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THE SUPREME COURT AND LEGAL UNCERTAINTY

Stephen G. Gilles*

INTRODUCTION

As Frank Easterbrook famously explained, "The Supreme Court is a regulator." One of the things the Court regulates is uncertainty in the American legal system. In this Article, my main focus will be on two types of legal uncertainty: uncertainty about what the law is and uncertainty about whether the law will remain the same in the future. The contemporary Supreme Court all too often creates (or fails to reduce) both types of legal uncertainty without sufficient reason. Because space does not permit an examination of the Court’s work as a whole I will make my case by sketching several illustrations of damaging Court-created legal uncertainty.

I assume agreement on the proposition that, all else equal, legal uncertainty is disadvantageous because it reduces the law’s efficacy “in guiding the courts themselves, in guiding the behavior of the people subject to the [law], and in guiding the behavior of the parties to actual disputes.” On the other hand, reducing legal uncertainty inevitably entails information, law-production, and other costs. Consequently, determining whether there is too much uncertainty in a particular area of law frequently requires a judgment call about whether the tradeoffs are worth it. Readers of this Article will therefore have to decide for themselves whether they agree with my assessment that the Court has undervalued the damage done by legal uncertainty in the examples I will present.

Before turning to those examples, however, I want to suggest some reasons why today’s Court may be prone to discount or ignore the costs of legal uncertainty. Since Justice O’Connor retired in 2006, the Court has been divided four-one-four along ideological lines, with Justice Kennedy holding the balance of power between the four con-

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3. See id. at 542–45.
servative Justices⁴ and their four liberal counterparts.⁵ During the previous decade, the Court was divided three-two-four along basically the same ideological lines: the four liberals prevailed if either of the two “swing” (or centrist) Justices—Justices O’Connor and Kennedy—joined them, while the three conservatives⁶ needed to pick up both swing votes to prevail.

Of course, the Court decides many unanimous cases each Term, and many others in which the division between majority and dissent is primarily legal rather than political.⁷ But the Court’s docket is notoriously loaded with ideologically freighted cases. In those arenas, at least, the Court’s ideological division has unquestionably been a major factor tending to increase uncertainty in the law. For one thing, when ideological feelings run high, stare decisis is likely to carry little weight. For example, since Justice O’Connor’s retirement, the Court has reversed course in several important contexts in which Justice Kennedy had previously been in dissent. Two leading examples are Gonzales v. Carhart,⁸ upholding the federal ban on partial-birth abortions despite a prior decision striking down similar state bans,⁹ and Citizens United v. Federal Election Commission,¹⁰ striking down important aspects of the McCain–Feingold campaign finance legislation that the Court had upheld just a few years earlier. Beyond that, a good deal of constitutional law may turn on which of the following events occurs first: the death or retirement of a conservative (or Justice Kennedy) while a liberal is president and there are not enough conservative senators to force the appointment of a centrist, or the death or retirement of a liberal (or Justice Kennedy) while a conservative is president and there are not enough liberal senators to force the

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⁴ Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito.
⁵ Until recently, the liberal Justices were Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer. The list is now Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan. I acknowledge, of course, that the categories “liberal” and “conservative” are somewhat crude and imprecise, as is the category “centrist,” which I use to describe such diverse jurists as Justice White, Justice O’Connor, and Justice Kennedy.
⁶ At that time, the three conservative Justices were Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.
appointment of a centrist. On today’s Court, actuarial uncertainty begets legal uncertainty!

But even supposing that a stable five-Justice majority, liberal or conservative, were to emerge, there are powerful forces at work tending to perpetuate the Justices’ high level of tolerance for legal uncertainty. In a provocative recent article, Craig Lerner and Nelson Lund argue that the Supreme Court has become a bevy of “celebrity Justices” who operate more like nine independent political arbiters than a court of law. Their critique—which applies to Justices of all ideological persuasions—incisively shows how Congress has allowed the Court to veer from its role as a “genuinely judicial institution” to an increasingly politicized one. At the same time, Lerner and Lund’s analysis helps explain why reducing legal uncertainty is a low priority for today’s Court.

The extent of Congress’s constitutional authority to shape and structure the Supreme Court is underappreciated even in the legal academy. The Constitution requires that there be a Supreme Court, specifies the jurisdiction it may exercise, and vests the federal judicial power in one Supreme Court and such lower federal courts as Congress chooses to create. The Justices are nominated by the President and must be confirmed by the Senate. To protect judicial independence, the Constitution further provides that the Justices may be removed only by impeachment by the House and conviction by the Senate, and that their compensation may not be reduced. Apart from these barebone specifications, the Constitution leaves it to Congress to decide such fundamental matters as how many Justices there shall be, how much they shall be paid, and just what their judicial duties shall consist of.

As Lerner and Lund explain, Congress’s initial choices concerning the Supreme Court have by now given way to profoundly different ones. Early Supreme Court Justices lived and worked together, had no law clerks and no palatial courthouse, had a largely mandatory docket that included many mundane diversity and admiralty cases, wrote mostly anonymous opinions, and travelled around the nation

12. Lerner & Lund, supra note 11, at 1258.
13. See id. at 1255.
15. See U.S. CONST. art. II, § 2, cl. 2.
16. Strictly speaking, the Constitution provides only that all Article III “Judges . . . shall hold their Offices during good Behaviour,” but this has always been understood to mean that impeachment is the only manner by which such Judges may be removed. Id. art. III, § 1.
hearing cases as circuit judges for several months each year. Over time, however, all of that has changed. To begin with, Chief Justice John Marshall successfully pushed the Court to adopt the custom of issuing signed opinions for the Court. Although Justice Marshall was able to keep his Court unanimous almost all the time, today's culture of frequent concurring and dissenting opinions gradually took root in the twentieth century. By 1948, the ratio of separate opinions to majority opinions exceeded 1:1, and remains in the same vicinity today. The practice of signed opinions, Lerner and Lund argue, has inexorably encouraged Justices to develop their own individual jurisprudences.

As for the Justices' duties, Congress effectively ended circuit riding in 1891, and—at the Court's behest—gave the Court almost total control over its docket in the so-called Judges' Bill of 1925. The Court has used this power to tilt its docket heavily in the direction of federal law and particularly constitutional cases. Moreover, the Court has gradually reduced the number of cases it hears from more than 200 per Term in the early 1920s, to about 150 by the 1980s, and finally to roughly eighty in recent years. To help with this increasingly light workload, each Justice has been entitled (since the 1970s) to four law clerks (an innovation that began with some Justices hiring solitary clerks in the late nineteenth century). Not only do many Justices delegate much of the responsibility for opinion writing to their clerks, discussions between each Justice and his or her clerks seem to have supplanted deliberations among the Justices themselves to a considerable extent. And because clerks see themselves as employees of individual Justices rather than of the Court, they contribute further to its fragmentation into nine separate chambers. As Lerner and Lund point out, the Justices today seem less concerned about the Court's

