resolve the matter here.").

158. *See, e.g.*, Trevor K. Ross, Casenote, Reeves v. Sanderson Plumbing Products: *Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law*, 52 MERCER L. REV. 1549, 1566 (2001) ("*Reeves* will make it easier for a plaintiff to reach the jury because the courts will no longer be able to require 'plus' evidence."). Michael J. Zimmer, *Leading By Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL'Y 177, 188 (2001) (arguing that *Reeves* "should lead to most individual disparate treatment cases surviving a motion for summary judgment and going to the

however. Many lower courts continue to resolve inferences against plaintiffs and pick away at bits of evidence rather than viewing the record as a whole.[159] In the Northern District of Illinois, rates of grants of summary judgment still hover around 70%.[160] Commentators' dismay at courts' eagerness to grant summary judgment in these cases is now coupled with frustration at lower courts' less than passionate embrace of *Reeves*' insistence that juries, rather than judges, decide employment discrimination cases with competing inferences.[161]

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factfinder and many fewer judgments as a matter of law being granted overturning jury verdicts for plaintiffs").

159. *Supra* Part IV.B & nn.113–35. *See* Mereish v. Walker, 359 F.3d 330, 337–38 (4th Cir. 2004) (affirming summary judgment and explaining away decisionmakers' stated desire to protect "young, bright junior scientists" and concern about aging workforce, "tunnel vision," and "'problem' of the 'average age going higher'"); Love-Lane v. Martin, 355 F.3d 766, 788 (4th Cir. 2004) (affirming summary judgment on a race discrimination claim despite evidence that reasons given for termination were pretextual and that the plaintiff was retaliated against for complaining about discrimination against other minorities); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291–97 (4th Cir. 2004) (en banc) (affirming summary judgment despite derogatory comments about plaintiff's age and sex and evidence that decisionmakers relied on tainted information from biased supervisor); *id.* at 300, 304–05 (Michael, J., dissenting) (detailing derogatory comments and explaining evidence relating to decisionmakers' reliance); Filipovich v. K & R Express Sys., Inc., 391 F.3d 859, 864 (7th Cir. 2004) (affirming judgment as a matter of law despite evidence from which the jury could have found pretext); Sartor v. Spherion Corp., 388 F.3d 275, 279–80 (7th Cir. 2004) (affirming summary judgment and drawing inferences against plaintiff as to whether retained white employees were similarly situated); *see also* Zimmer, *supra* note 113, at 592 ("The courts still are slicing and dicing away plaintiff's evidence before reviewing the record for purposes of deciding motions for summary judgment and judgment as a matter of law."); James v. N.Y. Racing Ass'n, 233 F.3d 149, 155–57 (2d Cir. 2000) (explaining why *Reeves* is consistent with the Second Circuit's pre-*Reeves* precedent).

160. The fact that the grant rates for summary judgment motions in employment cases remained about the same after *Reeves* does not necessarily mean that judges were treating those cases as if *Reeves* had never been decided. In fact, in the six months immediately following *Reeves*, the grant rate in the Northern District of Illinois dropped to 57%—about ten percentage points lower than in any previous six month period since January 1997, suggesting that, at least initially, there was some change in treatment. *See* N.D. ILL. STATISTICS, *supra* note 96 (noting a decrease in grants of summary judgment from 77% in the first half of 2000 to 57% in the second half). The rate returned to the 70% range in the next period. *See id.* (noting an increase in grants of summary judgment to 76% in the first half of 2001). It is possible that some judges reverted to pre-*Reeves* ways after the first reaction to the case. It is also possible that lawyers' and litigants' strategies shifted in response to *Reeves*, with defendants settling plaintiffs' stronger cases without filing for summary judgment where previously they would have filed, and plaintiffs who might have accepted a relatively small settlement prior to a summary judgment ruling being more willing to see the motion through. Further empirical research is needed to determine if that is in fact occurring.

161. *See, e.g.*, FORMAN ET AL., *supra* note 99, at 3 ("Notwithstanding the explicit statutory grant of a trial by jury and the expressed legislative intent that these cases were to be decided by juries, courts have increasingly usurped the role of the jury in employment cases."); Zimmer,

The Court's lack of influence here requires a bit of unpacking, but it is consistent with the Court's general approach to its role and the lower courts' predictable responses. On the one hand, the Court claims that it announces rules of law and resolves circuit splits. In fact, that is what it said it was doing in *Reeves*—resolving a circuit split on the pretext-plus issue. Not surprisingly, therefore, lower courts have stopped requiring pretext-plus, at least explicitly.

On the other hand, the application of the summary judgment standards the Court announced (or, more accurately, reiterated) is easy for lower courts to distinguish or even ignore. The Court made no claims about why it applied the standards, and it said nothing about concerns with trends or inconsistencies in the lower courts, so it gave the lower courts no particular reason to think that the Court saw anything amiss in their prior approaches. It should be no surprise, therefore, that lower courts' responses have been inconsistent.[162] In fact, all the cases discussed at the beginning of Part VI.B were decided after *Reeves*.[163]

This area of law demonstrates some of the pitfalls of the Court's current approach. The Court often ignores chaotic and inconsistent areas of the law as long as the problems in those areas arise from courts' discretion in applying a standard on which they all agree. Its decisions about when to apply standards to the facts of a case appear arbitrary and often come without explanation, thereby diminishing its influence when it does actually apply standards.

Imagine, however, that instead of deciding only *Reeves*, the Court deliberately took three or four employment discrimination cases in which it applied the summary judgment standards—and explained that it was doing so in an attempt to rationalize this area of law.[164] Some of them might be harder,

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supra note 113, at 592–600 ("The early returns of decisions by the lower courts suggest that the lower courts have not changed their practices significantly despite the new approach ordered by the Court in *Reeves*."); Selmi, *supra* note 101, at 574 (concluding "that employment discrimination cases are unusually difficult to win"); Lanctot, *supra* note 113, at 546 ("[T]he lower courts thus far have not appreciably changed their basic approach to employment discrimination cases.").

162. *See* Georgene M. Vairo, *Through the Prism: Summary Judgment After the Trilogies*, SH063 ALI-ABA 577, 636 (2003) (stating that "case law applying *Reeves* is all over the map"); William D. Evans, Jr., *Summary Judgment Considerations After* Reeves v. Sanderson Plumbing, 70 U.S.L.W. 2139, 2141 (Sept. 11, 2001) ("The case authorities are 'a work in progress.' It would be unwise to claim that all the circuit courts have established a firm position . . . .").

163. *Supra* Part IV.B & nn.113–35.

164. In *Ash*, discussed *supra* note 112, the Court reversed a lower court's grant of judgment as a matter of law to a defendant for the first time since it decided *Reeves*. The Court did not, however, actually apply the standards itself as it did in *Reeves*. Instead, it criticized the lower court's holding that the word "boy" without a racial term like "black" can never be evidence of discriminatory intent, and it objected to the Eleventh Circuit's description of the standard to be used when determining whether a plaintiff's qualifications were so superior to the

or might come out the other way, with the plaintiff losing, but together they would likely mark a clearer path—by better channeling the discretion of the lower courts—and would therefore promote uniformity and the rule of law. The remainder of this Article explores these and other possible ways the Court can give meaningful guidance in areas of law governed by standards.

V. Fleshing Out Standards

As explained in Part IV, in areas of law with large numbers of fact-intensive cases, selective search, task interference, and bounded rationality may make it impossible or very difficult for appellate courts to police uniformity or, at the very least, coherence, in the application of broad standards. The combination of large numbers of fact-intensive cases with vaguely worded standards creates a situation where less may be more: a small number of key precedents—cases decided by the Supreme Court rather than the courts of appeals—could lead to a more clearly marked path for litigants and judges to follow.

There are a number of different ways that this kind of targeted decisionmaking by the Supreme Court might operate in practice. This Part begins the process of examining some of these mechanisms and exploring their benefits and possible limitations.

