**Oregon Law Review**
Summer, 2001 – Volume 80, Number 2
Cite as 80 Or. L. Rev. 447 (2001)

# THE LOGIC OF LEGAL CONFLICT: THE PERPLEXING COMBINATION OF FORMALISM AND ANTI-FORMALISM IN ADJUDICATION OF CONFLICTING LEGAL NORMS

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***448** How does the legal system mediate conflicts between legal norms [FN1] demanding mutually exclusive outcomes? [FN2] How, ***449** in other words, do courts adjudicate cases where one legal norm requires or allows X, while another legal norm prohibits X? A rule-based legal system must incorporate a mechanism for answering this question, for without such a mechanism a legal system cannot rationally determine what the law demands. It is surprising, therefore, that legal scholars have yet to provide a general descriptive theory accounting for the way courts adjudicate such conflicts. This article seeks to remedy that gap in our understanding.

As an initial example of a case in which legal norms demand mutually exclusive outcomes, consider a variation on

H.L.A. Hart's "no vehicles in the park" hypothetical. [FN3] Imagine that the legislative body passes a statute prohibiting vehicles, including bicycles, from entering the park. Later, the legislature passes a second statute authorizing bicycle races in the park every Sunday. Because the second statute allows what the first statute prohibits, passage of this second statute gives rise to a situation where two legal norms stand in a posture of mutually exclusive conflict.

What governs adjudication of such conflicts? As this Article explains, a pair of remarkably rigid, organically emerging, unambiguous, uncomplicated, and universally applicable axioms, coupled with an equally rigid hierarchic ordering of legal categories and subcategories, provide clear and incontestable answers in almost all cases where courts find that legal norms stand in a posture of mutually exclusive conflict. The axioms and ordering of legal categories are globally applicable in that they govern adjudication of mutually exclusive conflict between legal norms regardless of varying context or circumstance. In other words, the axioms and ordering govern regardless of whether the conflict lies between, for example, a statute and a constitutional norm, a constitutional text and constitutional decisional authorities, or a statute and a common law rule.

Identification, description, and modeling of the ordering and ***450** axioms represents a central thrust of the Article. [FN4] The aim is not to report the rules courts cite, or the rationales courts set forth in opinions. The Article instead seeks to identify, evidence, and model the barest set of principles--the axioms and ordering--which account for, explain, and predict the outcomes of cases in which courts have determined that legal norms stand in a posture of mutually exclusive conflict. Sections I and II of the Article explain, illustrate, and model the axioms and ordering.

Identification of the profound influences the axioms and ordering work on legal practice and the form of legal argumentation represents the second main goal of the Article. Careful identification and description of the axioms and ordering will allow us to see unconventional and counterintuitive ideas and connections that might otherwise remain obscured. Touching on their universal applicability, for example, we will see that the ordering and axioms, rather than the purported special status of constitutional rights, best account for Bill of Rights norms trumping Congress's irreconcilably conflicting enumerated Article I, Section 8, legislative powers. In other words, the phenomenon of Bill of Rights norms always nullifying irreconcilably conflicting exercises of Congress's legislative powers constitutes a pedestrian application of the axioms and ordering discussed and modeled herein, rather than an application of some supposed special constitutional law context-specific hierarchic priority of Bill of Rights norms over conflicting Article I, Section 8, norms. To provide a concrete example, the Free Speech Clause of the First Amendment would trump Congress's Commerce Clause based power to pass a statute prohibiting the interstate transport and sale of printed material critical of government policies, not because the First Amendment enjoys some special hierarchic status over and above other constitutional norms, but merely as a result of a straightforward application of one of the two axioms and the ordering identified herein. This unique conceptualization of Bill of Rights versus Article I, Section 8, conflicts becomes apparent only after distilling the bare or essential elements governing ***451** cases in which courts have determined that legal norms demand mutually exclusive outcomes.

The clarity gained by careful descriptive distillation also exposes a perplexing close juxtaposition of extreme formalism with extreme anti- formalism. Briefly, adjudication of cases in which norms possibly stand in a posture of mutually exclusive conflict involves two distinct components or phases. First, as a threshold matter, by interpreting the meaning of legal norms either broadly or narrowly, a court determines whether or not the norms are, in fact, in conflict. Next, once a court has interpreted the norms, and finds them in conflict, it must resolve the conflict. Flexible anti-formalism characterizes the first phase, while a surprisingly extreme and rigid formalism characterizes the second phase. When dealing with the threshold norm interpretation issue, courts enjoy comparatively boundless discretion. Because extant norm interpretation rules fail to constrain, and legal language is often open-textured, in any given case a court may freely adopt an expansive or a narrow norm interpretation. Broad norm interpretation results in finding norms to stand in a posture of conflict, while narrow norm interpretation can avoid the conflict. Moving to the second phase, once a court has found a norm pair to be in a posture of mutually exclusive conflict, the rigidly formalistic ordering and axioms come to bear. Because the axioms and ordering are exceedingly inflexible, they leave courts no room for discretionary maneuvering. Once a court has determined that two legal norms stand in a posture of conflict, the court can do little more that mechanistically apply the ordering and axioms to arrive at unavoidable and indisputable results. So rigidly formalistic are the axioms and ordering that the second phase resembles a perfunctory, ministerial act, with ultimate substantive outcomes all but prepackaged in the finding that a norm pair either does or does not stand in a posture of mutually exclusive conflict.

While examples of formalism and anti-formalism can easily be identified throughout the legal system, the close juxtaposition of such antagonistic features here is unique and hard to rationalize. Combining dramatically opposed elements into a single process of adjudicating cases in which legal norms may conflict allows courts to use the anti-formalist first phase to subvert and avoid the constraining purpose of the second rigidly formalistic phase. Knowing that the extreme formalistic rigidity of the conflict resolution ***452** phase offers no room for discretionary maneuvering, courts employ the discretion afforded by the extreme anti-formalism of norm interpretation to interpret norms broadly or narrowly, thereby achieving the desired outcomes, regardless of the purportedly constraining effect of the rigid axioms and ordering. For example, when interpreting norms broadly would bring a norm pair into mutually exclusive conflict, and the rigid formalism of the twin axioms and ordering would resolve that conflict in an inescapable and substantively undesirable way, a court can freely use its broad interpretive discretion to narrowly interpret the norms, avoid the conflict, and thereby reach the opposite and more desirable outcome. A main function of rigidly formalistic rules such as the axioms and ordering identified herein is to tightly constrain courts. Yet the broad and flexible discretion afforded courts in the norm interpretation phase undermines any constraining effect that the rigid axioms and ordering could exercise on judges.

The combination of such extreme anti-formalism in the first phase with extreme formalism in the second phase raises a series of related questions: Can the close juxtaposition of diametrically opposed elements--unfettered anti-formalism and extremely rigid formalism--in the same adjudication process be rational? Why would a legal system insist on extreme rigid formality in the adjudication of cases where legal norms stand in a posture of irreconcilable conflict, while allowing courts ample interpretive discretion to find that any given norm pair does or does not stand in a posture of irreconcilable conflict? Stated more succinctly, if we are willing to afford courts sufficient discretion to subvert the ordering and axioms' rigid formalism at will, why adhere to the rigidly formal ordering and axioms in the first instance? Why bother with a constraining formalistic set of axioms and ordering in the norm conflict resolution phase, when courts can evade those constraints through flexible norm interpretation discretion in the norm interpretation phase? This is the central puzzle underlying a practice so closely combining extreme formalism and anti-formalism. [FN5]

***453** The coupling of the extreme rigid formalism of the axioms and ordering alongside the flexible anti-formalism of norm interpretation also explains two related phenomena. First, it explains why courts adjudicating cases in which norms possibly conflict focus almost exclusively on issues of norm interpretation, and almost never even refer to axioms and ordering. This is so because the formalistic rigidity of the axioms and ordering denies courts any room for discretionary maneuverability, and thereby channels legal discourse into the flexible and anti-formalist issue of norm interpretation. Whether, for example, a newly passed statute trumps a conflicting preexisting statute is never the key question in a case involving two possibly conflicting statutes. It is axiomatic and undisputable that a newly passed statute trumps a conflicting pre-existing statute. Realizing the inflexibility of this axiomatic rule, lawyers and courts focus their argumentative energies on the interpretive question, the only area where courts have enough discretion to shape substantive outcomes. Because the surface discourse in cases of conflicting legal norms focuses on the meaning of the norms in question, the impact of the axioms and ordering, which channel the discourse to focus on questions of norm interpretation, can be easy to overlook.

Relatedly, the rigid formalism of the axioms and ordering helps explain why courts sometimes adopt strained norm interpretations. Consider a new statute and a substantively desirable preexisting statute which, if interpreted in the most obvious or natural way, would irreconcilably conflict with each other. According to the axioms and ordering discussed herein, a newly passed statute always and unconditionally trumps an irreconcilably conflicting preexisting statute. Thus, if a court adopts the most natural or obvious interpretation of each statutory norm, the new statute will nullify the substantively desirable preexisting statute. Because the axioms and ordering deny courts any room for discretionary maneuverability, however, a court seeking to preserve the substantively desirable preexisting statute must adopt unnatural, non-obvious, and strained narrow norm interpretations. Narrow interpretation avoids any conflict between the statutes and thereby avoids engagement of the rigid and unforgiving axioms and ordering. In short, faced with the prospect of undesirable substantive outcomes that would inescapably follow from application of the rigidly formalistic axioms and ordering, courts adopt strained norm interpretations in an effort to ***454** avoid application of the axioms and ordering. The formalistic, rigid axioms and ordering operate as a set of immovable obstacles around which courts must maneuver, and all but compel courts to adopt strained norm interpretations in an effort to achieve substantively desirable outcomes. That courts often exercise broad and relatively unfettered interpretive discretion to adopt strained norm interpretations is not news. Identification and careful description of the rigid axioms and ordering discussed herein, however, allows us to clearly see some of the reasons courts adopt

strained norm interpretations.

The principal aims of the Article are identification, explanation and modeling of the axioms and ordering, and a discussion of their impact on the form of legal discourse. The Article is organized as follows: Section I explicates the ordering of legal categories and twin axioms that govern adjudication of such cases. Numerous real and hypothetical cases are used to illustrate the central ideas. Section II synthesizes the ideas developed in Section I into a simple model which accounts for the outcomes of almost all cases in which legal norms are held to demand mutually exclusive outcomes. The model graphically represents the ordering and axioms governing adjudication of conflicts between legal norms demanding mutually exclusive outcomes and highlights the key issues in such cases. It also illustrates that the same key issues dominate such cases regardless of varying contexts or circumstances. Section III shifts from descriptively modeling the ordering and axioms to outlining their above-mentioned practical consequences. Section IV discusses in depth the above mentioned odd juxtaposition of formalism and anti-formalism, and offers several illustrative cases in which courts avoid or engage the rigid ordering and axioms by adopting strained norm interpretations. Finally, Section V concludes the Article by foreshadowing future normative work to be built on the foundations established herein.

## I

## Mediating Conflicts Between Legal Norms Demanding Mutually Exclusive Outcomes

This section sets forth the essential elements governing adjudication of cases in which courts determine that legal norms stand in a posture of irreconcilable conflict. As an initial matter, it is important to acknowledge that in many cases courts exercising ***455** their interpretive discretion attribute broad or narrow meaning to legal norms, thereby determining whether legal norms stand in a posture of irreconcilable conflict. Broad interpretation will bring two legal norms into conflict, while narrow interpretation will avoid any conflict. The Article will discuss in greater detail the role of courts in determining whether legal norms stand in a posture of irreconcilable conflict in Section III below. In this section, however, I am concerned primarily with the principles which govern adjudication of cases once courts have determined that norms in fact do stand in a posture of irreconcilable or mutually exclusive conflict. I begin by briefly summarizing the key concepts.

The practice of adjudicating conflicts between legal norms demanding mutually exclusive outcomes boils down to a simple system centering on (1) categorical differences between different kinds of legal norms; (2) a hierarchic ordering in which those different kinds of legal norms are arranged; (3) the practice of always preferencing norms belonging to superordinate legal categories over irreconcilably conflicting norms belonging to subordinate legal categories; and (4) the practice of always preferencing newer norms over older irreconcilably conflicting norms belonging to the same legal category.

First consider the hierarchic ordering of legal categories. At the most basic level the legal system recognizes constitutional, statutory, administrative and common law norms as different in kind, or in other words as composing what I will call four separate "legal categories." Further, the legal system treats these four legal categories as comprising a stratified hierarchy. Constitutional norms occupy the highest strata, while statutory, administrative, and common law norms each occupy, in descending order, the remaining strata.

Within three of these four layers lie pairs of what I will call "legal subcategories," also arranged in a stratified, hierarchic manner. Within the category "constitutional norms," for example, the legal system treats "constitutional textual norms" and "constitutional doctrinal norms" as comprising two distinct legal subcategories. Likewise, within the category "statutory norms," lawyers and judges treat statutory texts as different in kind from the doctrinal case law precedents which interpret statutory texts.

This stratified, hierarchic ordering of legal categories and subcategories works to mediate conflicts between legal norms demanding ***456** mutually exclusive outcomes through a system of axiomatic trumps. As a first axiomatic meta-principle, legal norms belonging to a legal category or subcategory occupying a high position in the ordering trump conflicting norms belonging to a legal category of inferior position. Thus, for example, constitutional norms trump conflicting statutory norms, and statutory norms trump conflicting administrative norms. Likewise, norms belonging to the subcategory "constitutional textual norms" trump conflicting norms belonging to the subcategory

"constitutional doctrinal norms." In short, the membership of a legal norm in a given legal category or subcategory is a key factor in determining which of two conflicting legal norms we will privilege and which we will subordinate.

The chronologic order of norm creation is a second key factor in mediating conflicts between legal norms demanding mutually exclusive outcomes. As an axiomatic meta-principle, whenever two conflicting legal norms belong to the same legal category and subcategory the more recently created norm will trump the conflicting preexisting norm. Thus, for example, a constitutional amendment, or in other words a newly created constitutional textual norm, trumps or amends a conflicting preexisting constitutional text. Likewise, a newly articulated common law doctrinal norm trumps and replaces its older conflicting common law doctrinal norm predecessor.

Parts A-C below expand on this descriptive sketch. Part A defines what I mean by situations where norms demand mutually exclusive outcomes, or what I call "true legal conflict." Part B describes the ordering of legal categories, as well as the two axioms, which govern adjudication of true legal conflict. Part C discusses what I call legal subcategories, and describes how the axioms mentioned in Part B apply to true legal conflict between norms belonging to the same or to different legal subcategories. Part C also discusses the fact that we do not recognize or employ any categoric distinctions between different kinds of legal subcategories. Thus, for example, we treat all constitutional textual norms as similar in kind when mediating conflicts between them. To give a specific example, contrary to the conventional wisdom, Bill of Rights constitutional textual norms do not occupy a higher position in the ordering of constitutional norms than any other kind of constitutional textual norms.

The descriptive account that emerges from Parts A-C will not ***457** be of the dense, context-rich variety. Instead, I seek to ferret out the principles governing adjudication of cases in which a court has determined that legal norms stand in a posture of mutually exclusive conflict. I therefore will not provide an exhaustive narration of cases exemplifying that practice, but rather will distill from real and hypothetical exemplar cases the bare elements of that practice.

## A. Defining Legal Conflict

Before attempting to fill in the details of the above descriptive sketch, let me first clarify what I mean by situations where legal norms could or do demand mutually exclusive outcomes, or what I will call "true legal conflict." Legal norms demand mutually exclusive outcomes, or in other words stand in a posture of true legal conflict, when one legal norm requires or allows what another prohibits, or conversely prohibits what another requires or allows. We can use a "but for" analysis to identify such cases. In all instances of true legal conflict, but for the presence of one legal norm, that which a second legal norm requires, allows, or prohibits would unquestionably be required, allowed, or prohibited. Given the presence of that first legal norm, however, that which the second legal norms requires, allows, or prohibits, might not be allowed, required or prohibited. In short, in all cases where legal norms demand mutually exclusive outcomes, the presence of a first legal norm at the very least raises a question as to whether the law will ultimately require, allow, or prohibit that which a second legal norm purports to require, allow, or prohibit.

Consider the following hypothetical legal conflict: Legal norm A allows or requires X. Legal norm B, however, could plausibly be interpreted to prohibit X (or require not-X). But for the presence of norm B, norm A would be given full effect, and the law would allow or require X. Conversely, but for the existence of norm A, norm B would be given full effect, and the law would prohibit X (or require not-X). Given the simultaneous existence of both legal norms, however, a question arises as to whether the law ultimately requires, allows, or prohibits X, or in other words, whether the law will privilege norm A over norm B, or vice versa.

### 1. True Legal Conflict

Let me sharpen my definition of legal conflict by specifying the ***458** distinction between "true legal conflict" and what I will call "potential legal conflict." The distinction I draw between true and potential legal conflict is important because the Article focuses more on the former than the latter. Attention to the distinction now will avoid confusion in later sections of the Article.

The key distinction between true and potential legal conflict centers on the interpreted meanings attributed to the

legal norms in question. Where two legal norms, as interpreted, demand mutually exclusive outcomes, we have an instance of true legal conflict. When, in contrast, two legal norms would demand mutually exclusive outcomes if one or both norms were interpreted broadly, but in fact do not demand mutually exclusive outcomes because one or both norms are given narrow interpretations, we have an instance of potential legal conflict.

Thus, a true conflict between legal norms is present when one norm, as interpreted, requires or permits what another norm prohibits, or vice versa. In such cases, enforcement of one norm necessarily means the non-enforcement, or even the nullification, of another. The two norms in question, in other words, demand mutually exclusive outcomes. Return to the hypothetical case in which legal norm A requires or permits X, while legal norm B could plausibly be interpreted to prohibit X (or require not-X). Were norm B so interpreted, norm B would stand in a posture of true legal conflict with norm A. [FN6]

For a more contextualized example of true legal conflict, return to the earlier-mentioned variation on H.L.A. Hart's "no vehicles in the park" hypothetical. [FN7] Imagine that the legislature passes a statute prohibiting vehicles, including bicycles, from entering ***459** into the park. Further imagine that the legislature later passes a statute authorizing bicycle races in the park every Sunday. Here we have a true conflict between two statutory norms. The first statute prohibits bicycles, while the second permits them, at least on Sundays. But for the presence of the first statute, the second would unquestionably define what the law ultimately requires, and vice versa. Given the existence of both statutes, however, a question arises as to which legal norm shall be privileged and which subordinated.

How would a court resolve such a conflict? The second statute would work a partial implied repeal of the first statute. [FN8] Vehicles, including bicycles, would still be prohibited in the park, except that bicycles would be allowed for racing on Sundays. In short, the permissive norm, allowing bicycles on Sundays for racing, would be privileged over the prohibitory norm, generally prohibiting bicycles. [FN9] At bottom, however, the following key element ***460** makes the conflict a true legal conflict: It would be impossible to simultaneously enforce and apply both statutory norms to their fullest reach, and one legal norm must be privileged, at least partially, over another. More concretely, the two norms demand mutually exclusive states--both the prohibition and allowance of bicycles in the park on Sundays.

In the above example, a court would privilege the permissive norm over the prohibitory norm. In other cases, however, true legal conflict leads to the opposite result. Consider, for example, a hypothetical true legal conflict between two constitutional norms, the Commerce Clause doctrinal demarcation of congressional legislative power to regulate interstate commerce, and the Fourth Amendment doctrinal protection against unreasonable searches and seizures. Commerce Clause doctrinal norms permit Congress to legislate over any area affecting interstate commerce. [FN10] Fourth Amendment doctrinal norms, in contrast, prohibit legislation authorizing or requiring certain kinds of searches and seizures. [FN11] Assume that Congress were to pass a statute allowing ***461** U.S. marshals to arbitrarily and randomly stop and search individual vehicles traveling on interstate highways for the purpose of curbing the interstate trade of illegal narcotics. Though Commerce Clause doctrine certainly permits Congress to create such a statutory norm (because vehicles traveling on interstate highways affect interstate commerce), [FN12] the statute would clearly violate current Fourth Amendment doctrine (because the searches would be arbitrary and random). [FN13] But for the presence of the prohibitory legal norm--here Fourth Amendment doctrine--the permissive norm-- here Commerce Clause doctrine--would be fully enforceable. Stated differently, were it not for the prohibitions of Fourth Amendment doctrine, the statute would be constitutional because under prevailing Commerce Clause doctrine such a statute falls within Congress's legislative powers. [FN14] Given the presence of Fourth Amendment doctrine, however, ***462** a court would no doubt hold the hypothetical statute unconstitutional. [FN15] As such, the hypothetical presents an instance of true legal conflict between Commerce Clause and Fourth Amendment doctrinal norms.

It is important to note that a court would hold the statute unconstitutional not because it lies beyond Congress's Commerce Clause powers, but because it violates Fourth Amendment doctrine. Thus, Fourth Amendment doctrine would work to suppress Congress's practical ability to exercise the full extent of its legislative powers under Commerce Clause doctrine. Though suppressed, the full range of Congress's legislative powers under Commerce Clause doctrinal norms would remain formally intact. Fourth Amendment doctrinal prohibitions, in other words, would in no way alter the contours of Commerce Clause doctrine, but rather would truncate Congress's capacity to utilize the full reach of its Commerce Clause legislative powers. The effect is to create a zone of congressional

powers that, although formally enduring, stand dormant and unuseable. [FN16] It is this overlapping of ***463** normative requirements, prohibitions, or allowances that makes the conflict between Fourth Amendment and Commerce Clause doctrine a true legal conflict.

2. Potential Legal Conflict

Often, however, a court can use its interpretive discretion to transform what would qualify as true legal conflict into what I will label "potential conflict" between legal norms. Recall the key distinction between a true and potential legal conflict. In the ***464** former case two legal norms, as interpreted, require, allow or prohibit mutually exclusive outcomes. Both norms, as interpreted, cannot simultaneously be enforced or applied to their fullest extent, and therefore we must privilege one norm over another. In the latter case, in contrast, by interpreting one or both norms narrowly, a court avoids finding that the norms in question demand mutually exclusive outcomes. More specifically, where two norms, as interpreted, do not present mutually exclusive requirements, allowances, or prohibitions, but could present mutually exclusive requirements, allowances, or prohibitions were they interpreted more broadly, we have a case of potential rather than true legal conflict. In such cases, the two potentially conflicting legal norms, as narrowly interpreted, may be applied to their fullest reach without the need to privilege one over another.

As an illustration, return again to the 'no vehicles in the park' hypothetical used above. If we assume that the prohibitory statute defines vehicles to include bicycles, then passage of the permissive statute allowing bicycles in the park for Sunday races necessarily gives rise to a true legal conflict. Under such circumstances the two norms in question would demand mutually exclusive outcomes, and we would be forced to privilege, at least partially, one norm over another. If we assume, however, that the prohibitory statute does not define vehicles as including bicycles, a court interpreting that statute could avoid true legal conflict by reading the statutory prohibitions on vehicles in the park as not encompassing bicycles. A court, in other words, could hold that bicycles are not "vehicles," at least within the meaning of the statute. [FN17] A court following this strategy could enforce and apply both statutory norms, as narrowly interpreted, to their fullest reach, thus avoiding the issue of which norm to privilege and which to subordinate. Vehicles, which do not include bicycles, would still always and unconditionally be prohibited from the park, and bicycles would always and unconditionally be allowed in the park on Sundays for racing.

We find numerous instances of potential legal conflict in legal practice. Consider, for example, Morton v. Mancari. [FN18] Morton dealt with the Indian Reorganization Act of 1934, [FN19] and the ***465** Equal Employment Opportunity Act of 1972. [FN20] The former statute requires that Native Americans be afforded preference over non-Native Americans for certain jobs in the Bureau of Indian Affairs. [FN21] The latter statute prohibits, inter alia, race discrimination in federal government employment. [FN22] A statute prohibiting race discrimination in government hiring would seem irreconcilable with a statute requiring preferences favoring Native Americans for certain government jobs. [FN23] Nonetheless, by interpreting the Equal Employment Opportunity Act of 1972 more narrowly than its text would seem to allow, in Morton the Supreme Court held that the two statutes do not demand mutually exclusive outcomes. [FN24] The Court achieved its narrow interpretation of the Equal Employment Opportunity Act of 1972 by focusing on non-textual indicia of legislative intent, and concluded that in passing the Equal Employment Opportunity Act of 1972 Congress did not intend to disturb the preferences required by the Indian Reorganization ***466** Act of 1934. [FN25]

To provide a second example, we find potential legal conflict between statutes that regulate certain categories of utterances based on their content and First Amendment doctrine generally prohibiting content-based speech regulations. Consider the statute prohibiting utterances constituting threats of violence against the President of the United States. [FN26] Because the statute specifically aims to penalize speech based upon its content, it appears to stand in a posture of true conflict with First Amendment doctrinal norms prohibiting content-based speech regulations. [FN27] Yet the Supreme Court avoids such a true legal conflict by carving out a limited set of categorical exceptions to the general First Amendment doctrinal prohibition on content- based speech regulations, [FN28] including an exception for the statute penalizing threats of violence against the President. [FN29] Given the categorical exceptions, ***467** First Amendment doctrinal norm protections do not overlap with the statutory penalty prohibition on utterances threatening violence against the President.

Contrast the potential legal conflict presented by First Amendment doctrinal protections and the statutory prohibition on utterances threatening violence against the President with the true conflict between Fourth Amendment and Commerce Clause doctrines discussed in Subpart 1 above. In the former case, due to the limited reach courts have given First Amendment doctrine, First Amendment doctrinal protections and statutory prohibitions on utterances threatening violence against the President can coexist without one encroaching upon the other. In the latter case, however, because Commerce Clause and Fourth Amendment doctrine, as constructed by the courts, both enjoy sweeping scope, rather than coexisting, the two doctrinal areas partially overlap. Commerce Clause doctrine, in other words, permits Congress to create some legislation which Fourth Amendment doctrine renders unenforceable. [FN30]

3. Interpretive Discretion in Determining True and Potential Legal Conflict

As the examples in the previous part illustrate, whether norms stand in a posture of true or potential legal conflict often turns on an exercise of judicial interpretive discretion. [FN31] More specifically, ***468** courts may find a given pair of norms in a posture of either true or potential conflict by choosing a broad or narrow interpretation of one or both of those norms. Returning to Morton v. Mancari, the Supreme Court avoided a true legal conflict by narrowly interpreting the Equal Employment Opportunity Act of 1972. [FN32] The lower court, however, reached the opposite conclusion by reading that statute broadly. [FN33] Moreover, Morton is not a case where the Supreme Court or the lower court erroneously construed the Equal Employment Opportunity Act of 1972. To the contrary, given the flexible principles of statutory interpretation, both the Supreme Court's narrow reading, as well as the lower court's broad reading, constitute highly plausible interpretations of the statute. [FN34] The Supreme Court's finding that the ***469** two statutes stood in a posture of potential conflict, therefore, resulted more from the Court's interpretive discretion than from any compatibility immanent in the meanings of those norms.

This element of judicial discretion might tempt one to qualify the distinction between true and potential legal conflict that I have drawn as a distinction without a difference. In other words, one might infer that instances of what I have labeled potential legal conflict represent not so much avoidance of true legal conflict via narrow norm interpretation, but rather resolution of true legal conflict via narrow norm interpretation. Indeed, in at least some cases the true legal conflict that would result from broad norm interpretation, along with attendant substantive consequences, probably motivates courts to adopt narrow norm interpretations that avoid true legal conflict. [FN35]

The reality of courts purposefully interpreting norms narrowly in order to avoid true legal conflict, however, stands wholly apart from the conceptual distinction between true and potential legal conflict that I highlight. At most, that reality means that courts, rather than the meanings immanent in legal norms alone, play a significant role in determining whether particular cases involve true or potential legal conflict. Stated differently, we cannot always know a priori whether norms stand in a posture of true or potential legal conflict. Only after a court has interpreted the ***470** norms in question, and found them either irreconcilable or reconcilable, can we say that those norms stand in a posture of true or potential legal conflict. [FN36] The fact that courts play a significant role in determining whether norms stand in a posture of true or potential legal conflict, however, does not mean that true and potential legal conflict are conceptually indistinguishable. More specifically, it does not mean that a court which interprets norms narrowly in order to avoid true legal conflict has "resolved" an instance where norms demand mutually exclusive outcomes. Quite to the contrary, a court engaging in such a strategy quite bluntly finds that the norms in question demand mutually satisfiable outcomes. [FN37] As such, a court engaging in this strategy avoids, rather than resolves, true legal conflict.

If anything, that courts use narrow norm interpretation to avoid true legal conflict buttresses the claim that true and potential legal conflict are conceptually distinct. Were true and potential legal conflict conceptually indistinguishable, there would be ***471** no reason for courts to purposefully read norms more narrowly than they otherwise might. In an effort to avoid finding norms in a posture of true legal conflict, however, courts often resort to strained norm interpretations. [FN38] Such purposeful avoidance of true legal conflict signals that courts view true and potential legal conflict as conceptually distinct.

The different substantive outcomes which follow from finding norms in true versus potential legal conflict also flags the conceptual distinction between the two. Were true and potential legal conflict alike, we would expect the legal system to treat them the same. The system, however, treats them differently. When a court finds two norms

standing in a posture of potential legal conflict, both norms survive and may be applied to their fullest reach. When a court finds those same two norms standing in a posture of true legal conflict, in contrast, both norms cannot be applied to their fullest reach, and one norm must be privileged over another.

Further, courts implicitly recognize the conceptual distinction between true and potential legal conflict by adjudicating them with different analytic processes. Courts adjudicate cases they find to be instances of potential legal conflict with what amounts to a one-step process. They employ interpretive rules, presumptions, canons, and principles to determine that the legal norms in question do not require, allow, or prohibit mutually exclusive outcomes. [FN39] In contrast, when courts adjudicate cases of true legal conflict, they employ a two-step process. First, a court must ***473** employ its interpretive discretion to find that the legal norms in question in fact do demand mutually exclusive outcomes. Next, a court must determine which of the two conflicting norms will be privileged. I will explain the axiomatic principles governing the second step in Part B below. [FN40] For now, however, it suffices to note that adjudication of instances of true legal conflict requires a two-step process, that courts adjudicate instances of true and potential legal conflict differently, and that this differential treatment signals that the courts at least implicitly recognize the conceptual distinction between true and potential legal conflict that I advance.

In short, then, the reality of courts playing a role in determining whether norms stand in a posture of true or potential legal conflict, and the possibility of courts purposefully interpreting norms narrowly in an effort to avoid true legal conflict, do nothing to break down the distinction between true and potential legal conflict that I highlight. As I will explain in Section III, however, the principles governing adjudication of true legal conflicts have profound consequences for whether or not courts find norms to stand in a posture of true or potential legal conflict. [FN41] As a brief preface, the rigidly formalistic nature of those axioms forces lawyers and judges to focus, not on the issue of resolution of true legal conflict, but rather on the prior issue of whether norms stand in a posture of true or potential legal conflict. In addition, the nature of the axioms often forces courts to resort to strained, narrow norm interpretation in an effort to avoid true legal conflict and attendant substantive consequences. [FN42] I turn my attention to those axioms in the next Part.

***474** B. Chronologic and Legal Categoric Mediation of True Legal Conflict

Having explicated the distinction between true and potential legal conflict, I now turn to the principles governing the adjudication of almost all instances of true legal conflict, regardless of contextual or circumstantial variants. In briefest terms, an ordering of legal categories, along with a pair of formalistic axioms, accounts for the outcomes of almost all cases presenting true legal conflict. As the discussion below will make clear, whether two truly conflicting legal norms belong to the same or different legal categories determines which of two axiomatic rules will govern the conflict. The concepts of "legal category" and "membership" in a legal category, therefore, are of central importance. The precise meaning of those concepts will become evident as the Article progresses. To begin the discussion, however, it will suffice to recall that we recognize four principal legal categories--constitutional, statutory, administrative, and common law norms. In all instances of true legal conflict between legal norms belonging to the same legal category, chronologic order of norm creation mediates the conflict. I call this the "chronologic axiom." [FN43] In all instances of true legal conflict between two legal norms that belong to different legal categories, the stratified, hierarchic ordering of legal categories mediates the conflict. I call this the "categoric axiom." Subparts 1 and 2 below explain the chronologic and categoric axioms.

As a warning, I do not claim that courts dealing with true legal conflict explicitly cite the chronologic and categoric axiom language that I will use. Nor do I claim that courts necessarily consciously employ the chronologic and/or categoric axioms that I highlight when mediating true legal conflicts. Instead, my claim ***475** is that regardless of vocabulary, and regardless of what courts may purport to do, the chronologic and categoric axioms that I highlight explain or account for outcomes in almost all instances of true legal conflict. The chronologic and categoric axioms are, in short, fundamental immutable background meta-norms embedded in, and reflected by, the practice of adjudicating cases presenting true legal conflict.

1. The Chronologic Axiom

First, consider the role of chronology. My claim is that the chronologic order of norm creation explains or

accounts for the result of almost all cases of true legal conflict where the truly conflicting legal norms are members of the same legal category. More directly, once a court has determined that two norms belonging to the same legal category stand in a posture of true legal conflict, as an axiomatic principle, the later-in-time-created norm always and unconditionally prevails over the earlier-in-time-created norm. [FN44] Further, the later-in-time-created norm prevails over the earlier-created truly conflicting norm because it was created later in time. Its status as the more recently created norm provides the key causal reason (but not necessarily the stated justification) for privileging it over a previously existing truly conflicting norm. Chronology, in short, does all the work in resolving true conflict between legal norms belonging to the same legal category.

Return to our abstract hypothetical. Again, imagine that statute A requires X, and that statute B prohibits X (or requires not-X). In such a situation, the order in which the two statutes came into being determines which statutory norm will be privileged, and which will be subordinated. If statute B were passed after statute A, then statute B would trump statute A, and the law would ultimately prohibit X (or require not-X). [FN45] The opposite ***476** would result if statute B came into being before statute A. [FN46] Or consider the following examples of chronologic order of norm creation resolving instances of true conflict between constitutional norms: The Sixteenth Amendment, removing constraints on direct federal income taxation, contradicts and supersedes the earlier in time ratified Article I, Section 9, Clause 4, prohibition on direct taxation. [FN47] Likewise, the Twenty-First Amendment, rescinding prohibition, repealed the Eighteenth Amendment, which had established prohibition. [FN48] In each example, a pair of constitutional norms belonging to the same legal category stand in a posture of true conflict, and in both examples, the later created norm prevails over the preexisting norm. The same principle applies at the administrative, and common law levels. [FN49] I ***477** refer to this phenomenon as the chronologic axiom.