18. Id. at 1277.
19. Id. at 1279.
20. See id. at 1281.
22. Lerner & Lund, supra note 11, at 1268, 1286.
23. See id. at 1290–92.
24. See id. at 1293.
25. Although the Justices may pursue their individual agendas, they also have a collective interest in maximizing the Court's power and influence. As Senator Thomas Walsh of Montana, one of the few Senators to resist the Judges' Bill, observed, the Court's push for that legislation exemplified "that truism, half legal and half political, that a good court always seeks to extend its jurisdiction, and that other maxim, wholly political, so often asserted by Jefferson, that the appetite for power grows as it is gratified." 62 CONG. REC. 8547 (1922) (statement of Sen. Walsh).
own consistency and more concerned about maintaining their own personal consistency.\(^{26}\)

The result—a Court of celebrity Justices who have complete control over their agendas—operates to increase legal uncertainty in several ways. Here is a partial list: it means that many important legal questions go unanswered because the Court finds it politic to duck them for one reason or another; it tends to produce outcomes in which the Court muddles through without actually settling on a consistent approach or answer; it tends to weaken stare decisis and hence to make the law less settled and more uncertain; and it tends make individual Justices more willing to refuse to accept entire lines of cases with which they disagree. In the examples that follow, we will see each of these tendencies at work.

II. THE SUPREME COURT'S UNPREDICTABLE APPLICATION OF STARE DECISIS IN CONSTITUTIONAL CASES

The first example concerns the modern Supreme Court's treatment of stare decisis, a doctrine that explicitly rests on a concern with certainty and predictability in the law. As the Court recently put it, overruling established precedent "simply because we might believe . . . a decision is no longer 'right' would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability."\(^{27}\) Beyond that, the Court continues to invoke Justice Brandeis's maxim that "in most matters it is more important that the applicable rule of law be settled than that it be settled right."\(^{28}\) At first blush, then, the Court's commitment to stare decesis seems to show that the Court values legal certainty quite highly.\(^{29}\)

Once one looks more closely at the Court's test for invoking stare decisis in constitutional cases, however, a very different picture emerges. Stare decisis, the Court has often said, is "not an inexorable

\(^{26}\) To curb these tendencies, Lerner and Lund propose (1) abolishing signed opinions, including signed dissents; (2) requiring the Court to hear one case certified by a court of appeals for each case in which the Court grants certiorari; (3) stripping the Justices of their law clerks, and instead allowing the Court as a whole to hire law clerks in more limited numbers, who would be supervised by the Supreme Court librarian and allowed only to do research (not work on opinions); and (4) requiring the Justices to ride circuit, as they did until the late nineteenth century. Lerner & Lund, supra note 11, at 1259-61, 1294. I am sympathetic to these proposals, but my argument in this Article does not encompass them.

\(^{27}\) John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008).


\(^{29}\) On occasion, the Court has argued that stare decisis need not be followed because a well-established precedent has generated great legal uncertainty. See, e.g., Erie R.R. v. Tompkins, 304 U.S. 64, 74 & n.8 (1938) (critiquing Swift v. Tyson, 41 U.S. 1 (1842) on that ground).
command.” Instead, as the Court explained in Planned Parenthood v. Casey,

[When this Court reexamines a prior holding, its judgment is customary informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.]

These factors include (1) whether the precedent has proven unworkable in practice, (2) whether there has been significant and justifiable reliance on the precedent by persons in our society, (3) whether the precedent has been eroded by other decisions, (4) whether the relevant facts have importantly changed, and (5) whether overruling would adversely affect the Court’s credibility and legitimacy. Merely to describe these factors is to recognize that, as Michael Paulsen puts it, the Court’s stare decisis doctrine “consists of a classic multifactor balancing test of incommensurable considerations.” Any such test will inevitably generate considerable uncertainty about which precedents are protected by stare decisis and which are not.

But it gets worse. After presenting a devastating critique of the Court’s inconsistent application of each stare decisis factor in constitutional cases, Paulsen concludes that each factor “contains internal contradictions,” “admits of conflicting applications,” and “suffers from certain major analytic defects and unclarity,” while the relationships among them and their relative weights are left undefined. “No factor is necessarily necessary. No factor is sufficient.” In short, the Court’s stare decisis doctrine, on its face and even more so as applied, leads to widespread uncertainty and confusion in constitutional law.

What accounts for the Court’s reintroduction of so much legal uncertainty into the formulation and application of a doctrine that is intended to do precisely the opposite? Clearly the Court’s ideological
division is a part of the story. It is striking that the Court's only detailed explication of its stare decisis doctrine came in *Casey* and was used by the five-Justice majority in that case to justify reaffirming the "essential holding" of *Roe v. Wade*. Moreover, although Paulsen supplies telling examples from several areas of constitutional law, the most glaring contradictions in the Court's use of stare decisis have come in its substantive due process decisions. By entangling stare decisis in the Court's most lawless constitutional innovations, the *Casey* Court helped politicize and destabilize the doctrine of stare decisis itself.

To be clear, I am not arguing that the value of legal certainty should lead the Court to adopt a rigid doctrine of stare decisis in constitutional law. There is a vigorous ongoing debate among constitutional scholars about the optimal version of stare decisis, and I make no attempt here to determine which is the better view. The point is simply that, having long adhered to a version of stare decisis in constitutional cases, the Court's glaringly inconsistent use of *Casey*'s complex doctrine has created substantial legal uncertainty for no apparent legal reason.

III. The *Chevron* Doctrine as an Engine of Legal Uncertainty

As we have just seen, the Court's approach to stare decisis in constitutional cases breeds uncertainty about which precedents are safe and which are up for grabs. Nevertheless, in cases involving the judicial interpretation of federal statutes, the Court has consistently adhered to a fairly strong version of stare decisis. Remarkably, however, the

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39. See, e.g., Paulsen, *supra* note 32, at 1185-88 (discussing the Court's inconsistent treatment in its substantive due process decisions of whether a particular precedent has been eroded by other decisions).
41. Paulsen, for one, argues that stare decisis should be abolished in constitutional law in favor of a practice under which precedents, while considered respectfully, are given only whatever weight their reasoning entitles them to, and are not followed if the later Court concludes they were wrongly decided. See Paulsen, *supra* note 32, at 1210-11; see also Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1538 (2000); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).
42. See, e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").
Court has implemented a quite different policy when it comes to regulatory statutes that are administered by federal agencies. The Court’s *Chevron* doctrine, summarily stated, holds that statutory ambiguity should normally be treated as an implicit delegation of lawmaking authority to the agency that administers the statute—and, therefore, that federal courts should defer to the agency’s interpretation of an ambiguous statutory provision, provided that the interpretation is reasonable.\(^4\) Consequently, as Justice Stevens’s opinion for the Court in *Chevron v. Natural Resource Defense Council* acknowledged, the reach of ambiguous federal regulatory statutes is subject to rapid and dramatic change—for example, when a new Administration with different policy views takes office.\(^4\)

That *Chevron* massively increased legal instability in federal administrative law seems undeniable. On the other hand, the pre-*Chevron* regime of judicial review of agency interpretations of regulatory statutes was notoriously complex, multi-factor, and uncertain.\(^4\) Consequently, *Chevron* also reduced the uncertainty associated with predicting which agency interpretations would survive judicial review.