A. How the Supreme Court Might Do It

One of the ironies of the Supreme Court's current approach is how far it is from the common law roots of our legal system. The Court announces rules and standards often without applying them to the factual situations from which

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candidate actually selected that the comparison is evidence of pretext. The Court declined to consider whether the evidence in the case at hand suggested that the defendant's use of "boy" could be seen as evidence of discriminatory intent. It expressly declined to "define more precisely what standard should govern pretext claims based on superior qualifications." And it refused to say whether the petitioners' evidence in fact was sufficient to demonstrate pretext. Instead, it remanded for the Court of Appeals to "determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding." In other words, the Court did not even decide whether these particular jury verdicts should be upheld. Furthermore, the Court said nothing about why it had chosen to issue an opinion in this case nor anything else to indicate that it thought the Eleventh Circuit's opinion exemplified a more widespread problem with the way courts address employment discrimination cases. It remains to be seen, of course, what, if any, effect *Ash* will have on lower court decisionmaking or whether the Roberts Court will decide more cases in this area of law, perhaps making use of the very mechanisms discussed *infra*, Part V.

they arise. A more traditional common law-like approach would treat the application of standards as a serious and important way to provide valuable guidance to lower courts and litigants, not as an afterthought or whim.[165] This Part addresses three versions of my suggested approach in detail—analogical anchoring, signaling, and refining. These mechanisms are not mutually exclusive in any given case, but discussing them separately allows for analytical clarity.

1. Analogical Anchoring

By deciding a series of cases in which it applied a standard, the Court could harness the traditional common law method of analogical reasoning to mark a path for lower courts. Analogical reasoning in the common law can be understood in these terms: if the outcome of case *X* is *A*, and the facts of case *Y* are relevantly similar to the facts of case *X*, then the outcome of case *Y* should be *A* as well. Of crucial importance to this question is whether the facts of *X* and *Y* are relevantly similar or whether they are different in some way that warrants a different outcome.[166]

Often, discussions of the role of analogical reasoning, particularly in the Supreme Court, focus on the development of legal doctrines. For example, is the right to abortion relevantly the same or different from the right to consensual sexual relations between adults of the same sex, a right that the Court originally "derived (in large part) from cases involving a right to educate one's children"?[167] Or is same-sex sexual harassment relevantly the same or different from male-on-female harassment?[168] This kind of reasoning is used

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165. *See, e.g.*, Hellman, *Shrunken Docket*, *supra* note 1, at 438 ("[T]he Court cannot entirely escape its common-law roots, and . . . a docket devoted solely to making law may not make law in the most effective way.").

166. *See* Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 745 (1993) (describing the "characteristic form of analogical thought in law"). The basic form follows:

> (1) Some fact pattern *A* has a certain characteristic *X*, or characteristics *X*, *Y*, and *Z*; (2) Fact pattern *B* differs from *A* in some respects but shares characteristics [sic] *X*, or characteristics *X*, *Y*, and *Z*; (3) The law treats *A* in a certain way; (4) Because *B* shares certain characteristics with *A*, the law should treat *B* the same way.

Id.

167. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 30 & n.134 (1997) (citing Roe v. Wade, 410 U.S. 113, 152 (1973); Griswold v. Connecticut, 381 U.S. 479, 481 (1965); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

168. Dorf, *supra* note 167, at 30 & nn.147–48 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986); Oncale v. Sundowner

by a court or courts to decide how and whether to extend a particular legal doctrine to a new type of situation, and it is an essential part of the common law method.[169] I call this use of analogical reasoning "exploratory."

But analogical reasoning can serve another purpose—the purpose of giving substance to standards that otherwise are phrased in very general terms, and, in the process, providing additional guidance to future courts that must apply those standards. If the Supreme Court decides, for example, three employment discrimination summary judgment cases, then it provides three actual cases from which the lower courts can analogize in deciding their cases.[170] Those cases become "fixed points for analysis,"[171] and they can make the lower courts' search of precedent less selective by anchoring the search. In other words, lower courts must make their judgments consistent with those fixed points, either by distinguishing the cases or by determining that they are relevantly the same and therefore require the same outcome. Because the Supreme Court cases can anchor future lower court analysis, I call this use of precedent in analogical reasoning "analogical anchoring."[172]

Offshore Servs., 523 U.S. 75, 77–78 (1998); Castaneda v. Partida, 430 U.S. 482, 499; *id.* at 514 n.6 (Powell, J., dissenting); Johnson v. Transp. Agency, 480 U.S. 616, 624–25 (1987)).

169. *See* Dorf, *supra* note 167, at 29 ("The common law method, in the sense of case-by-case doctrinal development, plays an especially large role in the Court's constitutional right jurisprudence."); Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1003–06 (1996) (arguing that "if anything that has *F* and *G* also has *H*, then everything that has *F* and *G* also has *H*").

170. *See* Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1187 (1999) ("[One] simple advantage of the analogical method of decisionmaking is that past cases provide the judge with a ready supply of examples from which to develop reasons for decision.").

171. Sunstein, *supra* note 166, at 753. Sunstein uses the term "fixed points for analysis" to refer to ideas that are uncontestable. *Id.* For example, to many people, the outcome of *Brown v. Board of Education* is uncontestable. I use the term in a slightly different sense—as precedent that must be followed regardless of whether the judge in fact believes that the case was correctly decided.

172. Cognitive theorists use the term "anchoring" to refer to a heuristic in which a decisionmaker's conclusion (generally about a numerical estimate) is skewed by often irrelevant information received before the decision is reached. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–88 (2001) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128–30 (1974)). So, for example, people asked to estimate the percentage of countries in the United Nations that are African nations had significantly different estimates depending on whether they were initially told the number was more than ten percent or less than sixty-five percent. Guthrie et al., *supra* at 789 (citing Tversky & Kahneman, *supra*, at 1128). Judges are not immune to this heuristic. Guthrie et al., *supra* at 787–94. Analogical anchoring, however, is a way to see the heuristic as an advantage. The "fixed points for analysis" are the anchors. At times, of course, those anchors might skew lower court decisions in one direction or another, but sometimes, that may

The difference between exploratory analogical reasoning and analogical anchoring is functional, not theoretical. The structure of the argument under each approach is likely to be similar as a logical or philosophical matter.[173] There are cases that can be described as involving both types of reasoning and cases that may well be used by later courts in both ways. My point in distinguishing between the two is to highlight a powerful but underutilized tool for the Supreme Court to provide guidance to lower courts.

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be the desired result. *See infra* Part V.A.2 (discussing signaling). At other times, the Supreme Court may itself respond to the lower courts' responses to the anchors to provide more guidance. *See infra* Part V.B.1.b (discussing institutional change in the judiciary).

173. *See* Sunstein, *supra* note 166, at 746 (describing four overlapping features of analogical reasoning: "principled consistency; a focus on particulars; incompletely theorized judgments; and principles operating at a low or intermediate level of abstraction"). These features of analogical reasoning identified by Professor Sunstein in his discussion of analogical reasoning in the context of exploratory analogical reasoning are particularly apt with respect to analogical anchoring. A lower court trying to decide whether the evidentiary record it has before it requires a grant or a denial of summary judgment, for example, wants its ruling to be consistent with other summary judgment cases decided by the Supreme Court (as well as with other binding authority). The court is focused on the particulars of its case and how it compares to the particulars of cases that have gone before. The body of law that emerges will by definition "develop[] from concrete controversies"; the "principles" that emerge will be "developed with constant reference to particular cases." *Id.* at 746–47. There may be no "comprehensive theory that accounts for the particular outcomes"—and there need not be. *Id.* at 747. Finally, and relatedly, the principles that evolve from this line of reasoning will "operate at a low or intermediate level of abstraction." *Id.*

There is, of course, a lively debate over whether analogical reasoning is reasoning at all and whether analogical arguments have logical coherence. *See, e.g.*, Brewer, *supra* note 169, at 940 (developing a philosophical explanation of analogical reasoning); Sunstein, *supra* note 166, at 742 (arguing in favor of the use of analogical reasoning); Sherwin, *supra* note 170, at 1179 (defending "the practice of reasoning by analogy on the basis of its epistemic and institutional advantages"); Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371 (1997) (arguing that "analogy is a way of stating a conclusion, not a way of reaching one"); F.M. Kamm, *Theory and Analogy in Law*, 29 ARIZ. ST. L.J. 405, 413–16 (1997) (disagreeing with Dworkin); Larry Alexander, *Bad Beginnings*, 145 U. PA. L. REV. 57 (1996) (arguing that analogical reasoning in law is not a unique or adequate form of reasoning). To the extent that analogical reasoning is logically valid, my claims are that much stronger. But even if analogical reasoning is somehow philosophically suspect or even if it is a poor version of a more robust form of reasoning such as deductive reasoning, my argument remains the same. My argument is functional, not philosophical, and it relies on the undeniable facts that courts generally follow precedent and that, in so doing, they compare the facts of the case before them with the facts of the cases that came before. *Cf.* Sherwin, *supra* note 170, at 1186 (describing the "indirect" but functional benefits of analogical reasoning that "are not attributable to the rational force of the analogical method, and . . . are consistent with the claim that the results of analogical reasoning will sometimes be wrong"); Sunstein, *supra* note 166, at 771 ("[T]here will be a real difference between the legally correct outcome and the morally correct outcome."). Moreover, there may be no real alternative. A fully articulated rule or general theory will often be much too complex in practice, leaving courts to muddle along by comparing cases to each other. *Id.* at 776.