Note the limited nature of my claim: chronologic order of norm creation alone fully resolves all cases of true legal conflict between legal norms that belong to the same legal category. I do not claim that courts use chronology to adjudicate cases of potential legal conflict. Recall that potential legal conflict involves narrow interpretation to avoid situations where norms would otherwise demand mutually exclusive outcomes. In cases of potential legal conflict, norms, as narrowly interpreted, may be applied and enforced to their full extent without the need to privilege one over another. As such, the need to rely on the chronologic order of norm creation to resolve a conflict between norms demanding mutually exclusive outcomes never arises.

Nor do I claim that chronology plays any role in resolving true legal conflicts between legal norms that belong to different legal categories. Quite to the contrary, the chronologic order of norm creation is utterly irrelevant whenever truly conflicting norms belong to different legal categories. Consider a true legal conflict between a statute and an administrative regulation. If a statutory norm requires X, while the later created administrative norm prohibits X (or requires not-X), the statutory norm obviously prevails over the later-in-time-created administrative norm. Regardless of the chronologic order in which the norms are created, the norm belonging to the category "statutory norms" always and unconditionally trumps truly conflicting norms belonging to the category "administrative norms." [FN50] An earlier-in-time-created statutory norm, in other words, will always and unconditionally trump a later-in-time-created truly conflicting administrative norm.

As explained thus far, the chronologic axiom operates as a binary switch. The switch is turned on whenever two legal norms belonging to the same legal category stand in a posture of true legal conflict, but is turned off whenever the truly conflicting norms are members of different legal categories. The axiom simply restates in a generalized and context-independent form the last in time principle abundantly familiar to lawyers and judges. ***478** The principle is commonly employed in various particularized contexts. Thus, in the statutory context, newer statutes are said to repeal older irreconcilably conflicting statutes. [FN51] At the administrative level, new regulations supersede old irreconcilable regulations. [FN52] Similarly, in the constitutional context, new constitutional amendments nullify the effect of preexisting truly conflicting constitutional clauses, [FN53] while in the common law context new common law doctrinal rules replace old doctrinal rules. [FN54]

Once stated in this simplified, context-independent form, questions that might otherwise remain obscured spring forward: If the last in time principle governs true conflicts between legal norms belonging to the same legal category, why should it be utterly irrelevant to the adjudication of legal conflicts between norms belonging to different legal categories? Why, for example, is the chronologic order of norm creation definitive in mediating a true conflict between two statutes, but immaterial to adjudication of a conflict between a recently minted statutory

norm, and a long ago ratified constitutional norm? What could account for making chronology alone the decisive factor under one set of circumstances (conflicting norms belong to the same legal category), but a non-factor under a slightly different set of circumstances (conflicting norms belong to different legal categories)?

***479** 2. The Categoric Axiom

If the chronologic axiom governs adjudication of true legal conflict only when the norms in question belong to the same legal category, what governs adjudication of true legal conflict when the norms in question belong to different legal categories? In such cases, regardless of contextual variants, courts always and unconditionally preference norms belonging to a legal category of superordinate position in the ordering of legal categories over norms belonging to a legal category of subordinate position in that ordering. Return to the preceding hypothetical in which a statute requires X, while an agency regulation prohibits X. [FN55] In such a case, the former norm trumps the latter norm because (1) the former norm belongs to the category "statutory norms," (2) the latter legal norm belongs to the category "administrative norms," (3) the legal category "statutory norms" occupies a higher position in the ordering of legal categories than the legal category "administrative norms," and (4) as an axiomatic principle, norms belonging to legal categories of superordinate position in the ordering of legal categories always and unconditionally trump conflicting norms belonging to legal categories of subordinate position in that ordering.

In short, the norm requiring X prevails over the norm prohibiting X (or requiring not-X) only because it belongs to the legal category "statutory norms," and the legal category "statutory norms" occupies a higher position in the ordering of legal categories than the legal category "administrative norms." No appeal to the greater wisdom of requiring X, or to the folly of requiring not-X, is needed in order to justify the conclusion that the law ultimately requires X. The mere fact that one norm is categorized as a statute, and another conflicting norm is categorized as an administrative rule, coupled with the categoric axiom, fully accounts for the conclusion that in cases of true conflict the former always and unconditionally trumps the latter. While one can imagine bolstering the conclusion that a statutory requirement must prevail over a conflicting agency rule requirement by pointing out the greater wisdom of the statutory requirement, such bolstering is absolutely superfluous to that conclusion. [FN56]

***480** The same phenomenon repeats itself in cases of true conflict between constitutional and statutory, administrative, or common law norms. Where, for example, a constitutional norm prohibits X, and a statutory, administrative, or common law norm allows X, courts always and unconditionally privilege the constitutional norm over the statutory, administrative, or common law norm, and find that the law ultimately prohibits X. [FN57] Likewise, where a statutory or administrative norm stands in a posture of true conflict with a common law norm, courts always and unconditionally privilege the statutory norm or administrative norm over the common law norm. [FN58]

In sum, we observe not a hierarchy of legal norms, but rather a hierarchy of legal categories. It is membership in a given legal category, and the hierarchic position that legal category occupies in the ordering of legal categories, coupled with an axiomatic preferencing of norms belonging to superordinate legal categories over norms belonging to subordinate legal categories that governs adjudication of true legal conflicts between norms belonging to different legal categories.

The four principal legal categories do not overlap, but instead are separated from each other by inviolable lines of demarcation. A given legal norm belongs to one and only one of the four principle legal categories. Because the hierarchy is stratified rather than a smooth continuum, the categoric axiom means that resolution of true conflict between norms belonging to different legal categories requires only a very simple analysis operating at a very high level of generality. One only needs to know the category ***481** memberships of the truly conflicting norms in order to know which will be privileged and which will be subordinated.

No lawyer or judge would question that, as a matter of positive law, constitutional norms trump truly conflicting statutory norms, or that statutory norms trump truly conflicting administrative and common law norms. As with the chronologic axiom, however, the categoric axiom restates these context-dependent principles in a generalized, simplified and context-independent manner--norms belonging to superordinate legal categories always and unconditionally trump norms belonging to subordinate legal categories.

Again, boiling down several similar rules operating in different contexts to a single, simple axiomatic principle leads to a series of questions that might otherwise go unasked: What justifies or accounts for dividing up legal norms into a four-part typology? Why not a two-, three-, or six-part typology? Why, in short, are the lines of demarcation between categories drawn along certain axes and not along others? Why does legal practice treat the four-part typology as arranged in a particular inelastic, hierarchic ordering, as opposed to some other possible ordering, or a malleable continuum? Most importantly, what justifies always and unconditionally privileging norms classified into the upper echelon categories of the ordering over norms assigned to lower echelon categories? Why not in the alternative employ, for example, a rebuttable presumption favoring norms classified into the upper echelon categories over norms assigned to lower echelon categories?

C. Legal Subcategories

The discussion in Section I.B highlighted the four principle legal categories--constitutional, statutory, administrative, and common law norms--as well as the chronologic and categoric axioms which mediate true legal conflicts. The short version of the story thus far runs as follows: by signaling whether two truly conflicting norms belong to the same or different legal categories, the extant ordering of legal categories determines which of two axiomatic norms will govern almost any instance of true legal conflict. If the truly conflicting norms belong to the same legal category, the chronologic axiom dictates that the more recently created norm will always and unconditionally trump the preexisting norm. If, in contrast, the truly conflicting norms belong to ***482** different legal categories, the categoric axiom dictates that the norm belonging to the superordinate legal category always and unconditionally trumps the norm belonging to the subordinate legal category. The particular hierarchic architecture of the extant ordering of legal categories in turn defines which legal categories occupy superordinate positions and which legal categories occupy subordinate positions.

The story, however, gets a bit more complicated, for in order to fully explain the outcomes of cases of true legal conflict, we must add a second layer to the ordering of legal categories. My claim is the following: when adjudicating cases in which a court has determined that legal norms stand in a posture of true legal conflict, the legal system operates as though parallel sets of what I will call "second order legal subcategories" lie nested within three of the four principal legal categories. The demarcations between these second order legal subcategories correspond to the distinction between textually inscribed norms (the inscribed words of constitutional clauses, statutes, and administrative regulations published in the Code of Federal Regulations) and judicial decisional authorities which interpret textually inscribed norms. [FN59] As with the four principal legal categories, or what I will hereinafter refer to as "first order legal categories," second order legal subcategories are arranged into a stratified hierarchic ordering. Textual norms of any given kind are superior to doctrinal norms of that same kind.

Thus, for example, within the first order legal category "constitutional norms" the legal system recognizes at least two categorically distinct types of norms: constitutional textual norms, [FN60] or the actual inscribed clauses found in constitutions, and constitutional doctrinal norms, or judicially developed bodies of law that interpret those textual clauses. [FN61] Further, the second order subcategory "***483** constitutional textual norms" occupies a higher position in the ordering of legal categories than the second order subcategory "constitutional doctrinal norms." Similar sub-categoric divisions exist between textual and doctrinal norms at the statutory and administrative levels. [FN62]

The categoric axiom discussed in the previous part works to resolve true legal conflicts between legal norms that belong to different second order legal subcategories in the same way that it resolves true conflicts between legal norms belonging to different first order legal categories. Where, for example, a constitutional textual norm stands in a posture of true conflict with a constitutional doctrinal norm, the constitutional textual norm always and unconditionally trumps the constitutional doctrinal norm. More to the point, the norm belonging to the second order legal subcategory "constitutional textual norms" trumps the norm belonging to the second order legal category "constitutional doctrinal norms" for one and only one reason: the former legal subcategory occupies a higher position in the ordering of legal subcategories than the latter.

We can express the categoric axiom's application to true conflicts between legal norms belonging to textual versus doctrinal second order legal subcategories as a positive requirement: doctrinal norms must be reconcilable with at least one plausible meaning of the textual norms they interpret. In other words, where a given textual norm admits

to a certain range of plausible meanings, an interpretation of that textual norm which carries the weight of precedent must at least fall within that range of meanings. Alternatively, we can state it as a prohibition: doctrinal norms may not stand in a posture of true legal conflict with all of the meanings plausibly attributable to the textual norms they interpret. Stated differently, where a given textual norm admits to a certain range of plausible meanings, an interpretation of that textual norm which carries the weight of precedent may not fall outside of that range of meanings.

The chronologic axiom also applies to true conflicts between norms belonging to the same second order legal subcategory in the same way that it applies to true conflicts between norms belonging to the same first order legal categories. When faced with ***484** two truly conflicting statutory textual norms, for example, the more recently created statute always and unconditionally trumps or repeals the pre-existing statute. The new statutory textual norm trumps the pre-existing truly conflicting statutory textual norms by virtue of its status as the more recently created norm. Similarly, a newly promulgated administrative regulation replaces any pre-existing truly conflicting administrative regulations solely because the former is of more recent vintage than the latter.

Subpart 1 below delves more deeply into the distinction between textual and doctrinal norms that I highlight. Subparts a, b, and c offer exemplar cases illustrating and evidencing the chronologic and categoric axioms' roles in mediating true legal conflict between constitutional, statutory, and administrative norms.

1. The Case for a Distinction Between Textual Versus Doctrinal Norms

In this Subpart, I will pre-emptively address some possible objections to the distinction between textual and doctrinal norms that I highlight. Recall that the clauses of the Constitution, statutes in the United States Code, and administrative regulations published in the Code of Federal Regulations, are classified as textual norms, and that judicial decisional authorities which interpret textual norms count as doctrinal norms. Adherents of both the radical deconstructionist and absolute formalist jurisprudential models (to the extent that any exist outside of extreme theoretical constructs useful for understanding more realistic deconstructionist and formalist approaches) would deny the possibility of more than one kind of legal norm. As a result, the radical deconstructionist and the absolute formalist also would have to deny both the possibility of a categorical division between textual and doctrinal norms, and any role for the categoric axiom in mediating true legal conflicts between any two norms belonging to the same first order legal category.

At one extreme, the radical deconstructionist theorist would argue that we cannot categorically separate what I call textual legal norms (the norm being interpreted) from what I call doctrinal legal norms (the judicially chosen interpretation of the norm) because only the latter norms exist. [FN63] For the radical deconstructionist, ***485** what I label textual norms are not norms at all. An uninterpreted legal text cannot constitute a normative statement, or in other words, cannot demand compliance with its dictates, because its "dictates" are radically indeterminate. [FN64] Only after a court has chosen a particular construction of a legal text can we even begin to claim that we have a legal norm that can demand compliance with its dictates. [FN65] As such, for the radical deconstructionist, the only kinds of norms that could possibly exist are what I label doctrinal norms, or in other words, the interpretations of legal texts that judges choose.

At the other end of the spectrum, an absolute formalist approach would suggest that we cannot categorically separate what I call textual norms from what I call doctrinal norms because only the former constitutes a legal norm. For the absolute formalist, an interpretation of a legal norm constitutes nothing more than an application of the singular meaning inherent in that norm to a particular factual setting. [FN66] Norm interpretation is not norm creation, but rather the mechanical application of norms created by non- judicial institutions to varying factual scenarios. [FN67] From this perspective, a court interpreting what I call a textual norm merely applies rather than creates norms. Therefore, only what I call textual norms, but not what I call doctrinal norms, could constitute normative statements. In other words, for the absolute formalist, only textually inscribed norms, whether constitutional, statutory, administrative or common law in kind, constitute normative statements. More to the point, judicial applications of those textually inscribed norms reflect and follow, rather than constitute, normative statements.

Because both the radical deconstructionist and absolute formalist models (somewhat ironically) deny the possibility

of more than one kind of legal norm, and in turn must deny the possibility of a categoric distinction between what I call textual and doctrinal norms, both models are fatal to the thesis that the categoric axiom mediates true legal conflicts between textual and doctrinal legal norms. I will not here defend the claim that the categoric distinction between textual and doctrinal norms that I identify stands up as a matter of logic. It may or may not. Instead, I ***486** merely advance the following sociological point: by acting in ways that suggest a rejection of both the radical deconstructionist and absolute formalist models, judges behave as though they recognize that what I call textual norms differ in kind from what I call doctrinal norms.

First consider how judicial behavior signals a rejection of the radical deconstructionist model, and the idea that only judicial interpretations of what I call textual norms could possibly constitute normative statements. Judges often at least claim that the meaning inherent in a given norm curbs judicial discretion, and inhibits a court from constructing law in a particular fashion. Consider, for example, cases where courts claim that the meaning of a given norm compels one interpretation, while expressing a desire to interpret the norm in question in some different way. [FN68] Even simpler, consider cases where a court rejects the meaning of a norm suggested by a litigant as an impermissible reading of that norm. [FN69] In such cases courts invoke the notion that norms have immanent and therefore bounded (though perhaps not unique), rather than radically indeterminate, meanings.

Another side of judicial behavior, however, evidences a rejection of absolute formalism, and the idea that judicial interpretations of what I call textual norms do not themselves constitute legal norms. Despite concerns over institutional legitimacy, ***487** courts acknowledge that legal norms often admit to more than one plausible meaning. They do so explicitly in the rare cases where they openly admit to choosing one plausible meaning over another. [FN70] They also do so implicitly when they reverse an interpretation of a textual norm that has proved dysfunctional or otherwise problematic, but not beyond the bounds of plausible meaning, [FN71] as well as when they offer one construction in a majority opinion, and another in a dissenting opinion. [FN72] Such actions at least tacitly concede that norms admit to multiple plausible meanings, and that courts choose between plausible meanings when interpreting norms. More importantly, such actions represent a rejection of the absolute formalist idea that judicial norm interpretation involves no act of norm creation, and consists instead of the mere application of the singular meaning inherent in a given norm to varying factual scenarios.

In short, judicial behavior refutes the ideas that legal texts have either fully determinate (absolute formalism) or fully indeterminate (radical deconstructionism) meanings. Consequently, judicial behavior undermines the premise somewhat ironically unifying the two otherwise diametrically opposed models, the idea that only one kind of legal norm--textual for the absolute formalist, doctrinal for the radical deconstructionist--could exist. [FN73] To the contrary, judicial behavior implies that judges assume ***488** that what I call textual legal norms have an inherently bounded (though not unique) range of plausible meanings, and that judges interpreting legal norms choose between those plausible meanings. [FN74] Judicial behavior, in other words, acknowledges a distinction between two kinds of norms--the norms courts interpret, which have a range of plausible meanings, versus the chosen interpretations of those norms set forth in opinions of precedential authority. This is the distinction between textual and doctrinal norms that I highlight. The three subparts that follow illustrate the distinction between textual and doctrinal norms in the constitutional, statutory, and administrative contexts, and explain how the categoric and chronologic axioms mediate true legal conflicts between textual and doctrinal norms.

#### a. Constitutional Legal Subcategories

Consider first the distinction between the second order legal subcategories that I have labeled "constitutional textual norms" and "constitutional doctrinal norms." I begin with a discussion of the categoric axiom at work in cases of true legal conflict between norms belonging to these two subcategories. I claim that constitutional textual and doctrinal norms differ in kind, that constitutional textual norms are hierarchically superior to constitutional doctrinal norms, and that constitutional textual norms, therefore, always and unconditionally trump truly conflicting constitutional doctrinal norms.

We find evidence of the categoric axiom in dissenting opinions which accuse the majority of creating constitutional doctrinal norms irreconcilable with the meaning of constitutional textual norms. [FN75] Katz v. United States, [FN76] a Fourth Amendment search and seizure case, provides an interesting example of this phenomenon. ***490** The majority opinion in Katz creates Fourth Amendment doctrine prohibiting law enforcement agencies from

eavesdropping on telephone booths without a warrant. [FN77] Relying on a textualist interpretive approach, [FN78] Justice Black's dissent argues that the Fourth Amendment allows such activities because its prohibitory terms--"search" and "seizure"--cannot plausibly be stretched to encompass prohibition on what amounts to eavesdropping on phone booth telephone conversations. [FN79] Black's argument consists of a premise, an assertion, and a conclusion. ***491** First, the premise: constitutional textual norms trump truly conflicting constitutional doctrinal norms, or stated differently, constitutional doctrinal norms irreconcilable with the meaning of a constitutional textual norm are illegitimate. Next, the assertion: the doctrinal rule fashioned by the majority cannot be reconciled with the meaning of the Fourth Amendment. [FN80] Finally, the conclusion: the doctrinal rule fashioned by the majority, therefore, is illegitimate. The majority in Katz can hardly deny Black's categoric axiom initial premise, and therefore must focus its rebuttal on Black's assertion that its doctrinal rule cannot be reconciled with the meaning of the Fourth Amendment. Indeed, the majority reconciles the doctrinal rule it establishes with the meaning of the Fourth Amendment by arguing that earlier cases have already read the Fourth Amendment to have a broader meaning than the plain meaning of its words might suggest. [FN81]

Cases in which courts overrule standing constitutional doctrinal norms on the ground that the doctrinal rules are irreconcilable with the meaning of applicable constitutional textual norms are also evidence of the categoric axiom. As an example, consider the double jeopardy case of Burks v. United States. [FN82] In Burks, the Supreme Court reversed part of its then-extant double jeopardy doctrine because, in the Court's words, "our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands," and accordingly, "should no longer be followed." [FN83] In cases such as Burks, the Court, in ***492** effect corrects its prior doctrinal errors on the categoric axiom ground that the constitutional doctrinal norm it had earlier developed stands in a posture of true conflict with the meaning of a preexisting constitutional textual norm. [FN84]

Katz and Burks evidence the categoric axiom as a mediator of true legal conflict between constitutional textual and doctrinal norms. But could it really be true that the categoric axiom explains the outcomes of all cases of true legal conflict between constitutional textual and constitutional doctrinal norms? Is it really the case that constitutional textual norms always and unconditionally trump truly conflicting constitutional doctrinal norms? How absolute, in other words, is the categoric axiom? After all, it often appears that constitutional doctrine dominates constitutional text. When deciding constitutional cases, the Supreme Court habitually reasons from standing constitutional doctrine, with little or no reference to constitutional text. [FN85] Further, ***493** constitutional doctrine is often only loosely related to, and on occasion difficult to square with, constitutional text. [FN86] Constitutional doctrinal norms, in short, often appear to eclipse constitutional textual norms.

Though accurate, none of these observations weaken the thesis (1) that constitutional textual and doctrinal norms constitute separate juridic categories, (2) that the former occupies a higher position in the extant ordering of legal categories than the latter, and (3) that constitutional textual norms therefore always and unconditionally trump truly conflicting constitutional doctrinal norms. The Supreme Court's inclination to reason from constitutional doctrine rather than constitutional text does not evidence an inversion of the constitutional textual norm over constitutional doctrinal norm hierarchy. Instead, that phenomenon is an artifact of the brevity and open- textured quality of constitutional textual norms, [FN87] and the corresponding elaborate characteristic of constitutional doctrinal norms. Simply stated, owing to the sparseness of constitutional textual norms, we have far more constitutional doctrine than constitutional text. We naturally should expect, therefore, that courts deciding constitutional cases most often base their decisions on constitutional doctrinal norms rather than constitutional textual norms. Moreover, the fact that the Supreme Court relies more often on constitutional doctrine than constitutional text tells us nothing about which of the two occupies a higher position in the hierarchy of legal categories. The volume of influence, in short, has no relevance to the issue of whether one kind of norm trumps another kind of norm in cases of true legal conflict. [FN88]

***494** Nor do constitutional doctrinal norms loosely related, or even unrelated, to particular constitutional textual passages cast doubt on the constitutional text over constitutional doctrine hierarchic ordering. Consider the constitutional privacy rights enunciated in Griswold v. Connecticut [FN89] and augmented in Roe v. Wade. [FN90] Those who argue that constitutional privacy rights lack a constitutional textual root [FN91] may be tempted to slide into claiming that Griswold and Roe constitute an inversion of the constitutional text over constitutional doctrine ordering. Without wading too deeply into the privacy rights morass, even if we accept the notion that constitutional doctrinal privacy rights lack a plausible constitutional anchor, [FN92] we would not have an example of constitutional doctrinal norms trumping constitutional textual norms. [FN93] At best we would have an example of

a set of constitutional doctrinal ***495** norms unhinged from specific constitutional clauses. [FN94] Constitutional doctrine unhinged from constitutional text, however, in no way signals an inversion of the text over doctrine hierarchic ordering. Only a constitutional doctrinal norm trumping a truly conflicting constitutional textual norm could constitute an inversion of that ordering.

Instances where the Supreme Court develops constitutional doctrine hard to square with constitutional text present a more complicated challenge to the thesis that the categoric axiom fully accounts for the practice of mediating conflicts between constitutional textual and constitutional doctrinal norms. [FN95] Close examination, however, reveals instances of potential conflict between the constitutional textual and doctrinal norms, rather than an inversion of the constitutional textual norm over constitutional doctrinal norm hierarchic ordering. [FN96] Indeed, by illustrating how ***496** courts creatively interpret constitutional textual norms in order to avoid violation of the categoric axiom, such cases buttress rather than diminish the notion that constitutional textual norms always and unconditionally trump truly conflicting constitutional doctrinal norms. Recall, for example, Katz v. United States, where Justice Black's dissent accuses the majority opinion of creating a doctrinal norm irreconcilable with the meaning of the Fourth Amendment. [FN97] In response, the majority opinion offers a theory explaining why the Fourth Amendment textual norm has a meaning different from that suggested by its words alone, and why its doctrinal rule therefore does not stand in a posture of true conflict with the Fourth Amendment. [FN98] By reading the Fourth Amendment differently than Black does, the Court finds potential rather than true conflict between the Fourth Amendment and the doctrinal rule adopted.

Consider a second example, the Hans v. Louisiana doctrinal norm guarantying states sovereign immunity from suits filed by their own citizens in federal courts. [FN99] Critics argue that the doctrinal rule of Hans cannot be reconciled with the meaning of the Eleventh Amendment. They base this assertion on the plain meaning of the Eleventh Amendment, which prohibits federal court jurisdiction over suits against states initiated by citizens of foreign states and foreign nations, and by implication allows federal court jurisdiction over suits initiated against states by their own citizens. [FN100] Hans' critics, in essence, charge that by extending ***497** state sovereign immunity to suits filed in federal court by citizens of the defendant state, Hans illegitimately privileges constitutional doctrine over the clear meaning of a constitutional textual norm. Hans' defenders reply that the case neither contradicts the meaning of the Eleventh Amendment textual norm, nor privileges constitutional doctrine over constitutional text. While admitting that the text of the Eleventh Amendment does not specifically prohibit federal court jurisdiction over suits initiated against states by their own citizens, Hans' supporters assert that the meaning of the Eleventh Amendment textual norm is not defined exclusively by its textually inscribed words, but rather by the state sovereignty principle that it symbolizes and confirms. [FN101] Given that the Eleventh Amendment textual norm encompasses a meaning other than that suggested by the plain meaning of its inscribed words, the doctrinal rule of Hans can be reconciled with, or in other words, does not stand in a posture of true legal conflict with the meaning of the Eleventh Amendment textual norm.

***498** Katz and Hans illustrate that what at first glance may appear to be instances of privileging constitutional doctrine over constitutional text, can ultimately turn out to be (or can be made into) cases of clever interpretation to avoid true legal conflict. [FN102] The key to Katz and Hans lies in the common practice of finding that textual norms may admit to meanings other than those suggested by the plain meaning of their textually inscribed words. [FN103] Because the opinions in Katz and Hans offer theories which reconcile the doctrinal rules they create with the meaning of the constitutional textual norms involved, they constitute instances of potential rather than true legal conflict, and therefore cannot constitute instances of constitutional doctrine trumping truly conflicting constitutional text.

Ultimately, the most direct evidence to support the thesis that the categoric axiom explains the outcomes of true legal conflicts between constitutional textual and doctrinal norms lies in examining instances where constitutional textual amendments overturn standing constitutional doctrinal norms. [FN104] Several textual amendments to the federal constitution trump constitutional doctrinal ***499** rules developed by the Supreme Court. [FN105] Consider the earliest such instance, the true conflict between Chisholm v. Georgia [FN106] and the Eleventh Amendment. [FN107] Chisholm established the doctrinal rule that the Constitution provides no sovereign immunity protection to states against suits brought in federal courts by citizens of another state. [FN108] The norm enunciated by the Eleventh Amendment, in contrast, explicitly states that the Constitution shall not be construed so as to allow federal court jurisdiction over cases brought against a state by a citizen ***500** of another state. [FN109] As such, the doctrinal rule of Chisholm and the textual norm enunciated in the Eleventh Amendment demand mutually exclusive

outcomes.

How did the legal system resolve this true legal conflict? Unsurprisingly, as the categoric axiom would predict, the Eleventh Amendment norm has been held to trump the Chisholm norm. [FN110] The norm enunciated by the Eleventh Amendment belongs to the second order legal category "constitutional textual norms." The norm enunciated by Chisholm belongs to the second order legal subcategory "constitutional doctrinal norms." The former occupies a higher position in the extant ordering of legal categories and subcategories than the latter. Legal norms belonging to legal categories and subcategories of superordinate position always and unquestionably trump truly conflicting legal norms belonging to legal categories and subcategories of subordinate position.

As a second example consider a well known case of true legal conflict between a constitutional amendment and standing constitutional doctrine, the Twenty- Sixth Amendment overturning of the doctrinal rule of Oregon v. Mitchell. Mitchell held that the Constitution did not provide Congress the power to regulate the minimum voting age in state and local elections. [FN111] The Twenty-Sixth Amendment, however, textually established a congressional power to enforce the right of all citizens age eighteen or older to vote in any federal, state, or local elections. [FN112] Not surprisingly, ***501** in accord with the categoric axiom, the Twenty-Sixth Amendment has been held to trump Mitchell. [FN113]

The Eleventh and Twenty-Sixth Amendment overturning of the Chisholm and Mitchell doctrinal rules brings us to the role of the chronologic axiom in resolving true conflicts between constitutional legal norms.

Might the chronologic axiom explain the outcomes of the Chisholm versus Eleventh Amendment and Mitchell versus Twenty-Sixth Amendment true legal conflicts? In other words, do constitutional amendments trump constitutional doctrine not only because of their status as constitutional textual norms, but also because they are created after the constitutional doctrinal norms? While the chronologic axiom explains the resolution of certain legal conflicts between constitutional norms, it does not explain the outcome of true legal conflicts such as that between Chisholm and the Eleventh Amendment, or Mitchell and the Twenty-Sixth Amendment. The categoric axiom alone explains the outcome in all cases of true conflict between constitutional textual and constitutional doctrinal norms.

First, in at least the Chisholm versus Eleventh Amendment true legal conflict, it is not entirely clear that the constitutional amendment actually postdates the constitutional doctrinal norm. Though ratified after the Chisholm decision, the constitutional textual norm enunciated by the Eleventh Amendment arguably predates Chisholm. At least that is how the Supreme Court views the state sovereign immunity norm expressed by the Eleventh Amendment. The Court has held that the Eleventh Amendment did not create a new constitutional norm, but rather that the Eleventh Amendment merely confirms the preexisting state sovereign immunity norms inherent in the constitution's structure. [FN114] If the Court is correct, then the chronologic order of norm creation cannot explain the Eleventh Amendment's trump of the doctrinal rule of Chisholm. [FN115]

***502** Putting aside the issue of when the norm expressed by the Eleventh Amendment came into being, the categoric axiom, rather than the chronologic axiom, still best explains cases where constitutional amendments trump constitutional doctrinal norms. We know this because the chronologic factor has no impact on outcomes in such cases. Thus, were the chronologic order in which the Chisholm and Eleventh Amendment norm came into being reversed, the ultimate outcome would have been the same. More specifically, had the Supreme Court tried to establish the Chisholm-like doctrinal rule after passage of the Eleventh Amendment, the Eleventh Amendment would nonetheless trump that doctrinal rule. To understand why, return to Burks v. United States. Recall that in Burks the Court held that a constitutional textual norm trumps a later created truly conflicting constitutional doctrinal norm. [FN116] The Court, in other words, overruled a doctrinal rule on the grounds that it was irreconcilable with the meaning of (or more accurately all meanings plausibly attributable to) the Fourth Amendment. A Chisholm-like doctrinal norm created after passage of the Eleventh Amendment would have suffered the same fate as the Fourth Amendment doctrinal rule in Burks-- reversal on the grounds that it stands in true conflict with the meaning of a preexisting constitutional textual norm. [FN117] Chronologic order of norm creation, therefore, cannot be a reason for privileging constitutional textual norms over constitutional doctrinal norms.

At best, the chronologic axiom provides a supplementary but unnecessary reason for a later created constitutional

textual norm to trump an earlier created constitutional doctrinal norm. Indeed, chronology alone cannot explain the outcome of the Chisholm versus Eleventh Amendment true conflict. Were the category memberships of the Chisholm and Eleventh Amendment norms reversed, the Chisholm norm would undoubtedly ***503** trump the Eleventh Amendment norm. More specifically, if the rule allowing federal court jurisdiction over suits brought against states by citizens of another state qualified as a constitutional textual norm, while the rule prohibiting federal court jurisdiction over such cases qualified as a constitutional doctrinal norm, no matter what chronologic order those two norms came into being, the former would trump the latter. As such, the categoric axiom is outcome determinative, while the chronologic axiom is immaterial to the outcome of the Chisholm versus Eleventh Amendment true legal conflict.

This, of course, does not mean that the chronologic axiom has no role in explaining the resolution of true legal conflict between constitutional norms belonging to the textual and doctrinal second order constitutional categories. To the contrary, the chronologic axiom fully explains the outcomes of true legal conflicts between constitutional norms that belong to the same legal subcategory. Thus, as mentioned in Part B above, newly ratified constitutional textual amendments always and unconditionally trump truly conflicting preexisting constitutional textual norms. For example, the Twenty-First Amendment, repealing prohibition, trumps the Eighteenth, which had established prohibition. [FN118] Similarly, newly created constitutional doctrinal norms always and unconditionally trump truly conflicting preexisting constitutional doctrinal norms. Post-1937 Commerce Clause doctrine, for example, replaced pre-1937 Commerce Clause doctrine. [FN119] I will have more to say about the role of the chronologic axiom in resolving true legal conflicts between constitutional norms in Subpart 2 below. [FN120]

b. Statutory Legal Subcategories

The legal system's treatment of statutory norms echoes its treatment of constitutional norms. We recognize two basic second ***504** order subcategories of statutory norms, "statutory textual norms" and "statutory doctrinal norms." I consider statutory textual norms to be the textually inscribed norms that gain both bicameral legislative and executive approval. I consider statutory doctrinal norms to be judicial interpretations of statutory textual norms carrying precedential value. The categoric axiom explains the outcome of all true legal conflicts between statutory textual and doctrinal norms, while the chronologic axiom accounts for the result of almost all true conflicts between statutory norms belonging to the same second order statutory subcategory. The evidence in the statutory realm parallels that reviewed in the constitutional realm. [FN121] This parallel reflects that the chronologic and categoric axioms I highlight work in the same ways to mediate instances of true legal conflict regardless of contextual variations.