Over time, however, that advantage of the *Chevron* doctrine has been undermined by the doctrine’s growing complexity. Initially, the Court’s decisions (arguably including *Chevron* itself) suggested that statutory ambiguity, without more, gave rise to an inference that Congress had implicitly delegated lawmaking authority to the agency.\(^4\) Such a broad reading of *Chevron* made its application straightforward. In *United States v. Mead*, however, the Court held that *Chevron* deference does not apply unless the agency both possessed and exercised the authority to resolve the issue of statutory meaning “with the force of law.”\(^4\) This condition, *Mead* indicated, would generally be satisfied when the agency was authorized to (and did) resolve the question through rulemaking or formal adjudication, as well as under certain other (undefined) circumstances.\(^4\) *Mead* also held that agency rulings that are not entitled to *Chevron* deference may nevertheless merit

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44. See id. at 865 (“[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments.”).
45. See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 562 n.95 (1985) (identifying ten factors used at various times by the Supreme Court in determining how much, if any, deference to extend to agency interpretations of statutes).
some deference, under Skidmore v. Swift & Co.,49 where the agency has relevant expertise that it brought to bear in deciding the issue.50

Justice Scalia, who had championed the broad reading of Chevron, protested in dissent that the Court was throwing away the simplicity of Chevron as "an across-the-board presumption,"51 while simultaneously reviving "the indeterminacy of Skidmore deference."52 Interestingly, the majority conceded that Justice Scalia's approach would be preferable if the overriding goal were "to simplify the judicial process of giving or withholding deference."53 But the Court placed more weight on tailoring deference to its view of congressional intent. In light of the wide diversity of statutes authorizing discretionary administrative action, the Court thought it "implausible that Congress intended [to give administrative agencies] . . . either Chevron deference or none at all."54 On that score, Justice Scalia's view—expressed in a law review article he wrote a decade before Mead—is that "the quest for the 'genuine' legislative intent is probably a wild-goose chase anyway," and consequently "any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."55 Why that background rule of law is more faithful to the Administrative Procedure Act (the APA) than one that extends no deference to agency interpretations of statutes, Justice Scalia did not say. Indeed, in the same article he conceded that the framers of the APA proceeded on the assumption (which he termed "quite mistaken") "that questions of law would always be decided de novo by the courts."56 One might think the intent of the enacting Congress should be controlling, absent an express provision to the contrary in a particular enabling statute. After all, the APA's scope of review provision commands that "the reviewing court shall decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . . ."57

50. Mead, 533 U.S. at 234-35.
51. Id. at 257 (Scalia, J., dissenting).
52. Id. at 250.
53. Id. at 236 (majority opinion).
54. Id.
56. Id. at 514.
57. Administrative Procedure Act, 5 U.S.C. § 706 (2006); see also John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 193–94 (1998); cf. Mead, 533 U.S. at 241 (Scalia, J., dissenting) (acknowledging that "[i]here is some question whether Chevron was faithful to the text of the Administrative Procedure Act").
Remarkably, the Court offered no response to Justice Scalia's claim that *Mead* would result in the "ossification" of large swathes of federal law. By "ossification," Justice Scalia meant that when an agency is not entitled to invoke *Chevron* deference, a federal court's interpretation of an ambiguous statute will preclude the agency from adopting a different (reasonable) interpretation in the future. The Court could have pointed out that it is ordinarily advantageous for the meaning of ambiguous federal statutes to be definitively resolved by judicial interpretation. Prior to *Chevron*, federal courts frequently interpreted ambiguous regulatory statutes practically de novo, while giving respectful consideration to the administering agency's view of their meaning. But having endorsed in *Chevron* the proposition that statutory ambiguity should be construed as an implied delegation to the agency, the Court now seems unwilling to acknowledge the downside of the "flexibility" *Chevron* created.

In *National Cable Telecommunications v. Brand X Internet*, the Court—again with Justice Scalia in dissent—confronted another layer of complications attributable to *Mead* and *Chevron*. The statutory interpretation issue in *National Cable* was whether broadband Internet service constitutes "telecommunications service" under the Communications Act. Several years before the *National Cable* litigation, in a case in which the FCC was not a party, the Ninth Circuit Court of Appeals ruled that broadband Internet service does constitute telecommunications service. Subsequently, after notice-and-comment rulemaking, the FCC ruled that broadband Internet service does not constitute telecommunications service. On appeal, the Ninth Circuit vacated the FCC's ruling, declining to give *Chevron* deference and following its prior decision as a matter of stare decisis.

Among the questions the Supreme Court faced on these facts was whether the Ninth Circuit should have applied *Chevron* notwithstanding its own contrary precedent. The Court reasoned that under *Chevron*, "it is for agencies, not courts, to fill statutory gaps," and that this must hold true regardless of "the order in which the judicial and administrative constructions occur." Accordingly, the Court held that a prior judicial interpretation of a statute must yield to an agency's

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58. Indeed, that is the gist of what goes by the somewhat misleading name of "Skidmore deference."
60. AT&T Corp. v. City of Portland, 216 F.3d 871, 880 (9th Cir. 2000).
61. Nat'l Cable, 545 U.S. at 977–78.
62. Brand X Internet Servs. v. FCC, 345 F.3d 1120, 1132 (9th Cir. 2003).
63. Nat'l Cable, 545 U.S. at 982–83.
subsequent, *Chevron*-eligible interpretation unless the lower court had adopted a construction that it held the statute unambiguously required.\textsuperscript{64} If the court merely adopted what it viewed as the “best” interpretation of an ambiguous provision, the agency’s construction trumps the court’s.\textsuperscript{65}

As Justice Scalia pointed out, *National Cable* creates considerable uncertainty about the status of judicial opinions in administrative law, because many of those opinions (especially those issued before *National Cable*) might not specify whether the court found the statute to be unambiguous.\textsuperscript{66} Beyond that, Justice Scalia argued that the majority in *National Cable* was adopting a constitutionally dubious strategy (subjecting federal judicial decisions to reversal by executive branch officials) to ameliorate the problem of ossification it had created in *Mead*.\textsuperscript{67} The Court denied that there was any constitutional problem with its solution, but admitted that it was trying to avoid the ossification of federal administrative statutes that would result if agencies were barred “from revising unwise judicial constructions of ambiguous statutes.”\textsuperscript{68}

What is one to make of the ongoing *Chevron* story, viewed through the lens of legal uncertainty? Although *Mead* reduced *Chevron*’s domain, the *Chevron* doctrine (with its inherent uncertainty about agency reconstruction of regulatory statutes) still stands as a central feature of administrative law. Having bought into *Chevron*’s premise that statutory ambiguities should be regarded as implicit delegations of lawmaking authority to the administering agencies, the Court now simply ignores *Chevron*’s uncertainty costs. Worse yet, it treats them as a remedy for the supposed evils of ossification.