Just how powerful this tool can be is underscored by Professor Braithwaite's empirical research on nursing home regulation, previously discussed in Part III. This research suggests that in some contexts, standards, coupled with examples to mark the path, promote more uniformity and better compliance than does a complex set of rules. Professor Braithwaite examined, for example, regulators' efforts to require a "home-like" atmosphere in the homes. Braithwaite found that in Australia, where the homes were subject to a general standard requiring a home-like atmosphere coupled with examples that took the form of what he calls "non-binding rules," observers found a relatively high level of compliance and uniformity.[174]

The observers reported a different result, however, where the homes were governed by a complex and large body of binding rules also designed to require a home-like atmosphere. With many highly specific rules, nursing home staff could find ways to literally comply while entirely losing sight of the overall purpose. In Illinois, for example, a rule-governed jurisdiction, one rule required that there be a certain number of pictures on the walls. Braithwaite found that nursing home staff would arbitrarily rip pictures out of magazines and stick them on the walls as a way of literally complying with the standard without in fact achieving its intent of creating a home-like atmosphere.[175]

Braithwaite concluded that, at least in some regulatory environments, standards coupled with non-binding rules can create more uniformity than a complex body of rules.[176] This conclusion provides an inexact but instructive analogy to our judicial system. In a fact-intensive, standard-governed area of law with a large number of cases, appellate and trial courts face a web of precedent, similar to the complex and highly specific rules governing nursing homes in Illinois. Each case is a binding rule, but they may not together make up a coherent whole. It is easy to lose the forest for the trees. More analogous to the Australian system would be a general standard articulated and then applied by the Supreme Court in a handful of cases.

Of course, the Supreme Court's precedents, unlike the nonbinding examples Braithwaite describes, are binding. But the binding nature of Supreme Court precedent is likely to contribute to the effectiveness of analogical anchoring in the judicial system. Courts are not supposed to ignore

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174. Braithwaite, *supra* note 86, at 61.

175. *Id.*

176. *See id.* at 65, 68, 75 (arguing that this form of regulation creates the most certainty when governing complex actions in changing environments with large economic interests at stake). This form of regulation is even more reliable when "embedded in institutions of regulatory conversation that foster shared sensibilities." *Id.* at 71. Arguably, courts are such institutions.

precedent.[177] Although most lower court judges are likely not particularly concerned about being reversed by the Supreme Court in any given case,[178] judges do generally

> want to "get it right" simply because they have internalized norms of *stare decisis* through their professional training and because judicial decisions must be rationalized on the basis of precedent.[179]

To see how analogical anchoring might work in practice, consider again *Reeves*. In *Reeves*, the Court expressly declined to articulate a rule that summary judgment must be denied in any case where the plaintiff could show that the defendant's asserted explanation for the job action was false or not genuinely believed.[180] But *Reeves* did not provide much guidance on the question of when a jury should be allowed to infer discrimination in a case where the defendant's explanation might well be disbelieved, but the plaintiff lacks other evidence that specifically points to discrimination as the motive, such as discriminatory remarks made by the defendant.[181]

But imagine that instead of deciding only *Reeves*, the Court deliberately took three or four summary judgment employment discrimination cases, specifically focused on this question. For example, the Court could take a series of cases in which it reviewed summary judgments in favor of defendants, thereby demonstrating the type of cases that it believes are worthy (and are not) of a jury's consideration.

The Court recently provided this kind of guidance in a series of cases addressing ineffective assistance of counsel. In three recent cases,

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177. *See, e.g.*, Sunstein, *supra* note 166, at 770 ("Law imposes greater constraints on the analogical process. Existing legal holdings sometimes provide the necessary commonality and the necessary consensus. People who disagree with these holdings usually agree that they must be respected; the principle of *stare decisis* so requires.").

178. *See* Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 LAW & SOC'Y REV. 143, 146 (2003) (citing JONATHAN MATTHEW COHEN, INSIDE APPELLATE COURTS 42–45 (2002)).

179. *Id.* at 147 (citing Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018 (1996)); *see also* Frank B. Cross, *Decisionmaking in the U.S. Courts of Appeals*, 91 CAL. L. REV. 1457, 1473–74 (2003) (discussing reasons why judges follow precedent).

180. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 148–49 (2000) ("[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing . . . will *always* be adequate.").

181. In fact, *Reeves* itself was not such a case. In *Reeves*, the decisionmaker told the plaintiff he "was so old [he] must have come over on the Mayflower," and that he "was too damn old to do his job." *Id.* at 151.

Williams v. Taylor,[182] *Wiggins v. Smith*,[183] and *Rompilla v. Beard*,[184] the Court reversed the denial of habeas relief and explored what kind of investigation defense lawyers must undertake. In *Williams* and *Wiggins*, the Court explained that the decision of a defense lawyer not to investigate mitigating evidence can be effective assistance of counsel only if the lawyer had enough information to make an intelligent decision about whether further investigation would likely be helpful.[185] In *Rompilla*, the Court went a bit further. It reversed the denial of habeas relief where defense counsel failed to examine a publicly available document they knew the prosecution planned to use at sentencing.[186] The Court held that defense counsel had acted unreasonably and it granted habeas relief.[187]

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182. *See* Williams v. Taylor, 529 U.S. 362, 397 (2000) (stating that Williams was denied effective assistance of counsel when his trial lawyers failed to investigate and present substantial mitigating evidence to the sentencing jury).

183. *See* Wiggins v. Smith, 539 U.S. 510, 534 (2003) (finding that defense counsels' failure to expand their investigation of petitioner's life history for mitigating evidence beyond the presentence investigation report and social services records fell short of prevailing professional standards).

184. *See* Rompilla v. Beard, 125 S. Ct. 2456 (2005) (ruling that defense counsel's failure to examine a file on defendant's prior conviction for rape and assault that they knew would be introduced during the sentencing phase of a capital murder trial warranted habeas relief on the grounds of ineffective assistance of counsel).

185. *See Williams*, 529 U.S. at 396 ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in William's favor was not justified by a tactical decision to focus on William's voluntary confession. . . . [These omissions] clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."); *Wiggins*, 539 U.S. at 527 ("In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel but also whether the known evidence would lead a reasonable attorney to investigate further.").

186. *See Rompilla*, 125 S.Ct. at 2465 ("Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize.").

187. *Id.* Nonetheless, the Court declined to hold that defense counsel must *always* review every publicly available relevant document:

> The ease with which counsel could examine the entire file makes application of this standard correspondingly easy. Suffice it to say that when the State has warehouses of records available in a particular case, review of counsel's performance will call for greater subtlety.

Id. at 2465 n.4; *see also id.* at 2469 (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland v. Washington* . . . .").

In these three cases, the Court left the general standard for ineffective assistance of counsel unchanged. To establish ineffective assistance, a defendant must show both that his trial lawyer's representation "fell below an objective standard of reasonableness" and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[188] And on habeas, the defendant must additionally establish that when the state courts ruled on his ineffectiveness claim, as they must do for the claim to be considered in federal court, the state courts applied those well-established standards unreasonably.[189] The *Williams-Wiggins-Rompilla* trilogy did not alter any of those requirements.[190] Nonetheless, those cases did provide guidance. Subsequent courts, when confronted with arguments that defense counsel did not do adequate investigation, must analogize the facts of those cases to the facts of *Wiggins*, *Williams*, and *Rompilla*.[191]

Another way the Court can anchor through the application of standards is to decide some cases that have opposite results in order to "establish the margins of tolerable diversity."[192] An early example of this approach involved two cases dealing with the evidence necessary to denaturalize a citizen on the grounds that the individual harbored mental reservations at the time he took the Oath of Allegiance. In the first case, *Baumgartner v. United States*,[193] the Court refused to denaturalize the petitioner.[194] It held that the evidence was

188. Strickland v. Washington, 466 U.S. 668, 668, 694 (1984).

189. Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2000).

190. In *Wiggins*, the Court explained that *Williams*—the first of the three cases—"is illustrative of the proper application of the[] standards" set forth in *Strickland*, and pointed out that "we therefore made no new law in resolving Williams' ineffectiveness claim." *Wiggins*, 539 U.S. at 522.