Beginning with the chronologic axiom, the evidence is altogether straightforward. Quite obviously, the chronologic axiom explains the outcome of cases where a new statute trumps or repeals a preexisting truly conflicting statute. Where the provisions of two statutes irreconcilably conflict, the later statute repeals the earlier statute. [FN122] Likewise, the chronologic axiom fully explains cases where a new statutory doctrinal norm trumps and replaces a preexisting truly conflicting statutory doctrinal norm. Where a court first interprets a given statute in one way, but later adopts a different interpretation, that later adopted interpretation controls. [FN123]

Turning to the categoric axiom, the evidence is a bit more complex, but no less forceful. As in the constitutional context, dissenting opinions charging that statutory doctrinal norms created by majority opinions are irreconcilable with the meaning of (or ***505** range of meanings plausibly attributable to) statutory textual norms illustrate the categoric axiom in action. As an example, consider Varity Corporation v. Howe, [FN124] a recent ERISA case. Varity deals with the issue of whether ERISA authorizes individual equitable relief, as opposed to suits for equitable relief on behalf of a retirement plan as an entity, for breach of fiduciary duties in the administration of such plans. [FN125] The majority opinion creates a statutory doctrinal rule under ERISA allowing individuals to sue for equitable relief. [FN126] The dissent, however, opposes the majority's doctrinal rule on the grounds that it "cannot be squared with the text or structure of ERISA." [FN127] Stated more precisely, the dissent invokes the categoric axiom by arguing that the statutory doctrinal rule created by the majority is illegitimate because it stands in a posture of true conflict with the meaning of the ERISA statutory textual norm it interprets. As we saw in constitutional cases, the majority in Varity can hardly oppose the categoric axiom reasoning underlying the dissent. Instead, the majority focuses its energies on an attempt to explain how the statutory doctrinal rule it adopts in fact reconciles with the meaning of the ERISA statute. [FN128]

Also paralleling the evidence covered in the constitutional context, opinions that overrule statutory doctrinal norms on the grounds that they cannot be reconciled with the meaning of the statutory textual norms they interpret demonstrate the categoric axiom at work. Consider Monroe v. Pape [FN129] and Monell v. Department of Social Services of New York. [FN130] Both Monroe and Monell create statutory doctrinal rules under The Civil Rights Act of 1871, better known as § 1983. [FN131] Under the doctrinal rule created in Monroe, plaintiffs may not recover under § 1983 ***506** against a municipality or local government entity. [FN132] Via a review of legislative history, Monroe held that a prohibition on suits against municipalities and local government entities falls squarely within the meaning of § 1983. [FN133] Upon a reconsideration of § 1983's legislative history, however, Monell concluded that Congress in fact had intended that § 1983 apply to municipalities and local government entities, [FN134] and that the doctrinal rule of Monroe, therefore, was in true conflict with the meaning of § 1983. [FN135] In accord with the categoric axiom, the Court overturned the doctrinal rule of Monroe, [FN136] and replaced it with a new doctrinal rule allowing § 1983 suits against municipalities and local government entities. [FN137]

Finally, also as in the constitutional area, we find the most direct evidence of the categoric axiom at work in the statutory area in cases where statutory textual and doctrinal norms stand in a posture of true conflict, and the former trump the latter. In short, the categoric axiom fully explains the outcomes of such cases. Recent civil rights norm development illustrates the point. The Civil Rights Act of 1991 overruled a series of seven Supreme Court doctrinal interpretations of Title VII and § 1981. [FN138] Consider ***507** two of those cases. Lorance v. AT&T Technologies, Inc. established the Title VII- based statutory doctrinal norm that in Title VII-based seniority system discrimination suits the statute of limitations begins to run from the time the seniority system is established. [FN139] The Civil Rights Act of 1991 overruled Lorance by specifying that the limitations period in such cases begins to run when the plaintiff is adversely affected by a discriminatory seniority system. [FN140] Next, Wards Cove Packing Co. v. Antonio established the Title VII statute based doctrinal norm that an employer- defendant in a Title VII disparate impact discrimination case bears only the burden of production, but not the burden of proof, on the issue of defendant's business necessity defense. [FN141] The Civil Rights Act of 1991, however, overruled Wards Cove by specifying that the burden of proof for the business necessity defense rests squarely on employer-defendants in Title VII disparate impact discrimination cases. [FN142]

***508** In both instances the statutory textual norm--the Civil Rights Act of 1991--trumps and nullifies the truly conflicting statute based doctrinal norm--the doctrinal interpretations of Title VII set forth in Lorance and Wards Cove. [FN143] More importantly, the categoric axiom fully explains such results. In brief, the second order legal subcategory "statutory textual norms" occupies a superordinate position in the ordering of legal categories over the second order legal subcategory "statutory doctrinal norms." Lorance and Wards Cove set forth a series of statutory doctrinal norms. The Civil Rights Act of 1991 creates a series of statutory textual norms. The Lorance and Wards Cove norms cannot be reconciled with The Civil Rights Act of 1991 norms. The Civil Rights Act of 1991 textual norms, therefore, trump the Lorance and Wards Cove doctrinal norms.

Yet, returning to an issue visited in connection with constitutional textual and doctrinal norms, might chronologic order of norm creation have something to do with the overturning of the doctrinal rules established in Lorance and Wards Cove? In other words, might the fact that The Civil Rights Act of 1991 was passed after those two decisions explain why it trumps the norms established by those cases? Statutory textual norms which overturn statutory doctrinal norms usually possess the quality of being more recently created than the statutory doctrinal norms that they overturn. How then can we know whether it is the statutory textual norm's membership in a legal subcategory occupying a superordinate position in the ordering of legal categories and subcategories, as opposed to its status as a more recently created norm, which explains such an outcome? That is, how can we disentangle the newness of the statutory textual norm from the fact that it is a textual norm?

The operation of special interpretive statutes helps untangle the issue. When seeking to overrule statutory doctrinal norms, legislatures usually create new statutory textual norms. [FN144] Special ***509** interpretive statutes, however, work differently. Rather than overruling statutory doctrinal norms via the creation of some new statutory textual norm, they instead overrule statutory doctrinal norms by clarifying and reinstating the meanings of already existing statutory textual norms. [FN145] For this reason special interpretive statutes present instances where old statutory textual norms trump newer truly conflicting statutory doctrinal norms. Such cases demonstrate that it is not the newness of the statutory textual norms, but instead their status as textual norms, which explains why statutory textual norms trump truly conflicting statutory doctrinal norms.

An example will illustrate the point. Section 1981 had long been understood to establish a cause of action for discrimination in both the formation and execution of employment contracts. [FN146] Patterson v. McLean Credit Union, however, established a doctrinal interpretation of § 1981 limiting causes of action under the statute to discrimination in only the formation of employment contracts. [FN147] The Civil Rights Act of 1991, in part a special interpretive statute, overruled Patterson. It did not do so, however, using the common strategy of amending § 1981. Instead, the Act overruled Patterson by clarifying and reinstating what Congress considered to be the correct original meaning of § 1981--that § 1981 allows a cause of action for discrimination in both the formation and execution of employment contracts. [FN148] Thus, it is the ***510** preexisting § 1981 statutory textual norm, and not a new statutory textual norm, which does the work of overruling Patterson.

The Civil Rights Restoration Act of 1987 provides another example of a special interpretive statute which clarifies a preexisting statutory textual norm, and thereby overrules a statutory doctrinal norm. [FN149] The 1987 Act (which did not actually become law until 1988), sought "to restore the broad scope of coverage and to clarify the application of" several civil rights statutes, including Title IX of the Education Amendment of 1972. [FN150] In particular, the 1987 Act overruled the Grove City College v. Bell [FN151] statutory doctrinal gloss on Title IX. [FN152] Title IX generally prohibits sex-based discrimination in educational programs which receive federal funds. [FN153] Grove City College established the Title ***511** IX based doctrinal rule that student receipt of financial aid subjected the education institution's financial aid office, but not the entire institution, to Title IX requirements and prohibitions. [FN154] The Civil Rights Restoration Act of 1987, however, overturned the rule of Grove City College. [FN155] It did so by clarifying and restoring the original meaning of the Title IX textual norm which Grove City College had upset, rather than by amending or changing the meaning of Title IX. [FN156]

The unique feature of special interpretive statutes, as opposed to regular statutes, lies in the fact that they create no new norms, but rather reaffirm or clarify the meaning of already existing statutory textual norms. In so doing they invert the temporal sequence usually associated with statutory textual norms trumping truly conflicting statutory doctrinal norms. That temporal inversion, in turn, removes the possibility that the newness of a statutory textual norm could explain why it trumps a truly conflicting statutory doctrinal norm. Stated bluntly, special interpretive statutes demonstrate that even statutory textual norms predating truly conflicting statutory doctrinal norms will trump those doctrinal norms. As such, the chronologic axiom cannot account for the outcomes of such cases. The categoric axiom, however, can explain these outcomes. Simply stated, statutory textual norms always and unconditionally trump truly conflicting statutory doctrinal norms, regardless of whether they predate or postdate those statutory doctrinal norms.

c. Administrative Legal Subcategories

Moving to the final first order legal category--administrative norms--we again observe two second order subcategories of administrative norms, and the chronologic and categoric axioms operating to mediate legal conflicts. Administrative procedure varies tremendously from agency to agency. Any attempt to generalize about a hierarchy of administrative second order legal subcategories, therefore, risks gross oversimplification. A comprehensive analysis of agency processes and the corresponding variety of administrative legal categories lies well beyond the ***512** scope of this Article. Nonetheless, valid generalizations can be made regarding at least those administrative agencies empowered to both promulgate (a legislative function) and interpret (a judicial function) administrative regulations. [FN157] Within such agencies we again witness a second order subcategorical division between inscribed textual norms and doctrinal interpretations of those textual norms which enjoy stare decisis value. What I will label "administrative textual norms" are the binding inscribed textual regulations of general application promulgated by administrative agencies, or what administrative law scholars refer to as agency legislative rules usually found in the Code of Federal Regulations. [FN158] What I call "administrative doctrinal norms," in contrast, are agency interpretations of agency legislative rules found in agency adjudications which enjoy stare decisis value. [FN159]

***513** As in the constitutional and statutory areas, the categoric axiom explains the outcome of true legal conflicts between administrative textual norms and administrative adjudicatory norms, while the chronologic axiom explains the outcome of true conflicts between pairs of truly conflicting administrative textual norms, and between pairs of truly conflicting administrative adjudicatory norms. Starting with the chronologic axiom, new administrative

regulations trump and replace older truly conflicting regulations. Thus, for example, a newly promulgated regulation replaces a truly conflicting preexisting regulation. [FN160] Likewise, a new administrative adjudication interpreting a regulation trumps and replaces an old administrative adjudicatory interpretation of the same regulation. [FN161]

The categoric axiom, in turn, explains the outcome of cases where administrative textual norms trump truly conflicting administrative doctrinal norms. The Supreme Court has expressed the categoric axiom in the administrative law context as follows: an agency may not alter a legislative rule by giving that legislative rule an interpretation that is "plainly erroneous or inconsistent with" the legislative rule. [FN162] Stated differently, an administrative ***514** adjudicatory norm may not be irreconcilable with, or stand in a posture of true conflict with, the meaning of the administrative textual norm that it interprets and applies. This principle parallels the notion that a judicial statutory interpretation may not stand in a posture of true conflict with or fall outside the range of plausible meanings attributable to the statute being interpreted.

Jicarilla Apache Tribe v. FERC [FN163] presents an example of an administrative regulatory textual norm trumping a truly conflicting agency adjudicatory interpretation of that regulation. In Jicarilla, a Federal Energy Regulatory Commission (FERC) regulation allowed small natural gas suppliers to sell natural gas at a price above the price ceiling applicable to large natural gas suppliers. Under the regulation, however, small suppliers were not permitted to sell at the higher price if they had "purchased" natural gas reserves from a large company, as opposed to relying on their own reserves. Petitioners had acquired the natural gas they wished to sell at the higher small producer prices as payment in kind for leasing land to a large natural gas supplier. FERC had interpreted the payment in kind arrangement as a "purchase" of natural gas from a large supplier, and thus under its regulations denied petitioner's request to sell at the higher small producer price. On review, however, the Tenth Circuit found FERC's interpretation of its own regulation to be erroneous, and reversed on that ground.

More specifically, the court held that an in kind payment cannot be considered a "purchase" under the regulation. If the term "purchase" does not include in kind payments, the regulation stands in a posture of true conflict with the agency's application of the regulation. The regulation, as interpreted by the Tenth Circuit, allows the sale of natural gas at higher prices so long as the natural gas has not been "purchased" from a large natural gas supplier. The agency application of the regulation, in contrast, prohibits the sale of natural gas at higher prices even if the natural gas is not "purchased" from a large supplier. By nullifying the agency application of its own regulation the Tenth Circuit ***515** enforced the principle that agency adjudicatory interpretations may not stand in a posture of true conflict with agency textual regulatory norms. [FN164]

The categoric axiom accounts for the outcome of Jicarilla. Assume that X equals the sale of natural gas at a price above the normal ceiling whenever a small producer trades to acquire natural gas. In Jicarilla, one norm--the FERC regulation--allows X, or at least is read by the Tenth Circuit to allow X. Another norm--FERC's interpretation of its own regulation-- prohibits X (or requires not-X). The norm allowing X trumps the norm prohibiting X. The by now familiar categoric axiom reasoning explaining that outcome runs as follows: The norm allowing X belongs to the second order legal subcategory "administrative regulatory textual norms." The norm prohibiting X (or requiring not-X) belongs to a second order legal subcategory "administrative adjudicatory norms." The former legal subcategory occupies a superordinate position in the ordering of legal categories over the latter legal subcategory. Norms belonging to legal categories or subcategories of superordinate position in the ordering of legal categories always and unconditionally trump truly conflicting norms belonging to legal categories or subcategories of subordinate position in that ordering.

### 2. The Lack of Third Order Legal Subcategories

I have laid out the first order legal categories and second order legal subcategories central to resolution of true legal conflicts between norms belonging to different legal categories and subcategories. I now turn the discussion from the legal categories and subcategories that we utilize in resolving such true conflicts to those which do not help explain the outcomes of true legal conflicts.

My general claim in this Subpart is that the many possible descriptive differentiations that one might find between textual or ***516** doctrinal norms are irrelevant to explaining the outcomes of true legal conflicts between pairs of

textual norms, or pairs of doctrinal norms. More specifically, at least for purposes of adjudicating cases of true legal conflict, the legal system does not subdivide second order textual and doctrinal legal subcategories into various third order subcategories. Because the legal system does not recognize any third order subcategoric distinctions between different kinds of textual or doctrinal norms, the categoric axiom is irrelevant to explaining the outcomes of true legal conflicts between pairs of truly conflicting textual norms, and pairs of truly conflicting doctrinal norms. Instead, the chronologic axiom alone explains the outcomes of all such true legal conflicts.

To provide one striking example, the legal system does not treat Bill of Rights textual norms as different in kind from other constitutional textual norms. Bill of Rights textual norms often trump other truly conflicting constitutional norms. They do so, however, not because they constitute a categorically distinct and hierarchically superior kind of constitutional textual norm, but rather because, in accord with the chronologic axiom, they were created after the truly conflicting constitutional textual norms they trump.

Subparts a and b below use true conflicts between pairs of constitutional textual norms and pairs of constitutional doctrinal norms to illustrate these points. Subpart c focuses on whether Bill of Rights norms stand apart as a separate subcategory of constitutional norms.

### a. The Chronologic Axiom and the Lack of Constitutional Textual Subcategories

On the textual side, at least for purposes of mediating true legal conflicts, the legal system does not recognize or employ any categoric distinctions between kinds or subcategories of constitutional textual norms. More precisely, we do not treat any particular constitutional textual clause as different in kind, or as enjoying greater normative weight, than any other constitutional textual clause, at least not by virtue of membership in some special subcategory of constitutional texts. In this sense, we treat the second order legal subcategory "constitutional textual norms" as indivisible.

Let me clarify what I mean, and more importantly do not mean, by the claim that we do not recognize or utilize any categorical ***517** distinctions between different kinds of constitutional texts, and that no particular constitutional text is considered to carry more normative weight than any other, at least not by virtue of membership in some special third order subcategory of constitutional norms.

First, I do not mean to suggest that all constitutional texts enjoy equal influence. Consider the legal system's treatment of members of the second order legal subcategory "constitutional textual norms." Some constitutional textual provisions clearly have had a greater practical impact than others. [FN165] The Free Speech Clause, for example, has had a far greater impact than the Engagements Clause, which is hardly ever litigated. [FN166] The Fourteenth Amendment has spawned vast doctrinal elaboration, while the Twenty- Seventh has yielded no Supreme Court action. [FN167] Differences in practical impact, however, stem not from categorical differences between constitutional clauses, but rather from factors such as the turns of history, the precision of the texts in question, or the centrality of a provision to our constitutional system. My point is unrelated to the degree of influence constitutional texts may exert. Instead, I am focusing on the position in a hierarchy of legal categories that constitutional textual norms occupy.

Nor do I mean to suggest that constitutional texts are descriptively homogenous, or in other words that they could not possibly be divided into distinct descriptive categories. Quite obviously, constitutional texts descriptively differ along numerous dimensions. We could, for example, dissect the universe of ***518** constitutional textual norms along functional lines. We can describe some constitutional textual provisions as power granting and others as rights granting. Article III, Section 1, for example, grants judicial powers to the Supreme Court and other inferior courts that Congress may establish. Similarly, Article I, Section 8, Article VI, Section 3, and Section 5 of the Fourteenth Amendment grant powers to Congress. [FN168] Most clauses in the Bill of Rights, in contrast, establish or protect rights, [FN169] as do a handful of passages in the main body of the Constitution, such as Article IV, Section 2, and Article III, Section 2. [FN170] Articles V and VII serve yet a third function, which is neither power granting nor rights granting. Articles V and VII establish constitutional creation, amendment, and ratification rules. We could label such constitutional textual norms as norm generation regulative. We might go further to attach a fourth functional descriptive label--power proscribing--to a different handful of constitutional textual passages. In this group we could place, for example, the passages of Article I, Section 10, which lists specific limitations on the

powers of state governments, or the last sentence of Article V, which limits the power to amend the text of the Constitution. A fifth functional group might be composed of those constitutional texts which define the nature, structure, and operation of government institutions. Consider, for example, Article I, ***519** Section 3, Clause 2: "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." [FN171] Or consider the second sentence of Article II, Section 1: "He [the President] shall hold his Office during the Term of four Years . . . ." [FN172] Such constitutional textual norms could be labeled "institution defining" clauses.

We could also descriptively differentiate constitutional texts on non- functional grounds. Distinctions can be drawn based on the degree of generality or specificity of constitutional provisions. Some constitutional texts enunciate basic political principles using airy terms. Others, in contrast, use the relatively precise language common in modern statutes and regulations. Compare, for example, the popular sovereignty principles enunciated in the Preamble, with the statute-like precision of the Twenty-Fifth Amendment. [FN173] Alternatively, constitutional texts differ in terms of their impact. Some constitutional texts are central to the fundamental underlying principles expressed in a constitution, while others play little or no role in the operation of a given constitutional system. Compare, for example, Article VI, Paragraph 2, the often litigated Supremacy Clause, with Article VI, Paragraph 1, which states "All Debts contracted and Engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." [FN174]

The fact that different constitutional textual norms exhibit different features, and may be subject to different descriptive labels, however, does not mean that such distinctions help explain the outcomes of true legal conflicts between pairs of constitutional textual norms. Indeed, the interesting point is that despite the ease with which we can divide constitutional textual norms into ***520** different descriptive or functional groupings, such descriptive or functional distinctions play no role in mediating true legal conflicts between truly conflicting constitutional textual norms. Lawyers may easily comprehend descriptive and functional differences between constitutional texts. Lawyers do not, however, resolve instances of true legal conflict between pairs of constitutional textual norms by reference to descriptive and functional third order subcategoric distinctions between different kinds of constitutional textual norms. Lawyers are accustomed to the idea that, for example, constitutional norms control statutory, administrative, and common law norms, or that constitutional text controls constitutional doctrine. They are not, however, accustomed to the idea that one kind or subcategory of constitutional textual norms controls another kind or subcategory of constitutional textual norms.

If not by resort to an ordering of third order legal subcategories, how then do we resolve instances of true conflict between constitutional textual norms? As discussed above, the chronologic rather than the categoric axiom explains the outcomes of true legal conflicts between pairs of constitutional textual norms. [FN175] Newer constitutional textual norms trump, or in other words, repeal or amend, truly conflicting older constitutional textual norms. [FN176] The chronologic axiom explains why, for example, ***521** Section 2 of the Twentieth Amendment (Congress convenes on third day of January) trumps Article I, Section 4, Clause 2 (Congress convenes on first Monday in December). [FN177] Likewise, it accounts for the Twenty-First Amendment (ending prohibition) repeal of the Eighteenth Amendment (establishing prohibition). In both cases two constitutional textual norms require mutually exclusive outcomes. [FN178] The later in time provision unquestionably prevails. [FN179]

b. The Chronologic Axiom and the Lack of Constitutional Doctrinal Subcategories

Largely because constitutional doctrinal norms interpret and apply constitutional textual norms, we observe the same phenomenon within the legal subcategory "constitutional doctrinal norms." The legal system does not recognize any categoric distinction between different kinds of constitutional doctrinal norms. As a consequence the categoric axiom cannot explain the outcomes of true legal conflicts between constitutional doctrinal norms. The chronologic axiom, in contrast, fully accounts for the outcomes of such true conflicts.

As an illustration of the role of the chronologic axiom, recall the hypothetical true legal conflict between Commerce Clause doctrine versus Fourth Amendment doctrinal norms. [FN180] Again, ***522** assume that Congress were to pass a statute allowing U.S. marshals to randomly search any car traveling on interstate highways for the purpose of curbing the interstate transport of illegal narcotics. Standing Commerce Clause doctrine permits Congress to pass such a statute. [FN181] Fourth Amendment doctrinal norms, however, prohibit legislation

authorizing or requiring certain kinds of searches and seizures. [FN182] As discussed above, such a statute would without doubt be struck down as an unconstitutional violation of Fourth Amendment doctrinal norms, despite the fact that the statute falls within Congress's Commerce Clause powers. [FN183] Stated differently, a true conflict between Commerce Clause and Fourth Amendment doctrinal norms would be resolved by privileging the former over the latter.

The chronologic axiom fully explains the Fourth Amendment doctrine trump over truly conflicting Commerce Clause doctrine. Simply stated, the Fourth Amendment was created after the Commerce Clause. [FN184] To the extent that the two stand in a posture of true conflict, in accord with the chronologic axiom, the later in time created Fourth Amendment, and its doctrinal elaborations, will trump the earlier in time created Commerce Clause, and its doctrinal elaborations. Indeed, in all cases where Bill of Rights doctrinal norms stand in a posture of true legal conflict with the doctrinal definitions of Congress's enumerated powers, the former trumps the latter. The chronologic axiom accounts for these results. [FN185]

***523** As with all of the rights granting clauses of the Bill of Rights, and their respective attendant bodies of constitutional doctrinal norms, Fourth Amendment protections against unreasonable searches and seizures cuts across and limits Congress's ability to exercise the full reach of its Article I, Section 8, legislative powers. The example I offer, in other words, is no different from any true legal conflict between rights granting constitutional doctrinal norms rooted in the Bill of Rights, and power defining constitutional doctrine rooted in Article I, Section 8. In all such cases, the later in time right granting Bill of Rights norms trump the earlier in time power granting enumerated powers norms.

### c. Do Constitutional Rights Granting Norms Trump Other Constitutional Norms?

Could the fact that rights granting doctrinal interpretations of Bill of Rights clauses always trump truly conflicting power granting doctrinal norms rooted in the Constitution's main body signal that in fact the legal system does recognize a third order subcategoric distinction between rights granting and power granting constitutional doctrinal norms? [FN186] Might such a third order categorical distinction, in other words, do just as good a job of explaining the outcome of the Commerce Clause doctrine versus Fourth Amendment doctrine conflict as the chronologic axiom? Does the following reasoning apply to true legal conflicts between Fourth Amendment and Commerce Clause doctrine, and indeed to any constitutional doctrinal norms describable as rights granting versus those describable as power granting? (1) Fourth Amendment doctrinal rules belong to the third order legal subcategory "constitutional rights granting doctrinal norms"; (2) ***524** Commerce Clause doctrinal rules belong to the third order legal subcategory "constitutional power granting doctrinal norms"; (3) the former subcategory occupies a higher position in the stratified hierarchic ordering of legal categories than the latter, (4) in instances of true legal conflict, norms belonging to legal subcategories occupying superordinate positions in the ordering of legal categories always trump norms belonging to legal subcategories of subordinate position in that ordering. Does the invariable privileging of Bill of Rights doctrine over truly conflicting power granting doctrinal norms rooted in the Constitution's main body evidence that rights granting and power granting constitutional norms constitute separate third order legal subcategories, with the former occupying a higher place in the ordering of legal categories and subcategories than the latter?

For several reasons, the chronologic axiom better accounts for the outcomes of true legal conflicts between constitutional doctrinal norms than does a supposed third order categoric distinction between rights granting and power granting constitutional doctrinal norms. First, it simply may not be true that rights granting constitutional doctrinal norms always trump truly conflicting power granting constitutional doctrinal norms. It is certainly true as a rule that rights granting constitutional doctrine rooted in the Bill of Rights always trumps truly conflicting power granting constitutional doctrine rooted in the Constitution's main body. It is probably not true, however, that all rights granting constitutional doctrinal norms will always trump all truly conflicting power granting constitutional doctrinal norms.

Thus, post-Bill of Rights power granting constitutional doctrine rooted in the enforcement clauses of the Civil War Amendments, may very well trump truly conflicting rights granting constitutional doctrine rooted in the Bill of Rights. For example, Congress may be able to regulate certain utterances when legislating under the Civil War Amendments' enforcement powers that it could not regulate if legislating under its Article I, Section 8, enumerated

powers. [FN187] Such statutes would present clear cases ***525** of power granting constitutional doctrinal norms--Civil War Amendment enforcement clause doctrine--trumping a rights granting constitutional doctrinal norms--First Amendment doctrine. [FN188]

The logic of Seminole Tribe of Florida v. Florida [FN189] buttresses the idea that Civil War Amendment enforcement powers allow passage of statutes which would run afoul of Bill of Rights norms were they passed under Congress's Article I, Section 8, enumerated powers. Seminole Tribe holds that Congress may not use its Article I, Section 8, Commerce Clause legislative powers to abrogate Eleventh Amendment state sovereign immunity, but may use its Fourteenth Amendment enforcement legislative powers to do the same. [FN190] In so holding, Seminole Tribe endorses two related ideas. First, when in true conflict, the Eleventh Amendment trumps Congress's earlier created Article I, Section 8, legislative powers. Second, when in true conflict, Congress's legislative powers under Section 5 of the Fourteenth Amendment trumps the earlier created Eleventh Amendment. [FN191] Seminole Tribe, in other words, exemplifies the chronologic axiom as a mediator ***526** of true legal conflict between constitutional doctrinal norms. If, by virtue of its later in time creation, Section 5 of the Fourteenth Amendment can trump the Eleventh Amendment, then it is entirely possible that it can also trump truly conflicting rights granting Bill of Rights norms. The logic endorsed by Seminole Tribe, in short, brings us one small step from the holding that Congress, acting under its Civil War Amendment legislative powers, could pass legislation that would not violate Bill of Rights norms, even if that same legislation would clearly violate Bill of Rights norms were they passed pursuant to Congress's Article I, Section 8, legislative powers. [FN192]

The above sketched analysis falls far short of exhaustive. It nonetheless reinforces the idea that later in time created power granting constitutional doctrinal norms may trump earlier in time created truly conflicting rights granting constitutional doctrinal norms. [FN193] We probably cannot, therefore, consider rights granting and power granting constitutional doctrinal norms as categorically distinct from power granting constitutional doctrinal norms, with the former occupying a higher position in the ordering of legal categories and sub-categories than the latter.

A further reason to doubt the explanatory power of a third order subcategoric distinction between Bill of Rights doctrinal norms and power granting doctrinal norms rooted in the Constitution's main body is that such an explanation operates at a very low level of generality, and therefore can explain only a very narrow range or particular kind of true legal conflicts. The categoric axiom, in contrast, operates at a high level of generality, and explains the outcomes of any true legal conflict between truly conflicting norms belonging to the same legal subcategory created at different points in time, regardless of context. Whenever both a ***527** general and a particular explanation possess the same predictive value for a given phenomenon, and the general explanation fully encompasses the more particular explanation, we should favor the more general explanation over the more particularized explanation. [FN194]

A categoric distinction between Bill of Rights doctrinal norms and power granting doctrinal norms rooted in the body of the Constitution can explain why Bill of Rights doctrine trumps truly conflicting power granting doctrine rooted in the Constitution's body. The chronologic axiom also fully accounts for that phenomenon. The chronologic explanation, unlike the legal categoric explanation, however, accounts for much more than the way we mediate true legal conflict between Bill of Rights doctrine and power granting doctrine rooted in the Constitution's main body. It also explains the results of true legal conflicts between all rights granting and all power granting constitutional norms, or more broadly between all truly conflicting legal norms belonging to the same legal category and subcategory created at different points in time. Using a subcategoric distinction between rights granting doctrine rooted in the Bill of Rights versus power granting doctrine rooted in the Constitution's main body to explain the phenomenon of the former norms trumping the latter norms amounts to nothing more than a restatement of the phenomenon we are trying to explain. A better form of explanation seeks to account for that phenomenon as representing a particular instance or example of the same more general axiomatic principle, such as the chronologic axiom.

The third and most important reason to favor the chronologic explanation over the legal categoric explanation, however, relates to an issue that lies beyond the aims of this Article, but which I will cover in future work, and touch upon in the conclusion below. By way of preface, the architecture of the extant ordering of legal categories and subcategories is defined by the ***528** varying sources of legal norms. Generally speaking, the legal system recognizes categoric and subcategoric distinctions between different kinds of legal norms only when legal norms are created by different law creating institutions or entities. We should doubt the notion that constitutional rights

granting and power granting norms constitute separate third order legal subcategories, with members of the former trumping truly conflicting members of the latter, for the simple reason that constitutional rights granting and power granting norms are not uniformly created by separate law creating entities or institutions. Stated differently, concluding that rights defining constitutional doctrinal norms categorically differ from power defining constitutional doctrinal norms would require us to do what we generally do not do--draw categoric lines of distinction between legal norms created by the same law creating institutions or entities.

I have drawn on constitutional legal norms to explain why third order subcategoric distinctions between functionally or descriptively differentiable textual or doctrinal norms do not help explain the outcomes of true legal conflicts. I do not mean to argue, however, that functional or descriptive differences between norms have no role to play. While not relevant to the resolution of true legal conflicts, particular functional or descriptive attributes of certain norms will in some cases play a large role in determining whether those norms stand in a posture of true legal conflict with other norms in the first place. Another look at Bill of Rights norms and power granting norms rooted in the Constitution's main body will clarify my point.

At least in recent decades, many Bill of Rights clauses have gained a special status among constitutional norms reflected in relatively expansive doctrinal interpretations of those clauses. According to the conventional wisdom, the special status of Bill of Rights norms means that they act as trumps over other constitutional and sub-constitutional norms. [FN195] According to such thinking, legal rights granting constitutional norms occupy a superior place among constitutional norms. My claim that the chronologic axiom, rather than a third order categoric distinction between rights granting and power granting constitutional norms, ***529** best explains the Bill of Rights norms trump over truly conflicting norms rooted in the Constitution's main body, stands in opposition to theories which cast rights as trumps. Legal norms describable as rights granting do not trump other legal norms by virtue of their status as rights granting norms. Instead, rights granting legal norms (or for that matter any norm) trump other legal norms only under a very specific set of conditions--when a court finds that rights granting norms are in true conflict with norms belonging to a subordinate legal category or subcategory, or where a court finds that rights granting norms are in true conflict with some other older norm belonging to the same legal category and subcategory. Indeed, this means, as mentioned above, that constitutional doctrinal norms rooted in constitutional clauses ratified after the Bill of Rights will trump truly conflicting doctrinal norms rooted in the Bill of Rights. The special place that the Bill of Rights norms have taken on in recent decades cannot save them from the chronologic axiom.

On the other hand, the special place occupied by Bill of Rights norms likely influences whether a court will find Bill of Rights norms to be in true conflict with other constitutional norms. To the extent that many Bill of Rights clauses have taken on heightened value, we should expect that courts will tend to preserve them by finding that Bill of Rights norms do not stand in a posture of true conflict with norms rooted in post-Bill of Rights constitutional clauses.

Consider an extreme example. The First Amendment, ratified in 1791, states that "Congress shall make no law . . . abridging the freedom of speech . . . ." [FN196] The Sixteenth Amendment, ratified in 1913, grants Congress the power to "lay and collect taxes on incomes, from whatever source derived, without apportionment." [FN197] Does the chronologic axiom mean that the Sixteenth Amendment, ratified after the First Amendment, empowers Congress to lay and collect direct taxes in ways that would abridge First Amendment freedom of speech protections? Though it may sound surprising, this is a possible (but not probable) outcome. Indeed, given their open-textured quality, the First and Sixteenth Amendment textual norms stand in a posture of true legal conflict. Under the chronologic axiom, therefore, it is not implausible to conclude that the Sixteenth Amendment ***530** partially trumps the Free Speech Clause of the First Amendment. Thus, the Supreme Court could develop a set of Sixteenth Amendment doctrinal rules allowing Congress the power to place a greater tax burden on those who speak out against the government policies. [FN198] Because free speech protections have taken on a unique importance, however, we should expect the Supreme Court to avoid this outcome at all costs.

Let me be more precise. First, a set of Sixteenth Amendment doctrinal norms allowing Congress the power to tax in ways that abridge First Amendment rights does not appear to stand in irreconcilable conflict with the sparsely worded Sixteenth Amendment textual norm. [FN199] Nothing on the face of the Sixteenth Amendment itself, in other words, appears to limit Congress's power to lay taxes on income that disproportionately burden those who voice opposition to government policies. A set of Sixteenth Amendment doctrinal norms allowing such an income

tax scheme, however, would clearly stand in a posture of irreconcilable ***531** conflict with extant First Amendment doctrinal norms. [FN200] Further, under the chronologic axiom, because the Sixteenth Amendment was ratified after the First Amendment, such a set of Sixteenth Amendment doctrinal norms would indeed trump truly conflicting extant First Amendment doctrinal norms. The special value accorded First Amendment norms would not render them immune from nullification by later created truly conflicting power granting constitutional norms.

On the other hand, the special status of First Amendment and other Bill of Rights protections means that we must qualify the above scenario as extremely improbable. While the Supreme Court could in theory develop such a set of Sixteenth Amendment doctrinal rules, it almost certainly would not do so. In the face of a federal statute taxing those who express negative opinions about government policies at higher rates than those who do not, we would expect the Supreme Court to adopt a doctrinal interpretation of the Sixteenth Amendment textual norm as possessing a meaning far narrower than its open-textured inscribed words alone permit. We would expect the Court, in other words, to read into the Sixteenth Amendment textual norm implicit or intended limitations on Congress's power to lay income taxes. Those implicit or intended limitations would include the qualification that Congress may not use its power to lay income taxes to abridge extant constitutional rights. Such a judicial gloss would constitute a set of Sixteenth Amendment doctrinal rules allowing Congress to place a disproportionately high income tax burden on those who voice opposition to government policies to be outside the scope of, or in true conflict with, the meaning of the Sixteenth Amendment textual norm. Under the categoric axiom, such a set of doctrinal rules would be nullified, thus preserving extant First Amendment doctrinal norms. [FN201] We would expect ***532** the Court to adopt this approach because our political culture values First Amendment protections far more than Congress's power to lay and collect income taxes.

In short, the fact that we place a higher value on some constitutional norms than others means that whenever true legal conflict will result in the nullification of a highly valued norm, we can expect courts to use their interpretive discretion to transform what could be an instance of true legal conflict into an instance of potential legal conflict, thus preserving that highly valued norm. The special status Bill of Rights norms have gained, however, does not mean that Bill of Rights norms constitute some special third order legal subcategory which trumps later in time created truly conflicting power granting constitutional norms. Thus, theorists inclined to cast Bill of Rights norms as trumps are not so much wrong as they are overly simplistic. Bill of Rights norms do not act as trumps, or at least they do not act as trumps due to some superordinate ranking over all other constitutional norms. On the other hand, given the special status the Bill of Rights has acquired, courts will likely strive to preserve Bill of Rights norms by interpreting post-Bill of Rights constitutional norms narrowly in order to avoid true legal conflicts with Bill of Rights norms, and the attendant chronologic axiom consequences.