Perhaps the Court’s thinking is that federal regulatory policy will be improved if expert, politically accountable agencies rather than courts wield the authority to construe or, more accurately, construct the meaning of ambiguous provisions in the statutes they administer.\textsuperscript{69} But the Court has never made a case for that debatable proposition, let alone explained why a judgment of this sort should trump the likely meaning of the APA. Beyond that, there is reason for concern that the Court’s judgment may be colored by concern for its own pri-

\textsuperscript{64} Id. at 985.
\textsuperscript{65} See id.
\textsuperscript{66} Id. at 1018 (Scalia, J., dissenting).
\textsuperscript{67} Id. at 1015–16.
\textsuperscript{68} Id. at 983 (majority opinion).
macy. The pre-*Chevron* regime gave considerably more power to the
courts of appeals—particularly the D.C. Circuit—to determine the
meaning of ambiguous regulatory statutes. *Chevron*’s rhetoric is that
of a power-abnegating judiciary,\(^7\) but in reality, it was primarily the
interpretive power of the federal courts of appeals that the *Chevron*
Court ceded to administrative agencies. Moreover, as Justice Scalia
has observed, *Chevron* made it easier for the Supreme Court, in the
face of the ever-expanding administrative state, to oversee courts of
appeals’ review of agency statutory interpretations.\(^7\) What is good
for the Supreme Court, however, is not necessarily good for the
country.

From the standpoint of minimizing legal uncertainty, the better
course would be to scrap *Chevron* in favor of an across-the-board rule
that statutory ambiguities should be resolved by federal courts, with
due regard to whatever persuasive considerations (including expert-
tise) may support the agency’s interpretation.\(^7\) Although *Chevron*
has had its ups and downs, no Justice has shown any inclination to
move administrative law in that direction. Perhaps more surprisingly,
while there is plenty of academic criticism of *Chevron*, the legal insta-
Bility it engenders has drawn few complaints.\(^7\) The innumerable indi-
viduals, organizations, and firms whose interests turn on the
construction of federal regulatory statutes may see *Chevron* differ-
ently. For these parties, interpretive battles won are much harder to
translate into stable, permanent victories. And even apart from win-
ners and losers, the risk of sweeping changes in administrative law is
bound to complicate planning and invite rent-seeking behavior.

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70. See id. at 866 ("When a challenge to an agency construction of a statutory provision, fairly
conceptualized, really centers on the wisdom of the agency’s policy, rather than whether it is a
reasonable choice within a gap left open by Congress, the challenge must fail. In such a case,
federal judges—who have no constituency—have a duty to respect legitimate policy choices
made by those who do.").

71. See Scalia, *supra* note 55, at 517 (suggesting that “the sheer volume of modern dockets
made it less and less possible for the Supreme Court to police diverse application of [the] ineffa-
ble [pre-*Chevron*] rule”).

72. For a proposal along these lines, see Jack M. Beermann, *End the Failed Chevron Experi-
ment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L.
REV. 779, 786 (2010).

73. Even Jack Beermann, who calls for *Chevron* to be overruled, suggests that “flexibility may
be a virtue of *Chevron.*” *Id.* at 809. Of course, one could acknowledge that *Chevron* creates
widespread instability in federal law, but argue that *Chevron* should be retained because it en-
hances the ability of agencies to revise policy judgments in light of new facts or values. See Eric
(2007).
IV. The Supreme Court's Discretionary Certiorari Docket and the Mail Fraud Cases

Thanks to the discretionary writ of certiorari and its success in persuading Congress practically to abolish its statutorily prescribed mandatory jurisdiction, the Court has had almost complete control over its docket for decades. Under the Court-made "Rule of Four," the Court grants certiorari in any case in which four Justices vote to do so.74 But on what criteria are the Justices supposed to base their votes? Supreme Court Rule 10, entitled Considerations Governing Review on Certiorari, states that "a writ of certiorari is not a matter of right, but of judicial discretion," which "will be granted only for compelling reasons."75 The Rule describes "the character of the reasons the Court considers," but simultaneously warns that its description does not control the Court's discretion.76 To simplify somewhat, Rule 10 indicates that the Court is likely to grant certiorari only if (1) a case presents an important question of federal law, and (2) either (a) lower appellate courts have reached conflicting decisions on that question; (b) the question is one that should be settled by the Court; or (c) a lower appellate court has answered the question in a manner that conflicts with the Court's relevant decisions.77

As Rule 10 would lead one to predict, the Court's docket is dominated by important questions of federal law. But which ones? The Court wades into some lower-court conflicts, but allows others to percolate, sometimes indefinitely. And overt disregard of the Court's decisions by the lower courts is rare. So the key practical question is, which important issues of federal law will the Court decide to consider? Rule 10 in effect "defined certworthiness tautologically; that is, that which makes a case important enough to be certworthy is a case that we consider to be important enough to be certworthy."78 Nor do the Court's cases supply a clearer answer: on occasion, the opinion of the Court will tersely indicate why the Court granted certiorari, but these conclusory statements provide no guidance for the future.79 The upshot, as Edward Hartnett has written, is that "there is (virtually) no

74. See Hartnett, supra note 21, at 1647.
76. Id.
77. Id.
79. See Hartnett, supra note 21, at 1723 (citing Gerhard Casper & Richard Posner, The Workload of the Supreme Court 20 (1976)).
law governing the Supreme Court’s exercise of power to set its own agenda, and the Court has steadfastly refused to establish any.\textsuperscript{80}

In the absence of any law to apply, one must turn to the Court’s actions—that is, its decisions to grant or deny certiorari—to get a sense for how the Justices set their agenda. Entire books have been written on this subject,\textsuperscript{81} and I make no pretense to a systematic treatment of it. Instead, I have chosen to focus on the Court’s cases construing the widely used federal mail fraud statute because they exemplify the Court’s often puzzling use (or non-use) of its power selectively to intervene via the writ of certiorari.

The federal mail fraud statute (§ 1341),\textsuperscript{82} provides in relevant part,

\begin{quote}
Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, [uses the mails or causes them to be used,] shall be fined . . . or imprisoned not more than 20 years . . . .
\end{quote}

In the 1970s, federal prosecutors began bringing mail fraud prosecutions that went beyond the traditional understanding of fraud as limited to schemes to defraud the victim of money or property. Their efforts met with almost complete success. Prior to the Supreme Court’s 1987 decision in \textit{McNally v. United States},\textsuperscript{83} every court of appeals had concluded that “schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.”\textsuperscript{84}