191. *See, e.g.*, Coble v. Dretke, 417 F.3d 508, 518–19 (5th Cir. 2005) (factually distinguishing *Williams*, *Wiggins*, and *Rompilla* and denying habeas); Harries v. Bell, 417 F.3d 631, 637–42 (6th Cir. 2005) (analogizing to facts of *Williams* and *Rompilla* and granting habeas); Soffar v. Dretke, 368 F.3d 441, 476–78, 480 (5th Cir. 2004) (analogizing to facts of *Wiggins* and granting habeas); Longworth v. Ozmint, 302 F. Supp. 2d 535, 568–69 & n.23 (D.S.C. 2003) (factually distinguishing *Wiggins* and denying habeas); *see also* Donald R. Sonper & Susan Haire, *Interpreting Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 963, 979 (1992) (finding that "differences in fact patterns appeared to have greater impact than [some other] variables . . . on judicial relief in obscenity cases").

192. Scalia, *supra* note 4, at 1186.

193. Baumgartner v. United States, 322 U.S. 665 (1944).

194. *Id.* at 677–78 ("[W]e conclude that the evidence . . . affords insufficient proof that [Baumgartner] . . . had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant the . . . grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship.").

insufficient to establish that Baumgartner had maintained "impermissible political allegiance" with Germany as opposed to entirely permissible "cultural ties to [his] country of origin."[195] Two years later, in a case presenting similar issues, the Court found that the government had adequately proven the impermissible allegience and upheld denaturalization.[196]

Analogical anchoring, of course, will not always produce "decisive" guidance for the lower courts.[197] Nonetheless, by deliberately applying a standard in a series of cases, the Court could mark a path that would help to channel the discretion of the lower courts, and would therefore promote uniformity and the rule of law.

2. Signaling

The Court's decision to take a case or series of cases in some area of law can itself, at times, operate as a kind of signal to the lower courts: Listen up! This is an area that the Court has deemed worthy of its attention. This signal can be particularly powerful when all the cases point in the same direction, suggesting the need for a course correction. The 1986 summary judgment trilogy operated this way. In 1986, the Court decided three cases in a single term, all reversing or vacating a denial of summary judgment by the courts of appeals.[198] Before the trilogy, summary judgment was generally disfavored.[199] Afterwards, however, the trajectory of the law in the lower courts changed.

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195. Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—To Enforce, To Omit, or Maybe To Change?*, 88 GEO. L.J. 329, 358 n.165 (2000).

196. *See* Knauer v. United States, 328 U.S. 654, 669–73 (1946) (finding that Knauer falsely forswore allegiance to Hitler and the German Reich and that Congress has the power to provide for denaturalization on the grounds of fraud); *see also* Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 HARV. L. REV. 1441, 1450 (1956) (discussing *Baumgartner* and *Knauer*).

197. Sunstein, *supra* note 166, at 767.

198. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (finding that the court of appeals did not apply proper standards in evaluating the district court's decision to grant petitioner's motion for summary judgment); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (vacating the judgment of the D.C. Circuit because it did not apply the correct standard in reviewing the district court's grant of summary judgment); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (reversing the court of appeals' denial of summary judgment and remanding the case for reconsideration). In all these cases, the district courts had granted summary judgment and the courts of appeals reversed.

199. *See* Miller, *supra* note 113, at 1041 ("*Celotex* thus completes the Supreme Court's transformation of summary judgment from a somewhat disfavored and seldom successful motion to one that is to be shunned no longer.").

More specifically, the Court was understood to be signaling to the lower courts that, as a general matter, they should be more willing to grant summary judgment.[200] And indeed, after the trilogy, summary judgment became central to civil litigation and is now frequently (perhaps too frequently) granted in all kinds of cases.[201]

Ineffective assistance of counsel provides a more recent example of signaling. Lower courts have noted the Court's recent reversals of the denial of habeas corpus in three recent cases involving ineffective assistance of counsel. For example, the Fifth Circuit, in a case decided after *Williams* and *Wiggins* but before *Rompilla*, reversed the district court's grant of summary judgment against a petitioner on a claim of failure to investigate adequately. It explained that "the Supreme Court's recent emphasis on ineffective counsel claims indicates that we must be accurate and use care in reviewing [the defendant's] claim."[202] The signal was sent and received, at least by the Fifth Circuit. Now that the Court has granted relief in *Rompilla*, the signal may be even stronger.

In *Rompilla*, however, the Court did not explain why it granted certiorari. The first sentence of the majority opinion reads: "This case calls for specific application of the standard of reasonable competence required on the part of defense counsel by the Sixth Amendment." The Court said nothing else about why it took the case. Nor did it offer any explanation in *Williams* or *Wiggins*.

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200. *See, e.g.*, Charity Scott, *Medical Peer Review, Antitrust, and the Effect of Statutory Reform*, 50 MD. L. REV. 316, 375–76 (1991) (explaining that the "trilogy appeared to reject the conventional wisdom" that summary judgment should be granted sparingly and noting that the trilogy "has created a judicial atmosphere more conducive to the granting of summary judgment").

The lower courts understood this signal despite several facts that might have suggested that the Court intended a more ambiguous, or at very least less general, signal. Two of the three cases were 5–4 decisions and the third was 6–3, with different justices in the majority and dissent each time. Each of the cases addressed a very specific question about the application of summary judgment. *Matsushita* considered summary judgment's interaction with principles of antitrust law; *Celotex* addressed whether the moving party was obliged to produce any evidence in its summary judgment motion if it was not the party with the burden of proof at trial; and *Anderson* explained the interaction of summary judgment with a heightened standard of proof, as in libel cases. None of the cases, therefore, announced a new approach to summary judgment as a general matter.

201. *See* Miller, *supra* note 113, at 984–85 (noting the "dangers that post-trilogy practice poses to a litigant's ability to reach trial" and observing that "an expansive reading of the trilogy encroaches upon traditional litigation values").

202. Guy v. Cockrell, 343 F.3d 348, 354 (5th Cir. 2003) (citing *Wiggins* and finding counsel "rendered ineffective assistance in violation of the Sixth Amendment because counsel's decision to limit the scope of their investigation into potential mitigation evidence was unreasonable") (quoting Strickland v. Washington, 466 U.S. 668, 673 (1984)). On remand, the district court held an evidentiary hearing and granted relief. Guy v. Dretke, No. Civ. A. 5:00-CV-191-C, 2004 WL 1462196, at *2 (N.D. Tex. June 29, 2004).

At times, such silence about why the Court is taking the cases it is deciding, or about the effect those cases may or should have, can muddy the waters.[203] The FELA cases of the 1940s and 1950s, for example, despite Justice Douglas's belief in their importance, failed to send a clear signal to the lower courts or the bar and were derided as a time-consuming diversion into error correction.[204] Even one contemporary commentator who acknowledged that the Court might have a legitimate purpose for taking those cases argued that the purpose had not been achieved. The Court may have "intended to clarify the standard for submission of cases to the jury, in order to assure uniformity in the administration of the FELA."[205] Nevertheless, it failed to do so because the Court did not attempt "to explain its position to the lower courts in an opinion frankly discussing [the relevant issues] . . . and openly overruling earlier decisions which are no longer in accord with its views."[206]

As in the FELA cases, to the extent that the Court already occasionally applies standards in fact-specific situations, any signaling effect may be muffled by the institutional denial that the Court does anything that can be characterized as error correction. This may be what happened with *Reeves* and its aftermath. Because the Court did not explain why it was moved to apply the

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203. In fairness, at the time certiorari is granted, the Court, or more accurately, the individual justices, may not know or understand the role a particular case can, should, or will play. Often, the significance of a case becomes clear only during preparation for argument and the drafting of opinions, but often not even until the opinion has issued and commentators and lower courts respond.

204. *See* Scherner-Kim, *supra* note 195, at 1441 ("Many of the FELA cases decided by the Court seem to fall outside the normal scope of the Court's business, which rarely includes cases so largely dependent on specific facts . . . . In some terms the Court has decided so many cases arising under the act that members of the Court have been moved to protest."); Harper & Leibowitz, *supra* note 40, at 454 ("Since the time of the Court, we are told, is so precious, and since the result cannot be generalized beyond the particular case, the review of this type of case seems unjustifiable."); *id.* at 454 n.138 (discussing Justice Frankfurter's opposition to review of FELA cases and citing *Hill v. Atl. Coast Line R.R.*, 336 U.S. 911 (1949)); Wilkerson v. McCarthy, 336 U.S. 53, 66 (1949) (Frankfurter, J., concurring) ("For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system of compensation . . . may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give the power to control the Court's docket."); Reynolds v. Atl. Coast Line R.R., 336 U.S. 207, 209 (1949) ("Mr. Justice Frankfurter is of the opinion that this is also a case in which the petition for certiorari should not have been granted.").