## II

## Modeling Mediation of True Legal Conflict

Figure 1 below graphically represents both the legal categories and subcategories, and the chronologic and categoric axioms, the essential features governing adjudication of true legal conflicts. The model, which applies to almost all instances of true legal conflict, works as follows: In cases of true legal conflict between norms belonging to different first order legal categories, the ***533** norm belonging to a legal category of superordinate position in the ordering always and unconditionally trumps any norm belonging to a legal category occupying a subordinate position in the ordering. Three of the four first order legal categories--constitutional, statutory, and administrative norms--are divided into two second order legal subcategories. In cases of true legal conflict between norms belonging to different second order legal subcategories, the legal norm belonging to a second order legal subcategory of superordinate position in the ordering always and unconditionally trumps any norm belonging to a second order legal subcategory of subordinate position in the ordering. In cases of true conflict between legal norms belonging to the same second order legal category, the chronologic order of norm creation determines which norm will be privileged, and which will be subordinated. Newer norms trump older truly conflicting norms of the same legal category and subcategory. Graphically, legal norms located in the upper right hand corner of Figure 1--recent constitutional textual norms--will always and unconditionally ***534** trump any other truly conflicting norm. Those norms located in lower left hand corner--old common law norms--will always and unconditionally be trumped by any other truly conflicting norm.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Note that in utilizing the model to resolve true legal conflicts, one moves first from left to right, and then if necessary from right to left. When dealing with any pair of truly conflicting legal norms, the analysis begins on the left hand side of the model. If the conflicting norms belong to different first order legal categories (for example, constitutional versus statutory), the conflict is resolved without further analysis. The constitutional norm will trump the truly conflicting statutory norm. If, however, the conflicting norms belong to the same first order legal category (for example, both statutory norms), in order to resolve the conflict one moves rightward in the model, and considers the second order legal subcategories. If the norms belong to different second order legal subcategories (for example, statutory text versus statutory doctrine) the conflict is resolved without further analysis. The statutory textual norm will trump the truly conflicting statutory doctrinal norm. If, however, the conflicting norms belong to the same second order legal subcategory (for example, both statutory textual norms), one must reverse course and move from right to left. Of the two norms under scrutiny the norm located furthest to the right in the chart is the norm of most recent creation, and as such will trump the other, older, truly conflicting norm.

By moving first from left to right, and then if necessary from right to left, the model reflects that the categoric axiom enjoys supremacy over the chronologic axiom. In other words, preexisting norms belonging to superordinate legal categories and subcategories (the categoric axiom) will trump even new truly conflicting norms (the chronologic axiom) belonging to subordinate legal categories and subcategories. [FN202] A preexisting constitutional norm, for example, trumps a newly passed truly conflicting statute. Likewise, a preexisting statute trumps a newly promulgated truly conflicting administrative regulation, or newly announced common law rule. As I will mention in the conclusion below, the unconditional and exceptionless primacy of the categoric axiom over the chronologic axiom ultimately ***535** may undercut the democracy-reinforcing values reflected by the ordering of legal categories and subcategories.

My claim is that the model, or more accurately the ordering of legal categories and subcategories, and chronologic and categoric axioms reflected in the model, account for the outcome of almost every case in which a court has determined that legal norms stand in a posture of true conflict, regardless of context or particular circumstance. [FN203] I do not claim, however, that the model ***537** expresses the vocabulary or the extant reasoning that lawyers and judges employ when arguing over and adjudicating instances of true legal conflict. Nor do I claim that one cannot identify more particularized or contextualized explanations for the way any given instance of true legal conflict has been resolved. [FN204] Instead, the model set forth above offers a simple framework which explains and predicts outcomes in cases of true legal conflict, and a set of vocabulary and concepts applicable to such cases regardless of varying contextual circumstances. Most importantly, the model (1) both explains and predicts the outcomes of instances of almost any case where legal norms demand mutually exclusive outcomes and (2) serves to highlight the axiomatic background norms which govern the practice of mediating instances of true legal conflict.

Interestingly, the chronologic and categoric axioms and ordering of legal categories and subcategories expressed in the model constitute legal meta-norms that emerged much like the rules of grammar. They have not been the product of conscious law making, but instead have emerged organically to reflect and untangle ***538** complex patterns of practice. Just as grammar rules break down and simplify the complex behavior of verbal and written communication into a relatively small set of basic principles, so too does the ordering of legal categories and subcategories and the chronologic and categoric axioms simplify the seemingly complex practice of adjudicating cases where legal norms demand mutually exclusive outcomes. Also similar to the rules of grammar, the axioms and ordering have both descriptive and prescriptive components. The rules of grammar both describe the way verbal and written communication are structured, and prescribe the way verbal and written communication ought to be structured. The axioms and ordering similarly describe the factors governing adjudication of cases involving truly conflicting legal norms, and also prescribe the factors courts ought to consider when dealing with such cases. The axioms and ordering, in other words, tell us what courts do as a rule, and what they ought to do because the rules so prescribe.

So fundamental and ingrained are the axiomatic principles captured in the above model, that lawyers need not engage in a conscious act of reflection in order to invoke them. Just as one need not understand or consciously invoke the rules of grammar in order to speak and write in a grammatically correct fashion, lawyers need not consciously invoke the ordering and axioms in order to litigate or adjudicate cases of true legal conflict. Lawyers intuitively grasp and apply, for example, the ideas that statutory norms are hierarchically superior to and will trump

truly conflicting common law norms, or that newer statutory norms trump and repeal older truly conflicting statutory norms. Lawyers need not, and in fact usually do not, thrust such axiomatic principles forward as major premises in legal arguments. Instead, those axiomatic principles operate more indirectly as a presupposed and unquestioned framework within which argument over conflicting norms takes place.

As such, the model in Figure 1 reflects already familiar ideas. It expresses those ideas, however, in a concise, generalized, context-independent, and simple fashion. Just as an understanding of the rules of grammar can illuminate the otherwise imperceptible organization and structure embedded in verbal and written communication, boiling down adjudication of true legal conflict to its simplest essence will illuminate a range of otherwise***539** impalpable structural and normative issues. The remainder of the Article will focus on these structural and normative issues.

## III

## Behavioral Consequences of the Framework for Mediating True Legal Conflict

As the real and hypothetical examples throughout the Article have illustrated, the framework governing adjudication of true legal conflicts very often affects substantive outcomes. Perhaps more interesting, however, is the impact of the framework on judicial behavior. As an initial matter, because substantive outcomes to true legal conflicts follow almost deterministically from the rigidly formalistic framework, courts adjudicating cases of legal conflict focus on the less deterministic issues of norm interpretation, and whether or not norms stand in a posture of true legal conflict. Further, because the framework's rigid formalism denies courts the ability to directly and openly shape substantive outcomes in cases of true legal conflict, courts often employ their broad interpretive discretion as a strategy for indirectly shaping substantive outcomes. Courts do so by shaping the meaning and reach or scope of legal norms, thereby manipulating whether norms stand in a posture of true or potential legal conflict. By interpreting norms narrowly, and finding norms in a posture of potential conflict, courts avoid application of the framework and the substantive results that would mechanistically follow. By interpreting norms broadly, thereby finding norms in a posture of true legal conflict, courts engage the framework, thereby selecting the substantive outcomes that the framework mechanistically produces.

The selection of strained and difficult to rationalize norm constructions, whether narrow or broad, manifest that a desire to avoid or engage the framework, and to avoid or select attendant substantive outcomes, rather than straight forward application of traditional interpretive principles, often drives judicial norm interpretation. Courts consciously or unconsciously weigh the substantive consequences mechanistically following from application of the framework versus avoidance of the framework when determining whether to read norms broadly or narrowly. In short, unable to directly manipulate the rigid and formalistic axioms and ordering, courts exercise their relatively unconstrained interpretive discretion to determine whether norms stand in a posture ***540** of true legal conflict. If the court finds a true legal conflict, the mechanistic application of the framework swings into action; if the norms instead stand in a posture of potential legal conflict, then the court avoids the framework.

The story of courts allowing substantive considerations, rather than pure application of interpretive principles, to influence the breadth or narrowness of their norm constructions is not in and of itself particularly surprising. That courts consciously or unconsciously consider substantive impacts when deciding whether to interpret norms broadly or narrowly lies beyond dispute. The interesting aspect of courts using their relatively unconstrained interpretive discretion to avoid or engage the framework for mediating true legal conflict, however, lies in the way that this practice closely juxtaposes loosely constrained, complex, anti-formalistic judicial norm interpretation principles with the formalistic, rigid, and uncomplicated chronologic and categoric axioms, and ordering of legal categories and subcategories.

That juxtaposition raises the following questions: could a system for dealing with legal conflict which incorporates such oxymoronic and contradictory elements possibly be optimal? Why insist on an extraordinarily high degree of exceptionless, formalistic rigidity in the chronologic and categoric axioms and ordering of legal categories and subcategories, while at the same time affording courts sufficient open ended interpretive discretion to subvert their formalistic rigidity in many if not most cases?

Parts A and B below explore how the framework for resolving true legal conflict focuses judicial attention on issues of norm interpretation, and how the desire to either avoid or engage the framework prompts courts to narrowly or expansively construct norms, often to the point of adopting strained and difficult to rationalize interpretations. Part C explores the oddity of juxtaposing the formalism of the framework with the anti-formalism of norm interpretation principles and practices.

A. The Focus on Norm Interpretation

Resolution of almost all instances of legal conflict turns on the answers to the following three questions: First, do the norms in question stand in a posture of true or potential legal conflict? Second, if the norms in question stand in a posture of true legal conflict, which norm belongs to a superordinate legal category or subcategory? Third, if the norms in question stand in a posture ***541** of true legal conflict, and they belong to the same legal category and subcategory, which norm was created later in time? The exceptionless, rigid formalism of the chronologic and categoric axioms, as well as the simplicity of the ordering of legal categories and subcategories, usually obviate the possibility of litigating the second and third questions. The first question, in contrast, constantly raises litigiable issues, because determining whether norms stand in a posture of true or potential legal conflict requires courts to define the meaning and therefore the scope of the legal norms in play. Narrow interpretation may transform what could have been true legal conflict into potential legal conflict, and vice versa. For this reason, issues surrounding the meaning of legal norms dominate the discourse in cases of legal conflict. The ordering and axioms, in contrast, exercise their influence in the background as immutable obstacles around which legal argument must maneuver.

Consider more closely why the second and third questions rarely raise litigiable issues. Because we almost never are in doubt as to which norms belong to which legal categories and subcategories, we almost never have cause to litigate the second question. We almost always know exactly which norms qualify, for example, as members of the legal category "statutory norms" and which qualify as members of the category "common law norms," or which qualify as "constitutional norms," and which as "administrative norms." [FN205] Further, there is never any doubt as ***542** to the hierarchy of the ordering of legal categories. No court, for example, would seriously dispute that norms belonging to the legal category "statutory norms" trump truly conflicting norms belonging to the legal category "common law norms" or the legal category "administrative norms."

Turning to legal subcategories, we find again that courts rarely find reason to focus on issues of subcategory membership or the hierarchic ordering of legal subcategories. No court directly and openly challenges the notion that textual norms trump truly conflicting doctrinal norms, or in other words, that a doctrinal interpretation of any given textual norm may not stand in a posture of true conflict with all plausible meanings of the textual norm it interprets and applies. Further, to the extent that courts have reason to focus on the issue of which norms belong to textual versus doctrinal subcategories, such disputes center on the meaning of textual norms. Recall, for example, Justice Black's reading of First and Fourth Amendment textual norms. [FN206] Because Black applies a textualist analysis, he defines the meaning of First and Fourth Amendment textual norms narrowly, and therefore finds certain doctrinal holdings irreconcilable with those meanings. Other justices, however, apply different interpretive approaches, and are thus willing to define the First and Fourth Amendment textual norms more broadly than Black. The dispute between Black and other justices in First and Fourth Amendment cases, therefore, does not deal with which norms belong to the textual versus doctrinal subcategories. Instead, it centers on the range of plausible meanings attributable to First and Fourth Amendment textual norms, and accordingly whether those textual norms stand in a posture of true or potential legal conflict with certain judicially advanced First and Fourth Amendment doctrinal norms. Those disputes, in other words, are disputes over the meaning of legal norms, rather than over legal subcategory memberships.

Moving to the third question, because courts almost never are in doubt as to which of two conflicting norms was created later in time, the third question rarely raises litigiable issues. No court could seriously question, for example, that the Twenty-First ***543** Amendment (ratified December 5, 1933) was created after the Eighteenth (ratified January 16, 1919). [FN207] Nor is there ever any doubt that a constitutional textual norm effective as of December 5, 1933 trumps a truly conflicting constitutional textual norm effective as of January 16, 1919. The same is true in the statutory, administrative, and common law contexts. Very few cases turn on confusion over which of two truly conflicting statutory norms or administrative norms were created later in time. Likewise, courts rarely, if ever, harbor doubt over which of two truly conflicting common law doctrinal norms was most recently announced.

In short, the second and third questions are essential to the resolution of any true legal conflict. Due to the clarity and formalistic rigidity of the ordering and axioms, however, answers to the second and third questions are almost always uncontroversial and clear-cut. For this reason, though essential to resolving true legal conflict, the second and third questions mentioned above rarely become a focus of litigation. Instead, the first question--whether legal norms stand in a posture of true or potential legal conflict--dominates the discourse.

Consider an example. Assume that an old statute allows X, and that a new statute plausibly may be interpreted as prohibiting X. For the lawyer advocating X, certain arguments prove unavailing. That lawyer could not profitably base his argument on the categoric axiom, and the idea that the norm allowing X is categorically distinct and hierarchically superior to the norm prohibiting X. The clarity of the architecture of the extant ordering of legal categories and subcategories leaves no room to doubt that both norms belong to the same legal subcategory--statutory textual norms. Nor could he profitably argue that the older statutory norm allowing X should trump the newer statutory norm prohibiting X. The chronologic axiom admits no exceptions, and is thoroughly unambiguous. Newer norms always and unconditionally trump preexisting truly conflicting norms of the same legal category and subcategory. In short, the lawyer advocating X would have no reason to direct the discourse towards questions two and three. The answers to both of those questions are abundantly obvious and beyond dispute.

In this case, as in most cases, resolution of true legal conflict almost always comes prepackaged in chronologic and categoric ***544** axioms, and the ordering of legal categories and subcategories governing such cases. Once a true legal conflict has been admitted, the answers to the second and third questions enumerated above, and indeed the resolution of the true conflict itself, inescapably and transparently follow. The only way out of this trap is never to enter it in the first place, in other words, to deny the existence of a true legal conflict. The lawyer advocating X, in other words, is left with little choice but to focus on the meaning of the later in time created statute, insisting that it ought not to be read as prohibiting X, and that as a consequence, the two norms in question do not demand mutually exclusive outcomes. By advocating that the preexisting and new statutory textual norms stand in a posture of potential, rather than true legal conflict, the lawyer advocates that both legal norms remain fully in force. The lawyer advocating the prohibition of X, of course, will adopt the exact opposite strategy. Seizing upon the chronologic axiom, he will argue that the later in time created statutory textual norm can be read only to prohibit X, that the two norms consequently stand in a posture of true legal conflict, and that the newer statute therefore trumps the earlier created statute.

Henderson v. United States [FN208] vividly illustrates how the meaning of legal norms, and whether norms stand in a posture of true or potential legal conflict, dominates the discourse in cases of legal conflict. Henderson addresses whether Federal Rule of Civil Procedure 4, or section 2 of the Admiralty Act, 46 U.S.C. app. § 742, governs the period of time allowed for service of process in admiralty suits brought against the United States as owner of a vessel. [FN209] Rule 4 affords plaintiffs an extendable period of 120days from the date plaintiff files suit to effect service of process. [FN210] Under § 742, however, plaintiffs must effect service of process "forthwith," a period considerably shorter than 120 days. [FN211] Section 2 of the Admiralty Act was passed in 1920, and ***545** had remained unchanged at the time of Henderson. [FN212] Rule 4 was created eighteen years later, in 1938, and was amended by Congress in 1982. [FN213] In deciding the case the Court never touches on controversies relating to application of the chronologic axiom. Instead, the chronologic axiom operates as a background assumption which lies beyond dispute. The crux of the dispute centers on the meaning of Rule 4 and § 742, and whether the two norms can be reconciled. [FN214] At first glance, the plain meaning of Rule 4 would appear to stand in a posture of true legal conflict with § 742, and in accord with the chronologic axiom, the former should trump and repeal the latter.

The defendant, however, was not so quick to concede. Though unable to directly attack the chronologic axiom, the United States pursued the only strategy that could possibly save § 742 from implicit repeal--theories suggesting that Rule 4 and § 742 do not irreconcilably conflict. The United States first focused on the meaning of Rule 4, and suggested that the two provisions can be harmonized by interpreting Rule 4 as a reducible 120- day outer limit on plaintiff's time to serve process. [FN215] On this theory, § 742 merely works to shorten Rule 4's 120-day outer limit in a ***546** narrow subset of cases, and therefore does not irreconcilably conflict with Rule 4. Justice Ginsburg's majority opinion, however, rejected this line of argument on the grounds that, read in its historical context, Rule 4 does not set forth an outer limit on the time to serve process, but rather affords the plaintiff an "irreducible allowance" of 120 days within which to effectuate service. [FN216]

As a second theory for why the two norms do not stand in a posture of true legal conflict, the United States argued that Rule 4 may be interpreted as a procedural requirement, while § 742 may be read as a jurisdictional requirement relating to waiver of sovereign immunity. [FN217] On this line of reasoning, the two norms set forth separate and independent, and therefore non-conflicting, requirements. Procedurally, Rule 4 requires that plaintiff serve process within 120 extendable days of filing suit. [FN218] Jurisdictionally, in order to secure a waiver of sovereign immunity, § 742 requires that plaintiff serve the United States "forthwith." [FN219] Plaintiffs must satisfy both the procedural and jurisdictional requirements in order to bring the United States before a federal district court on an admiralty claim. The Court dismissed this argument as well, somewhat cryptically holding that "several of § 742's provisions . . . have a distinctly facilitative, 'procedural' cast," and therefore cannot be read as jurisdictional. [FN220]

Ultimately, the Court held that Rule 4 irreconcilably conflicts with and impliedly repeals § 742. [FN221] The important feature of this case, however, lies in its obsession with the meaning of Rule 4 and § 742, and its lack of discussion focusing on the chronologic axiom. Henderson, in other words, illustrates how the battleground in cases of legal conflict centers not on the application of the axioms, but rather on the meaning of the legal norms in question, ***547** and whether those norms stand in a posture of true or potential legal conflict.

B. Interpretive Subterfuge Prompted by the Rigid Axioms and Ordering

Beyond focusing attention on issues of norm interpretation, the framework for mediating true legal conflicts provokes courts to use their relatively unconstrained interpretive discretion to counteract their inability to directly and openly manipulate the framework's exceptionless, rigid, and formalistic nature. The rigidity of the framework affords courts no room to maneuver when dealing with true legal conflicts. Because the outcome of almost any true legal conflict mechanistically follows from the ordering and axioms, once a true legal conflict has been admitted, courts cannot directly and openly escape their inexorable consequences. No matter what the substantive ramifications, a court, to provide just two examples, cannot directly and openly escape finding that a new statutory textual norm trumps a preexisting truly conflicting statutory textual norm, or that a statutory norm trumps a truly conflicting administrative norm.

Yet, as Henderson suggests, courts can and do employ an indirect strategy for shaping substantive outcomes in cases of legal conflict. The rigidity of the framework denies courts the ability to manipulate its application to true legal conflicts. Courts, however, can and do use their relatively unconstrained interpretive discretion to select and avoid substantive outcomes by manipulating norm meaning, whether norms stand in a posture of true or potential legal conflict, and whether the framework for mediating true legal conflicts will be engaged or evaded. Opting for broad norm interpretation which results in finding norms in a posture of true legal conflict, for example, engages the ordering and axioms, and results in the mechanical nullification of the older or subordinate norm. Opting for narrow norm interpretation, and thereby finding norms in a posture of potential conflict, evades the rigidly formalistic framework for mediating true legal conflict, thus preserving the older or subordinate norm.

By toggling between plausible broad or narrow norm interpretations, courts indirectly and covertly select or avoid the substantive outcomes that mechanistically follow from the framework governing adjudication of true legal conflicts. When courts engage in this practice, the desire to engage or evade the framework, ***548** or to select or avoid the substantive outcomes resulting from the framework, rather than traditional indicia of legal meaning, drives the norm interpretations that courts adopt. In most cases, the use of judicial interpretive discretion to compensate for the lack of discretion in applying the framework merely leads courts to adopt norm interpretations other than those that they would otherwise choose if the avoidance or selection of substantive outcomes were not a consideration. In these cases, the desire to engage or avoid the framework operates as a "but for" cause of the court's choice of one particular plausible norm interpretation over another. In other cases, however, it appears that a desire to either avoid or select the substantive outcomes following from the framework for adjudicating true legal conflict prompts courts to adopt strained and tenuous norm interpretations lying on the fringes of plausibility. In both kinds of cases, the desire to either evade or engage the framework for mediating true legal conflicts distorts norm interpretation.

Of course, it is never possible to know with certainty what motivates a court to adopt a given norm interpretation. Consider, however, a few select examples where it appears likely that courts have used their broad interpretive discretion to either avoid or select outcomes resulting from the framework for mediating true legal conflict. In each

case the court adopts a plausible, but highly contested, or even difficult to justify, norm interpretation. Further, in each case the desire to either avoid or select the substantive outcomes resulting from the framework for mediating true legal conflicts helps account for and explain the strained norm interpretation adopted. While the norm constructions can be rationalized within the parameters of traditional principles of norm interpretation, the adopted constructions arguably lie on the fringes of plausibility. The added factor of either evading or engaging the framework for mediating true legal conflicts at the very least makes those interpretations more understandable than traditional principles of norm interpretation alone.

### 1. Henderson v. United States: Engaging the Chronologic Axiom

For an initial example, return to Henderson v. United States. [FN222] Recall that Henderson dealt with whether the time period for ***549** service of process set forth in Federal Rule of Civil Procedure 4 supersedes the time period for service of process set forth in § 742 of the Admiralty Act in admiralty cases brought against the United States. [FN223] With the chronologic axiom lurking in the background, the substantive outcome in Henderson turned most directly on the meaning attributed to § 742. If, as the three dissenting Justices, and four of the five federal appellate courts that considered the issue contend, § 742's "forthwith" service requirement counts as a jurisdictional prerequisite to waiver of sovereign immunity, [FN224] then § 742 does not stand in a posture of true legal conflict with the strictly procedural Rule 4. On the other hand, if § 742's "forthwith" service requirement is read as merely procedural, as the Court ultimately held, [FN225] then § 742 stands in true conflict with Rule 4, and under the chronologic axiom, Rule 4, passed by Congress in 1982, [FN226] inexorably works as an implied repeal of § 742, [FN227] passed in 1920. [FN228]

In order to reach the conclusion that Rule 4 impliedly repeals § 742's "forthwith" service requirement, however, the Court must disregard the canon of statutory interpretation instructing courts to resolve ambiguity over statutory waivers of sovereign ***550** immunity in favor of government entities. [FN229] On the one hand, the Court fails to obviate the canon's applicability by claiming that § 742 is unambiguous. The Court goes no further than the conclusory assertions that § 742's "forthwith" service of process requirement "is not pervasively 'jurisdictional,'" ' [FN230] "not sensibly typed . . . 'jurisdictional,'" ' but instead has a "'procedural' cast." [FN231] In short, the Court does not deny that § 742 is subject to more than one plausible interpretation. Indeed, as the dissenting opinion correctly points out, under commonly employed principles of statutory interpretation, § 742 is "ambiguous" at best. [FN232] Under such circumstances, the canon instructing that "the Government's consent to be sued must be construed strictly in favor of the sovereign . . . ." clearly applies. [FN233] The Court, however, never explains why the canon ought not lead to the contrary interpretation of § 742. Indeed, the Court never even mentions the canon.

The Court's thin reasoning in support of its reading of § 742, that a strong majority of federal judges that had considered the issue differed with the Court's interpretation, [FN234] and that the Court failed to even mention an obviously applicable canon of statutory construction that would have led to a contrary result, renders the Court's interpretation of § 742 highly suspect, at least from the perspective of traditional principles of norm interpretation. The Court's interpretation, however, becomes easier to understand once we factor in the consequences of interpreting the norm contrary to the canon. The contrary interpretation would, in accord with the chronologic axiom, result in the nullification of § 742 and its short period to effectuate service of process. In an era of liberalized federal service rules reflecting the desire to avoid dispensing with cases on purely procedural grounds, [FN235] and ***551** in which failure to timely serve process rarely leads to dismissal of claims with prejudice, [FN236] § 742 is an outdated anomaly. Unless the Court employs its broad interpretive discretion to give § 742 a strained interpretation which brings it into true conflict with Rule 4, § 742's outdated service of process requirement will persist. The desire to engage the chronologic axiom in the service of eradicating an anachronistic statutory requirement, rather than the traditional tools of statutory interpretation, best explains the Court's reading of § 742 in Henderson.

### 2. United Steelworkers of America v. Weber: Avoiding the Categoric Axiom and the Statutory Text over Statutory Doctrine Ordering

United Steelworkers of America v. Weber [FN237] provides another illustration of the use of judicial interpretive discretion, this time resulting in evasion of the categoric axiom and the statutory text over statutory doctrine

ordering. Weber dealt with Title VII of The Civil Rights Act of 1964, and whether under the Act, private sector employers may engage in voluntary race-conscious hiring practices aimed at eliminating existing racial imbalances in employment. [FN238] Justice Brennan's majority opinion found such practices permissible under Title VII. [FN239] Stated more precisely, the Court held that the doctrinal interpretation of Title VII permitting private sector employers to voluntary engage in race-conscious hiring practices did not stand in a posture of true conflict with the meaning of Title VII textual norm. To reach that conclusion the Court had to resort to a tenuous reading of Title VII.

Title VII generally prohibits race-based discrimination in employment. [FN240] In Weber the defendant-employer voluntarily adopted a program for training and hiring historically under-represented African-Americans for certain higher paying skilled positions. [FN241] The plan reserved fifty percent of the positions in the ***552** program for African-Americans. [FN242] In the first year of hiring under the plan, "[t]he most senior black selected into the program had less seniority than several white production workers whose bids for admission were rejected." [FN243] One of the more senior white employees who was not selected for the program instituted a class action suit alleging a Title VII violation. [FN244]

Both the plain meaning of Title VII, as well as the evidence of legislative intent, indicated that race-based discrimination, whether aimed at members of minority groups or at whites, was forbidden. Section 703(d) of the Act reads in relevant part as follows: "It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training." [FN245] Further, the extensive examination of evidence of legislative intent provided by Justice Rehnquist's dissenting opinion indicates that in passing Title VII, Congress contemplated that Title VII would not sanction race-based discrimination against non- minorities. [FN246]

The Court, however, skates around the plain meaning and legislative intent of Title VII with an ingeniously creative, though strained, reading of the Act. The Court first focuses on general statements of congressional intent indicating a desire to combat a long history of discrimination against African- Americans in employment. [FN247] Building on this background, the Court seizes upon section 703(j), which states that Title VII shall not be "interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group . . . ." [FN248] As the dissenting opinion makes clear, section 703(j) was inserted into Title VII by opponents of the bill who sought to insure that courts and administrative agencies would not interpret Title VII as sanctioning race-based discrimination against non-minorities. [FN249] Cleverly, however, the Court holds that the use of the word "require," rather than the words "require or permit," in section 703(j), indicates that Congress did ***553** not intend to prohibit voluntary, as opposed to court-ordered mandatory, private enterprise hiring programs discriminating against non- minorities in employment. [FN250]

While not without foundation, commentators have noted the tenuous reasoning of Justice Brennan's opinion in Weber. [FN251] Indeed, one commentator has credited the Weber opinion with reviving long dormant scholarly interest in statutory interpretation. [FN252] The Brennan opinion, in essence, uses a creative reading of Title VII to reconcile the meaning of Title VII with the doctrinal interpretation of Title VII advanced by the defendant, thus evading application of the textual norm over doctrinal norms ordering, and the inexorable nullification of the proposed doctrinal construction of Title VII via the categoric axiom. In short, the Court's broad interpretive discretion, and its willingness to adopt a strained doctrinal interpretation of Title VII, allows that doctrinal interpretation to survive. A less results-oriented reading likely would hold that Title VII prohibits all forms of race-based discrimination in employment, and thus would find the meaning of Title VII in true conflict with the interpretation of Title VII advanced by the defendant.

I make no comment on whether the Brennan reading of Title VII in Weber should be cataloged as good or bad, legitimate or illegitimate, or a proper use of judicial interpretive discretion or ***554** an example of judicial overreaching. My main point is merely that the formalistic rigidity of both the categoric axiom, and the statutory textual norm over statutory doctrinal norm hierarchy, prompts Justice Brennan to adopt a strained interpretation of the Title VII textual norm. Because the categoric axiom and textual over doctrinal norm framework offers the Court no room to maneuver, Brennan's opinion bends over backward to avoid true conflict between that textual norm and the doctrinal spin which Justice Brennan sought to create. That Justice Brennan and courts in general may in certain cases behave in a results-oriented fashion, is neither new nor particularly interesting. The intriguing observation, however, lies in the way that a simple set of axiomatic principles constitute immovable obstacles around which

courts and lawyers weave in order to achieve desired substantive outcomes and how these immovable obstacles all but oblige courts to adopt strained norm interpretations. Cases such as Weber illustrate the indirect but substantial impact the usually unnoticed rigidly formalistic ordering and axioms exercise on judicial behavior.

### 3. Tedla v. Ellman: Avoiding the Categoric Axiom and the Statutory over Common Law Ordering

We find courts interpreting around the framework for adjudicating true legal conflicts in cases dealing with statutory and common law norms as well. Recall the famous negligence per se case, Tedla v. Ellman, [FN253] where the Court of Appeals of New York created an exception to negligence per se rule it had earlier announced in Martin v. Herzog. [FN254] Under the negligence per se rule, applicable statutory standards of conduct, rather than the common law principle of reasonableness, provide the yardstick for determining negligence. When an act violates a statutory standard, that act will be deemed negligent, even where that act would be considered reasonable under traditional common law standards. [FN255] The negligence per se rule is thought to "respect the hierarchical nature of law by assuming that statutes, so long as they meet constitutional standards, always trump inconsistent ***555** common law rules." [FN256] In Tedla, however, strict adherence to the negligence per se rule, or in other words, strict adherence to the categoric axiom and statutory norm over common law norm ordering would have produced a problematic substantive outcome. Rather than mindlessly accepting that outcome, the court used its interpretive discretion to shape and refine common law doctrine so that regular common law reasonableness principles, rather than a statutory standard, would govern the case. The court in other words, narrows the contours of the negligence per se doctrine in order to avoid true conflict between the statute in question and normal common law principles of reasonable behavior.

A brief explanation of Tedla will clarify the point. The case centers on the defense of contributory negligence based on the plaintiffs' violation of a statute requiring that pedestrians walk on the left side of roadways, facing traffic. [FN257] The two plaintiffs, however, had been walking on the right side of a New York highway, with traffic, when they were struck by the negligent defendant's automobile. [FN258] Because eastbound traffic was heavy, and westbound traffic was light, however, walking on the right hand side of the road, in violation of the statute, was in fact safer than walking on the left hand side of the road, in compliance with the statute. At the time New York adhered to the rule of contributory negligence. Finding plaintiffs contributorily negligent for having violated the applicable statute would have denied plaintiffs any recovery from the admittedly negligent driver. This result seems unfair because the plaintiffs were acting reasonably and safely, albeit in violation of the statute.

At first glance, the statute, requiring pedestrians to walk on the left hand side of roadways, and the common law rule of reasonableness, allowing pedestrians to walk on the lighter traffic side of the road whether on the left or right, stand in a posture of true conflict. In accord with the negligence per se doctrine, which merely restates a fragment of the categoric axiom, the statutory standard should trump the common law standard, and the plaintiffs should be found contributorily negligent for having violated the statutory standard, and should recover nothing. Rather than accept such an undesirable outcome, the court employs its ***556** interpretive discretion to fashion an exception to the negligence per se rule which eliminates the true conflict between the statutory and common law norms. [FN259] Under the newly created exception, which arguably swallows the rule, [FN260] violation of a statutory standard of conduct will be excused whenever compliance with that standard would be more dangerous than non-compliance. [FN261] Given the newly created exception, the statutory standard would not apply to plaintiffs, for compliance with the statute would have required the plaintiffs to walk into the face of heavy traffic, rather than with their backs to light traffic.

By narrowing the circumstances under which negligence will be defined by a statutory rather than a common law reasonableness standard, Tedla eliminates what otherwise would have been an instance of true legal conflict between statutory and common law norms. [FN262] Had the court simply blindly applied the unmodified negligence per se rule of Martin, plaintiffs would have been found contributorily negligent, and would not have recovered from an admittedly negligent driver. Having eliminated the statute versus common law standard true conflict, the common law rule of reasonableness governs the case. Plaintiffs, therefore, may be found not negligent, and can recover against the negligent driver.

The key point we can draw from Tedla, however, is that the ***557** rigidity of both the statutory over common law

ordering and the categoric axiom force the Court to narrow the Martin negligence per se rule. In order to avoid the effect of the exceptionless and inflexible categoric axiom, and the substantively undesirable result it would produce, the court in Tedla must truncate the rule of Martin. Under a less formalistic and more flexible system for adjudicating truly conflicting norms, in contrast, the court could have left the rule of Martin fully intact, but determined that on the particular facts of Tedla, the rule of Martin ought not apply, despite the fact that such an outcome would invert the statute over common law ordering and violate the categoric axiom. Assume, for example, that the categoric axiom were not an iron-clad rule, but rather merely a rebuttable presumption favoring statutes over common law norms. Under such a regime, rather than truncating an extant common law rule, which has ramifications for future cases, the court could simply find that on the particular facts of Tedla the presumption favoring statutes over common law rules has been overcome. The impact of the decision in Tedla would be limited to the parties in that case, and courts adjudicating future cases similar to Tedla would revisit on a case-by-case basis the issue of whether the statute over common law ordering presumption has been overcome.