The defendants in \textit{McNally} fared no better, and their case broke no new legal ground. The defendants, a former public official and a private individual, were in a position to control the selection of an insurance broker to provide workers’ compensation insurance to the Commonwealth of Kentucky.\textsuperscript{85} The defendants concocted a scheme whereby a portion of the insurance commissions Kentucky paid to the insurance broker would be diverted to insurance agencies they controlled.\textsuperscript{86} The government made no attempt to prove that the defendants’ conduct had deprived Kentucky of money or property by

\begin{footnotes}
\textsuperscript{80} \textit{Id.} at 1648.
\textsuperscript{81} \textit{See id.} at 1646 n.11 (listing sources).
\textsuperscript{84} \textit{Id.} at 358. For citations to the courts of appeals decisions, see \textit{id.} at 362–64 nn.1–4 (Stevens, J., dissenting).
\textsuperscript{85} \textit{Id.} at 352–53 (majority opinion).
\textsuperscript{86} \textit{Id.}
\end{footnotes}
increasing the insurance commissions or in any other way.\textsuperscript{87} Instead, the defendants were convicted on the by-then familiar theory that their kickback scheme had defrauded the people of Kentucky of their intangible right “to have the Commonwealth’s affairs conducted honestly.”\textsuperscript{88}

Under these circumstances, there was little reason to expect that the Supreme Court would grant certiorari in \textit{McNally}. The Court had repeatedly denied certiorari in “intangible rights” mail fraud cases, and although there were significant differences among the circuits in their understanding of the mail fraud statute,\textsuperscript{89} those differences were not at issue in \textit{McNally}. Yet the Court not only granted certiorari, it also dealt the Justice Department a stinging defeat. In a terse opinion invoking the rule of lenity,\textsuperscript{90} the Court rejected the lower court consensus:

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.\textsuperscript{91}

Justice Stevens (joined in part by Justice O’Connor) dissented, arguing that the Court had no basis for overturning “the settled, sensible construction that the federal courts have consistently endorsed.”\textsuperscript{92} He rejected the application of the rule of lenity, reasoning that “the series of Court of Appeals’ opinions applying this very statute to schemes to defraud a State and its citizens of their intangible right to honest and faithful government, notwithstanding the absence of evidence of tangible loss, removed any relevant ambiguity in this statute.”\textsuperscript{93}

In hindsight, \textit{McNally} seems to have been a case in which the Court granted certiorari because a group of Justices suspected that the lower federal courts had acquiesced in a power grab by federal prosecutors. After briefing and argument, that view prevailed, and the Court decided to restore the mail fraud statute to what the majority saw as its

\textsuperscript{87} Id. at 360.
\textsuperscript{88} Id. at 352.
\textsuperscript{89} See Skilling v. United States, 130 S. Ct. 2896, 2929 (2010) (noting that there was “considerable disarray” in the pre-\textit{McNally} case law over what—besides bribes and kickbacks—the intangible-rights theory included).
\textsuperscript{90} See \textit{McNally}, 483 U.S. at 359–60 (“The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language.”).
\textsuperscript{91} Id. at 360.
\textsuperscript{92} Id. at 368 (Stevens, J., dissenting).
\textsuperscript{93} Id. at 375.
original and more limited scope.\textsuperscript{94} Despite the absence of a conflict, the Court's decision to intervene was certainly defensible in light of the statute's importance to federal prosecutors and the magnitude of the error that the Court believed the lower courts had made. If anything, one might wonder why the Court waited so long: there had been a lower-court consensus in favor of the honest services theory since 1982 at the latest.\textsuperscript{95}

Congress, however, took a dim view of the Court's narrow interpretation of the mail fraud statute. In 1988, one year after \textit{McNally}, Congress enacted 28 U.S.C. § 1346, which provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services" for purposes of the mail and wire fraud statutes.\textsuperscript{96} Although § 1346 obviously nullified \textit{McNally}'s holding that federal mail fraud is "limited in scope to the protection of property rights,"\textsuperscript{97} there was wide disagreement about what Congress put in its place. Congress made no attempt to define "the intangible right of honest services," and that phrase was not a term of art in the pre-\textit{McNally} appellate decisions. As a result, the courts of appeals have struggled to determine what is included in "the intangible right of honest services," with widely divergent results.\textsuperscript{98}

Having seen for themselves in \textit{McNally} how much latitude the lower courts were willing to give creative federal prosecutors in mail fraud cases, the Justices might have been expected to grant certiorari in the first § 1346 case that came their way. Instead, for twenty years, the Supreme Court turned a blind eye to the confusion and uncertainty in the lower courts concerning the meaning of § 1346's "intangible right of honest services." Then, early in 2009, Justice Scalia dissented from the denial of certiorari in an honest services mail fraud case.\textsuperscript{99} He argued that despite the best efforts of the lower federal courts to find some limiting principle for the "honest services theory," Congress had failed to "define what 'the intangible right of honest services' is, whence it derives, and how it is violated."\textsuperscript{100} As a result, Justice Scalia suggested, § 1346 may violate due process, because "[i]t

\textsuperscript{94} See id. at 359–60 (majority opinion).
\textsuperscript{95} Skilling v. United States, 130 S. Ct. 2896, 2936 (2010).
\textsuperscript{97} McNally, 483 U.S. at 360.
\textsuperscript{98} Skilling, 130 S. Ct. at 2928 n.36.
\textsuperscript{100} Id. at 1310.
is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.”

A few months after Justice Scalia’s protest, the Court granted certiorari in two § 1346 cases (Weyhrauch v. United States102 and Black v. United States103) and added a third (Skilling v. United States) in October 2009.104 In each case, the Court granted certiorari on a specific question that had generated conflict in the lower courts.105 But the petition in Skilling also explicitly posed the broader question whether § 1346 “is unconstitutionally vague” if not limited to conduct motivated by “private gain,” and it was this question that proved decisive.106 By a six–three majority, in an opinion by Justice Ginsburg, the Court construed § 1346’s “intangible right of honest services” as intended to include bribes and kickbacks.107 As so construed, the Court held, § 1346 was not unconstitutionally vague.108 But the Court also acknowledged that a broader reading such as that urged by the government would raise a serious vagueness question.109 Accordingly, invoking the familiar constitutional avoidance canon, the Court held that the honest services statute should be construed to include only bribes and kickbacks.110 In light of that holding, the Court concluded that Skilling had not committed honest services mail fraud and remanded for the Fifth Circuit Court of Appeals to conduct a harmless error analysis.111

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101. Id.
105. In Weyhrauch, the question was whether § 1346, as applied to a public official, requires the government to prove that the defendant violated a disclosure duty imposed by state law in order to convict on a non-disclosure theory. See 129 S. Ct. at 2863 (limiting the Court’s grant of certiorari to this question). In Black, it was whether § 1346 applies to the conduct of a private individual whose alleged scheme to defraud did not contemplate economic or other property harm to the private party to whom honest services were owed, See Petition for Writ of Certiorari, Black, 2009 WL 75563 (No. 08-876). And Skilling asked whether § 1346 requires the government to prove that the defendant’s conduct was intended to achieve “private gain” rather than to advance the employer’s interests. Petition for Writ of Certiorari, Skilling, 2009 WL 1339243 (No. 08-1394).
106. Petition for Writ of Certiorari, Skilling, 2009 WL 1339243 (No. 08-1394).
108. Id. at 2933.
109. Id. at 2931.
110. Id.
111. Id. at 2934. The Court also concluded that the jury instructions concerning honest services mail fraud in Black were erroneous, and remanded for harmless error review by the court of appeals. 130 S. Ct. at 2970. As to Weyhrauch, the Court simply vacated the judgment and remanded to the court of appeals for reconsideration in light of the holding in Skilling. Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam).
In concurrence, Justice Scalia (joined by Justices Kennedy and Thomas) argued that “the intangible right of honest services” is unconstitutionally vague.112 The Court’s construction of § 1346, he claimed, was “not interpretation but invention” in contravention of the settled doctrine that federal courts may not define new federal crimes.113 The majority replied that it is equally well-settled that “the Court does not legislate, but instead respects the legislature, by preserving a statute through a limiting interpretation.”114