205. Scherner-Kim, *supra* note 195, at 1450.

206. *Id.* at 1452. The Court also failed to provide meaningful guidance on the margins of tolerable diversity. "[I]t did not provide a guide to lower courts by undertaking to decide cases illustrative of the circumstances in which it would consider a directed verdict proper." *Id.* at 1450. And even when the court did "approve[] the removal of a case from the jury . . . no attempt was made by the majority to explain why the case was less appropriate for the jury than other cases previously decided." *Id.* at 1449–50.

standards it articulated—and because it decided only one (relatively easy) case—the lower courts could choose to see *Reeves* either as providing a course-correction or as a single and unremarkable application of a well-established standard that had little relevance beyond the facts of *Reeves* itself.[207] An explicit change in the Court's certiorari criteria, or more frequent acknowledgment that "review of this case would help to illuminate 'the character of the standard,'"[208] or an explanation of why it is actually applying a standard in a given case instead of simply announcing it would all sharpen lower courts' focus on the import of the Supreme Court's precedents. In other words, the Court could send a clearer message if it was willing both to acknowledge what it is doing and to explain why.

3. Refining: Closing in on the Rule, or, at Least, the Key Criteria

A third overlapping way that applying standards might help provide more guidance and uniformity is by closing in on a rule, or at least by identifying the facts and criteria that are most important to a particular result as a way of refining the standard. This is a classic understanding of the common law method: gradually, and case by case, closing in on a rule of law.[209] For many

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207. *See* Zimmer, *supra* note 113, at 577–78 ("[T]he Supreme Court spent much of its opinion applying the rules . . . to the facts of this particular case rather than announcing any new rules about how this should work. Lower courts may feel less compelled to follow the example of the Supreme Court than they might otherwise be if the Court had announced new legal rules.").

208. BMW of N. Am., Inc. v. Gore, 517 U.S 559, 568 (1996) (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994)).

209. *See, e.g.*, Scalia, *supra* note 4, at 1178 (characterizing the common law method as a process by which courts "gradually close[] in on a fully articulated ruled of law by deciding one discrete fact situation after another until . . . the truly *operative* facts become apparent"); *see also* Sherwin, *supra* note 170, at 1193–94 (describing evolutionary aspect of common law). In some situations, the Court will actually "rulify" a standard, to quote a term coined by Professor Mark Rosen. Mark D. Rosen, *Modeling Constitutional Doctrine*, 49 ST. LOUIS U. L.J. 691, 700 (2005). In other words, the specific application of a standard becomes a rule that can be used in future cases. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000), for example, the Court "rulified" its general redressability standard, and held that redressability was met even where the only relief available was civil penalties paid to the government, not to the plaintiff. Rosen, *supra*, at 696.

Not all standards lend themselves to this kind of rulifying, however, or they lend themselves to this kind of rulifying only at the risk of either overbreadth and inflexibility on the one hand, or picayune and byzantine rules, on the other. In *Reeves*, for example, the Court could have announced a rule that any time the defendant's explanation could be disbelieved, the case must go to the jury. The Court—appropriately, in my view—chose not to do this. Such a rule would be overbroad. As a result, after *Reeves*, the operative legal standard is still much more standard than rule, and would remain so even if the Court were to decide additional cases

standard-governed areas of law the Supreme Court is likely to address, of course, the infinite permutations of possible facts, the Court's limited resources, and the Justices' own bounded rationality make closing in on an actual rule impossible. Nonetheless, by deciding a handful of cases, the Court can highlight which factors it considers particularly important or particularly likely to point to one result or another.

The Court appears to be engaged in precisely such an enterprise in its consideration of the constitutionality of punitive damages. Following a series of cases that acknowledged the possibility of due process constraints on punitive damages awards,[210] the Court first struck down such an award in *BMW of North America, Inc. v. Gore.*[211] In *Gore*, the Court articulated a series of "guideposts"—sort of a three-part standard—for determining when an award was unconstitutionally excessive. The Court instructed courts to consider "the degree of reprehensibility of the defendant's conduct," the ratio between punitive and compensatory damages, and a comparison of the punitive damages to "civil or criminal penalties that could be imposed for comparable misconduct."[212] The Court was not explicit about how these criteria should be applied, but it invalidated the punitive damages award in that case.

Next, the Court decided *State Farm Mutual Automobile Insurance Co. v. Campbell.*[213] It again invalidated a punitive damages award, but this time it provided more information about how courts should apply the second criterion. Although the Court in *Gore* explicitly "reject[ed] a categorical approach" to determining the appropriate ratio between compensatory and punitive awards,[214] it explained in *Campbell* that "few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process."[215]

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in this area.

210. *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994) (finding that Oregon's denial of judicial review of the size of punitive damage awards violates the Fourteenth Amendment's Due Process Clause); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) (upholding the judgment of the Supreme Court of Appeals of West Virginia that a punitive damages award did not *in that instance* violate the Due Process Clause of the Fourteenth Amendment); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (affirming the judgment of the Supreme Court of Alabama that the punitive damages award did not *in that instance* violate the Due Process Clause of the Fourteenth Amendment).

211. BMW of N. Am., Inc. v. Gore, 517 U.S 559 (1996) (finding that a two million dollar punitive damages award is grossly excessive and thus exceeds constitutional limits).

212. *Id.* at 560, 575, 581, 583.

213. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

214. *BMW*, 517 U.S. at 582.

215. *Campbell*, 538 U.S. at 425. This holding could be seen as creating a presumption that a punitive damages award more than ten times larger than the compensatory award is

Even after *Campbell*, however, many questions remain about how courts should apply the standards and further guidance from the Supreme Court is warranted. For example, some believe that a "defendant's intentional disregard for the health and safety of others"—a factor that was not present in either *Gore* or *Campbell*—should justify a larger award.[216] If the Court continues to take a variety of cases in this arena, the relative importance of this and other factors may become clearer, and lower courts may have substantially more guidance about how to judge when a punitive damages award is unconstitutional.

Despite occasional appearances in the Court's jurisprudence, none of these mechanisms are institutionalized as techniques for regular use by the Supreme Court. The occasional appearances are haphazard and undertheorized—and as a result, are often less effective than they might be. Nonetheless, judicious use of these (and other) mechanisms[217] might well go a long way towards

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unconstitutional in the absence of other particularly compelling factors. And indeed, creating presumptions is another mechanism that the Court might use to provide more guidance to the lower courts in standard-governed areas of law. *See generally* Timothy R. Holbrook, *Substantive versus Process-based Formalism in Claim Construction*, 9 LEWIS & CLARK L. REV. 123 (2005). The Court could hold, for example, that a plaintiff who establishes that the defendant's explanation could be disbelieved presumptively is entitled to a jury trial. It would be the defendant's burden to establish that the evidence could never support a finding of discrimination. Such an approach offers moderately clearer guidance to the lower courts, although it may run the risk of rule-like overbreadth.

Alternatively, if too narrow, presumptions, like rulification, create the danger of overly picayune and byzantine rules. For example, the Court did in fact use the word "presumption" in *Campbell*, but it did so only with respect to the specific facts of the case, including the 145-to-1 ratio of punitive to compensatory damages present in that case. *See Campbell*, 538 U.S. at 426 ("In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio."). Lower courts that have described *Campbell*'s holding as a presumption likewise apply that presumption to very large ratios. *See* Atkinson v. Orkin Exterminating Co., 604 S.E.2d 385 (S.C. 2004) (finding a punitive damage award to be excessive where the ratio between compensatory and punitive damages was 127 to 1); Williams v. Philip Morris Inc., 92 P.2d 126, 144 (Or. App. Ct. 2004) ("[T]here is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96-to-1 ratio between the compensatory and punitive damages awarded to plaintiffs."); *In re* The Exxon Valdez, 296 F. Supp. 2d 1071, 1098 (D. Alaska 2004) ("In *State Farm*, the Court began its application of the ratio guidepost with the presumption that a triple-digit ratio would not comport with due process.").

216. Hines, *supra* note 93, at 798.

217. As noted earlier, *supra* notes 165–205 and accompanying text, these mechanisms are, in practice, likely to be overlapping, and some areas of law may benefit from more than one approach. Admissibility of expert testimony may be such an area. A recent article surveys empirical studies and argues that although *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S, 579 (1993), heightened judicial awareness of the importance of scrutinizing proffered expert testimony, courts lack helpful criteria for deciding what testimony to admit. A. Leah Vickers, Daubert, *Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. REV. 209 (2005). In other words, *Daubert* and *Kumho*

rationalizing standard-governed areas of the law that are currently unpredictable and incoherent.[218]

B. Implications of the Approach

In addition to providing much more meaningful guidance to the lower courts in many important areas, these mechanisms might well bring several other important benefits. Nor are they without possible problems, both in result and in implementation. This section outlines some of these issues and concerns in a preliminary attempt to explore the implications of the proposal.