### 4. Rust v. Sullivan: Avoiding the Categoric Axiom and the Constitutional over Statutory Norm Ordering

Courts use their interpretive discretion to avoid and select substantive outcomes following from the framework for mediating true legal conflicts in the constitutional context as well. Recall the already mentioned potential legal conflict between First Amendment doctrinal norms and statutes which regulate certain categories of content-based utterances. First Amendment doctrine generally prohibits content-based speech regulations. [FN263] ***558** The Supreme Court, however, has carved out narrow exceptions to that general prohibition. As previously mentioned, the Court has upheld a federal statute prohibiting utterances constituting threats of violence against the President of the United States. [FN264] Other exceptions from First Amendment coverage include defamatory, obscene, profane, and fighting words utterances. [FN265]

The rigidity of the categoric axiom and ordering of legal categories all but compels the Court to exercise its interpretive discretion over the contours of First Amendment doctrine to carve out these categoric irregularities, thus avoiding true conflict between First Amendment doctrine and certain categories of statutory speech regulations. Because the categoric axiom itself admits of no exceptions, when facing a statute penalizing, for example, threats of violence against the President, or defamatory utterances, the Court faces two choices. On the one hand, it can maintain a conceptually neat and orderly First Amendment doctrine prohibiting all restrictions aimed at content-based utterances. On the other hand, when the categoric axiom and constitutional norm over statutory norm ordering would result in the nullification of a desirable statutory norm, the Court can carve out an exception to that general prohibition.

As with cases where the Court has carved out categoric exceptions to the general First Amendment prohibition on content-based speech regulations, Rust v. Sullivan [FN266] illustrates the use of judicial interpretive discretion employed in the service of avoiding true legal conflict and the attendant substantive consequences. The case provides ample reason to suspect that the desire to evade the categoric axiom, and thus preserve a sub- constitutional ***559** norm, motivated the Court to endorse a questionable statutory interpretation.

Rust dealt with Title X of the Public Health Service Act, and a set of Department of Health and Human Services Regulations interpreting Title X. [FN267] Title X authorized federal grants for "'family planning projects which . . . offer . . . family planning methods and services," ' [FN268] but prohibited the award of such grants to "'programs where abortion is a method of family planning." ' [FN269] Health and Human Services administrative regulations interpreting and implementing Title X's "'abortion as a method of family planning" ' language [FN270] imposed three conditions on receipt of a Title X family planning grant: First, the "'project may not provide counseling concerning the use of abortion as a method of family planning." ' [FN271] Second, the project cannot "'encourage, promote or advocate abortion as a method of family planning." ' [FN272] And third, the project must be "'physically and financially separate" ' from any organization engaging in abortion activities. [FN273]

Petitioners challenged the agency interpretation of Title X as a violation of First Amendment free speech doctrine, and Fifth Amendment Due Process Clause right to terminate pregnancy doctrine. [FN274] In a five-to-four decision authored by Justice Rehnquist, the Court rejected the petitioner's argument, and held that the agency interpretation of Title X did not run afoul of First and Fifth Amendment protections. [FN275] In order to reach that conclusion,

however, the Court, as in Henderson v. United States, [FN276] had to glide over a clearly applicable canon of statutory construction which would have lead to the opposite result. [FN277] Moreover, Justice Rehnquist had to sidestep that canon of construction in a situation quite similar to both pre- and post- Rust cases where he was willing to use the canon to support the statutory interpretations he there endorsed.

***560** Rehnquist's opinion conceded the ambiguity of both Title X's text and legislative history, [FN278] that petitioners had offered a permissible alternative reading of the statute, [FN279] and that the constitutional objections raised by petitioners were not without force. [FN280] Normally, under such circumstances, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." [FN281] Despite the avoidance canon's [FN282] directive, however, the Court endorsed the constitutionally questionable agency interpretation of Title X over the also plausible but constitutionally clean interpretation suggested by petitioners. The Court dismisses the avoidance canon on the grounds that the constitutional objections raised by petitioners were not sufficiently "grave and doubtful" to merit adoption of an alternative less constitutionally problematic reading of Title X. [FN283] Justice Blackmun's strongly worded dissent charges that the Court "sidesteps" the avoidance canon, [FN284] and labels the Court's minimization of the constitutional questions implicated by the agency interpretation of Title X as "disingenuous at best." [FN285]

The avoidance canon essentially instructs courts to treat any statutory norm that raises serious constitutional questions as in true conflict with constitutional norms, and to adopt a plausible interpretation of that statutory norm which does not implicate ***561** serious constitutional issues, thus avoiding the true conflict. The wiggle room in the canon comes in defining whether the constitutional issues raised by a particular statutory norm interpretation indeed raise "serious" or merely trivial constitutional issues. Reasonable minds may disagree as to whether the constitutional issues at play in Rust were sufficiently serious to invoke the avoidance canon. Rust, however, at the very least reinforces the idea that courts enjoy sufficient interpretive flexibility to either select or avoid the substantive outcomes that would otherwise mechanistically result from the framework for mediating true legal conflicts. To Blackmun, the agency interpretation of Title X not only raises serious First and Fifth Amendment issues, but in fact clearly stands in a posture of true conflict with First and Fifth Amendment doctrine. [FN286] Rehnquist, in contrast, argues that, while raising constitutional questions that are not without force, the agency interpretations ultimately do not raise sufficiently "serious" First and Fifth Amendment issues to merit their invalidation under the avoidance canon. [FN287] By manipulating whether a statute or regulation raises sufficiently serious constitutional issues, a court manipulates whether those statutory or administrative norms stand in a posture of true or potential conflict with constitutional norms, and ultimately manipulates whether those statutory or administrative norms will survive or be nullified in accord with the categoric axiom.

More likely, however, Rust demonstrates how courts can use the plasticity of their interpretive discretion to select a substantive outcome despite the rigid formalism the categoric axiom, or more broadly the rigid formalism of the framework for mediating true legal conflicts. Just three years after sidestepping the avoidance canon in Rust, in United States v. X-Citement Video, Inc., [FN288] also a First Amendment case, Justice Rehnquist employed the avoidance canon to invalidate a statutory interpretation raising what he held to be serious constitutional questions. X-Citement dealt with an alleged violation of the federal statute prohibiting the shipping, receipt, distribution, and reproduction of child pornography. ***562**[ FN289] At issue was the statute's scienter requirement, and whether it applied only to the act of transport, shipping, receiving, distribution or reproduction of materials, or to both the act of transport, shipping, receiving, distribution or reproduction of materials, as well as the fact that the materials constitute pornography depicting minors. [FN290] The former broad interpretation would allow conviction of those who, for example, knowingly transport across state lines materials that happen to constitute child pornography, even if they did not know that the material constituted child pornography. The latter narrow interpretation would only allow convictions where, for example, one transporting materials knows or has reason to know that the material he transports constitutes child pornography.

Though admitting that the former interpretation is the "most natural grammatical reading" of the statute, [FN291] relying on the avoidance canon the Court adopts the latter narrow interpretation. [FN292] A scathing dissent authored by Justice Scalia accuses the Court of abusing the avoidance canon to rewrite the statute in a way never intended by Congress, and irreconcilable with the meaning of the statute, [FN293] in order to avoid holding the only plausible reading of the statute unconstitutional under First Amendment free speech principles. [FN294]

Further, three years before Rust, Justice Rehnquist signed onto a majority opinion endorsing use of the avoidance canon in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council. [FN295] Rust closely parallels DeBartolo Corp. In both cases the Court finds that the statute is subject to more than one plausible interpretation. [FN296] In both cases the Court finds that the administrative agency interpretations of the respective statutes raise important constitutional questions. [FN297] Both opinions mention and discuss the avoidance canon. [FN298] At ***563** this point, however, Rust and DeBartolo Corp. part company. In DeBartolo Corp., the Court applies the avoidance canon, and rejects an administrative statutory interpretation which raises serious constitutional concerns. [FN299] In Rust, the Court downplays the seriousness of the constitutional concerns, and therefore dismisses the avoidance canon, allowing an agency statutory interpretation to stand. [FN300]

None of this is meant to argue that one could not conjure up logical lines of distinction rationalizing and distinguishing the use (or abuse) of the avoidance canon in Rust, X-Citement, and DeBartolo Corp. Instead, the point is to demonstrate that the plasticity of judicial norm interpretation discretion allows courts to compensate for their lack of discretion and control over the application of the axioms and ordering that form the framework for mediating true legal conflicts. Where a court wishes to avoid a particular statutory interpretation, it can pursue the following strategy: find that the interpretation raises "serious" constitutional questions, deploy the avoidance axiom to find that interpretation irreconcilably conflicts with constitutional norms, and, in accord with the categoric axiom and the ordering of legal categories, invalidate the statutory interpretation. A court may employ this strategy even when it arguably requires giving the statute a meaning different from the most natural meaning of the statute's words, or the most likely legislative intent. X-Citement represents such a case. Alternatively, where a given statutory interpretation raises constitutional questions, a court wishing to preserve that interpretation deploys the opposite strategy: sidestep the avoidance canon by holding that the constitutional questions are not sufficiently serious to merit adoption of a less plausible statutory interpretation raising no constitutional issues. Arguably, Rust represents such a case.

In short, by manipulating norm interpretations, and whether those interpretations raise "serious" constitutional questions, courts may selectively invoke or evade the avoidance canon. Invoking the avoidance canon, results in finding the norms in question in a posture of potential legal conflict, and preservation of a ***564** desirable (to that court) statutory norm interpretation. Evading the avoidance canon results in finding the norms in question to be in a posture of true legal conflict, resulting in the nullification of a problematic (to the court) statutory interpretation, and the adoption of some other more desirable interpretation. Either way, a desire to either evade or engage the categoric axiom and attendant substantive consequences influences the norm interpretation ultimately adopted. According to Professor Kloppenberg, this is exactly what we see in Rust and X-Citement. [FN301] In Rust, Justice Rehnquist employs what Professor Kloppenberg terms the narrow version of the avoidance canon, [FN302] which requires that the statutory interpretation in question raise "grave and doubtful" constitutional questions. [FN303] Using the narrow version of the avoidance canon, the five-to-four majority opinion upholds the controverted agency interpretation of Title X. [FN304] In X-Citement, however, Rehnquist returns to the broad version of the avoidance canon that he had rejected in Rust, which requires avoidance of any statutory interpretation that would raise "serious" constitutional questions. [FN305] Using the broad version of the avoidance canon, Rehnquist narrowly construes a statute. [FN306] According to Professor Kloppenberg, the "inconsistency" in the Court's use of the avoidance canon exemplified in Rust and X-Citement suggests a "politically motivated and results-oriented" approach. [FN307] Professor Kloppenberg's evaluation of Rust summarizes the point succinctly: "Because there are two versions of the [avoidance] canon, courts are able to sidestep the canon when, for political reasons, they wish to address the constitutionality of controversial statutes and regulations." [FN308] The fact that Justice Rehnquist has voted consistently to limit the right to terminate pregnancy, [FN309] coupled with the fact that he flip-flops from ***565** the narrow to the broad version of the avoidance canon from Rust to X-Citement, strongly suggests a results-oriented approach designed to circumvent the categoric axiom, and constitutional norm over statutory norm ordering.

Thus, beyond merely reinforcing the point that courts very often enjoy enough interpretive flexibility to evade the categoric axiom and constitutional norm over statutory norm hierarchy, Rust provides ample evidence to suggest that the substantive outcomes that follow from either finding the agency interpretation of Title X in true or potential conflict with First and/or Fifth Amendment doctrine motivate the statutory interpretations advanced by the Court. Had the Court been interpreting Title X in a vacuum, or behind some form of a Rawlsian veil of ignorance ***566** blind to the categoric axiom and attendant substantive consequences, it may very well have reached the opposite

interpretation of Title X. Realizing that reading Title X in a way that puts it in true conflict with the First or Fifth Amendment would lead to nullification of a favorable (in the Court's eyes) administrative interpretation of Title X, however, appears to have motivated the Court to find the norms involved in potential rather than true conflict, thus upholding the agency interpretation of Title X.

Again, I do not here offer any judgment on whether such judicial behavior should be praised or condemned. My main point is rather that such judicial behavior occurs because formalistic rigidity of the chronologic and categoric axioms, along with the ordering of legal categories and subcategories, offers courts no space to influence substantive outcomes. Lacking a way to manipulate our framework for mediating true legal conflicts, courts fall back on the only tool available--their broad interpretive discretion--in an effort to shape substantive outcomes. This perspective on judicial behavior explains why, for example, Justice Rehnquist would vacillate between the broad and narrow versions of the avoidance canon in Rust, X- Citement, and DeBartolo Corp. that the courts are inconsistent from case to case, and that substantive outcomes motivate that inconsistency is old news. The novel observation, however, lies in the idea that the ordering and axioms, factors rarely part of legal discourse or mentioned in opinions, all but force courts with an eye on substantive outcomes into such inconsistencies.

## IV

## The Juxtaposition of the Formalistic Axioms and Ordering with Anti-Formalist Interpretive Discretion

The cases discussed above illustrate how courts can use their relatively unconstrained interpretive discretion to evade or engage the framework governing adjudication of true legal conflicts. On the one hand, judicial interpretive discretion functions as an escape valve for the rigid axiomatic rules governing instances of true legal conflict. Where, for example, those rules point to problematic substantive outcomes, a court interprets the norms in question as in potential rather than true legal conflict, thus sidestepping application of the framework and its inexorable consequences. On the other hand, the flexibility of judicial interpretive discretion allows courts to easily engage the framework's ***567** formalistic machinery in order to achieve desirable substantive outcomes by finding norm pairs in a posture of true rather than potential conflict. By reading a statutory norm broadly, for example, a court finds that statutory norm to be in true conflict with a problematic common law norm, thus engaging the categoric axiom, and nullifying the problematic common law norm. In so doing the court creates a superficial appearance of neutrality. The principles employed by the court, for example, that statutory norms trump truly conflicting common law norms, rather than judicial manipulation of the meaning of the norms, at least superficially appear to do the work of nullifying the problematic (to that court) norms.

Such interpretive subterfuge is interesting because it squarely juxtaposes loosely constrained, complex, anti-formalistic judicial norm interpretation principles with formalistic, rigid, and uncomplicated frameworks for mediating true legal conflict. The odd feature of this juxtaposition lies in the following: courts are never willing to openly and directly violate the chronologic and categoric axioms, or to invert the extant legal categoric hierarchies. Yet they appear perfectly willing to use their broad powers of norm interpretation, often to the point of adopting strained and difficult to rationalize norm constructions lying on the fringes of plausibility, in order to evade and/or engage that framework, thus willfully shaping substantive outcomes. No court, for example, would dare to explicitly and openly contradict the notion that textual norms trump corresponding constitutional, statutory, and administrative doctrinal norms, or in other words, that constitutional, statutory, and administrative doctrinal norms at least must be reconcilable with the meaning of corresponding textual norms. [FN310] At the same time, however, courts appear perfectly willing to use their interpretive discretion, often in inconsistent and hard to rationalize ways, to weave around and evade this and ***568** other axiomatic principles governing true legal conflict. In such cases, courts formally adhere to the axioms, but in actuality subvert them.

That courts are often inconsistent, willful, substantive outcome driven, and willing to deploy discretion in an area where they enjoy it (norm interpretation) to compensate for their lack of discretion in another area (mediating true legal conflict), is of no great moment. That courts use their interpretive discretion to affect substantive outcomes, or conversely that substantive outcomes influence judicial norm interpretation, scarcely raises an eyebrow. An interesting and novel feature of this practice, however, lies in the fact that the legal system insists on rigid, exceptionless, formalistic chronologic and categoric axioms, and ordering of legal categories and subcategories,

while simultaneously allowing courts to employ their flexible norm interpretation powers to evade and subvert them. Why would a legal system so closely juxtapose such contradictory elements? Why, for example, stridently insist that constitutional norms always and unconditionally trump even new and highly democratically legitimate statutory norms, while at the same time allowing sufficient discretion in shaping the meaning of constitutional and statutory norms that courts can freely toggle between finding those norms in true versus potential conflict, and thereby select substantive outcomes? The dilemma presents itself at two levels. First, why so closely intertwine formalism with anti-formalism? Next, why insist on an ordering of legal categories and subcategories featuring an exceptionless and rigid superiority of constitutional norms over statutory norms, while allowing courts sufficient interpretive discretion to avoid that ordering in most cases of conflict?

The latter query, of course, touches on Alexander Bickel's counter- majoritarian difficulty, [FN311] the central question of American constitutional theory over the last several decades. [FN312] Examination ***569** of our legal system's practice of adjudicating conflicts between legal norms demanding mutually exclusive outcomes, however, has revealed that the counter-majoritarian difficulty presents itself not only in cases of true conflict between constitutional and sub-constitutional norms, but that it in fact pervades the entire legal system. Not only can the categoric axiom and ordering of legal categories result in the nullification of statutes of high democratic legitimacy by constitutional norms of low democratic legitimacy, but they can lead to statutes of low democratic legitimacy trumping administrative and/or common law norms of high democratic legitimacy, or administrative norms of low democratic legitimacy trumping common law norms of higher democratic legitimacy.

Thus, for example, an old anachronistic statute passed by a long-retired Congress, and no longer able to muster majoritarian support, trumps a truly conflicting administrative agency regulation created by the current executive enjoying an electoral mandate, and reflective of current majoritarian sentiments. [FN313] Similarly, an agency regulation reflective of narrow special interests that have "captured" a regulatory agency will trump a truly conflicting common law norm favoring more broad based general interests. Likewise, the categoric axiom and the textual over doctrinal norm ordering also result in the nullification of doctrinal norms of high democratic legitimacy by textual norms of low democratic legitimacy. Thus, for example, a recent judicial doctrinal interpretation of an old and anachronistic statutory textual norm may better reflect current majoritarian sentiments than the ***570** statutory textual norm itself. In accord with the categoric axiom, and textual norm over doctrinal norm ordering, however, if that recent doctrinal interpretation stands in a posture of true conflict with the old and anachronistic statutory textual norm, the textual norm will trump the doctrinal norm. [FN314] The categoric axiom and textual norm over doctrinal norm ordering produces the same outcome in cases of true conflict between constitutional textual and doctrinal norms. An old and anachronistic constitutional textual norm trumps truly conflicting constitutional doctrinal norms, even when the doctrinal norm, but not the textual norm, could pass majoritarian muster in today's world. [FN315]

***571** Whether the pervasive counter-majoritarian results that the framework for mediating true legal conflicts can produce represents a virtue or a vice lies beyond the scope of this Article. More germaine to this project, however, is seeing the counter-majoritarian problem as pervasive, rather than merely a question of constitutional law. This underscores the questions raised above: Why stridently insist that constitutional norms trump truly conflicting sub-constitutional norms, or that statutory norms trump truly conflicting sub- statutory norms, while simultaneously allowing courts free rein in determining whether or not norms stand in true or potential conflict? More generally, what could explain the odd juxtaposition of a rigidly formalistic framework for mediating true legal conflict with ample judicial interpretive discretion enabling courts to easily subvert that framework?

The counter-majoritarian effects the framework can produce immediately suggest one possible answer. Were it not for flexibility in defining the meaning of norms, and in turn in determining whether norms stand in a posture of true or potential conflict, the inflexibility of the framework for mediating legal conflicts would render courts powerless to avoid even disastrous, unexpected outcomes to true legal conflicts that the framework would mechanistically produce. Would we really want a system of axiomatic rules for resolving true legal conflict without flexible rules of norm interpretation that allow courts to wiggle out from under their unbending constraints? Would we really want a system, for example, that forces the Supreme Court to strike down as violating the First Amendment every statute that limits utterances based on content? Perhaps we are better off with a system of rigid formalistic axioms, coupled with relatively unconstrained principles of norm interpretation, which allows courts to find that the First Amendment, in fact, does not extend to protect certain narrow classes of utterances, and therefore does not stand in a posture of true conflict with statutes that prohibit fighting words or defamation. The same argument applies at other

levels. Do we really want a system for managing legal conflict which affords no judicial ability to find via creative norm interpretation, for example, ***572** that a new agency regulation influenced by current executive and legislative branch oversight does not truly conflict with an anachronistic statutory norm created by a long retired Congress? Or do we really want a system which denies courts the ability to narrowly interpret some statute serving narrow special interests, and thereby preserve a potentially conflicting, long standing, and public-interested common law norm?

After all, in at least some cases, the Supreme Court appears to use its interpretive discretion to soften what would otherwise be harsh and sometimes counter-majoritarian outcomes resulting from the framework for mediating true legal conflict. Indeed, somewhat counter-intuitively, under the extant framework for mediating true legal conflicts, avoidance of counter-majoritarian outcomes often requires that courts exercise their interpretive discretion in a willful fashion, and that they adopt farfetched norm interpretations. Courts unwilling to use their norm interpretation powers in a purposeful manner will end up blindly enforcing both newer special interest driven norms over older norms reflecting broader based interests, and categorically superordinate but undemocratic norms over subordinate but majoritarian norms.

On the other hand, such an arrangement allows courts to surreptitiously undermine what are supposed to be exceptionless and unambiguous axioms without explaining their motivations or reasoning, and to do so without the benefit (or perhaps the burden) of fact development, briefing, and oral argument on whether those axioms ought not be followed in the particular case by the parties. Though the avoidance and selection of the substantive outcomes resulting from the framework for mediating true legal conflict appear in many cases to drive the norm interpretations that courts adopt, the discourse of judicial opinion focuses more on issues of norm interpretation than on the underlying issue of the merits and demerits of substantive outcomes. Courts engaging in this brand of interpretive subterfuge never explicitly or formally violate the chronologic or categoric axioms, nor invert the hierarchies of the ordering of legal categories and subcategories. Nonetheless, by interpreting norms with an eye towards finding norms in either true or potential conflict, or towards either avoiding or selecting the substantive outcomes resulting from the framework for resolving true legal conflicts, courts in effect do just that. Most importantly, they do so without ***573** having to justify their reasons in a public written opinion, for their opinions center on the issue of norm interpretation, and whether norms, as interpreted, stand in a posture of true or legal conflict while the opinion may justify the interpretation adopted using traditional tools of norm interpretation, in actuality, the factors driving the adopted norm interpretation--the desire to evade or engage the framework for mediating true legal conflict, and to thereby avoid or select attendant substantive outcomes--never is briefed, argued, or included in the court's published opinion. In short, while the coupling of a rigid, exceptionless, formalistic framework for mediating true legal conflict with sufficient interpretive discretion to undermine that framework, may allow courts enough flexibility to reach the 'right' outcomes, it fails to force them to articulate what truly motivates those outcomes. Rather than a frank discussion of substance, this arrangement permits the charade of holding norms in true or potential legal conflict in order to reach desired unstated and unjustified substantive outcomes.

Moreover, though interpretive flexibility may be useful for ameliorating the counter-majoritarian effects that the framework for mediating true legal conflict would otherwise produce in selected cases, it also opens the door to another counter-majoritarian problem. Specifically, it opens the door to willful, unelected judges employing their broad interpretive powers, not to soften the counter majoritarian blow of the rigid framework, but instead to consciously or unconsciously avoid or select particular substantive outcomes in line with personal values or political judgments. While we can never penetrate the minds of judges, cases like Rust, Tedla, Henderson, and Weber arguably exemplify the use (or misuse) of interpretive discretion to avoid or select the substantive results which, on more honest and less strategic norm interpretations, would mechanistically follow from the framework for mediating true legal conflict. In sum, the practice of adjudicating legal conflict is a double-edged sword. On the one hand, the framework's rigidity necessitates the use (and even abuse) of broad judicial interpretive discretion to smooth out its sharp edges in cases where it would produce counter-majoritarian or otherwise undesirable substantive outcomes. That broad interpretive discretion, however, allows courts to undermine the framework at will, often in counter-majoritarian ways. As the saying goes, live by the sword, die by ***574** the sword. The oddity of this system can best be explained as a reflection of contrary desires--the desire to limit judicial discretion, and the desire to allow an escape value for rigid, rule-based resolution of true legal conflicts.

At the end of the day, this odd juxtaposition of formalism and anti- formalism is unsatisfactory. While no system incorporating an element of judicial discretion can eradicate the risk of judicial willfulness, by employing loosely constrained judicial norm interpretive discretion as the salve for the formalistic framework for mediating true legal

conflict, our system exacerbates that risk. It does so because it allows courts to cloak value driven outcomes, and evasion and engagement of the framework for mediating true legal conflict, in the neutral sounding language of norm interpretation. Thus, rather than explicitly stating and justifying an evasion, for example, of the chronologic axiom, our system allows courts to achieve that evasion by narrowly interpreting a new statutory norm such that it stands in a posture of potential rather than true conflict with a preexisting desirable (to that court) statutory norm by selecting and citing the interpretive principles which rationalize that finding.

Again, interpretive subterfuge in and of itself is old news. The close juxtaposition of broad interpretive flexibility with the extreme formalistic rigidity of the framework, however, represents a truly odd phenomenon. Why deny courts any modicum of discretion in applying the framework, while at the same time affording courts ample discretion to easily sidestep the framework? Why not simply give courts some flexibility up front so as to avoid the charade of the use and abuse of interpretive discretion masquerading as neutral and objective adjudication? Given all of this, we are still left with the question of whether it makes sense to deny courts discretion at one level while granting courts broad discretion at another. In other words, if we are willing to afford courts broad enough interpretive discretion so that they can wiggle out from under the formalistic axioms governing true legal conflicts, why not just give courts the discretion to determine which of two conflicting legal norms should prevail in the first place? Rather than falsely constraining courts with axioms and an ordering of legal categories and subcategories, and forcing courts to engage in interpretive subterfuge in order to circumvent those restraints, why not simply allow a court facing two conflicting norms to make a policy decision as to which of the ***575** two norms ought to prevail, or whether the two ought to be harmonized?

Part of the answer lies in the recognition that judicial interpretive discretion, though not nearly as inflexible as the chronologic and categoric axioms, is at least in some cases bounded. While a given legal norm may admit to a range of plausible meanings, no legal norm admits to an unbounded range of meanings. Indeed, in many cases, courts have little choice but to find norms in a posture of true conflict, or alternatively little choice but to find them in a posture of potential conflict. As such, a system of rigidly formalistic axioms coupled with relatively unconstrained, but not totally open-ended, interpretive discretion in fact will work in many cases to limit judicial ability to avoid the axioms. While a court may in one case have a free choice as to finding a pair of norms in either true or potential legal conflict, courts will not enjoy such a free choice in all cases. In some cases a court has little choice but to find that two norms stand in a posture of true legal conflict. In other cases, a court has little choice but to find that two norms do not stand in a posture of true legal conflict.

Ultimately, any defense or criticism of the practice of coupling the formalistic and rigid framework for mediating true legal conflicts, however, must engage in some form of comparative analysis. We must ask, in other words, whether we could construct a better system than the arguably paradoxical or internally contradictory one that we now employ. Given the parameters implicit in current practices--that both unconstrained judicial discretion, as well as pure rigid formalism are undesirable methods for mediating true legal conflicts--can we conceive of a system superior to the odd mix of formalistic axioms coupled with relatively unconstrained interpretive discretion that we now employ?

I leave the task of fully answering that question for future work. At this point, however, I sketch the following preliminary response: It is unclear that our current set of practices can be characterized as optimal. The presumption must be against any system so closely juxtaposing polar opposite elements. We can imagine alternative systems for managing legal conflict which both constrain judicial power, yet avoid the shortcomings of our current practice. A system based on rebuttable presumptions (that newer norms trump older norms of the same legal category and subcategory, and that norms belonging to superordinate legal categories or subcategories trump norms belonging to ***576** subordinate legal categories or subcategories) may represent a step towards such a system. Alternatively, a system that discards the chronologic and categoric axioms altogether, and replaces them with a multi-factor balancing test for deciding which of two conflicting norms should prevail may also prove superior to our current set of practices.

These systems would shift the exercise of judicial discretion from issues of norm interpretation onto the issue of whether and why the presumptions favoring newer and superordinate legal norms ought to be rebutted in a given case, or whether and why a multi-factor balancing test points towards favoring an older norm over a newer norm, or a superordinate norm over a presumptively subordinate norm. Further, a system based on rebuttable presumptions with enumerated exceptions, or a system based on a multi-factor balancing test, would allow courts flexibility to

shape outcomes in cases of legal conflict, or more importantly, to avoid the unforseen problematic substantive outcomes resulting from a more rigid axiomatic rule-based system. At the same time, however, such systems would focus the discourse in cases of legal conflict upon the central issue of which norm ought to be privileged, and which norm ought to be subordinated, rather than on the side issue of norm interpretation. Such systems would allow courts to interpret norms based on the traditional tools of norm interpretation, free from the temptation to use their interpretive discretion to compensate for their lack of discretion in applying a rigid, formalistic framework for mediating true legal conflict. Rather than strained norm interpretations, courts could explain their decisions by showing that the case at hand fits within certain exceptions to the chronologic or categoric axioms, or alternatively, that the presumptions have been overcome.

Of course, systems for dealing with legal conflict based on rebuttable presumptions or multi-factor balancing tests would themselves be subject to interpretive subterfuge. Courts can always manipulate the weight assigned to one or two factors in a balancing test, or manipulate the strength of rebuttable presumptions, in order to avoid or select a problematic or desired substantive outcome. This is always the case, at least in any system which affords courts a measure of discretion, and therefore cannot form a basis for qualifying such systems as inferior to the current system. On the other hand, systems based on rebuttable ***577** presumptions, or multi-factor balancing tests would have an advantage. They would allow courts to honestly interpret legal norms, or more accurately, to interpret legal norms in accord with the traditional tools of norm interpretation, rather than under a regime making interpretive subterfuge the only possible means for escaping a rigidly formalistic framework for mediating true legal conflicts. Further, such systems would allow courts to make the issue of whether the chronologic or categoric axioms ought to be applied or ignored the central issues of litigation in cases of legal conflict. Rather than the artificial issues of legal interpretation, and true versus potential legal conflict, which in many if not most cases reaching the appellate courts are wholly indeterminate, courts could focus explicitly and directly on the real underlying issue of whether and why in a given instance a new norm ought not trump a preexisting norm, or a normally categorically superordinate norm ought not trump a normally subordinate norm.

## V

## Conclusion: The Democracy Enhancing Source Narrative Underlying the Ordering and Axioms and Its Normative Implications

Despite the oddity of coupling a rigidly formalistic framework for mediating true legal conflict with highly flexible interpretive discretion, there is a definite logic underlying and justifying the framework's architecture. As mentioned above, in many cases the framework can result in anti-democratic outcomes, especially when courts refrain from using their flexible interpretive discretion to ameliorate the framework's exceptionless axioms. Despite this, a democracy reinforcing narrative underlies and justifies the ordering and axioms. Examination of both the peculiar way this justificatory narrative attempts to advance democratic ends, as well as the way it fails in that attempt, points towards a number of interesting, iconoclastic, and sometimes unnerving, normative prescriptions. I leave for future work a full explanation of the justificatory narrative underlying the framework for mediating true legal conflicts, its democracy enhancing aims, and the normative prescriptions that follow. To conclude this Article, however, I offer a brief sketch of the direction I anticipate that future work will take.

To begin, the narrative rationalizing and explaining the architecture***578** of the framework for mediating conflict between legal norms demanding mutually exclusive outcomes focuses on the sources of legal norms, and the differing degrees of majoritarian democratic legitimacy that those sources may plausibly claim. Stated more specifically, differences between the sources of legal norms, and differences between the perceived majoritarian democratic legitimacy of those sources, explain and legitimize (1) the structure of the extant ordering of legal categories and subcategories, (2) the categoric axiom, and (3) the chronologic axiom.

First consider how the differences in sources of legal norms account for the different legal categories and subcategories. Simply stated, we treat legal norms created by a particular law-creating entity or institution as similar in kind, and as members of a particular legal category. We categorize legal norms created by legislative bodies, for example, as members of the legal category "statutory norms." Similarly, legal norms ultimately created by the popular sovereign are categorized as constitutional norms, while we treat legal norms created by executive branch agencies as administrative norms, and legal norms created exclusively by Article III courts as common law norms.

On the subcategoric level, we recognize textual norms, most directly created by the popular sovereign, legislative bodies, or administrative agencies, as categorically distinct from doctrinal norms, created most directly by judicial institutions. In short, the difference in sources of legal norms accounts for the categoric and subcategoric distinctions we recognize between different kinds of legal norms.

The perceived degree of democratic legitimacy of the sources of legal norms, in turn, explains the particular hierarchic ordering in which we have arranged the different legal categories and subcategories. Thus, for example, the constitutional-over-statutory norm ordering is explained by the greater perceived democratic legitimacy of "We the People" over our legislative agents. Likewise, the perceived superior democratic legitimacy of legislative bodies over executive branch agencies and courts explains the statutory over administrative and common law norm ordering. Turning to the second order legal subcategories, or the textual norm over doctrinal norm ordering, we perceive the popular sovereign, legislatures, and executive branch agencies--the creators of constitutional, statutory, and administrative textual norms--as enjoying greater democratic legitimacy than judicial institutions--the law-creating institutions directly responsible for fashioning***579** constitutional, statutory, and administrative doctrinal norms.

In sum, the extant ordering of legal categories and subcategories displays a tight positive correlation between the perceived democratic legitimacy of the various law generating sources, and the relative normative strength of the extant legal categories and subcategories of legal norms. The greater the degree of democratic legitimacy that the source of a particular kind of legal norm may claim, the higher the position in the ordering of legal categories that kind of norm will occupy. This line of reasoning, which I label the "source narrative," offers a parsimonious synthesis of several context-bound, traditional justifications and rationalizations for recognizing certain legal categorical distinctions but not others, as well as for affording certain categories of legal norms greater normative weight that other categories of legal norms.

The democracy-enhancing source narrative also accounts for the chronologic and categoric axioms. Taking the categoric axiom first, once we assume that legal norms belonging to superordinate legal categories and subcategories enjoy greater democratic legitimacy than legal norms belonging to subordinate legal categories and subcategories, always and unconditionally granting the former a trump over the latter serves to reinforce democratic ends. If, for example, we posit that constitutional norms--ultimately a creation of the popular sovereign--may claim greater democratic legitimacy than statutory, administrative, or common law norms--all created by law making institutions of lesser democratic legitimacy than "We the People"-- reinforcement of democratic principles demands that in cases of true conflict we privilege constitutional norms over sub-constitutional norms. Similar ideas undergird the chronologic axiom. All things being equal, between two truly conflicting norms belonging to the same legal category and subcategory, the more recently created norm enjoys a greater democratic pedigree than the preexisting norm.

Without fully explicating the argument, a new constitutional amendment, statute, administrative regulation, and even common law rule has been subjected to law creating procedures factoring in current, or at least relatively recent, majoritarian preferences. An old constitutional amendment, statute, administrative regulation, or common law rule, in contrast, reflects an old majoritarian preference. In short, the justification for granting ***580** new norms a trump over preexisting truly conflicting norms of the same category and subcategory lies in the idea that the newer norm reflects majoritarian preferences which supercede the majority preferences reflected in the older norm.