To resolve this disagreement, it would be necessary for the Justices to agree on criteria for determining when an interpretation of a statute strays so far from its text that “construction” becomes “invention.” But in Gary Lawson’s words, “as embarrassing as it may seem, our [federal] legal system has no single governing theory of statutory interpretation,”115 let alone a test for the boundary line between interpretation and legislation. Rather than wade into these deep waters, both the majority and the dissenters in Skilling were content to hurl settled (and question-begging) axioms at each other. The attendant legal uncertainty—how will the Supreme Court construe this statutory language, and at what point will the Court decline to adopt an otherwise sensible meaning because it constitutes legislation rather than interpretation?—is so pervasive in our legal culture that we take it for granted. The uncertainty costs of the Justices’ inability to get their interpretive house in order, however, will not go away simply because we have gotten used to them.

Putting aside the dispute over interpretation-versus-invention, it is hard to find fault with the Court’s construction of § 1346. The majority ducked an important and difficult question posed by Justice Scalia: who owes a fiduciary duty to provide “honest services” under § 1346?116 But even Justice Scalia did not contest the Court’s assertion that “our construction of § 1346 ‘establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress’s goal of “overruling” McNally.’”117

112. See Skilling, 130 S. Ct. at 2940 (Scalia, J., concurring).
113. Id. at 2939.
114. Id. at 2931 n.44 (majority opinion).
115. Lawson, supra note 46, at 507.
117. Id. at 2933 (majority opinion) (alterations in original) (quoting Brief for Albert W. Alschuler as Amicus Curiae, Weyhrauch v. United States, 129 S. Ct. 2863 (2009) (No. 08-1196)). In addition to summarizing the virtues of its interpretation of § 1346, the Court was acknowledging (by quoting) Professor Alschuler, whose amicus brief in Weyhrauch presented a powerful argument for the very construction the Court adopted. See id.
Nevertheless, the question remains: was it really necessary for the Court to wait twenty years to determine the meaning of the intangible right to honest services?\footnote{118} As Justice Ginsburg pointed out,  

Both before \textit{McNally} and after § 1346's enactment, Courts of Appeals described schemes involving bribes or kickbacks as "core ... honest services fraud precedents," "paradigm case[s]," "[t]he most obvious form of honest services fraud," "core misconduct covered by the statute," "most [of the] honest services cases," "typical," "clear-cut," and "uniformly . . . covered . . . ."\footnote{119} 

The pre-\textit{McNally} case law "core" from which to fashion the sensible, relatively bright-line construction that the Court chose in \textit{Skilling} was already in existence when § 1346 was adopted. To be sure, as Justice Scalia pointed out, no court of appeals had adopted \textit{Skilling}'s bribery-and-kickbacks-only construction of § 1346.\footnote{120} But as \textit{McNally} attests, the Court was just as capable in 1988 as it is today of going where no court of appeals has gone before.\footnote{121} Indeed, given that § 1346 plainly meant to resurrect the honest services theory as it had developed in the pre-\textit{McNally} courts of appeals decisions, there was less reason than usual with a new statute for the Court to give the courts of appeals first crack at delimiting the ambit of § 1346. And in any event, if that was the Court's reason for waiting, it could easily have intervened much earlier by granting certiorari in one of the many cases in which courts of appeals gave elaborate consideration to the § 1346 conundrum.\footnote{122} 

There were costs to waiting. Although bribe and kickback cases apparently continued to constitute the bulk of honest services mail fraud prosecution even after § 1346 was enacted, many defendants were charged with—and some pleaded guilty to or were convicted on—broader non-disclosure or self-dealing theories between 1988 and

\footnote{118. During those twenty years, the Court did decide one other mail fraud case. In \textit{Cleveland v. United States}, 531 U.S. 12 (2000), a unanimous Court resolved a circuit split by holding that § 1341 requires the object of the fraud to be property in the victim's hands.} \footnote{119. \textit{Skilling}, 130 S. Ct. at 2931 (alterations in original) (citations omitted).} \footnote{120. \textit{Id.} at 2939 (Scalia, J., concurring). Judge Easterbrook's opinion for the Seventh Circuit Court of Appeals in \textit{United States v. Thompson}, 484 F.3d 877, 883–84 (7th Cir. 2007) arguably comes close, but later Seventh Circuit cases did not adopt his suggestions.} \footnote{121. Similarly, although no court of appeals had ruled that § 1346 was unconstitutionally vague, see \textit{Skilling}, 130 S. Ct. at 2928 & n.38, the three concurring Justices thought it vague, see \textit{id.} at 2940 (Scalia, J., concurring) and the Court's grant of certiorari presumably stemmed from concerns about vagueness.} \footnote{122. \textit{E.g.}, United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc), \textit{cert. denied}, 543 U.S. 809 (2004); United States v. Brumley, 116 F.3d 728 (5th Cir. 1997) (en banc), \textit{cert. denied}, 522 U.S. 1028 (1997).}
Those who pleaded guilty or were convicted for engaging in conduct that Skilling subsequently established was not unlawful under § 1346 should be able to bring collateral attacks on “miscarriage of justice” grounds under 28 U.S.C. § 2255. But of course the prospective remedy of having their sentences vacated cannot restore to these defendants the years they lost in prison. More generally, federal prosecutors invested enormous effort in developing and litigating these now-invalidated theories nationwide. The result was great and protracted uncertainty about the potential mail fraud liability of any public official or corporate fiduciary who engaged in unethical conduct or breached a fiduciary duty. Uncertainty about potential criminal liability, of course, imposes significant risk-bearing costs on risk-averse individuals.

In short, a decent respect for the costs of ongoing uncertainty about the scope of § 1346 should have led the Court to take a case like Skilling years ago. One can only speculate as to the countervailing considerations that carried the day for two decades. Perhaps the Justices were not anxious to revisit an area in which they had provoked a sharp response from Congress. Or perhaps they simply felt they had too many bigger constitutional fish to fry. Whatever the reasons, the Court has not revealed them—but nothing that comes to mind seems remotely sufficient.