1. Benefits

a. Freedom from the Picayune

The nature of the certiorari criteria and the certiorari process encourages litigants to try to formulate questions as circuit splits involving rule-based questions of law, and the Court is indeed more likely to grant such petitions. A petition for certiorari that asks whether it is unconstitutional to order a passenger out of a car during a routine traffic stop—and that points to different answers to that question in different jurisdictions—is much more likely to be granted than a petition that simply asks whether it was unconstitutional for a particular officer to order a particular passenger out of the car during a particular traffic stop—even if the petition argues that the lower courts need guidance on this question and demonstrates how the courts have come to inconsistent results.[219]

In part as a result of these tendencies, an area of the law in which the Court takes an active interest can become excessively rulebound. Such a result

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Tires may have been successful at signaling, but lower courts might still benefit from further guidance in the form of refining or analogical anchoring.

218. *See* Jeffrey R. Lax, *Certiorari and Compliance in the Judicial Hierarchy: Discretion, Reputation and the Rule of Four*, 15 THEORETICAL POL. 61 (2003) (demonstrating through formal modeling how the Supreme Court could induce compliance in the lower courts by selectively granting certiorari to express approval or disapproval of lower court handling of search and seizure cases).

219. Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1120 (noting strong evidence that the presence of genuine conflict between the circuit courts of appeals, between state supreme courts, between federal courts and state courts, or between the lower court and Supreme Court precedent dramatically increases the probability that the Court will grant certiorari).

is not surprising: When a complex situation is governed by rules, the natural tendency is to write more and more specific rules over time to cover newly discovered loopholes or apparent inconsistencies.[220] The prime example of this phenomenon in the Supreme Court is the Fourth Amendment. Few would argue that the jurisprudence in this area is a stellar example of rules in action. Even Justice Scalia, foremost champion of rule-based jurisprudence, admitted in his most famous exegesis on the merits of rules that, in the Fourth Amendment area, the Court has gone too far. He suggested that perhaps instead of deciding "whether, in this particular fact situation, pattern 3,445, the search and seizure was reasonable," the Court "should take one case now and then, perhaps, just to establish the margins of tolerable diversity."[221]

This position is much like the proposed analogical anchoring mechanism. By articulating standards *and* fleshing them out by actual examples, the Court could both provide significant guidance to the lower courts and free itself from the picayune. The Court may find that it is in fact more willing to adopt standards in certain areas if it observes that a standards/examples model allows it to guide the lower courts effectively. This, in turn, may actually reduce the number of cases the Court feels it must take in certain areas, possibly even reducing its caseload in the long run. And it might make the rules/standards debate a more contextual one—which approach will work better *here*, in this area of law, given real world constraints such as bounded rationality and limited Supreme Court caseloads?[222]

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220. *See* Braithwaite, *supra* note 86, at 56 ("This problem multiplies as the state enacts more and more rules to plug loopholes opened up by legal entrepreneurs.").

221. Scalia, *supra* note 4, at 1186. The Fourth Amendment is unique in a number of ways. For one thing, the primary actors regulated by the Court's rulings in this area are law enforcement officials, not courts. The police are repeat players, and through training and experience, some argue, they are "actually better able to apply vague legal standards than almost any other regulated actors." William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2182 (2002). Stuntz argues, consistent with my approach, that the problem that needs to be solved is "not whether we can come up with the right legal terminology, but whether police officers can know roughly where the boundaries are in practice." *Id.* at 2175. For that to happen, he points out, "judges must be able to find the relevant facts." *Id.* at 2175 n.116. In other words, for police to have adequate guidance about how to act in accordance with the Fourth Amendment, they need guidance in the form of judicial rulings on other searches and seizures. The same principle applies to lower courts taking their cues from the Supreme Court.

222. *Cf.* Friedman, *supra* note 138, at 305 ("[W]hether the Supreme Court can rely on 'rules' or 'standards' when it decides cases—much mooted as a normative matter—may turn as much on questions of lower court compliance as on jurisprudential preferences.").

b. Institutional Shift in the Judiciary

The approach I argue for also may change the Supreme Court's relationship with the lower courts in several ways. First, as the Court actually decides some cases, rather than simply announcing the standard it is setting, the Justices may become more sensitive to administrative and jurisprudential headaches they create for the lower courts. If the Court has to repeatedly apply a standard it announces, for example, it may discover that doing so is not so easy.[223]

Moreover, the Court's current distance from the daily work of the lower courts may prevent the Justices from "fully appreciat[ing] how the particular issue fits into its larger setting."[224] One recent example of this problem arose in a 2003 employment discrimination case, *Desert Palace, Inc. v. Costa*.[225] In that case, the Court announced a new standard for when juries should be given a "mixed-motive instruction."[226] That is, the Court identified when juries should be asked to decide whether an adverse employment factor was motivated by discrimination in addition to other factors and to determine if the same result would have obtained absent the discrimination. *Costa* arguably dramatically

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223. *See* Hellman, *Shrunken Docket*, *supra* note 1, at 435 n.83 (questioning whether the Supreme Court would choose to adopt multifactor tests if the Justices themselves had to apply them in numerous cases); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 605 (1996) (Scalia, J., dissenting) (arguing that the majority opinion's criteria for evaluating the constitutionality of punitive damages are "'guideposts' [that] mark a road to nowhere; they provide no real guidance at all"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting) ("Instead of thus illustrating how the rule works, . . . [the Court] contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now."); *see also* Posner, *supra* note 5, at 59 ("[C]oncern with the consequences of its decisions does not figure largely in the Court's decisions. And why should it? The consequences are felt elsewhere—in this case, in the lower federal courts.").

224. Hellman, *Shrunken Docket*, *supra* note 1, at 435.

225. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (holding that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive instruction in a Title VII case). Judge Posner highlights another example in his recent *Harvard Law Review Foreword*, *The Court's Decision in* United States v. Booker, 125 S. Ct. 738 (2005), discussing the Court's invalidation of aspects of the sentencing guidelines. Discussing the consequences of that decision, he observes that:

> [L]ower federal courts have divided over how to apply the concept of plain error to defendants sentenced before *Booker*. When the Court finally resolves the conflict, thousands of defendants may have to be resentenced. The Court could have spared the courts a considerable burden . . . had it spelled out the application of the plain-error concept to [these cases] . . . .

Posner, *supra* note 5, at 59.

226. *Costa*, 539 U.S. at 92.

changed employment discrimination law, calling into question whether and how *McDonnell-Douglas* should be applied.[227] But the *Costa* Court made no mention of the relationship between its holding and the well-established analytical framework for employment discrimination cases that the lower courts use virtually every day. Although the Court could not possibly have answered all of the questions about the interaction of *Costa* with other precedents, its silence suggests a lack of either awareness or concern that *Costa*'s impact is likely much further-reaching than its "Questions Presented" suggested.[228]

Along the same lines, by actually deciding a handful of cases—perhaps while watching the lower courts' responses to those cases—the Court may well enjoy some of the historic benefits of the common law method. Rather than announcing rules and general principles with little attention to their actual application, the Court could, at least sometimes, engage in a collaborative process both within itself (by deciding a series of cases) and with the lower courts. The benefits of such a collaborative process include the gradual development of rules and standards, informed by actual cases,[229] and the promotion of the good will and mutual respect between the lower courts and the Supreme Court that is necessary for our system to operate smoothly.[230]

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227. *See generally* Jeffrey A. Van Detta, *"Le Roi Est Mort, Vive Le Roi! An Essay on the Quiet Demise of* McDonnell-Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case,"* 52 DRAKE L. REV. 71 (2003) (arguing that *McDonnell-Douglas* does not survive *Costa*, at least in Title VII cases); Matthew R. Scott & Russell D. Chapman, *Much Ado About Nothing—Why* Desert Palace *Neither Murdered* McDonnell-Douglas *Nor Transformed All Employment Cases To Mixed-Motive*, 36 ST. MARY'S L.J. 395 (2005) (arguing that *McDonnell-Douglas* is largely unaffected by *Costa*); *see also* Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312–13 (5th Cir. 2004) (applying *Costa* in ADEA case, to create a modified *McDonnell-Douglas* test); Mereish v. Walker, 359 F.3d 330, 340 (4th Cir. 2004) (expressing doubt that *Costa*'s holding applies in ADEA cases).