The source narrative undergirding both the chronologic and categoric axioms, as well as the ordering of legal categories and subcategories, is interesting for two reasons. First, it attempts to root the framework for resolving legal conflict in democracy enhancing principles, but as mentioned above, produces a pervasive counter-majoritarian difficulty. The narrative roots the framework governing adjudication of true legal conflict in democracy-enhancing principles by always favoring legal norms created by law-creating institutions of relatively high democratic legitimacy over truly conflicting norms created by law-making institutions of relatively low democratic legitimacy. Herein lies a key to the pervasive counter-majoritarian difficulty. Because the framework for mediating true legal conflicts is based on the democratic legitimacy of the sources of norms, rather than the democratic legitimacy of norms themselves, that framework often produces counter-majoritarian results. While the source of constitutional norms may in general enjoy greater democratic legitimacy than the source of administrative norms, in any given case a particular administrative norm may in fact enjoy greater democratic legitimacy than a truly conflicting constitutional norm. A newly minted administrative norm, after all, may very well reflect current majoritarian

preferences as filtered through the nationwide election of the current chief executive. Likewise, to give another example, though in general newer statutory textual norms created by a given law-making institution enjoy greater democratic legitimacy than older statutory textual norms created by the same law-creating institution, in any particular case an old statute may very well enjoy more majoritarian support than some new statutes. The older statute may have been the product of a difficult-to-assemble, but broad-based and pervasive majoritarian coalition. The newer norm, in contrast, may be the product of disproportionate special interest influence, and pork barrel legislative logrolling.

In short, by seeking to enhance democratic purposes based on the relative democratic legitimacy of norm-creating entities and institutions, rather than based on the relative democratic legitimacy of the norms those entities and institutions create, the ***581** framework for mediating true legal conflicts often produces particular counter-majoritarian results. The possibility of such counter-majoritarian results all but necessitates the countermeasure of flexible interpretive discretion for avoiding the framework, and the counter-majoritarian results that the framework may produce in particular instances. The countermeasure, however, opens the door to veiled judicial subterfuge employed not to ameliorate counter-majoritarian outcomes that would mechanistically follow from the framework for mediating true legal conflicts, but rather toward consciously or unconsciously avoiding or selecting counter-majoritarian substantive outcomes.

A second interesting feature of the source narrative lies in its surprising, and in some cases disturbing, normative implications. Again, I reserve for future work a close examination of how the source narrative leads to these normative conclusions. Here, I will merely mention them, and highlight one in particular. Generally, the normative prescriptions fall into two camps. The first camp is based on the assumptions that the framework for mediating true legal conflicts by and large succeeds in fulfilling the democracy-enhancing promise of the source narrative. This set of normative prescriptions seeks merely to perfect the framework, or in other words, to make relatively minor adjustments to its structure (but not necessarily minor in terms of practical impact) aimed at minimizing counter-majoritarian results, and insuring that the system for mediating true legal conflicts is internally consistent in terms of always privileging norms created by entities and institutions of greater democratic legitimacy over norms created by institutions of lesser democratic legitimacy. I will draw attention to one of the most provocative normative prescriptions falling into this first camp. In brief, the legal system should acknowledge and employ two heretofore unrecognized categoric distinctions between constitutional textual norms created by the popular sovereign versus constitutional and statutory norms created by legislative bodies. Let me delineate the contours of the argument in a bit more detail.

Consistency with source narrative logic demands that we treat popular- sovereign-created constitutional textual norms as categorically separate from, and hierarchically superior to, government institution-created constitutional textual norms. In other words, when popular-sovereign-created and government- created constitutional textual norms demand mutually exclusive outcomes, ***582** we should privilege the former over the latter. The nub of the argument lies in the following: we have been too lax in labeling all constitutional norms as sourced in the popular sovereign. While some constitutional norms locate their source in the popular sovereign, others are creations of government institutions which fail to secure popular consent. Under Article V, constitutional amendments are proposed and amended by legislative bodies. [FN316] Congress or the state legislatures propose amendments, while the state legislatures almost always ratify proposed amendments. [FN317] As Bruce Ackerman and Akhil Amar's recent popular sovereignty scholarship implies, [FN318] it is untenable to think that an amendment process dominated by normal standing legislative bodies will always function well as conduits through which "We the People" create constitutional norms. In some cases, legislative bodies will ratify constitutional amendments contrary to the deliberated popular consensus. It defies reality to describe such amendments as sourced in "We the People." Such amendments instead should be described as sourced in ordinary legislative bodies. In short, while most constitutional amendments are sourced in the popular sovereign, others are sourced in ordinary government legislative institutions.

In accord with source narrative logic, whenever legal norms locate their sources in different law-creating entities or institutions, the legal system treats those norms as members of different legal categories or subcategories. Since constitutional textual norms locate their sources not only in the popular sovereign, but also in normal standing legislative bodies, consistency with source narrative logic demands that we recognize popularly- created and government-created constitutional textual norms as constituting separate juridic categories.

Further, source narrative logic demands that we privilege the former over the latter. The source narrative justifies the practice ***583** of granting norms belonging to superordinate legal categories a trump over norms belonging to conflicting subordinate legal categories on the following grounds: norms created by law-creating entities or institutions of high democratic legitimacy--those norms belonging to superordinate legal categories--ought to be privileged over conflicting norms created by law-creating entities or institutions of low democratic legitimacy--those norms belonging to subordinate legal categories. As constitutional textual norms sourced in the popular sovereign can make a stronger claim to majoritarian democratic legitimacy than constitutional textual norms sourced in government law creating institutions, consistency with source narrative logic demands that, when in conflict, the former should trump the latter. Stated differently, consistency with source narrative logic demands not only that we recognize popularly-created and government-created constitutional textual norms as separate juridic categories, but also that the former occupy a higher position in the extant ordering of legal categories over the latter and that the former trump the latter when in true conflict.

Recognition of categorical distinctions between popular versus government- created constitutional norms spawns potentially radical repercussions. To provide one example, how would courts mediate conflicts between a popularly ratified and a government-created constitutional provision? Would a government-created constitutional amendment repeal a conflicting popularly created constitutional textual norm? Or would popularly-created constitutional amendments stand immune from repeal by government driven amendments, only subject to change by another popularly-created constitutional amendment? Perhaps the most interesting question arises when we ponder conflicts between constitutional and statutory norms. What would be the implication of recognizing categorical bifurcations between popularly created versus legislatively-created statutory norms for the resolution of conflicts between constitutional and statutory norms? Would, for example, a popularly-created statutory norm--created by direct democracy initiative or referendum procedures--be immune from nullification by a conflicting government-created constitutional norm? Or ought we continue to consider all constitutional norms, whether popularly- or government-created, as hierarchically superior to popularly-created statutory norms?

The idea that we ought to afford constitutional norms created ***584** by the popular sovereign a trump over truly conflicting constitutional norms created by legislative bodies follows from the notion that the current system for mediating true legal conflicts for the most part effectuates the source narrative's democracy-enhancing ends. A second approach, however, rejects the idea that the ordering of legal categories and subcategories, and chronologic and categoric axioms enhance democratic ends, and therefore arrives at a different set of normative prescriptions. This second set of normative prescriptions would seek not just minor adjustments in the practice of mediating true legal conflict, but instead would seek major structural overhaul aimed at insuring that in cases of true legal conflict norms of greater democratic legitimacy are more likely to trump norms of lesser democratic legitimacy than is the case under current practices.

Among the prescriptions that might be advanced on such an approach are the following: First, the legal system should abandon its longstanding practice of always and unconditionally allowing constitutional norms to trump conflicting statutory norms, and statutory norms to trump conflicting administrative norms. As mentioned in Section IV, a system based on rebuttable presumptions, or on a multi-factor balancing test, rather than a rigid and inviolable hierarchic ordering of constitutional, statutory, administrative, and common law norms, would more likely produce democratically legitimate outcomes than does the current system. Such systems would allow courts to avoid the counter- majoritarian outcomes resulting from the current framework, while also tending to encourage courts to explain their substantive decisions with substantive arguments, rather than with the charade of interpretive subterfuge designed to narrowly or broadly interpret norms in an effort to find norms in a posture of true or potential legal conflict thus engaging or avoiding the chronologic and categoric axioms.

Second, the Supreme Court should surrender its monopoly as the sole arbiter of constitutional and statutory meaning, and allow the political branches of government an overt role in defining the current meaning of constitutional and statutory textual norms. By allowing the more overtly political and democratically elected branches of government a role in defining the meaning of constitutional norms, we are more likely to read the Constitution and statutes in accord with current majoritarian preferences.

Third, we should allow new statutory norms to repeal recently ***585** created statutory norms passed by a supermajority coalition only when the new statutory norms attain a supermajority coalition greater than that which created statutory norms they seek to replace. Such a rule would diminish the possibility of new statutory norms

driven by logrolling and narrow special interests from repealing public-regarding statutes passed by broad coalitions.

Fourth, we should either attach a sunset period to constitutional and statutory norms, or alternatively subject constitutional and statutory norms to re-approval each generation. Such a practice would tend to eliminate situations where, for example, an old, anachronistic statute passed by a long- retired Congress trumps a truly conflicting recently created administrative norm reflecting current majoritarian preferences due to the influence of current executive and legislative branch oversight and control.

These and other prescriptions are built upon a clear descriptive understanding of the mechanisms for adjudicating cases where legal norms, as interpreted, demand mutually exclusive outcomes. In this Article, I have untangled those mechanisms and broken them down into a simple framework applicable regardless of contextual variations. No matter if we are dealing with constitutional, statutory, administrative, or common law norms (or any combination thereof), or dealing with textual versus doctrinal norms, the legal system employs the same simple mechanisms--an ordering of legal categories and subcategories, and the chronologic and categoric axioms--for adjudicating cases of true legal conflict. In concluding the Article, I have pointed towards the justificatory narrative underlying those mechanisms, as well as prescriptions supported by either acceptance or rejection of that narrative. I leave for the next several Articles full and detailed treatment of that narrative and those prescriptive conclusions.

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[FN1]. By the term "legal norm" I refer to any form of authoritative statement, or in other words a statement which purports to provide a reason for compliance with its requirements, prohibitions, or allowances, of general applicability, and of a legal nature, created by the entities and institutions charged with generating such statements. On the meaning of authoritative statements, and the authoritative nature of law, see Joseph Raz, The Morality of Freedom 38-69 (1986), and Joseph Raz, The Authority of Law 3-33 (1979). Legal norms, as I use the term, includes constitutions, statutes, administrative regulations, and common law rules.

[FN2]. For the concept of legal norms demanding mutually exclusive outcomes used herein, see infra Section I.A.1.

[FN3]. H.L.A. Hart, The Concept of Law 124-35 (2d ed. 1994). I will use Hart's hypothetical case extensively throughout the Article.

[FN4]. The value of the descriptive modeling herein is twofold: First, it distills the unadorned essence of what appears to be, at first glance, a relatively complex and contextually varying part of legal practice. Second, and more importantly, distillation to bare elements allows one to quickly and easily see what drives (and does not drive) a practice, the threads that tie (or fail to tie) a given set of practices together, and the problems and incongruities riddling a practice that otherwise might remain camouflaged.

[FN5]. As I mention in Section V below, a key rationale behind the rigid axioms and ordering turns out to be the idea that they promote the preservation of norms of relatively high democratic legitimacy. Even assuming this democracy-reinforcing rationale could withstand scrutiny, however, the unconstrained anti-formalism of the first phase threatens to undo any supposed democracy-enhancing qualities that might justify the axioms and ordering.

[FN6]. We see examples of true legal conflicts in cases where courts hold that federal and state legal norms demand incompatible outcomes. See, e.g., Bosarge v. United States Dep't of Educ., 5 F.3d 1414, 1419-20 (11th Cir. 1993).

Bosarge argues that, independent of FDCPA, Alabama state law restricts the federal government's statutory right to intercept federal income tax refunds. But the laws are in direct conflict, as the federal statutes provide that an agency owed a debt 'shall' so notify the IRS, which "shall" pay the debtor's federal income tax refund to the agency, while the Code of Alabama prohibits any "process for the collection of debts." Thus, under the doctrine of preemption, which is based upon the Supremacy Clause of the United States Constitution, the federal law must control.

Id. (footnotes omitted); see also United States v. Mitchell, 403 U.S. 190, 204 (1971) (holding that exempt status under state law does not bind federal tax collector); McAleer v. Jernigan, 804 F.2d 1231, 1233 (11th Cir. 1986) (stating that federal law supersedes conflicting state law).

[FN7]. See supra text accompanying note 3.

[FN8].

[W]hen two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.... [W]here a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation or of the common law is readily found in the terms of a later enactment.

1A Norman J. Singer, Sutherland Statutory Construction § 23.09, at 337-38 (5th ed. 1993).

[FN9]. Note, however, that under different circumstances other outcomes are possible. Imagine that the prohibitory statute did not specifically enumerate the kinds of vehicles prohibited. On this assumption, a court might read the term "vehicle" in the prohibitory statute as either including or excluding bicycles. The order in which the statutes are passed may also affect the substantive outcome. If, for example, the statute permitting bicycle races in the park on Sundays were passed before the statute generally prohibiting vehicles in the park, a court might very well read the later created ban on vehicles as an implied full repeal of the earlier statute allowing Sunday bicycle races. The later in time created statutory norm would trump the repugnant earlier created statutory norm. See id. The result would be a complete ban of vehicles from the park, including bicycles, with no exception for Sunday bicycle races. Alternatively, however, a court could read the later in time created statute banning vehicles as not effectuating an implied repeal of the earlier statute allowing Sunday bicycle races. The court could do so under the principle that a newly created generally worded statute will not be read to repeal an existing specifically worded statute, without clear legislative intent indicating a desire for such a repeal. See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Id. (citation omitted). Under this approach, vehicles, including bicycles, would be generally banned from the park, except that bicycles would be allowed in the park for Sunday races. Such an interpretation might be reinforced if the first statute, allowing bicycle races in the park on Sundays, had originally been interpreted as impliedly banning bicycles, or even vehicles generally, on all other days. In sum, the particular outcome that a court might reach could depend at least upon the wording of the two statutory norms, legislative intent, and applicable interpretive principles.

[FN10]. The Supreme Court has said the following about the Commerce Clause:

[T]he Commerce Clause is a grant of plenary authority to Congress. See National League of Cities v. Usery, [426 U.S. 833, 840 (1976)]; Cleveland v. United States, 329 U.S. 14, 19 (1946); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937). This power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." Gibbons v. Ogden, [22 U.S.] (9 Wheat.) 1, 196 (1824). Moreover, this Court has made clear that the commerce power extends not only to "the use of channels of interstate or foreign commerce" and to "protection of the instrumentalities of interstate commerce... or persons or things in commerce," but also to "activities affecting commerce." Perez v. United States, 402 U.S. 146, 150 (1971). As we explained in Fry v. United States, 421 U.S. 542, 547 (1975), "[even] activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." See National League of Cities v. Usery, 426 U.S. at 840;

Heart of Atlanta Motel, Inc. v. United States, [379 U.S. 241, 255 (1964)]; Wickard v. Filburn, 317 U.S. 111, 127-28 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); United States v. Darby, [312 U.S. 100, 120-21 (1941)].
Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276-77 (1981) (internal citations omitted).

[FN11]. See, e.g., Chandler v. Miller, 520 U.S. 305, 323 (1997) (holding that Georgia statute mandating that candidates for certain state offices certify that they have passed a drug test was held to have violated the Federal Constitution's Fourth Amendment); Knowles v. Iowa, 525 U.S. 113, 119 (1998) (holding that under Iowa law police issuing traffic citations have the same authority as if they were making an arrest violated the Fourth Amendment). See generally 1 Chester James Antieau & William J. Rich, Modern Constitutional Law § § 16.00-16.23, at 274-313 (2d ed. 1997).

[FN12]. The Fourth Circuit has held the following:
The evidence that Verna possessed and placed the bomb in an automobile, which travels the highways of North Carolina if not the federal highway system itself, is sufficient to fulfill section 922(g)'s requirement that Verna have possessed the bomb "affecting" interstate commerce. The potential, if not actual, effect on interstate commerce of a bomb in a vehicle traveling on a state highway which connects directly or indirectly with the interstate highway system is more than sufficient to meet section 922(g)'s "affecting commerce" requirement.
United States v. Verna, 113 F.3d 499, 502 (4th Cir. 1997).

[FN13]. See Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450-55 (1990) (holding that a highway vehicle checkpoint constitutes a seizure under the Fourth Amendment, but upholding police highway checkpoints against Fourth Amendment challenge so long as the stop is not unreasonably intrusive and not random); Delaware v. Prouse, 440 U.S. 648, 655-63 (1979) (striking down discretionary random automobile spot checks as an unreasonable seizure under the Fourth Amendment, but approving of "roadblock-type" highway checkpoint automobile searches in which all vehicles passing through a check point are stopped).

[FN14]. Though falling within Congress's Commerce Clause powers, under one novel line of thinking, Congress still might not have the authority to pass the hypothetical statute. Congress may have a duty to assess the constitutionality of statutes that it passes. See Michael A. Bamberger, Reckless Legislation: How Lawmakers Ignore the Constitution 1-14, 191-98 (2000). A strong reading of this duty might go so far as to prohibit Congress from passing statutes which are permissible under Article I, Section 8, enumerated powers, but unconstitutional because they violate some other constitutional norm. In this line of thinking, because the above posted hypothetical statute would violate Fourth Amendment doctrine, Congress would not have the authority to even pass the statute, despite the fact that Commerce Clause doctrine authorizes Congress to pass such a statute. Though this argument is not without foundation, as a matter of practical reality, Congress has passed, and will continue to pass, statutes which fall squarely within the doctrinally enunciated contours of its Article I enumerated legislative powers, but clearly violate the doctrinal definitions of Bill of Rights provisions. Further, the Supreme Court has never read any duty on the part of Congress to evaluate the constitutionality of statutes to mean that Congress does not have the authority to pass statutes which, though within its enumerated powers, likely run afoul of other constitutional provisions. Most importantly, this line of reasoning skirts the issue in play--what Commerce Clause doctrine allows Congress to do, and what Fourth Amendment doctrine prohibits Congress from doing.

[FN15]. Unless, of course, the Supreme Court were to decide to use such a case to significantly alter and trim the contours of Fourth Amendment doctrine.

[FN16]. One might read Commerce Clause doctrine as incorporating Fourth Amendment doctrine. On such a reading Commerce Clause doctrine would not extend to empower Congress to pass the above mentioned hypothetical statute.
The proposition I advance, however, is that Commerce Clause doctrine does not incorporate Bill of Rights

limitations. Commerce Clause doctrine therefore permits Congress to pass such a statute, while other constitutional norms render the statute unenforceable. In other words, Commerce Clause doctrine does not provide that Congress may legislate over areas affecting interstate commerce, except when such legislation would run afoul of Bill of Rights norms. Instead, it provides that, without exceptions or qualifications, Congress may legislate over any area affecting interstate Commerce. Bill of Rights limitations are external to and operate upon Commerce Clause doctrine. Nothing within Commerce Clause doctrine, however, limits Congress's power to legislate over those things affecting interstate commerce. Any limitations on that legislative power instead derive from other constitutional norms outside of Commerce Clause doctrine. See generally 3 Antieau & Rich, supra note 11, § 44.18, at 197-200 (discussing the First, Fourth and Fifth Amendment constitutional principles which truncate Commerce Clause legislative power).

Consider, for example, cases where the Court has held that Fifth Amendment due process guaranties truncate Congress's Commerce Clause powers. See R. R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330, 347 (1935) (stating that Congress's Commerce Clause legislative powers "must be exercised in subjection to the guarantee of due process of law found in the Fifth Amendment"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824) (discussing the scope of Commerce Clause powers and stating that Commerce Clause power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution" (emphasis added)); see also Erwin Chemerinsky, Constitutional Law: Principles and Policies § 3.1, at 166 (1997) ("In evaluating the constitutionality of any act of Congress, there are always two questions. First, does Congress have the authority under the Constitution to legislate? Second, if so, does the law violate another constitutional provision or doctrine....").

In other contexts, the Supreme Court has spoken of Bill of Rights norms as externally truncating otherwise broad Article I, Section 8, legislative powers.

It may be readily agreed that § 522(f)(2) [the statutory provision in question] is a rational exercise of Congress' authority under Article I, Section 8, Clause 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations.... [However, t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. [citations omitted]. Thus, however "rational" the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment.

United States v. Security Indus. Bank, 459 U.S. 70, 74-75 (1982) (citations omitted).

We find similar treatment of Congress's taxing and spending powers. The Court reads the taxing and spending power as a broad grant of power to legislate for the general welfare, as opposed to merely for effectuating other enumerated powers. United States v. Butler, 297 U.S. 1, 65-66 (1936). Other constitutional provisions, however, work to externally limit taxing and spending power. See Chemerinsky, supra note 16, § 3.4.1, at 199.

Thus, Congress has broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions. For example, a tax that was calculated or administered in a racially discriminatory fashion would be unconstitutional, not as exceeding the scope of Congress's Article I powers, but as violating the equal protection guarantee of the Fifth Amendment.

Id.

[FN17]. Indeed, Hart would argue that in such a situation the law is open textured and that a court therefore may exercise its discretion to interpret the prohibition on vehicles to include bicycles or not. See Hart, supra note 3, at 124-54.

[FN18]. 417 U.S. 535 (1974).

[FN19]. 25 U.S.C. § 461 (1994).

[FN20]. 42 U.S.C. § 2000e (1994).

[FN21]. Morton, 417 U.S. at 537-38. Section 12 of the Indian Reorganization Act provides:

The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and

ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.
25 U.S.C. § 472 (1994).

[FN22]. Morton, 417 U.S. at 540 n.6. 42 U.S.C. § 2000e-16(a) (1994 & Supp. III 1997) reads:
All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

[FN23]. Indeed, the lower court concluded that the two statutes in question "cannot exist side by side" and that the Equal Employment Opportunity Act of 1972 was "subject to no other interpretation." Mancari v. Morton, 359 F. Supp. 585, 590 (D.N.M. 1973), rev'd, Morton v. Mancari, 417 U.S. 535 (1974). Looking strictly at the text of the two statutes, it is hard to escape the conclusion that they stand in a posture of true legal conflict.

[FN24]. Morton, 417 U.S. at 547-52 (holding that the two statutes can be reconciled).

[FN25]. Id. at 547-52. The Court does not discuss the text of the statutes, but rather focuses on non-text indicia of legislative intent, including the earlier created Civil Rights Act of 1964, the treatment of executive orders forbidding government discrimination, other statutes passed shortly after the Equal Employment Opportunity Act of 1972 which grant native Americans preference in government programs, the canon of construction disfavoring statutory repeal by implication, and the canon disfavoring the repeal of a narrow statute by a broad statute. Id. at 547-51.

[FN26]. 18 U.S.C. § 871 (1994).

[FN27]. Generally, First Amendment doctrine prohibits government regulation of content based utterances. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (holding that "content based regulations are presumptively invalid"); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (invalidating "Son of Sam" statute on grounds that it constituted content-based regulation on speech); Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984) (stating that "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (holding that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); Laurence Tribe, American Constitutional Law § 12-2, at 790 (2d ed. 1988) (explaining that content-based regulations on speech are "presumptively at odds with the first amendment").

[FN28]. See R.A.V., 505 U.S. at 382-83, 399-400 (discussing in majority and dissenting opinions that limited categories of utterances not protected by general First Amendment doctrinal ban on content-based utterances); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984) (holding that "there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (enumerating obscene, profane, libelous, and fighting word utterances as categories of speech enjoying no First Amendment protection); Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 270 (1981) (stating that First Amendment does not protect, for example, utterances constituting price fixing, breach of contract, placing bets, or

extortion).

[FN29]. R.A.V., 505 U.S. at 388 (confirming that the First Amendment does not extend so far as to prohibit content-based speech regulation penalizing threats of violence against President); Watts v. United States, 394 U.S. 705, 707 (1969) (holding the statute penalizing threats of violence against President does not constitute facial violation of First Amendment).

[FN30]. The analysis here, of course, depends upon the assumption that Commerce Clause doctrine does not incorporate Fourth Amendment doctrine, but rather that Fourth Amendment doctrine operates upon Commerce Clause doctrine, and suppresses the exercise of some zone of Commerce Clause legislative power. See supra note 16.

[FN31]. On the other hand, we would be mistaken to conclude that courts can always employ their interpretive discretion to opt for narrow interpretation and avoidance of true legal conflict. In some cases, courts cannot escape true legal conflict. If, for example, our hypothetical "no vehicles in the park" statute textually defines vehicles to include bicycles, it is hard to see how a court could use its interpretive discretion to avoid true conflict with the statute allowing Sunday bicycle races in the park. Likewise, we would expect that the courts would be very reluctant to convert a true legal conflict between Fourth Amendment and Commerce Clause doctrinal norms into a case of potential legal conflict. Recall again the hypothetical statute discussed above allowing U.S. marshals to randomly stop and search any vehicle traveling on interstate highways for the purpose of seizing illegal narcotics. See supra text accompanying notes 9-13. Avoiding the true Fourth Amendment--Commerce Clause conflict caused by such a statute would require a court to hold either that the Commerce Clause does not authorize legislation that clearly and directly affects interstate Commerce, or that the Fourth Amendment does not prohibit random vehicle searches. A court, in other words, would have to substantially reshape the contours of Commerce Clause and/or Fourth Amendment doctrine in ways that would require the reversal of decades of doctrinal development.

[FN32]. See supra text accompanying notes 18-25.

[FN33]. See Mancari v. Morton, 359 F. Supp. 585, 590 (D.N.M. 1973), rev'd, Morton v. Mancari, 417 U.S. 535 (1974) (holding that two statutes in question "cannot exist side by side").

[FN34]. The other examples discussed in the previous Section illustrate the role of judicial discretion in determining whether norms stand in a posture of true or potential legal conflict. Return to the "no vehicles in the park hypothetical." See supra note 3. Assuming the statute prohibiting vehicles in the park does not textually define vehicles to include bicycles, a court could plausibly read the general prohibition on vehicles in the park as not including bicycles, thus avoiding true conflict between the statutory norms. Or, just as plausibly, a court could read the statutory prohibition on vehicles in the park to include bicycles, which would give rise to a true legal conflict with the statute allowing bicycles for Sunday races.

We can view the First Amendment doctrine versus statutory prohibition on utterances threatening violence against the President in the same light. See supra text accompanying notes 28-31. The fact that First Amendment doctrinal norms and the statutory prohibition on utterances threatening violence against the President stand in a posture of potential rather than true conflict results from the Supreme Court's exercise of discretion in shaping and limiting the contours of First Amendment doctrinal norms. Because the Supreme Court has read certain categorical exceptions into the general doctrinal rule prohibiting content based speech regulations, see infra text accompanying notes 263-66, First Amendment doctrine and the statutory prohibition on utterances threatening violence against the President do not demand mutually exclusive outcomes. The categorical exceptions to the general prohibition on content-based speech regulations are judicial creations not required by the meaning of the First Amendment textual norm. Stated differently, nothing in the meaning of the First Amendment's text impedes the Supreme Court from developing First Amendment doctrinal norms which protect all content-based utterances. Indeed, in other contexts, the Court has refused to carve out doctrinal exceptions, and has held First Amendment doctrine to stand in a posture of true

conflict with legal norms prohibiting certain content-based utterances. See, e.g., R.A.V., 505 U.S. at 391 (striking down hate speech regulation); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115-18 (1991) (striking down "Son of Sam" law).

[FN35]. In such cases, a court interprets one legal norm more narrowly than it otherwise might for the sole purpose of avoiding true legal conflict and attendant substantive consequences. As such, avoidance of true legal conflict via narrow norm interpretation modifies what would otherwise be the chosen interpreted meaning of a particular norm. But for the presence of one norm, the court would interpret another norm more broadly. In avoiding true legal conflict, a court may resort to plausible but difficult to rationalize norm interpretations. Such interpretive guile is particularly likely when true legal conflict would lead to a problematic substantive outcome. For example, consider again First Amendment doctrine prohibiting content-based speech regulations, and the categorical doctrinal exceptions to that general prohibition. See supra text accompanying note 29. The Court probably created the categorical doctrinal exceptions because they are necessary to avoid true conflict between First Amendment doctrine and, for example, the statutory prohibitions on utterances threatening violence against the President. See infra text accompanying notes 263-66. In other words, the Court has carved out an otherwise unwarranted exception to First Amendment doctrine, and held that First Amendment doctrine does not extend to protect such utterances, for the realpolitik reason that the opposite holding would result in the problematic outcome of striking down that statute as unconstitutional.

[FN36]. This represents nothing more than a rejection of vulgar formalism as a viable descriptive model of adjudication. See Brian Leiter, Positivism, Formalism, Realism, 99 Colum. L. Rev. 1138, 1146 (1999) (discussing "vulgar formalism" along with more defensible versions of formalism); Burt Neuborne, Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques, 67 N.Y.U. L. Rev. 419, 421-22 (1992) (arguing that "pure" formalism does not accurately account for judicial behavior).

As a general phenomenon, courts play a significant role in defining the meaning, and therefore substantive content of, legal norms. Many or most legal norms admit a range of plausible meanings. Though the conventional meaning of words, the rules of legal interpretation, and knowledge of judicial tendencies may allow us to predict how courts will interpret a given legal norm, we never know the substantive content of legal norms until a court has interpreted them. This remains true when courts deal with pairs of legal norms that would stand in a posture of true conflict if broadly interpreted.

[FN37]. See Watt v. Alaska, 451 U.S. 259, 266-68 (1981). In Watt, the Supreme Court, faced with apparently conflicting federal statutes governing the distribution of oil and gas reserves from Alaskan wildlife refuge, declined to invoke the "plain language" canon. The Court stated as follows:

Without depreciating this general rule, we decline to read the statutes as being in irreconcilable conflict without seeking to ascertain the actual intent of Congress. Our examination of the legislative history is guided by another maxim: "repeals by implication are not favored," Morton v. Mancari, 417 U.S. [535,] 549 [(1994)], quoting Posadas v. National City Bank, 296 U.S. 497, 503 (1936). "The intention of the legislature to repeal must be 'clear and manifest." ' United States v. Borden Co., 308 U.S. 188, 198 (1939), quoting Red Rock v. Henry, 106 U.S. 596, 602 (1883). We must read the statutes to give effect to each if we can do so while preserving their sense and purpose. Mancari, [417 U.S.] at 551; see Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940).

Id. at 266 (internal citation omitted).

[FN38]. See infra Section III.B.

[FN39]. These policy-imbued interpretive rules, presumptions, canons, and principles tend to encourage the harmonization of legal norms and the minimization of instances of true legal conflict. To provide but one example, interpretation jurisprudence instructs judges to interpret statutory norms so as to avoid finding them in true conflict with constitutional norms, even where such statutory interpretations are not the most natural readings of statutory text and legislative intent. See NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) (noting the early established interpretive policy of "holding that an Act of Congress ought not be construed to violate the Constitution

if any other possible construction remains available"); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id. (Brandeis, J., concurring) (citation omitted); see also Frederick Schauer, Ashwander Revisited, 1995 Sup. Ct. Rev. 71 (mentioning the canon of construction counseling avoidance of statutory interpretations which render statutes in a posture of true legal conflict with constitutional norms).

Other examples of principles of legal construction used by courts to avoid true legal conflict include the following: constitutional interpretation jurisprudence counsels avoidance of true conflicts between constitutional norms by instructing courts to read the constitution as a whole, and to create a coherent set of constitutional principles out of the sometimes discordant constitutional clauses. See Wright v. United States, 302 U.S. 583, 588 (1938) (citing Chief Justice Taney in Holmes v. Jennison, 540 U.S. (14 Pet.) 570-71 (1840)).

In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

Id.

There is no more likely way to misapprehend the meaning of language--be it in a constitution, a statute, a will or a contract--than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis's maw that one is in danger of being impaled upon Scylla's rocks.

Cent. Hanover Bank & Trust Co. v. Commissioner, 159 F.2d 167, 169 (2d Cir. 1947) (Hand, J.).

At the statutory level interpretive principles also usually seek to minimize true legal conflicts. Thus, for example, in an effort to avoid a possible implied repeal of an old statute by a seemingly discordant new statute, courts often invoke the canon stating that more specific statutory provisions take precedence over more general statutory provisions, even where the general provisions are of more recent vintage. See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).

[I]t is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."

Id. (citation omitted). This canon of interpretation essentially directs courts to read general and specific statutory textual norms as standing in a posture of potential rather than true legal conflict whenever possible. More generally, courts often invoke the canon that implied repeals are disfavored. See Morton v. Mancari, 417 U.S. 535, 550-51 (1974) ("When there are two acts upon the same subject, the rule is to give effect to both if possible ...."); 1A Singer, supra note 8, § 23.10, at 353-54 (discussing the presumption against implied repeal).

At another level, the deferential standard for judicial review of agency interpretations of statutes works to avoid true conflicts between statutory and administrative norms. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984), essentially instructs courts to defer to plausible agency statutory interpretations so long as those interpretations do not conflict with clear congressional intent.

[FN40]. By way of partial preface, at least since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the outcome in cases of true conflict between constitutional and statutory norms has been abundantly obvious. Nonetheless, privileging the constitutional norm over a conflicting statutory norm remains a necessary step in adjudicating cases of true legal conflict between constitutional and statutory norms, and a step unnecessary to adjudicating cases where true conflict is avoided via narrow interpretation of one or both norms. In short, then, true conflicts between legal norms differ from potential conflicts between legal norms in that adjudication of the former requires only interpretive principles, whereas adjudication of the latter cases requires in addition some apparatus for determining which of two incompatible norms to privilege.

[FN41]. See infra Section III.

[FN42]. See infra Section III.A-B.

[FN43]. The chronologic axiom, however, does not apply in cases where legal norms of the same legal category are interpreted as demanding mutually exclusive outcomes, or in other words, as standing in a posture of true legal conflict, and were created at the same point in time. As an example, consider the well known conflict between First Amendment Free Press Clause rights, and the Sixth Amendment right to trial by an impartial jury. See Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976) (favoring First Amendment free press rights over Sixth Amendment fair trial rights in case where press reporting on proceedings in criminal case posed threat to impartiality of jury). Though both the First and Sixth Amendments belong to the same legal category, they were ratified at the same time. The chronologic axiom, therefore, cannot help mediate any true legal conflict that might arise between them. I reserve treatment of true legal conflicts between norms belonging to the same legal category and sub-category, and created at the same time, for another occasion.

[FN44]. By "always and unconditionally" I mean without formal qualification. It may be possible to identify particular instances where courts fail to follow the rule that a later-in-time norm trumps any truly conflicting norm belonging to the same legal category. I consider such instances anomalous and erroneous, rather than exceptions to an unqualified rule. To provide a simple parallel example, a red traffic light always and unconditionally requires that one bring a moving vehicle to a stop. The fact that some fail to do so in no way signifies an exception to that rule, but rather a failure to comply with that rule.

[FN45]. Where the provisions of two statutes irreconcilably conflict, the later statute repeals the earlier statute. See Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) (stating that "where provisions in the two [statutory] acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"); 1A Singer, supra note 8, § 23.09 at 337-38.