V. THE PUNITIVE DAMAGES CASES: HERE TODAY, GONE TOMORROW?

My final example illustrates both the weakening of stare decisis and the unsettling proliferation of I-adhere-to-my-views positions on the Court. It is an example, moreover, that directly concerns legal uncertainty in the civil justice system—the primary focus of this Clifford Symposium. I refer to the Court’s ongoing project of fashioning procedural and (more controversially) substantive due process limits on common law punitive damage awards. The Court’s decision to intervene using constitutional law in the common law process of awarding punitive damages was prompted in large part by the perception that


124. See United States v. Shaid, 916 F.2d 984, 992 n.10 (5th Cir. 1990) (noting that after McNally, “the courts have granted collateral relief to those defendants whose mail fraud convictions were based on an intangible rights theory and whose conduct occurred prior to the statutory change [i.e., § 1346]”).

some punitive awards are arbitrary and unpredictable.126 Ironically, however, the Court’s creation of substantive due process limits on “excessive” awards has generated an unstable and uncertain line of cases whose very future is now in doubt.

The saga begins in 1989 with the Court’s decision in Browning-Ferris v. Kelco Disposal,127 holding that the Excessive Fines Clause128 does not apply to a punitive damage award. The Court declined to address the question whether the Due Process Clause constrains the traditional common law practice of allowing juries to determine the amount of punitive damage awards, subject only to judicial reasonableness review. Justice O’Connor, joined by Justice Stevens, argued that punitive damage awards had enough penal attributes that they should be treated as “fines” to which the Excessive Fines Clause applies.129 Beyond that, they (along with Justices Brennan and Marshall) signaled their willingness to impose some substantive due process limits in an appropriate case.130

Two years later, in Pacific Mutual Life Insurance Co. v. Haslip,131 the Court reached the due process issue but arrived at no clear-cut resolution. Justice Blackmun’s majority opinion held that the common law method of determining punitive damages was neither per se constitutional nor per se unconstitutional.132 What was the due process standard for identifying those “extreme results that jar one’s constitutional sensibilities”?133 The best the Court could come up with was the exquisitely vague formulation that “general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.”134 Applying that standard, the Court held the punitive damage award in Haslip constitutional.135

Next, in 1993 the Court struggled to apply Haslip’s mushy “reasonableness” approach in TXO Production Corp. v. Alliance Resources

128. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed . . . .”).
129. See Browning-Ferris, 492 U.S. at 297–98 (O’Connor, J., concurring in part and dissenting in part).
130. See id. at 280–81 (Brennan, J., concurring); id. at 283 (O’Connor, J., concurring in part and dissenting in part).
132. Id. at 17–18.
133. Id. at 18.
134. Id.
135. Id. at 23–24.
Justice Stevens's plurality opinion explicitly distinguished between the defendant's substantive due process claim that the verdict was unconstitutionally excessive and its various procedural due process challenges. Even when it came to procedural due process limits, the Court was far from unanimous. But the divisions were deeper (and even closer) on the substantive “excessive verdict” issues. Four Justices in TXO thought that the West Virginia jury's award of $19,000 compensatory and $10 million punitive damages in a slander of title action was not so “grossly excessive” as to violate due process; three Justices thought it was unconstitutional because it was based on arbitrary grounds (including animosity towards an out-of-state corporate defendant). Two others (Justices Scalia and Thomas) argued that the award should be upheld because there is no “substantive due process’ right that punitive damages be reasonable.”

One might have thought that TXO raised a warning flag for any Justice interested in joining a stable coalition to impose substantive due process constraints on punitive damages. Barring a change of mind on the part of Justice Scalia or Justice Thomas, only seven Justices believed there were any substantive due process limits. Moreover, there was a three-way split among those seven as to the proper standard for determining the excessiveness of an award. Indeed, under the rule that a fragmented Court's holding is to be determined “by those Members who concurred in the judgments on the narrowest grounds,” it was unclear which substantive due process approach qualified as the holding. In short, after TXO, the chances did not seem good that five Justices could permanently agree on a particular standard for substantive due process review.

The proponents of stricter substantive due process scrutiny were undeterred by these indicia of instability. Defendants and their liability insurers finally achieved their long-sought substantive due process

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137. Justice O'Connor, joined by Justice White and Justice Souter, argued in dissent that TXO was deprived of procedural due process because it did not receive “constitutionally adequate postverdict review” by the state courts. Id. at 496 (O'Connor, J., dissenting).
138. Id. at 468-69 (Kennedy, J., concurring in the judgment); id. at 470-71 (Scalia, J., concurring in the judgment); id. at 473 (O'Connor, J., dissenting).
139. Id. at 470 (Scalia, J., concurring in the judgment); see id. at 459-62 (plurality opinion).
140. See id. at 458 (plurality opinion) (explaining the plurality’s approach); id. at 466-67 (Kennedy, J., concurring in the judgment) (outlining his own approach to determining whether an award is excessive); id. at 489 (O'Connor, J., dissenting) (rejecting the plurality’s approach to determining whether an award is excessive).
breakthrough in 1996 in *BMW v. Gore.* A five-Justice majority (Justice Stevens, joined by Justices O’Connor, Kennedy, Souter, and Breyer) struck down an Alabama punitive damage award as so grossly excessive that it violated due process. The Court looked primarily to three factors to determine excessiveness: (1) the degree of reprehensibility attributable to the defendant’s conduct; (2) the ratio of punitive to compensatory damages; and (3) a comparison of the punitive award to criminal penalties or fines for the same conduct. Justices Scalia and Thomas continued to dissent on anti-substantive due process grounds. Indeed, they indicated that they regarded stare decisis as inapplicable, because the “constitutional doctrine adopted by the Court [was] not only mistaken but also insusceptible of principled application.” The other two dissenters, Justice Ginsburg and Chief Justice Rehnquist, dissented on prudential grounds. They argued that the Court had now committed itself to correcting mere “misapplication[s] of a properly stated rule of law,” contrary to Supreme Court Rule 10’s indication that certiorari will “rarely” be granted in such situations, and they further argued that the Court was ill-equipped for this project because it had “only a vague concept of substantive due process” to guide it.

With the 2003 decision in *State Farm Mutual Automobile Insurance v. Campbell,* the campaign to police punitive damage awards reached what may have been its high-water mark. Applying the *Gore* factors, the Court, in an opinion by Justice Kennedy, struck down a Utah verdict of $1 million in compensatory damages and $145 million in punitives against State Farm for bad faith failure to defend its insured. The Court announced new due process rules of thumb to guide the state courts: normally, more than a single-digit ratio is excessive, and if the compensatory award was substantial, a 1:1 ratio may be as great as due process permits. Last but not least, the addition of Chief Justice Rehnquist (presumably for reasons of stare decisis) ex-

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143. An Alabama jury had awarded $4,000 in compensatory damages and $4 million in punitive damages for fraudulent repainting by BMW of a car it sold as new to plaintiff Gore. *Id.* at 565–66. The Alabama Supreme Court reduced the punitive award to $2 million. *Id.* at 567.
144. *Id.* at 575–85.
145. *Id.* at 598–99 (Scalia, J., dissenting).
146. *Id.* at 599.
147. *Id.* at 612 (Ginsburg, J., dissenting) (quoting Supr. Cr. R. 10).
148. *Id.* at 612–13.
150. *Id.* at 415–16.
151. See *id.* at 425.
panded the due-process-with-teeth majority from five Justices to six.\textsuperscript{152}