228. The Questions Presented in *Costa* were:

> 1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in Price Waterhouse v. Hopkins?
>
> 2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

Brief for Petitioners, 2003 WL 742558, at *i. Nor has the Court provided any more guidance since deciding *Costa*. As of February 2006, only one Supreme Court opinion even cited *Costa*, and that opinion was a dissent. Smith v. City of Jackson, 125 S. Ct. 1536, 1552 (2005) (O'Connor, J., dissenting).

229. *See* Sherwin, *supra* note 170, at 1188–90 (describing the benefits of collaboration in analogical reasoning).

230. *See* Bhagwat, *supra* note 58, at 986 ("Because the possibility of review is . . . extremely limited, the true force of the Court's precedent must lie in the voluntary, good faith efforts of the lower courts to follow it."); Hellman, *Shrunken Docket*, *supra* note 1, at 437 (observing that a hierarchical judiciary cannot function effectively without feeling "the spirit of

Such a collaborative relationship between the Supreme Court and the lower court might also make "percolation" a much more useful tool. The ideal of percolation now is to allow several lower courts to consider a legal problem before the Supreme Court rules on it, thus giving the High Court the benefit of the considered judgments of a number of jurists. This ideal, and the reality, could be broadened. The concept of percolation could include the idea of watching how the lower courts apply standards announced by the Supreme

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goodwill and cooperation that comes from participation in a shared enterprise"); *see also* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 76 (1986) (arguing against Ronald Dworkin's ideal of the judge as Herculean "loner" and in favor of judicial dialogue). As then-Judge Ruth Bader Ginsburg and her co-author put it:

> It is good for the Supreme Court to turn its attention away from philosopher-king problems and towards the pedestrian statutory staples of the lawyer's craft, just as it is useful for the lower courts to be reminded periodically that their decisions, both large and small, must be woven harmoniously into a single, national, legal, fabric.

Ginsburg & Huber, *supra* note 25, at 1434.

There is reason to believe that the Roberts Court may be more interested in nurturing dialogue and collaboration than was the Rehnquist Court. Early signs suggest that the Roberts Court may be making modestly more aggressive use of per curiam opinions. As of February 21, 2006, the Roberts Court had issued nine substantive per curiam opinions reversing lower courts. Ash v. Tyson Foods, Inc., 2006 WL 386343 (Feb. 21, 2006); Lance v. Dennis, 2006 WL 386860 (Feb. 21, 2006); Ministry of Def. of Iran v. Elahi, 2006 WL 386291 (Feb. 21, 2006) Wis. Right to Life, Inc. v. F.E.C., 126 S. Ct. 1016, (2006); Bradshaw v. Richey, 126 S. Ct. 602 (2005); Eberhart v. United States, 126 S. Ct. 403 (2005); Kane v. Garcia Espitia, 126 S. Ct. 407 (2005); Schriro v. Smith, 126 S. Ct. 7 (2005); Dye v. Hofbauer, 126 S. Ct. 5 (2005). In all of OT 2004, the Court issued only five such opinions. Bell v. Cone, 543 U.S. 447 (2005); Howell v. Mississippi, 543 U.S. 440 (2005); Whitfield v. United States, 543 U.S. 209 (2005); San Deigo v. Roe, 543 U.S. 77 (2004); Smith v. Texas, 543 U.S. 37 (2004). In OT 2003, it issued only six. Holland v. Jackson, 542 U.S. 934 (2004); Middleton v. McNeil, 541 U.S. 433 (2004); Muhammad v. Close, 540 U.S. 749 (2004); Illinois v. Fisher, 540 U.S. 1174 (2004); Mitchell v. Esparza, 540 U.S. 12 (2003); Yarborough v. Gentry, 540 U.S. 1 (2003).

Moreover, in one of the Roberts Court's opinions, although the Supreme Court reversed, the Court also praised the Seventh Circuit for its handling of the issue and clearly invited the courts of appeals (and presumably state supreme courts) to flag issues that they believe are problematic. After explaining why the Seventh Circuit was wrong, the Court acknowledged that the error,

> was caused in large part by imprecision in our prior cases. Our repetition of the phrase "mandatory and jurisdictional" has understandably led lower courts to err on the side of caution. . . . Convinced, therefore, that [prior Supreme Court precedents] governed this case, the Seventh Circuit felt bound to apply them, even though it expressed grave doubts in light of [a later case]. This was a prudent course. It neither forced the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried by proceeding in a summary fashion. By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review.

Eberhart, 126 S. Ct. at 407.

Court. For example, if the Court announced a new standard, future cases—and petitions for certiorari—would provide insight into how the lower courts handle its application. If it applied a standard in one case, it could allow that precedent to "percolate" to see how the lower courts apply the same standard in other factual situations. Further involvement by the Court might or might not be necessary to ensure an appropriate level of uniformity, and were the Court to intervene again, it would have a clearer idea of what specific aspects of the standard called for further guidance. Moreover, deciding relatively routine cases may have a beneficial effect on the development of the law in another way, as well. Under current certiorari practice, it is possible that:

> [t]he cases that attract the Court's attention may well be ones that involve extreme facts or idiosyncratic lower-court rulings. The resulting decisions, if not tempered by precedents deriving from more routine controversies, may skew the law in a way that would be avoided if the Court regularly adjudicated cases in that area.[231]

2. *Caveats and Limitations*

a. *The Caveats*

Several caveats are in order. First, this proposal is preliminary. There are undoubtedly ways in which the mechanisms described could be refined or expanded upon, and there are undoubtedly other approaches that the Court could take. There may also be areas of law or stages in the development of a

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231. Hellman, *Shrunken Docket*, *supra* note 1, at 435–36. Frederick Schauer points to *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), as a particularly stark example of this kind of skew. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. (forthcoming 2006) (manuscript at 25). *Kumho Tire* addressed "what kind of scientific and other expert testimony should be" admissible. 526 U.S. at 138; Schauer, *supra*, manuscript at 25. As Schauer puts it:

> [A]lthough the question of what counts as expertise is a broad and important one, the Court in *Kumho Tire* faced it in the context of an expert who, testifying in a products liability case against the manufacturer of a tire which had been driven until bald and poorly repaired on multiple occasions, offered as his expert opinion that it was neither the tire's baldness nor its serial poor repair that had caused the tire failure, but rather a defect in the tire's design. And it is not surprising that in announcing a rule in the context of a case involving such a flimsy case of expertise, the Supreme Court fashioned a rule plainly tailored to the case of the bogus expert, without having any serious data on the extent to which bogus experts dominated the array of future cases that would be governed by the new rule.

Id.; *see also id.* manuscript at 40 (describing the Supreme Court's ability to use its discretionary jurisdiction to select representative cases, possibly diminishing the skew); *see supra* note 148 (discussing skew in employment discrimination cases that reach the Supreme Court).

legal standard in which, for a variety of reasons, these mechanisms are unlikely to work well. Further research is needed to explore these issues.

Second, this proposal is not magic. It cannot and will not eliminate all nonuniformity and inconsistency in the application of legal standards. Put in a more positive way, it cannot, will not, and should not eliminate all flexibility and discretion in applying standards. And as I discuss below, there are times when increased Supreme Court involvement in an area of law may not provide coherent guidance because the Court's application of its own standards in different cases is hard to reconcile. Nonetheless, this caveat does not detract from this Article's central point: The Court absents itself from standard-governed areas of law even when guidance in those areas is sometimes both sorely lacking and possible to provide.

Third, this proposal is not an attack on the use of standards in law. There are many areas of law in which standards are preferable, necessary, or both. But for standards to be consistent with rule of law values, for them to form part of a body of law that is, for the most part, coherent and predictable, a different kind of guidance may be necessary from merely announcing what the standards are. Often this guidance can best be provided by way of example, not by converting standards into rules.[232]

Finally, under any of these mechanisms, the Court's involvement in a particular case, if viewed in isolation, may well appear to be mere error correction. Such a conclusion would be mistaken. Under each of these mechanisms, the individual cases decided by the Court communicate more than the particular outcome on the particular facts of those cases. The use of these mechanisms is complicated, however, by the fact that the Court does not always know what will happen when it grants certiorari in a case. It will not always be possible, therefore, for the Court to use these mechanisms as deliberately and precisely as the descriptions of each mechanism suggest. Nonetheless, this caveat should not detract from the project at hand: to begin to explore ways for the Court to give guidance more effectively to the lower courts.