[FN46]. See, e.g., Pribilof Islands Transition Act--Coral Reef Conservation Act of 2000, Pub. L. No. 106-562, 114 Stat. 2794 (2000) (repealing 16 U.S.C. § 1165 (1994)).

[FN47]. More precisely, the Sixteenth Amendment overturned the Supreme Court's reading of the Article I, Section 9, prohibition on unapportioned direct taxes as prohibiting federal income taxes in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895). See Chemerinsky, supra note 16, § 3.4.2, at 200.

[FN48]. U.S. Const. amends. XVIII, XXI; United States v. Chambers, 291 U.S. 217, 222 (1934) ("Upon ratification of the Twenty-first Amendment, the Eighteenth Amendment at once became inoperative. Neither the Congress nor the courts could give it continued vitality.").

[FN49]. Where the provisions of two administrative regulations stand in a posture of true conflict, the later in time created regulation controls. See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 853-59 (1984) (upholding later promulgated EPA administrative regulation defining statutory term "source" on grounds that regulation constituted permissible construction of statutory term, despite fact that the later promulgated regulation defining the statutory term "source" was incompatible with previously promulgated regulation defining the same term); see also Motor Vehicle Mfr.'s Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (recognizing that agencies may alter their legislative rules); Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (stating that agencies may repudiate or change earlier promulgated agency norms so long as its grounds for so doing are clearly set forth); United Steelworkers of Am. v.

NLRB, 983 F.2d 240, 244- 45 (D.C. Cir. 1993) ("An agency may alter its interpretation of substantive law so long as its new interpretation does not conflict with the statute and so long as the agency supplied a 'reasoned analysis' for 'changing its course." ' (citations omitted)). Similarly, a newly crafted common law doctrinal rule replaces a truly conflicting older common law doctrinal rule. See, e.g., Sperry-New Holland v. Prestage, 617 So. 2d 248, 253-54 (Miss. 1993) (replacing common law product liability consumer expectation test with risk- utility test); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 409 (1970) (overruling longstanding federal common law rule established in The Harrisburg, 119 U.S. 199 (1886), disallowing wrongful death actions in maritime context and establishing new federal common law rule allowing wrongful death actions in maritime context); Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975) (replacing old common law tort defense of contributory negligence with new common law tort defense of pure comparative negligence).

[FN50]. See, e.g., INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987) (striking down newly created agency regulation on grounds that it was irreconcilable with pre-existing statutory norm that regulation purported to interpret).

[FN51]. See 1A Singer, supra note 8, § 23.09, at 337-38.

[FN52]. See, e.g., Chevron, 467 U.S. at 853-59 (upholding later promulgated EPA administrative regulation defining statutory term "source" on ground that regulation constituted permissible construction of statutory term, despite fact that promulgated regulation defining the statutory term "source" was incompatible with previously promulgated regulation defining the same term).

[FN53]. See, e.g., U.S. Const. art. I, § 3, cl. 1; id. at amend. XVII. The Seventeenth Amendment nullifies language in Article I, Section 3, providing for selection of senators by state legislatures, and in its place establishes direct popular election of senators. See, e.g., Valenti v. Rockefeller, 292 F. Supp. 851 (W.D.N.Y. 1968) (holding implicitly that Seventeenth Amendment nullifies rather than supplements Article I, Section 3, Clause 1 by deciding case regarding requirements of senatorial vacancy elections under Seventeeth Amendment principles, rather than Article I, Section 3, Clause 1, principles).

[FN54]. See, e.g., Sperry-New Holland, 617 So. 2d at 253 (replacing common law product liability consumer expectation test with risk-utility test); Moragne, 398 U.S. at 409 (overruling longstanding federal common law rule established in The Harrisburg, 119 U.S. 199 (1886), disallowing wrongful death actions in maritime context and establishing a new federal common law rule allowing wrongful death actions in maritime context); Li, 532 P.2d at 1243 (replacing old common law tort defense of contributory negligence with new common law tort defense of pure comparative negligence).

[FN55]. See supra text accompanying note 50.

[FN56]. Courts nonetheless do bolster their conclusions that a statutory norm prevails over a truly conflicting administrative norm with arguments relating to the greater wisdom of the statutory norms in comparison with the administrative norm.

[FN57]. See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708-09 (1999) (holding that the right to trial by jury in 42 U.S.C. § 1983 is not permitted at common law but guaranteed under the Seventh Amendment); Clinton v. New York, 524 U.S. 417, 449 (1998) (holding that the Line Item Veto Act was in violation of the Presentment Clause, Article I, Section 7, Clause 2); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (holding NLRB regulation prohibiting hand billing by union at shopping mall unconstitutional under First Amendment).

[FN58]. See, e.g., Brown v. Gardner, 513 U.S. 115, 121-22 (1994) (holding Department of Veterans Affairs regulation contrary to and nullified by statute even though regulation had endured sixty years); City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 319-20 (1981) (holding Federal Water Pollution Act Amendments of 1972 displaced conflicting federal common law and that court could not use its discretion under common law to impose greater regulations than governed by Act); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) (holding Death on the High Seas Act, and not conflicting federal maritime common law principles, governs recovery).

[FN59]. I include the decisions of Article I administrative law judges which enjoy precedential value as judicial decisional authorities.

[FN60]. One might plausibly conceive of original intent as constituting a separate subcategory of constitutional norms. A similar issue at the statutory level has been addressed in the literature. See Bernard W. Bell, Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation, 60 Ohio St. L.J. 1 n.6 (1999) (addressing whether legislative intent enjoys normative weight apart from statutory text). For the purposes of this Article, I will treat intent as illuminating the meaning of constitutional text, and as carrying no separate normative status.

[FN61]. By constitutional doctrine I mean bodies of judicially developed precedents established in individual cases which interpret constitutional texts.

[FN62]. See infra Section I.C.1.b-c. Unlike the constitutional, statutory, and administrative areas, however, the legal system does not divide the legal category "common law norms" into sub-categories.

[FN63]. See generally Michel Rosenfeld, Just Interpretations: Law Between Ethics and Politics 13-31 (1998).

[FN64]. Id.

[FN65]. Id.

[FN66]. See Leiter, supra note 36, at 1145-46.

[FN67]. Id.

[FN68]. See, e.g., Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125-26, 160-61 (2000) (holding by a five-justice majority that statute "clearly precluded" FDA jurisdiction to regulate cigarettes despite acknowledging the serious public health problem posed by cigarettes); Flood v. Kuhn, 407 U.S. 258 (1972) (disagreeing with previous rulings, Justice Blackmum holds baseball outside scope of federal antitrust laws but on stare decisis grounds holds baseball not subject to regulation under Commerce Clause); Insolia v. Philip Morris Inc., 216 F.3d. 596 (7th Cir. 2000) (stating "[i]f there were such a thing as moral estoppel, the outcome of this appeal would be plain" in favor of plaintiff, but finding in favor of defendant tobacco company on summary judgment because legal rules compel such a result); Specialty Food Sys. Inc. v. Reliance Ins. Co. of Ill., 45 F. Supp. 2d 541 (E.D. La. 1999) (holding that "although the equities in this case favor Specialty Food, the court is compelled to find for the defendant").

[FN69]. See, e.g., Portuondo v. Agard, 529 U.S. 61, 65 (2000) (refusing to adopt the respondent's interpretation of the Fifth and Sixth Amendments which would find unconstitutional a prosecutor's comments referring to defendant's ability to hear all of testimony and tailor his testimony to conform with what has been said); Salinas v. United States, 522 U.S. 52, 58 (1997) (refusing to adopt defendant's construction of the federal bribery statute); Robinson v. United States, 524 U.S. 282, 285 (1945) (rejecting petitioner's interpretation of statute disallowing death penalty when liberated kidnapping victim is unharmed to mean that victim is unharmed if no permanent injury is done to victim).

[FN70]. See, e.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 501 (1992). (Blackmun, J., dissenting) (stating that the court recognized "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section"); New York v. Quarles, 467 U.S. 649, 661 (1984) (O'Connor, J., concurring in part and dissenting in part) (admitting implicitly that legal norm in question subject to more than one plausible interpretation by stating that were case one of first impression she would agree with majority holding, but dissenting on grounds that established controlling precedent which had adopted a different interpretation than that embraced by majority compels reading Justice O'Connor's advances).

[FN71]. See, e.g., Holder v. Hall, 512 U.S. 874, 882-83 (1994) (acknowledging a previous reading of Voting Rights Act adopted one plausible interpretation in prior case law but nonetheless adopting another plausible interpretation).

[FN72]. See, e.g., Brown & Williamson, 529 U.S. at 125-26, 161-62 (holding by five-justice majority that statute "clearly precluded" FDA jurisdiction to regulate cigarettes while four-justice dissent argued that the statute's literal meaning and purpose allow FDA jurisdiction to regulate cigarettes); Badaracco v. Commissioner, 464 U.S. 386, 396, 401-02 (1984) (relying on the supposedly plain and unambiguous language of the Internal Revenue Code, the dissenting and majority opinions reach different results).

[FN73]. Admittedly, I have provided little to support the assertion that judges act as though they reject both the radical deconstructivist and absolute formalist models as accurate descriptive models of adjudication, and instead acknowledge that textual and doctrinal norms differ in kind. In the end, however, that assertion needs little support, for the thesis that judges reject both radical deconstructivism and absolute formalism hardly constitutes an extremist proposition. It would be hard to imagine that judges could adhere to the absolute formalist position seventy years after the advent of legal realism. As for the radical deconstructivist model, it has yet to gain broad consensus in the academy, let alone significantly influence the judiciary.

[FN74]. In some cases, the range of plausible norm meanings may be quite broad, while in others quite narrow, depending on the judge, the applicable interpretive principles, the conventional meaning of the words interpreted, and a host of other factors.

[FN75]. Justice Black's dissenting opinions, and to a lesser extent Justice Scalia's dissenting opinions, provide prime examples of this phenomenon. See, e.g., Barenblatt v. United States, 360 U.S. 109, 140-44 (1959) (Black, J., dissenting). Justice Black stated the following:

The First Amendment says in no equivocal language that Congress shall pass no law abridging freedom of speech, press, assembly or petition. The activities of this Committee, authorized by Congress, do precisely that, through exposure, obloquy and public scorn. The Court does not really deny this fact but relies on [a balancing test]....

....

To apply the Court's balancing test under such circumstances is to read the First Amendment to say "Congress shall pass no law abridging freedom of speech, press, assembly and petition, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised." This is closely akin to the notion that neither the First

Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so. Not only does this violate the genius of our written Constitution, but it runs expressly counter to the injunction to Court and Congress made by Madison when he introduced the Bill of Rights.

"If they (the first ten amendments) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."

Unless we return to this view of our judicial function, unless we once again accept the notion that the Bill of Rights means what it says and that this Court must enforce that meaning, I am of the opinion that our great charter of liberty will be more honored in the breach than in the observance.

Id. (citations omitted);

At least as to speech in the realm of public matters, I believe that the "clear and present danger" test does not "mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." Bridges v. California, 314 U.S. 252, 263 (1941).

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness." Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress. The Amendment as so construed is not likely to protect any but those "safe" or orthodox views which rarely need its protection.

Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting).

Consider also Justice Scalia's dissents:

In the last analysis, however, this debate is not an appropriate one. I have no need to defend the value of confrontation, because the Court has no authority to question it. It is not within our charge to speculate that, "where face-to-face confrontation causes significant emotional distress in a child witness," confrontation might "in fact disserve the Confrontation Clause's truth-seeking goal." If so, that is a defect in the Constitution-- which should be amended by the procedures provided for such an eventuality, but cannot be corrected by judicial pronouncement that it is archaic, contrary to "widespread belief," and thus null and void. For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him."

The Court today has applied "interest-balancing" analysis where the text of the Constitution simply does not permit it. We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.

Maryland v. Craig, 497 U.S. 836, 869-70 (1990) (Scalia, J., dissenting) (citation omitted).

The Court's decision in Griffin, however, did not even pretend to be rooted in a historical understanding of the Fifth Amendment. Rather, in a breathtaking act of sorcery it simply transformed legislative policy into constitutional command, quoting a passage from an earlier opinion describing the benevolent purposes of 18 U.S.C. § 3481, and then decreeing, with literally nothing to support it: "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Self-Incrimination Clause is reflected." Imagine what a Constitution we would have if this mode of exegesis were generally applied--if, for example, without any evidence to prove the point, the Court could simply say of all federal procedural statutes, "If the words 'Fifth Amendment' are substituted for 'act' and for 'statute,' the spirit of the Due Process Clause is reflected."

Mitchell v. United States, 526 U.S. 314, 336-37 (1999) (Scalia, J., dissenting) (citations omitted).

[FN76]. 389 U.S. 347 (1967) (Black, J., dissenting) (arguing that majority opinion establishes doctrinal interpretation of Fourth Amendment not compatible with meaning of words of Fourth Amendment).

[FN77]. Id. at 354-57, 359.

[FN78]. Id. at 365 ("[F]or me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution."). Justice Black does not necessarily advocate narrow construction of constitutional norms as a general principle. See id. at 366-67 (stating that "I do not deny that common sense requires and that this Court often has said that the Bill of Rights' safeguards should be given a liberal construction").

He, however, advocates the plain meaning of the words of constitutional textual norms as the primary barometer of meaning. Id. at 364, 373.

In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage.

Id. at 373.

[FN79]. Id. at 367, 373 ("I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping.... Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me.").

[FN80]. Id. at 364 (Black, J., dissenting). Justice Black stated:

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times" and thus reach a result that many people believe to be desirable.

Id.

[FN81]. In order to reconcile the meaning of the Fourth Amendment with the doctrinal rule it creates, the Katz majority looks beyond the conventional meaning of the words "search" and "seizure." The Court cites Silverman v. United States, 365 U.S. 505 (1961), and Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967), for the proposition that the Fourth Amendment has long been thought to prohibit "not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any 'technical trespass." ' Katz, 389 U.S. at 353.

[FN82]. 437 U.S. 1 (1978).

[FN83]. Id. at 12. Prior to Burks, Double Jeopardy Clause holdings had established the doctrinal rule that "[a] defendant who requests a new trial as one avenue of relief [along with requesting dismissal for lack of evidence at trial] may be required to stand trial again, even when his conviction was reversed due to failure of proof at the first trial." Id. at 10. In Burks, however, the Court, held that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient," even if the defendant has sought a new trial as one avenue of remedy in addition to seeking reversal of conviction for lack of evidence at trial. Id. at 18.

[FN84]. The Supreme Court has overruled its own doctrinal interpretations of constitutional clauses on dozens of occasions. See Christopher P. Banks, The Supreme Court and Precedent: An Analysis of Natural Courts and Reversal Trends, 75 Judicature 262, 265-66 (1992) (listing total of 121 overturned constitutional decisions through 1991). In some overruling cases, such as Burks, the Court is quite blunt about the errors that its past constitutional doctrinal interpretive decisions have committed. See Thomas R. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 655-59 (1999) (discussing cases where the Court overturns its own constitutional decision in order to correct an acknowledged error in the previous decisions, and arguing that the Court often uses "euphemistic" labels in place of admitting errors when overruling constitutional decisions). Payne v. Tennessee, 501 U.S. 808 (1991), represents a relatively recent, and much commented, example of this phenomenon. In Payne the Court held that the Eighth Amendment did not prohibit in all cases a capital sentencing jury from considering victim impact statements. Id. at 827. In so holding the Court overturned its earlier decisions in South Carolina v. Gathers, 490 U.S. 805 (1989), and Booth v. Maryland, 482 U.S. 496 (1987), both of which had held jury consideration of victim impact statements in capital cases in violation of the Eighth Amendment, on the grounds that those decisions were "wrongly decided." Id. at 817-18, 830.

[FN85]. David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 883 (1996). Strauss

states:

Most of the time, in deciding a constitutional issue, the text plays only a nominal role. The issue is decided by reference to 'doctrine'--an elaborate structure of precedents built up over time by the courts.... It is the rare constitutional case in which the text plays any significant role. Mostly the courts decide cases by looking to what the precedents say.

Id.

[FN86]. I have in mind, for example, cases such as Hans v. Louisiana, 134 U.S. 1 (1890), which holds that the Eleventh Amendment immunizes states from suits initiated in federal court by their own citizens, despite the fact that the Eleventh Amendment's text refers only to suits initiated by citizens of other states who initiate suit against a state in federal district court.

[FN87]. Commentators have noted both the brevity and open-textured nature of the Federal Constitution in comparison to both state constitutions and to the written constitutions of other nations. See G. Alan Tarr, Understanding State Constitutions 11-14 (1998).

[FN88]. Consider the following analogy: The federal district courts decide the vast majority of federal litigations, while the Supreme Court decides only a few. No one doubts, however, that the Supreme Court occupies a higher position in the hierarchy of federal court authority than the federal district courts.

[FN89]. 381 U.S. 479 (1965).

[FN90]. 410 U.S. 113 (1973).

[FN91]. See Webster v. Reproductive Health Servs., 492 U.S. 490, 518 (1989) (Rehnquist, C.J., plurality opinion) ("The key elements of the Roe framework--trimesters and viability--are not found in the text of the Constitution ...."); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 790 (1986) (White, J., dissenting). Justice White stated:

When the Court ventures further and defines as "fundamental" liberties that are nowhere mentioned in the Constitution (or that are present only in the so-called "penumbras" of specifically enumerated rights), it must, of necessity, act with more caution, lest it open itself to the accusation that, in the name of identifying constitutional principles to which the people have consented in framing their Constitution, the Court has done nothing more than impose its own controversial choices of value upon the people.

Id.; see also John Hart Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 935 (1973) (suggesting that "what is frightening about Roe is that this super-protected right is not inferable from the language of the Constitution").

[FN92]. Griswold and Roe, of course, are not completely unhinged from the Constitution's text. See Roe v. Wade, 410 U.S. 113, 152 (1973) (acknowledging that Constitution does not explicitly mention right of privacy, but stating that right to privacy has nonetheless long been recognized); Philip B. Heymann & Douglas E. Barzelay, The Forest and the Trees: Roe. v. Wade and Its Critics, 53 B.U. L. Rev. 765, 765-77 (1973) (arguing that privacy rights involved in Roe are tied to Fourteenth Amendment fundamental rights, and have been recognized by over fifty years of precedent).

[FN93]. Nor have constitutional doctrinal privacy rights protecting a woman's right to terminate pregnancy been found to stand in a posture of true conflict with Congress' Article I, Section 8, legislative powers. The Supreme Court, for example, has held that Congress may use its spending power to condition federal funds on compliance with federal regulations prohibiting abortion counseling. See Rust v. Sullivan, 500 U.S. 173 (1991). The Court

reached that result by holding that such an exercise of the spending power did not infringe upon the constitutional right to terminate pregnancy. Id. at 201. As such, the Court found the constitutional right to end pregnancy stands in a posture of potential rather than true conflict with Congress' spending powers.

[FN94]. The Supreme Court has acknowledged on several occasions the existence of constitutional doctrine untethered to particular superordinate constitutional clauses. See generally 3 Antieau & Rich, supra note 11, § § 44.00, 44.01 (suggesting that despite the "incantation" that "[t]he Constitution creates a Federal Government of enumerated powers" the Supreme Court has "long acknowledged" that the federal government enjoys unenumerated inherent powers). The Supreme Court, for example, has recognized several unenumerated powers inherent in federal sovereignty, such as the inherent power to "preserve the departments and institutions of the general government from impairment or destruction," Burroughs v. United States, 290 U.S. 534, 545 (1934); the inherent power to acquire territory by discovery or occupation, Jones v. Unites States, 137 U.S. 202 (1890); the inherent power to expel aliens, Unites States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950); the inherent power to make international agreements that are not treaties, B. Altman & Co. v. United States, 224 U.S. 583, 600-01 (1912); and the inherent power to protect federal employees and those in federal custody, Cunningham v. Neagle, 135 U.S. 1 (1890). Though such powers could today probably be found in the enumerated powers, the Supreme Court has found an unenumerated basis for each. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). In these cases, and in Griswold and Roe, although the Court is not developing constitutional doctrine based on particular clauses of the Constitution, we need not jump to the conclusion that it is developing constitutional doctrine completely unhinged from constitutional textual norms. It is perfectly plausible to view privacy rights and powers stemming from federal sovereignty to be implied from one or several textual statements in the Constitution. Insisting that constitutional doctrine not directly interpreting a particular constitutional clause is entirely unhinged from constitutional textual norms stakes out too extreme a position. After all, separation of powers is nowhere explicitly mentioned in the Constitution, so that position would put the vast body of Supreme Court developed separation of powers law into doubt.

[FN95]. Strauss, supra note 85, at 881 (1996) (noting that "some constitutional provisions are interpreted in ways that are very difficult to reconcile with the text").

[FN96]. The Supreme Court has developed doctrinal constitutional law difficult to square with constitutional text. See 3 Antieau & Rich, supra note 11, § 50.09, at 731 (asserting that "[e]ven when [constitutional] text is clear, Supreme Court Justices have chosen at times to ignore specific language in favor of their understanding of the 'sense' of those who adopted the text, or the meaning which has attached to the Constitution over a period of time"). Nonetheless, the primacy of constitutional text over constitutional doctrine is a basic feature of the constitutional system. That constitutional doctrine may be difficult to square with the meaning of constitutional text is irrelevant. We would witness an inversion of the constitutional text over constitutional doctrine hierarchic ordering only if the Supreme Court began creating doctrinal norms irreconcilable with the meanings plausibly attributable to constitutional textual norms.

[FN97]. See supra notes 76-80 and accompanying text.

[FN98]. See supra note 81.

[FN99]. See Hans v. Louisiana, 134 U.S. 1, 38 (1890) (holding states immune from suits initiated in federal court by their own citizens).

[FN100]. Eleventh Amendment text guarantees state immunity from federal court litigation initiated "by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI (emphasis added). Several commentators have argued that the Eleventh Amendment cannot be read to protect states from suits in federal court

brought by citizens of the defendant state. See Welch v. Tex. Dep't of Highways & Pub. Trans., 483 U.S. 468, 504-10 (1987) (Brennan, J., dissenting) (arguing that the Eleventh Amendment cannot be read to protect states from suits brought by citizens of the defendant state in federal court); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 301-02 (1985) (same); Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting) (arguing that Eleventh Amendment bars only suits initiated in federal court by citizens of other states and foreign countries, but does not bar suits initiated in federal court by citizens of the defendant state); Erwin Chemerinsky, Federal Jurisdiction § 7.3, at 375 (4th ed. 1994) (stating that Eleventh Amendment does not establish a constitutional rule protecting states from suits in federal court brought by citizens of the defendant state).

[FN101]. Since Hans the Supreme Court has located the meaning of the Eleventh Amendment not in the text of the Eleventh Amendment, but rather in the structure of the federal system and the qualities inherent in state sovereignty that the Eleventh Amendment assures. See Alden v. Maine, 527 U.S. 706, 729 (1999) (recognizing that "the scope of the States' immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by the fundamental postulates implicit in the constitutional design"); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) (stating that "[t]hough its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, we have long recognized that the Eleventh Amendment accomplished much more"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) (stating the Eleventh Amendment confirms, rather than defines, the scope of state sovereign immunity); Blatchford v. Native Vill. of Noatak & Circle Vill., 501 U.S. 775, 779 (1991) (pointing out that "[d]espite the narrowness of its terms, since Hans v. Louisiana, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms" (citation omitted)); Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) ( "Manifestly, we cannot... assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control.").

[FN102]. Further, whether or not the critics of Hans present a compelling argument against the holding is irrelevant. More important is the fact that Hans' critics choose to attack it on the grounds that the case privileges constitutional doctrine over constitutional text. The argument that Hans is problematic because it is incompatible with Eleventh Amendment text presupposes that we recognize constitutional text and constitutional doctrine as separate legal subcategories, with the former occupying a higher position in the hierarchy of legal categories than the latter. Likewise, the fact that Hans' defenders feel compelled to rebut the idea that the decision is incompatible with Eleventh Amendment text further evidences the normative superiority of constitutional text over constitutional doctrine. If constitutional doctrine occupied an equal or higher position in the normative hierarchy than constitutional text, Hans' defenders would have no need to explain why the doctrinal rule of Hans is not incompatible with Eleventh Amendment text.

[FN103]. Thus, in arguing that textual norms trump truly conflicting doctrinal norms, I am in no way endorsing or adopting a textualist approach to norm interpretation.

[FN104]. Given the open textured nature of constitutional texts, instances of true legal conflict between constitutional doctrinal norms and constitutional textual norms are rare. As demonstrated by Hans, the federal courts have proven adept at harmonizing their doctrinal holdings with open textured constitutional texts. Further, if my claim that constitutional text trumps constitutional doctrine is correct, courts developing constitutional doctrinal norms will almost never formulate constitutional doctrinal norms that stand in a posture of true conflict with the constitutional texts that they interpret. Were they to do so, the doctrinal norm would be illegitimate right out of the box. Stated differently, a court establishing a constitutional doctrinal rule must at least be able to offer some plausible explanation for why that doctrinal rule does not stand in a posture of true conflict with the constitutional text. Instances of true conflict between constitutional text and constitutional doctrine, therefore, will not likely result from the judicial development of constitutional doctrine.

[FN105]. On at least seven occasions constitutional amendments have trumped Supreme Court established

constitutional doctrinal norms. First, the Eleventh Amendment overturned the doctrinal rule of Chisholm. The Eleventh Amendment was directed specifically toward overturning the result in Chisholm and preventing suits against states by citizens of other states, or by citizens or subjects of foreign jurisdictions. Second, Section 1 of the Fourteenth Amendment overturned Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). The first sentence of Section 1 of the Fourteenth Amendment set aside the Dred Scott holding in a sentence "declaratory of existing rights, and affirmative of existing law." Third, the Fourteenth Amendment trumps the doctrinal rule of Barron v. City of Baltimore, 32 U.S. (5 Pet.) 243 (1833). By incorporating the Fifth, Sixth, and Eighth Amendments against the states, the Fourteenth Amendment overruled Barron's doctrinal rule holding that the Bill of Rights only applies to the federal government. Fourth, the Sixteenth Amendment, permitting income taxation, overturned Pollack v. Farmer's Loan & Trust Co., 157 U.S. 429 (1895). The ratification of the Sixteenth Amendment was the direct consequence of the Supreme Court's 1895 decision in Pollock, holding Congress's attempt to tax incomes uniformly throughout the United States unconstitutional. Fifth, the Nineteenth Amendment, establishing female suffrage, trumped the rule established in Minor v. Happersett, 88 U.S. 162 (1875), which had held that the Privileges and Immunities Clause of the Fourteenth Amendment did not guarantee female suffrage. Sixth, the Twenty- Fourth Amendment trumped the doctrinal rule of Breedlove v. Suttles, 302 U.S. 277 (1937). Breedlove found poll taxes not in violation of the Fourteenth and Nineteenth Amendments. Ratification of the Twenty-Fourth Amendment made poll taxes as a prerequisite to voting in federal elections unconstitutional. Seventh, the Twenty-Sixth Amendment overturned the doctrinal rule of Oregon v. Mitchell, 400 U.S. 112 (1970). Mitchell held that the Constitution did not permit Congress the ability to regulate state and local elections. The Twenty- Sixth Amendment textually establishes a congressional power to enforce the right to vote to all citizens age eighteen or older in every federal, state and local election. U.S. Const. amend. XXVI; see also Laurence H. Tribe, American Constitutional Law § 3-6, at 65 n.10 (2d ed. 1988) (listing five instances in which constitutional amendments have overturned Supreme Court established constitutional doctrine).

[FN106]. 2 U.S. (1 Dall.) 419 (1793).

[FN107]. U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[FN108]. Chisholm, 2 U.S. at 419-20. Chisholm involved the claim of a citizen of South Carolina brought in federal court against the state of Georgia. The case held that under Article III, Section 2, the federal courts had subject matter jurisdiction over suits brought by a citizen of one state against another state.

[FN109]. See supra note 107. The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[FN110]. The Supreme Court has long acknowledged that the Eleventh Amendment trumps the doctrinal rule of Chisholm. See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 669 (1999) (stating that the Eleventh Amendment "repudiated the central premise of Chisholm"); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 66-68 (1996); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 97-98 (1984); Principality of Monaco v. Mississippi, 292 U.S. 313, 320-28 (1934); In re State of N.Y., 256 U.S. 490, 497-98 (1921); Hans v. Louisiana, 134 U.S. 1 (1892). Given that the Eleventh Amendment was proposed specifically to overturn the rule of Chisholm, see Chemerinsky supra note 100, § 7.2, at 371-72 (suggesting that "the Eleventh Amendment was ratified specifically to overrule the... holding in Chisholm"), any other conclusion is hard to fathom.

[FN111]. See Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

[FN112]. U.S. Const. amend. XXVI; Harold W. Chase & Craig R. Ducat, Edward S. Corwin's The Constitution and What It Means Today 556 (14th ed. 1978).

[FN113]. See Nat'l Treasury Employees Union v. Nixon, 492 F.2d 587, 612 n.51 (D.C. Cir. 1974) (affirming that "the Twenty-Sixth Amendment to the Constitution effectively overruled the Supreme Court's decision in Oregon v. Mitchell").

[FN114]. See Alden v. Maine, 527 U.S. 706, 711-29 (1999) ("The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle ...."); see also supra note 101.

[FN115]. The Supreme Court's view that the Eleventh Amendment merely clarifies a constitutional norm predating the Chisholm doctrinal rule makes the Chisholm versus Eleventh Amendment true conflict unique. In the usual case of true legal conflict the constitutional textual norm involved constitutes a new constitutional textual norm, rather than a clarification of the Constitution's preexisting meaning.

[FN116]. See supra text accompanying notes 82-83. Recall that in Burks the Court overturned its then extant double jeopardy doctrine despite the fact that the constitutional textual norm (the Double Jeopardy Clause) predates the constitutional doctrinal norm (the Courts' then extant double jeopardy doctrinal rules).

[FN117]. The two norms stand in a posture of true conflict because the Eleventh Amendment explicitly provides states sovereign immunity protection against suits brought in federal court by citizens of a state other than the defendant state, or by citizens of a foreign nation, while the doctrinal rule of Chisholm stands for the proposition that a state citizen may sue another state in federal court.

[FN118]. See supra notes 47-48.

[FN119]. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (creating the first major New Deal era Supreme Court case offering broad interpretation of the Commerce Clause); United States v. Darby, 312 U.S. 100 (1941) (overruling Hammer v. Dagenhart, 247 U.S. 251 (1918), which held that the Tenth Amendment limits Congress's Commerce Clause powers, and broadly interpreting Commerce Clause powers); Wickard v. Filburn, 317 U.S. 111 (1942) (rejecting earlier embraced direct versus indirect effects theory of the Commerce Clause, and holding that Commerce Clause power extends to regulation of home grown wheat intended primarily for personal consumption).

[FN120]. See infra Section I.C.2.

[FN121]. For the purposes of this Article, I will treat legislative intent as evidence which may illuminate the meaning of statutory textual norms, but which does not constitute a kind or category of statutory norms itself. See supra note 60.

[FN122]. See Posadas v. Nat'l City Bank of N.Y., 296 U.S. 497, 503 (1936) (holding that "where provisions in the two [statutory] acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one"); 1A Singer, supra note 8, § 23.09, at 337-38.

[FN123]. See, e.g., Hubbard v. United States, 514 U.S. 695 (1995) (holding statute prohibits making false

statements in any department or agency proceeding contrary to prior interpretation of statute); Payne v. Tennessee, 501 U.S. 808 (1991) (finding no bar to victim impact statements in capital sentencing contrary to prior Eighth Amendment doctrinal readings); Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978) (overturning previous decision which had held government immune from suits initiated under 42 U.S.C. § 1983).

[FN124]. 516 U.S. 489 (1996).

[FN125]. Id. at 492.

[FN126]. Id. at 507-15 (discussing whether ERISA authorizes individual or only group equitable relief).

[FN127]. Id. at 516 (Thomas, J., dissenting).

[FN128]. The majority opinion in Varity offers four reason why the rule allowing individuals to sue under ERISA reconciles with the meaning of ERISA. Id. at 509-13.

[FN129]. 365 U.S. 167 (1961).

[FN130]. 436 U.S. 658 (1978).

[FN131]. For an overview of § 1983, see Sheldon N. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983 § 1.05 (3d ed. 1991). Generally, § 1983 provides a cause of action when one has "suffered the deprivation of constitutional or certain federal statutory rights by virtue of the conduct of state officials" acting under color of law. Id. § § 1.05-.06.

[FN132]. Monroe, 365 U.S. at 187-92 (concluding that § 1983 was not intended to apply to municipalities and discussing evidence of legislative intent supporting that conclusion).

[FN133]. Id. (reviewing legislative history indicating that Congress did not intend municipalities to be covered by § 1983).

[FN134]. Monell, 436 U.S. at 664-89 (discussing the legislative history which contradicts the doctrinal rule of Monroe).

[FN135]. Id. at 664-65, 700-01 (qualifying the doctrinal rule of Monroe as "incorrectly" interpreting § 1983, and stating that it is "beyond doubt" that Monroe "misapprehended" the meaning of § 1983).

[FN136]. Id. at 663 ("[W]e now overrule Monroe v. Pape... insofar as it holds that local governments are wholly immune from suit under § 1983.").

[FN137]. Id. at 690.

Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did

intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief ....
Id. (footnotes omitted).

[FN138]. See Landgraf v. USI Film Prods., 511 U.S. 244, 250-51 (1994) (stating that the Civil Rights Act of 1991 was passed in response to the Supreme Court's interpretations of Title VII and § 1981 in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Martin v. Wilks, 490 U.S. 755 (1989), EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989), W. Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83 (1991), and Library of Cong. v. Shaw, 478 U.S. 310 (1986)); Steinle v. Boeing Co., 785 F. Supp. 1434, 1436 & n.3 (D. Kan. 1992) (stating that The Civil Rights Act of 1991 overruled Supreme Court holdings in Patterson, Martin, Lorance, Wards Cove Packing Co., Price Waterhouse, West Virginia Univ. Hosp. Inc., and Arabian Am. Oil Co.); Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305-06, nn.9-13 (N.D. Cal. 1992) (stating that The Civil Rights Act of 1991 reverses and modifies Price Waterhouse, Martin, Lorance, Patterson, West Virginia Univ. Hosp., Inc., and explaining those statutory reversals and modifications).

[FN139]. 490 U.S. at 909-10 (clarifying limitations period for initiating suit in a Title VII discriminatory seniority system suit "will run from the date the system was adopted"); Ronald D. Rotunda, The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation, 68 Notre Dame L. Rev. 923, 945 (1993) (stating that Lorance held that the statute of limitations runs from the time a seniority system is adopted); Stuart H. Bompey & John D. Giansello, The Civil Rights Act of 1991: An Analysis, 429 PLI/Lit 87, 125-26 (1992) (discussing when the time period for filing suit under Title VII begins to run under the holding of Lorance).