In 2007, that majority shrank back to five Justices in \textit{Philip Morris v. Williams},\textsuperscript{153} even as the Court’s due process rules for punitive damage awards continued to become more exacting. In the context of a claim by a smoker’s estate for negligence and deceit,\textsuperscript{154} the Court held that it is a taking without due process of law for the jury to base a punitive damage award on harm to third parties—even if that harm occurs in state and is similar to the harm to the plaintiff.\textsuperscript{155} A jury, the Court ruled, may constitutionally consider harm to third parties for purposes of assessing the defendant’s culpability, but not for purposes of punishing the defendant “directly.”\textsuperscript{156} Without reaching the question whether the $79.5 million punitive damage award was constitutionally excessive, the Court remanded to the Oregon court so it could apply the Court’s holding to that award.\textsuperscript{157}

Let us take a closer look at the changes in the Court’s composition and voting preferences between \textit{State Farm} and \textit{Philip Morris}. The six-Justice majority in \textit{State Farm} shrank to five in \textit{Philip Morris} because, although Chief Justice Roberts and Justice Alito voted as their predecessors (Chief Justice Rehnquist and Justice O’Connor) presumably would have, Justice Stevens—while continuing to endorse \textit{Gore} and \textit{State Farm}—rejected the new due process ban on punishment for injuries to nonparties.\textsuperscript{158} On the other hand, in \textit{Philip Morris}, only Justice Thomas reiterated root-and-branch opposition to the “excessive verdict” cases.\textsuperscript{159} Justice Scalia joined Justice Ginsburg’s narrow dissent, which merely argued that the court below had faithfully applied the Court’s punitive damage precedents and had not authorized the jury to punish the defendant for injuries to nonparties.\textsuperscript{160}

Does this mean that Justice Scalia is reconsidering his non-acquiescence in the substantive due process excessiveness doctrine? Not necessarily. Justice Breyer’s opinion for the Court in \textit{Philip Morris} was careful to assert that its holding forbidding the use of punitive damages to punish nonparties was grounded exclusively in \textit{procedural} due

\textsuperscript{152} See id. at 411 (listing Justices joining in the opinion of the Court).
\textsuperscript{153} Philip Morris USA v. Williams, 549 U.S. 346, 348 (2007).
\textsuperscript{154} See id. at 349–50.
\textsuperscript{155} See id. at 353–54.
\textsuperscript{156} Id. at 355.
\textsuperscript{157} Id. at 357–58.
\textsuperscript{158} See id. at 358 (Stevens, J., dissenting).
\textsuperscript{159} See id. at 361 (Thomas, J., dissenting).
\textsuperscript{160} See id. at 362 (Ginsburg, J., dissenting).
process. In dissent, Justice Stevens pointedly claimed that the majority had announced a "new rule of substantive law." Justice Thomas used stronger language: "It matters not that the Court styles today's holding as 'procedural' because the 'procedural' rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages." By joining only Justice Ginsburg's opinion, Justice Scalia stayed on the sidelines in this skirmish. But that provides no assurance that he will recede from his non-acquiescence.

Since Philip Morris was decided, Justice Sotomayor has replaced Justice Souter, and Justice Kagan has replaced Justice Stevens. Only two of the six Justices who constituted the majority in State Farm (Justices Kennedy and Breyer) are still on the Court. Assuming that Chief Justice Roberts and Justice Alito prove to be reliable supporters of limiting punitive damages—as their votes to date suggest—the coalition still contains only four Justices. Unless Justice Scalia decides to acquiesce in the Gore–State Farm line, that coalition will need to enlist the support of Justice Sotomayor or Justice Kagan.

To the best of my knowledge, both new Justices are unknown quantities on these issues. It seems extremely unlikely that either Justice Sotomayor or Justice Kagan will object to the punitive damage limits on global anti-substantive due process grounds. Moreover, even if unpersuaded as an original matter, one or both of the new Justices might go along with those limits on stare decisis grounds. Alternatively, Justice Sotomayor and Justice Kagan might join forces with Justice Ginsburg and subscribe to a much more modest and limited form of substantive due process review—essentially returning to the nebulous reasonableness test the Court used in Haslip and TXO.

I have saved for last the Court's most recent brush with punitive damage awards: its admiralty decision in Exxon Shipping v. Baker. Justice Souter's opinion for the Court, adopting a 1:1 ratio of punitive to compensatory damages in admiralty cases, was based on federal common law. Consequently, we can draw no conclusions from it regarding the status of the substantive due process limits on excessive verdicts. There was, however, one straw in the wind. Justice Scalia, joined by Justice Thomas, filed a brief concurrence: "I join the opinion of the Court, including the portions that refer to constitutional limits

161. See id. at 353 (majority opinion).
162. Id. at 361 (Stevens, J., dissenting).
163. Id. at 361 (Thomas, J., dissenting).
165. Id. at 2626, 2633.
that prior opinions have imposed upon punitive damages. While I agree with the argumentation based upon those prior holdings, I continue to believe the holdings were in error."^{166}

Does this cryptic statement mean that Justices Scalia and Thomas no longer believe that the Court's substantive due process, excessive-damages jurisprudence is "insusceptible of principled application?"^{167} Perhaps: to "agree" with "argumentation" based on "prior holdings"^{168} would seem to presuppose that those holdings can be applied in a principled manner. Or perhaps not: if Justices Scalia and Thomas were committed to accepting the substantive due process limits as binding, why not just say so? Or perhaps it does not matter: the non-acquiescence vel non of Justices Scalia and Thomas could turn out to be irrelevant, if Justice Sotomayor or Justice Kagan proves to be a strong adherent of stare decisis in constitutional cases. And on that head-counting, head-scratching note, I conclude this brief look at the Court's substantive due process ban on excessive punitive damage awards—a venture that has consumed a significant chunk of the Court's attention over the past twenty years and that now appears completely up for grabs.

V. CONCLUSION

The Constitution vests the federal judicial power in the Supreme Court (and such lower courts as Congress creates), and that grant includes the awesome authority to declare acts of the federal and state governments unconstitutional.^{169} But the Constitution empowers Congress to determine by statute to what extent the Justices themselves have the freedom to decide whether and when to exercise the power of judicial review. Since the aptly-named Judges Bill of 1925, Congress has conferred almost absolute discretion on the Justices to set their own priorities.^{170} The examples I have presented in this Article suggest that reducing legal uncertainty is—undeservedly—nowhere near the top of their list. In my view, that is one more reason to give serious consideration to reforms along the lines that Lerner and Lund propose,^{171} in the hope that the Justices can be induced to behave more like members of a self-effacing, craftsman-like, and certainty-fostering court of law.

166. Id. at 2634 (Scalia, J., concurring).
168. Id.
169. See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
170. See Hartnett, supra note at 21, at 1644.
171. See Lerner & Lund, supra note 11, at 1259–61.