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232. Each case can be seen as a rule, of course. Each holding applying a standard is a rule with respect to cases with identical facts. But defining rules this way loses the forest for the trees. In standard-governed areas, having one decided case—a "rule"—for one set of facts does not convert the governing standard to a rule for the infinite number of other possible fact patterns.

b. *Confusion in the Supreme Court*

At times, the Court takes on a series of cases applying a standard, but rather than providing guidance, the Court's case law confuses. For example, the Court has decided an impressive series of cases on the subject of ERISA preemption.[233] Yet ERISA preemption remains one of the most convoluted and confusing areas of law, and the Court's most recent pronouncement in this arena, holding that ERISA preempts a Texas malpractice statute, was seen as a surprising reversal of a recent trend.[234] Even if the Court has been deliberately attempting to provide a series of "fixed points," this area of law is still more like a maze. Clarity and guidance to the lower courts have not resulted.

This problem is a real one, for which there may be no good solution.[235] The Justices generally do not know at the time they vote on certiorari what the result of the case will be. They certainly cannot be sure that, if the Court takes a series of cases applying a particular standard, the opinions will all point clearly in a single direction. So deliberately taking cases in order to apply standards carries with it some risk of sending mixed messages at best, incoherent and contradictory ones at worst.

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233. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 221 (2004) (ruling that respondents' state causes of action against HMOs under the Texas Health Care Liability Act for violation of an HMO's duty to exercise ordinary care in covering certain medical services were preempted by ERISA § 502(a)(1)(B) and thus were removable to federal court); Ky. Ass'n of Health Plans v. Miller, 538 U.S. 329, 341(2003) (holding that Kentucky's "Any Willing Provider" statutes regulate insurance and therefore are not preempted by ERISA under 29 U.S.C. § 1144(b)(2)(A)); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 402 (2002) (finding that ERISA does not preempt the Illinois HMA Act); Pegram v. Herdrich, 530 U.S. 211, 237 (2000) (stating that mixed treatment and eligibility decisions by HMO physicians are not fiduciary decisions under ERISA and that Herdrich did not state an ERISA claim); De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 808 n.1 (1997) (noting that between 1981 and 1997, the Court decided sixteen cases on ERISA preemption).

234. *See, e.g.*, Aaron S. Kesselheim & Troyen A. Brennan, *The Swinging Pendulum: The Supreme Court Reverses Course on ERISA and Managed Care*, 5 YALE J. HEALTH POL'Y L. & ETHICS 451, 452 (2005) (complaining that in *Aetna Health*, "the Supreme Court reversed course and reiterated its pre-1995 broad ERISA preemption doctrine" and noting that "[f]ew, if any, health law experts anticipated this event").

235. Similarly, the Supreme Court may sometimes get it wrong as a substantive matter. *See* Posner, *supra* note 5, at 71 (suggesting that the low number of cases heard by the Supreme Court "may actually be a good thing" because it reduces the number of mistakes the Court can make). Frederick Schauer argues further that the nature of common law decisionmaking is such that any error is likely to be amplified as subsequent courts and litigants rely on the prior one as precedent. Schauer, *supra* note 231, manuscript at 30–35. All this may be so, but it does not follow that chaos and unpredictability is a better outcome. And as pointed out *infra* there may be benefits to the mistakes occurring at the very visible Supreme Court level instead of in the lower courts.

One possible response to this concern is that perhaps confusion at the Supreme Court level is preferable to confusion in the lower courts. If the Supreme Court weighs in, it will narrow the points of unpredictability and reduce the number of key precedents lawyers and courts must work to reconcile. Another possible response is that where the issues involve the application or interpretation of a statute, increased Supreme Court involvement has a pro-democratic transparency. Congress and the public—even more than judges and litigants—cannot easily track overall trends in cases. If an area of law has become confused or has become biased for or against a particular type of litigant, that fact is likely to be far more apparent when the confusion or bias is evident in a relatively small number of Supreme Court opinions than in a mass of lower court precedents.[236] Even in constitutional law, confusion at the Supreme Court level is much more likely to draw the attention of commentators than is confusion in the lower courts, the result of which could be either positive or negative. It could be negative if it undermines public confidence in the Court. But it could be positive if the academic and other attention to these areas of law contributes suggestions and solutions for rationalizing them.

c. The Caseload and the Certiorari Process

With the Supreme Court's long history of unmanageable caseloads, many observers, lawyers, and members of the judiciary will likely be skeptical of any proposal that could increase the Court's caseload. And certainly, no one advocates a return to the days of caseloads of 150 per term. This proposal, however, does not require such a dramatic change. There is a lot of room between the eighty-five or ninety cases the Court currently decides and the 150 that most commentators view as too many. The Court has almost complete control of its docket. It could add a relatively small number of cases in which it provides guidance by applying standards itself.[237]

Of perhaps more concern is the potential impact of this proposal on the certiorari process. If lawyers believe that certain types of cases have better odds

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236. Legislative action is by no means guaranteed. Congress has thus far failed to respond to judicial pleas for action in the area of ERISA preemption. *See, e.g.*, *Aetna Health*, 542 U.S. at 222 (Ginsburg, J., concurring) (joining "the rising judicial chorus urging that Congress and . . . [this] Court revisit what is an unjust and increasingly tangled ERISA regime" (quoting DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453 (3d Cir. 2003) (Becker, J., concurring))).

237. *See supra* Part V.B.1.a (using standards more often might reduce the caseload in the long run). One option, which the Roberts Court may already be experimenting with, is the use of per curiam opinions, see *supra* note 229, which are generally issued without argument, based only on the petitions for certiorari.

of being heard by the Court, they are more likely to petition for certiorari. The proposal might therefore cause an increase in the already huge number of petitions filed annually. At the same time, somewhat new certiorari criteria and instructions for law clerks would have to be put in place. Determining when an area of law requires the Supreme Court's intervention because of the inconsistent ways the lower courts apply a standard is unlikely to be an easy task. Nonetheless, there are ways the Court could approach this problem. It could rely more heavily on *amici* in this process. Or it could require that petitioners demonstrate a series of applications of a standard that cannot reasonably be reconciled with one another.

In fact, the Court is gaining experience with the concept of an unreasonably applied standard. With the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) came new requirements for when the federal courts could grant habeas relief on claims that had already been considered and rejected on state postconviction review. One of the circumstances under which habeas can be granted is if the state adjudication "involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court."[238] In applying AEDPA, the Court has acknowledged the differences in the ways rules and standards (or "general" rules) operate and has indicated that it does not believe that identifying unreasonable applications of a standard is impossible:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.[239]

A similar approach is appropriate in certiorari determinations. If a standard is very general, the lower courts have more leeway in applying it before differences can be characterized as unreasonable. But with the kind of unpredictability present in some areas of the law today, different applications of the same standard often cannot be reasonably reconciled. When that is the case, Supreme Court involvement is warranted.

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238. 28 U.S.C. § 2254(d)(1) (2000) (emphasis added).

239. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

VI. Conclusion

This Article proposes a new way for the Supreme Court to do its job. It does not argue for a change in the Court's role, but rather suggests that the Court could be more effective if it recognized that different action may be needed in standard-governed areas of law than in areas controlled by rules. The Court's general failure to distinguish between rules and standards leads to profoundly inadequate guidance in some areas of law and to picayune and labyrinthine rules in others. This Article proposes that by deliberately applying standards in several cases, the Court can provide more robust guidance to the lower courts and litigants.

This approach is not, of course, a magic bullet. It will not provide certainty, nor will it eliminate all inconsistency in the application of legal standards. Or put in a more positive light, it will not deprive lower court judges of all discretion or of the ability to take account of the unique facts in individual cases. But the Court deprives itself of an important tool it could use to promote uniformity and the rule of law. By noting the differences between rules and standards and the different types of guidance that may be useful under each form of regulation, the Court could provide much more meaningful guidance.

Many unanswered questions remain. Some areas of law may be better suited to this approach than others. For example, technical standards applied or administered by agencies or specialized courts might be better left largely to those expert entities. On the other hand, standards regularly applied by repeat players, such as courts and law enforcement officials, may be particularly appropriate candidates for this kind of review. Another avenue for future research and analysis is whether mechanisms besides those discussed in this Article might also be helpful, and whether there are ways that the mechanisms discussed should be refined. Objections, disadvantages, and problems associated with this approach must be more fully vetted. Finally, research might examine whether there are patterns to the Court's past decisions about when to apply standards in its cases, patterns from which we could draw conclusions about some of these other questions. All of these important inquiries are for another day, however. For now, this Article begins the discussion by urging a broader and more functional understanding of the Supreme Court's role.