[FN140]. See 42 U.S.C. § 2000e-5(e)(2) (1994); Rotunda, supra note 139, at 945 (stating that under The Civil Rights Act of 1991 the period of limitation for Title VII seniority system discriminations suits begins to run "from the time a plaintiff is affected"); Bompey & Giansello, supra note 139, at 125-26 (stating that under The Civil Rights Act of 1991 the period of limitation for Title VII seniority system discrimination suits begins to run from the time "an unlawful employment practice occurs").

[FN141]. Wards Cove, 490 U.S. at 659-60 ("[T]he employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff."); Rotunda, supra note 139, at 933 ("Wards Cove held that the employer [in a Title VII disparate impact case] has only the burden of production, not the burden of persuasion, in establishing an affirmative defense of business necessity."); Bompey & Giansello, supra note 139, at 108 (stating that in Wards Cove the Court held that the employee-plaintiff bears the burden of persuasion in a Title VII disparate impact case).

[FN142]. See 42 U.S.C. § 2000e-2(k)(1)(A)(i), (m) (1994); Rotunda, supra note 139, at 933; Bompey & Giansello, supra note 139, at 108-09 ("[T]he Civil Rights Act of 1991 directly repudiates the Wards Cove definition of the employer's burden.... On this point, therefore, Wards Cove is no longer the law.").

[FN143]. See Steinle, 785 F. Supp. at 1436 n.3 (stating that The Civil Rights Act of 1991 overruled Supreme Court holdings in Lorance and Wards Cove); Stender, 780 F. Supp. at 1305-06 nn.9-13 (stating that The Civil Rights Act of 1991 reverses Lorance and Wards Cove).

[FN144]. Recall, for example, that in order to overturn the doctrinal norms established by Lorance and Wards Cove, Congress passed The Civil Rights Act of 1991, which amended Title VII.

[FN145]. See 1A Singer, supra note 8, § 27.04, at 472-73 (stating that "[t]he usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate," that the idea that "a legislature cannot with binding effect interpret or define its own terms in a subsequent and independent statute is unfounded," and that special interpretive statutes are "coming to be treated as binding with increasing frequency").

[FN146]. "One of the oldest federal civil rights statutes, 42 U.S.C. § 1981, had for sometime been held to prohibit discrimination on the basis of race, national origin or ethnicity 'in the making and enforcement of private contracts." ' Bompey & Giansello, supra note 139, at 99 (citation omitted). Prior to Patterson, "every federal court of appeals reaching the question had held that section 1981 prohibited discrimination at the formation of an employment contract and during the performance of the contract as well." Rotunda, supra note 139, at 939.

[FN147]. 491 U.S. 164, 175-79 (1989) (holding that § 1981 applies only to the making and enforcement of contracts, but not to post-contract formation conduct of employers); Rotunda, supra note 139, at 939-40 (discussing the Patterson interpretation of § 1981); Bompey & Giansello, supra note 139, at 99 (stating that in Patterson, the Court held that § 1981 "did not extend to conduct occurring after the establishment of the contract").

[FN148]. See 42 U.S.C. § 1981(b)-(c) (1994); Rivers v. Roadway Express, Inc., 511 U.S. 298, 305-06 (1994) (reviewing the argument that The Civil Rights Act of 1991 was intended to "restore" § 1981 to its pre- Patterson state); Stender, 780 F. Supp. at 1305-06 nn.9-13 (stating that "Congress' clear intention" in passing The Civil Rights Act of 1991 was to "undo the effects" of Patterson and other cases "which it believed were wrongfully decided, and to restore civil rights law to its previous state"); Watkins v. Bessemer State Technical Coll., 782 F. Supp. 581, 585 (N.D. Ala. 1992) (stating that The Civil Rights Act of 1991 "neatly falls into the unusual, but judicially recognized, category of an amendment that was not intended to change the law but only to clarify it"); see also Rotunda, supra note 139, at 940 (stating that The Civil Rights Act of 1991 establishes that § 1981 prohibits "discrimination on account of race and ethnicity even in the post-contract-formation period"); Bompey & Giansello, supra note 139, at 99 (stating that The Civil Rights Act of 1991 "reverses Patterson"). Interestingly, the text of § 1981 has changed little since its passage in 1870. The text of the statute reads in relevant part as follows: "All persons within the jurisdiction of the United States shall have the same right... to make and enforce contracts." 42 U.S.C. § 1981(a) (1994). As if to underscore that it merely sought to reinstate the pre-Patterson meaning of § 1981, The Civil Rights Act of 1991 did not change the original text of § 1981. Instead, the Act simply added the following text: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (1994).

[FN149]. The following cases provide further examples of special interpretive statutes which clarify the meaning of preexisting statutory textual norms and overrule statutory doctrinal norms: Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678-79, n.17 (1983) (holding that Pregnancy Discrimination Act overrules statutory doctrinal gloss on Title VII established in General Electric Co. v. Gilbert, 429 U.S. 125 (1976) by reinstating pre-Gilbert meaning of Title VII); Mrs. W. v. Tirozzi, 832 F.2d 748, 754-56 (2d Cir. 1987) (holding that Handicapped Children's Protection Act of 1986 overrules statutory doctrinal glosses on 28 U.S.C. § 1983 and The Education of the Handicapped Act established in Smith v. Robinson, 468 U.S. 992 (1984) by reinstating pre-Smith meaning of 28 U.S.C. § 1983 and The Education of the Handicapped Act).

[FN150]. Lussier v. Dugger, 904 F.2d 661, 665 (11th Cir. 1990).

[FN151]. 465 U.S. 555 (1984).

[FN152]. See Lussier, 904 F.2d at 664-68.

[FN153]. 20 U.S.C. § 1681(a) (1994); see also John F. Carroll, Note, Education-Title IX-Receipt by Private College Students of Basic Educational Opportunity Grants Constitutes Federal Financial Assistance to the Specific Program Benefitted Thereby Requiring Compliance with Title IX, Grove City College v. Bell, 16 St. Mary's L.J. 1015, 1017-18 n.12 (1985).

[FN154]. Grove City Coll., 465 U.S. at 573-74; see also Carroll, supra note 153, at 1023.

[FN155]. See Lussier, 904 F.2d at 665.

[FN156]. Id.

[FN157]. See 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 2.3 (3d ed. 1994) (discussing the fact that agencies often combine legislative and judicial function by both creating and interpreting legislative rules).

[FN158]. See id. § 6.3 (discussing agency legislative rules); see also Nat'l Latino Media Coalition v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) (holding that "a valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute"); 1 Davis & Pierce, supra note 157, § § 6.3, 6.5 (discussing the binding effect of agency legislative rules). Agency legislative rules may be created by informal notice and comment rulemaking, or announced in formal administrative adjudications. Richard J. Pierce, Jr. et al., Administrative Law and Process § 6.4.5, at 315-16 (3d ed. 1999) (describing the two processes by which agencies may create legislative rules).

[FN159]. Agency interpretive rules, procedural rules, and policy statements, which are commonly found in policy statements, manuals, guidelines, staff instructions, and other informal devices for communicating an agency's reading of its own regulations, are purely informational, and do not have the force of law. See Nat'l Latino Media Coalition, 816 F.2d at 788 (arguing that "an 'interpretive' rule does not have the force of law and is not binding on anyone"); 1 Davis & Pierce, supra note 157, § § 6.2, 6.3 (discussing agency policy statements and interpretive rules, and the fact that they have no binding effect); Pierce et al., supra note 158, § § 6.4.4a-6.4.4c (stating that interpretive rules, policy statements, and procedural rules, unlike agency legislative rules, are not binding on agencies, courts, or private actors).

Agency interpretations of their own legislative rules found in quasi-judicial formal adjudications, however, do enjoy the force of law. See 1 Davis & Pierce, supra note 157, § 8.1 (discussing agency adjudications). Formal agency adjudications produce administrative norms because, like judicial interpretations of statutes, and unlike agency interpretive rules, they enjoy stare decisis precedential value, and therefore operate as rules of general application. See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973) (stating agency adjudicatory decisions "may serve as precedents," that there is "a presumption that those policies [announced in adjudications] will be carried out best if the settled rule is adhered to," and that the agency's "duty to explain its departure from prior norms" flows from that presumption); Kelly ex rel. Mich. Dep't of Natural Res. v. FERC, 96 F.3d 1482, 1489 (D.C. Cir. 1996) ("It is, of course, axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent."); M.M. & P. Maritime Advancement, Training, Educ. & Safety Program v. Dep't of Commerce, 729 F.2d 748, 755 (Fed. Cir. 1984) ("An agency is obligated to follow precedent, and if it chooses to change, it must explain why."); William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 397 (1991) (discussing the stare decisis effect of statutory interpretation precedents); 2B Singer, supra note 8, § 49.05, at 16 (noting that principles of stare decisis "weigh heavily" in the statutory context); 2 Davis & Pierce, supra note 157, § 11.5 (discussing the precedential effect of agency adjudications); 3 Davis & Pierce, supra note 157, § 17.2. Davis and Pierce state:

[I]f an agency resolves adjudication A in one way by applying a policy or set of decisional criteria, and then resolves adjudication B in a different way by applying a different policy or set of decisional criteria, the second action must be reversed and remanded as arbitrary, capricious and an abuse of discretion unless the agency explicitly acknowledges and explains the reasons for its change in policy.
Id.

[FN160]. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 863-64 (holding that new administrative regulation may replace preexisting agency regulation where both are plausible interpretations of statute).

[FN161]. Thus, agency adjudications operate similarly to common law precedents. Agency adjudications constitute precedents "which are followed, unless they are distinguished or overruled" by another agency adjudication. 2 Davis & Pierce, supra note 157, § 11.5.

[FN162]. See 1 Davis & Pierce, supra note 157, § 6.10 ("An agency is not allowed to change a legislative rule retroactively through a process of disingenuous interpretation of the rule...."); John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 612-31 (1996) (reviewing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) and Udall v. Tallman, 380 U.S. 1 (1965) and their progeny and the conditions under which an Article III court may overturn an agency interpretation of its own substantive regulations).

[FN163]. 578 F.2d 289, 292-93 (10th Cir. 1978) (overturning agency adjudicatory interpretation of agency legislative rule on grounds that the agency's interpretation of its own regulation was "without legal foundation").

[FN164]. Note, however, that the conclusion that the agency violated the rule that an agency interpretation or application of its own regulation may not legitimately stand in a posture of true legal conflict with that regulation depends on a rejection of the agency's reading of the term "purchase." If, as the agency adjudication held, that term includes payment in kind, then the regulation and the agency adjudication would not stand in a posture of true legal conflict. By arguing that the term "purchase" includes payment in kind, the agency demonstrates that it too was cognizant of the requirement that agency adjudicatory norms must cohere with hierarchically superior regulations. Jicarilla thus shows how courts can transform true legal conflict into potential legal conflict.

[FN165]. See, e.g., Strauss, supra note 85, at 882-83, n.15 (discussing the "preferred position" of some constitutional provisions, and pointing out as an example that "[c]urrent interpretations of the Free Speech Clause entail more judicial invalidation of statutes than do current interpretations of the Takings or Contract Clauses").

[FN166]. The Engagements Clause, Article VI, Section 1, which transferred the debts incurred by the Articles of Confederation government to the government formed under the Constitution, has not been mentioned by the Supreme Court since at best the early stages of the republic. See Chase & Ducat, supra note 112, at 272 (observing that the Engagements Clause "is now of historical interest only"). In contrast, a Westlaw search performed on March 15, 2000, reveals that the Supreme Court mentioned the words "Free Speech Clause" in seventeen separate cases during the 1990s.

[FN167]. Incorporation of most of the Bill of Rights against the states has transformed the Fourteenth Amendment into one of the most often litigated parts of the Constitution. A Westlaw search performed on March 15, 2000, reveals that the Supreme Court mentioned the words "Fourteenth Amendment" in 712 separate cases during the 1990s.

[FN168]. Other constitutional provisions granting powers to Congress include the following: Article III, Section 1 (power to establish lower federal courts); Article IV, Section 1 (power to prescribe manner in which state public acts, records and judicial proceedings shall be proved); Article IV, Section 3 (power to admit new states to the union, and plenary power over territories and other United States properties); Article V (power to propose constitutional amendments); Section 2 of the Thirteenth Amendment (power to enforce Thirteenth Amendment); Section 2 of the Fifteenth Amendment (power to enforce Fifteenth Amendment); the Sixteenth Amendment (power to lay and collect income taxes); the repealed Eighteenth Amendment (power to enforce prohibition); the Nineteenth Amendment (power to enforce women's right of suffrage); Section 4 of the Twentieth Amendment (power to choose presidential successor); the Twenty-Third Amendment (power to enforce District of Columbia residents' right to vote in Presidential elections); the Twenty-Fourth Amendment (power to enforce ban on poll tax); and the Twenty-Sixth Amendment (power to enforce the right of those eighteen or older to vote).

[FN169]. The Ninth and Tenth Amendments may be exceptions. Arguably, the Ninth Amendment does not establish rights, but merely declares that the enumeration of certain rights does not mean that others do not exist. Similarly, the Tenth Amendment reserves those powers not delegated to the federal government to the states and the people.

[FN170]. Article IV, Section 2 establishes that citizens of each state have the privileges and immunities of citizens of the several states. Article III, Section 2 states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...."

[FN171]. Id. at art. I, § 3, cl. 4.

[FN172]. Id. at art. II, § 1.

[FN173]. Compare id. at pmbl., with id. at amend. XXV (presidential succession).

[FN174]. Id. at art. VI. Westlaw searches reveal that, as of December 2, 1998, 4,830 federal cases since 1944 have cited the words "Supremacy Clause." In contrast, since the ratification of the Constitution, as of December 2, 1998, only two cases published in official reporters have cited the text of Article VI, Paragraph 2. See Downes v. Bidwell, 182 U.S. 244, 347 (1901) (mentioning Article VI, Paragraph 1 but deciding claim relating to imposition of import duties on goods imported from a United States territory to a state on other grounds); Lunaas v. United States, 936 F.2d 1277, 1279- 80 (Fed. Cir. 1991) (mentioning Article VI, Paragraph 2, but deciding claim based on loan to Continental Congress on statute of limitation grounds); see also Chase & Ducat, supra note 112, at 272 (stating that Article VI, Paragraph 2, "is now of historical interest only").

[FN175]. See supra text accompanying notes 46-48.

[FN176]. Thus, for example, Section 2 of the Fourteenth Amendment (apportionment of congressional representatives) prevails over Article I, Section 2, Clause 3 (Three-Fifths Clause); the Seventeenth Amendment (direct election of senators) prevails over Article I, Section 3, Clauses 1 and 2 (election of senators by state legislatures); Section 2 of the Twentieth Amendment (Congress convenes on third day of January) prevails over Article I, Section 4, Paragraph 2 (Congress convenes on first Monday in December); the Sixteenth Amendment (allowing direct income tax) prevails over Article I, Section 9, Paragraph 4 (prohibiting direct income tax); the Twelfth Amendment (Electoral College votes separately for President and Vice President) takes precedence over Article II, Section 1, Paragraph 3 (Electoral College takes single vote from which President and Vice President chosen); Section 3 of the Twenty-Fifth Amendment (devolution of presidential powers upon Vice President in case

President-elect dies) takes precedence over the next-to-last sentence of Paragraph 1 of the Twelfth Amendment (when House is unable to choose President, Vice President acts as President); the Twenty-Fifth Amendment (presidential succession) prevails over Article II, Section 1, Paragraph 6 (presidential succession); the Eleventh Amendment (prohibiting federal court jurisdiction over suits against states without consent) takes precedence over Article III, Section 2, Clauses 6 and 8 (allowing federal court jurisdiction over certain suits against states); the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth amendments, however, take precedence over the Eleventh Amendment; the Thirteenth Amendment (banning slavery) takes precedence over Article IV, Section 2, Paragraph 3 (repatriation of fugitive slaves); and the Twenty-First Amendment (repealing prohibition) prevails over the Eighteenth Amendment (instituting prohibition). This principle is so entrenched as to be stated in legal encyclopedias. As one leading legal encyclopedia states: "[W]here a new amendment is irreconcilably in conflict with a part of the constitution adopted earlier, the new amendment prevails and supersedes it." 16 Am. Jur. 2d Constitutional Law § 45 (1998).

[FN177]. Compare U.S. Const. art. I, § 4, cl. 2, with U.S. Const. amend. XX, § 2.

[FN178]. I do not, however, consider differences in the time constitutional texts come into being to constitute a line of categorical demarcation between different types of constitutional texts. We do not consider 'old' constitutional text to be one kind of constitutional texts and 'new' constitutional texts to be another. A fairer reading of the legal system's treatment of such constitutional texts is that it considers older and newer constitutional texts to be members of the single category "constitutional textual norms," and resolves instances of true conflict between members of that category by privileging the more recently created norm over the older norm.

[FN179]. This is not to say, however, that the chronologic distinction is the only factor which is relevant to explaining the resolution of legal conflict in any particular case. Indeed, factors such as the subjective value ordering of a given judge, and principles and practices or legal interpretation can affect outcomes in cases of legal conflict. Such factors, however, work their influence at the level of determining whether two legal norms stand in a posture of true or merely potential legal conflict.

[FN180]. See supra text accompanying notes 10-16.

[FN181]. See supra notes 12, 16.

[FN182]. See supra text accompanying note 13.

[FN183]. See FTC v. Am. Tobacco Co., 264 U.S. 298, 307 (1924) (finding that a search conducted under the authority of a statute passed pursuant to Commerce Clause powers is unconstitutional if done in violation of Fourth Amendment); 3 Antieau & Rich, supra note 11, § 44.18, at 199 ("The Fourth Amendment ban on unreasonable searches and seizures restrains the power of Congress under the Commerce Clause.").

[FN184]. One clarifying note: constitutional doctrinal norms relate back in time to the date of the constitutional textual norms they interpret. Thus, in resolving true legal conflict between constitutional doctrinal norms, we look to the chronological order of norm creation of the textual constitutional norms from which the conflicting constitutional doctrinal norms in question sprang.

[FN185]. The analysis here depends upon the assumption that the Bill of Rights, ratified in 1791, should be considered a later in time created set of constitutional textual norms than the first seven articles of the Constitution, ratified in 1788. Admittedly, proposal and ratification of the Bill was prompted by the expressed desire of several

state ratifying conventions when adopting the Constitution that a Bill of Rights quickly be added. David E. Kyvig, Explicit and Authentic Acts: Amending the Constitution, 1776-1995, at 87 (1996). As such, one could plausibly argue that the body of the Constitution and the Bill of Rights chronologically constitute a single act of norm creation. As a formal matter, however, the Bill of Rights was ratified more than three years after the first seven articles of the Constitution. Further, the practice in mediating instances of true legal conflict has been to treat even the briefest of chronologic difference as decisive. Thus, even where two truly conflicting legal norms are created in the same year, the later in time norm trumps the earlier in time norm. See 1A Singer, supra note 8, § 23.17, at 386 (arguing that "when two acts of the same [legislative] session cannot be harmonized or reconciled, that statute which is the latest enactment will operate to repeal a prior statute of the same session to the extent of any conflict in their terms").

[FN186]. See generally, 3 Antieau & Rich, supra note 11, § 44.04 ("The Bill of Rights stands for the proposition that fundamental rights of United States citizens should be protected from government intrusion. All of the enumerated powers of Congress remain subject to these constraints, and only the courts can ensure their enforcement." (emphasis added)).

[FN187]. This example contrasts with the earlier discussed conflict between the First and Sixteenth Amendments. See infra text accompanying notes 198- 201. Because First Amendment values are so central to the constitutional system, and more highly valued than Congress's power to lay and collect income taxes, we would not expect the Supreme Court to find the First and Sixteenth Amendments to stand in a posture of true conflict. Id. As such, it is highly unlikely that Sixteenth Amendment legislative powers would ever trump First Amendment rights granting norms. In contrast, we can easily imagine the Supreme Court finding that Congress's Civil War Amendment legislative powers stand in a posture of true conflict with First Amendment norms. In short, the Court formally could (but in any imaginable world would not) develop a set of Sixteenth Amendment doctrinal norms which trump First Amendment doctrinal norms. The Court formally could, and very well may, develop a set of doctrinal norms rooted in Section 5 of the Fourteenth Amendment, and Section 2 of the Thirteenth Amendment, which would trump extant First Amendment doctrinal norms.

[FN188]. Though the Supreme Court has not directly confronted this issue, at least one scholar has urged this result in the hate speech context. See Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv. L. Rev. 124, 155-60 (1992) (suggesting that Section 2 of the Thirteenth Amendment provides a basis for hate speech prohibitions that would otherwise violate First Amendment Doctrine and arguing that the Court has avoided the issue). Other scholars have noted a "tension" between the First and Fourteenth Amendments in the hate speech context. See, e.g., Laurence R. Marcus, Fighting Words: The Politics of Hateful Speech 129-39 (1996) (discussing the tension between the First and Fourteenth Amendments and the notion that hate speech regulation may be framed as enforcing the Fourteenth rather than violating the First).

[FN189]. 517 U.S. 44 (1996).

[FN190]. Id. at 59.

[FN191]. Id. at 63-66 (holding that Congress may not abrogate Eleventh Amendment state sovereign immunity from suit in federal court when acting pursuant to pre-Eleventh Amendment Article I, Section 8, legislative powers, but may do so when legislating pursuant to post-Eleventh Amendment legislative powers, such as Section 5 of the Fourteenth Amendment); see also Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J., dissenting); Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976) (establishing that Congress may abrogate Eleventh Amendment state sovereign immunity from suit in federal court when legislating pursuant to Section 5 of the Fourteenth Amendment, ratified well after the Eleventh Amendment).

[FN192]. Nor does City of Boerne v. Flores, 521 U.S. 507 (1997), modify the analysis. Boerne stands for the proposition that Congress may use its Section 5 enforcement powers to enforce the Fourteenth Amendment, but not to "decree" by statute the substantive meaning of constitutional rights. Id. at 519. Boerne, in other words, reinforces the third branch's status as the sole arbiter of the meaning of the Constitution. Boerne, however, leaves intact Congress's power to use its Civil War Amendment legislative powers to enforce those amendments, so long as a "congruence between the means used and the ends to be achieved" is present. Id. at 530.

[FN193]. I reserve for another day a comprehensive analysis of whether or when post-Bill of Rights legislative powers offer Congress license to legislate in areas that would run afoul of Bill of Rights norms if Congress were legislating under its Article I, Section 8, enumerated powers.

[FN194]. Consider a simple example. Imagine that when the price of gasoline rises, consumers purchase less gasoline. We can explain this phenomenon with a general and a particular explanation. First, the general explanation: As a rule, when the price of a good rises, consumers purchase less of that good. Next, the particular explanation: As a rule, when the price of fossil fuels rise, consumers purchase less fossil fuels. Both explanations fully account for the phenomenon that we seek to explain. The more general explanation, however, encompasses the more particular explanation. Indeed, the particular explanation amounts to scarcely more than a restatement of the phenomenon that we seek to explain.

[FN195]. See Ronald Dworkin, Rights as Trumps, in Theories of Rights 153-67 (Jeremy Waldron ed., 1984) (arguing that rights operate as trumps on utility maximizing political decisions or policies); Ronald Dworkin, Taking Rights Seriously 92 (1977) ("It follows from the definition of a right that it cannot be outweighed by all social goals.").

[FN196]. U.S. Const. amend. I.

[FN197]. Id. at amend. XVI.

[FN198]. Generally, modern First Amendment doctrine applies strict scrutiny to regulation of speech against government policies or institutions, and qualifies protection of political speech as a central First Amendment objective. See McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346-47 (1995) (holding portion of statute requiring name and address of pamphleteer be printed on materials promoting the adoption or defeat of a ballot measure violates First Amendment, and stating that the speech regulated by the statute "occupies the core of the protection afforded by the First Amendment," that "advocacy of a politically controversial viewpoint--is the essence of First Amendment expression," and that "[w]hen a law burdens core political speech [the Court] applies 'exacting scrutiny" '); Boos v. Barry, 485 U.S. 312 (1988) (holding city ordinance prohibiting display of signs critical of foreign government within 500 feet of embassy in violation of First Amendment); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964) (finding Alabama libel law under which publisher of statements critical of elected city commissioner would have been per se libel if statements damaged commissioner's reputation constitutionally deficient under First Amendment, and stating that protecting ability to criticize government officials is "the central meaning of the First Amendment").

[FN199]. It would not stand in a posture of true conflict with Sixteenth Amendment text because that text does not specify any limits on Congress's power to lay and collect taxes on incomes. Any limits on that legislative power, therefore, must come from outside of the Sixteenth Amendment, or be read into the Sixteenth Amendment via judicial interpretive gloss. The only way that such a doctrinal reading would stand in a posture of true conflict with the Sixteenth Amendment textual norm would be if the text were a placeholder for the intent of its ratifiers, and that intent included the idea that Congress could not pass income tax laws impinging on extant constitutional rights. Though not resorting to such an interpretive technique regularly, the Supreme Court recently employed a similar

interpretive approach in Alden v. Maine, 527 U.S. 706 (1999) (holding that the text of the Eleventh Amendment is just a signifier for or declaratory of the ideas of state sovereignty at the time it was ratified).

[FN200]. See Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) (holding state tax based on newspaper circulation unconstitutional because it violated First Amendment by taxing newspapers critical of governor). Though not mentioned in Grosjean, later courts have noted that the newspapers primarily affected by the tax in Grosjean were those most critical of then Louisiana Governor Huey Long. See Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 580 (1983) (explaining that although the court did not explicitly refer to this history in Grosjean, comments in the opinion suggest that it may have been a significant motivating factor behind the tax legislation). Though Grosjean ruled on a state law tax, the same outcome would undoubtedly result if Congress were to pass a similar federal tax.

[FN201]. Indeed, this appears to be the course that Sixteenth Amendment jurisprudence has taken. The Sixteenth Amendment, and the power to tax in general, is thought to be subject to other Bill of Rights clauses. See Chemerinsky, supra note 16, § 3.4.1, at 199 (1997).

Thus, Congress has the broad power to tax and spend for the general welfare so long as it does not violate other constitutional provisions. For example, a tax that was calculated or administered in a racially discriminatory fashion would be unconstitutional, not as exceeding the scope of Congress' Article I powers, but as violating the equal protection guarantee of the Fifth Amendment.

Id.; see also Chase & Ducat, supra note 112, at 542 (stating that Congress's power to tax "remains subject to the due process clause of Amendment V").

[FN202]. If one did not first move from right to left when using the model, the model could indicate the opposite result.

[FN203]. The model, in other words, explains the outcome of a true legal conflict between a constitutional and a statutory norm, or between a statutory textual norm and a statutory doctrinal norm, or between a new and a preexisting administrative textual regulatory norm, or between any other combination of truly conflicting legal norms belonging to different legal categories, or belonging to the same legal category, but created at different points in time. The only kinds of true legal conflicts that the model does not address are (1) true legal conflicts between legal norms belonging to the same second order legal subcategory which were created at the same time, and (2) true legal conflicts between federal and state legal norms.

The model also does not directly incorporate treaties, executive agreements, executive orders, or interstate compacts because each are functional equivalents of either statutes or administrative regulations. Beginning with treaties, there exists some dispute as to whether treaties count as domestic legal norms at all, or instead are akin to contractual obligations between signatory nations. See Khaldoun A. Baghdadi, Apples and Oranges--The Supremacy Clause and the Determination of Self-Executing Treaties: A Response to Professor Vazquez, 20 Hastings Int'l & Comp. L. Rev. 701 (1997) (criticizing Professor Vazquez's Supremacy Clause-based conclusion that treaties qualify as domestic self-executing law); Martin S. Flaherty, History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land", 99 Colum. L. Rev. 2095 (1999) (arguing that weight of evidence suggests original intent of founders was that treaties be self-executing domestic law); Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995) (arguing that under Supremacy Clause treaties constitute self-executing domestic law); Carlos Manuel Vazquez, Laughing at Treaties, 99 Colum. L. Rev. 2154 (1999) (arguing that Constitution's text and structure indicate that treaties are self-executing domestic law); Carlos Manuel Vazquez, Treaty-Based Rights and Remedies of Individuals, 92 Colum. L. Rev. 1082 (1992) (same); John C. Yoo, Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding, 99 Colum. L. Rev. 1955 (1999) (arguing that original intent of founders was that treaties not constitute self-executing domestic law); John C. Yoo, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution, 99 Colum. L. Rev. 2218 (1999) (same). Omission of treaties from the discussion avoids venturing into a messy and unneeded side debate.

The second, and more important reason for not directly incorporating treaties into the model is that even if qualifying as domestic legal norms, the legal system considers treaties as the functional equivalent of statutes. Foster

v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (holding that self- executing treaties are "to be regarded in courts of justice as equivalent to an act of the legislature"). Thus, like statutes, treaties may not contravene constitutional norms. De Geofroy v. Riggs, 133 U.S. 258, 266- 67 (1890) (holding that treaties are subject to constitutional limitations). The last in time rule applies to conflicts between treaties and statutes. Whitney v. Robertson, 124 U.S. 190 (1888) (holding that if a treaty and a statute "are inconsistent, the one last in date will control the other"). Thus, where a treaty stands in true conflict with a preexisting statute, the treaty operates to amend or even repeal that statute. Likewise, a newly created statute in true conflict with a preexisting treaty operates to amend or even repeal the treaty. Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (holding that a later in time statute prevails over a preexisting treaty, and vice versa). In short, because treaties are essentially the equivalent of statutes, for the sake of simplicity I have omitted them from the model. Those who wish to incorporate treaties into the analysis may simply consider them to be part of the legal category "statutory norms," or alternatively think of that category as "statutory norms and treaties." Including treaties into the legal category statutory norms in no way alters the way the model works or its predictive power.

Closely related to treaties, executive agreements are not included in the model because they too are treated as statutes. Executive agreements, which became more common in the Cold War era, frequently deal with "commerce and trade pacts." Joel R. Paul, The Geopolitical Constitution: Executive Expediency & Executive Agreements, 86 Cal. L. Rev. 671, 722-23 (1998). There are two types of executive agreements: congressional-executive agreements which require the majority approval of both houses of Congress, and sole executive agreements which the President enters into on his or her own. Id. at 723. The two types of agreements have been used "interchangeably, and courts have not articulated any limitation on which of the two instruments the President should employ." Id. at 724. The congressional- executive agreement is not subject to the same legislative processes as regular bills but can be approved under "special 'fast-track' procedures that shorten the time [frame]." Id. at 725. The archetypal example of a sole executive agreement is President Truman's entry in the General Agreement on Tariffs and Trade (GATT). Id. at 751. Courts have treated GATT and other executive agreements like ordinary treaties. Id. at 756. An executive agreement could be superseded by a later passed statute and state courts treat them like any other federal statutory law. Id. Therefore, executive agreements fall into the same category as statutes.

Executive orders are also not included in the model because they are the functional equivalent of administrative regulations. When executive orders are issued under an express statutory grant of authority they are considered a delegation of Congress's power to the President. See Bryan A. Liang, "A Zone of Twilight": Executive Orders in the Modern Policy State, Persp. on Legis., Reg., and Litig., Mar. 1999, at 8. Courts treat this type of executive order "as the equivalent of federal statutes, having the force and effect of law." Id. Other executive orders are issued based on "general constitutional grants of power" even though there is no express mention of executive orders in the Constitution. Id. at 9. In fact, for an executive order to have the force and effect of law, it must be shown to have been issued "through some statutory mandate." Id. at 10. Executive orders which do not arise from an express statutory grant may be interpreted as "mere tools to implement the personal policies of the President" and are not considered legally binding and do not have the force and effect of law. Id. at 12. Thus, because executive orders generally have the force and effect of law only when promulgated under a statutory grant of power by Congress, they are similar to administrative regulations.

Finally, the model does not incorporate interstate compacts because they are the functional equivalent of statutes. Interstate compacts are binding agreements between or among states which generally require congressional approval. See Christi Davis & Douglas M. Branson, Interstate Compacts in Commerce and Industry: A Proposal for "Common Markets Among States," 23 Vt. L. Rev. 133, 137 (1998). States ratify the compacts in their legislatures and the compact cannot be amended because of the Contract Clause of the Constitution. Id. Only when Congress approves the compact does it become federal law. Id. at 138. Thus, if a state then passes a law contradictory to the compact, it is null because it conflicts with federal law and violates the Supremacy Clause. See Mayor & City Council of Baltimore v. Susquehanna River Basin Comm'n, No. WMN-98-3135, 2000 U.S. Dist. Lexis 8199, at *21 (D. Md. Mar. 30, 2000). Interstate compacts are problematic in that they bind the state prospectively and cannot be amended. See generally Jill Elaine Hasday, Interstate Compacts in a Democratic Society: The Problem of Permanency, 49 Fla. L. Rev. 1 (1997). However, because interstate compacts are generally approved by Congress and treated as federal laws they fall into the category of statutes.

[FN204]. For an example, return to the true legal conflict between the constitutional doctrinal norm established by Chisholm and the constitutional textual norm ratified in the Eleventh Amendment. See supra text accompanying notes 105-17. I explained the outcome of that true legal conflict as a result of the axiomatic background norm that legal norms belonging to superordinate legal subcategories (the Eleventh Amendment constitutional textual norm)

trump truly conflicting legal norms belonging to subordinate legal subcategories (the Chisholm constitutional doctrinal norm). One could also explain the resolution of that true legal conflict in a more particularized or contextualized manner. One could argue that the reason the Eleventh Amendment trumps Chisholm is that it was ratified in reaction to Chisholm, and was intended to overturn Chisholm. This more particularlized and contextualized explanation is valid. The more general explanation offered here, in other words, is not intended to deny the validity of more particularized and contextualized explanations, but rather to offer an explanatory framework which applied regardless of context. The legal categoric and chronologic explanatory framework offered here explains not only the outcome of the Chisholm and Eleventh Amendment true conflict, but the outcome of any true conflict between legal norms. A more particularized or contextualized explanation of the outcome of the Chisholm and Eleventh Amendment true conflict explains only one true legal conflict--that between Chisholm and the Eleventh Amendment.

[FN205]. The recent dispute over whether Miranda v. Arizona, 384 U.S. 436 (1966), sets forth a constitutional or common law norm is one noted exception to the notion that whether a norm qualifies as constitutional or not is obvious and beyond dispute. See Dickerson v. United States, 530 U.S. 428 (2000) (holding that Miranda is "a constitutional decision" and that Congress could not therefore overrule Miranda by statute); see also Paul G. Cassel & William G. Otis, Fixing Miranda, 34 Prosecutor 35, 37 (2000) (surveying the issue and arguing that Miranda did not establish a constitutional rule); Paul G. Cassel, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 471 (1996) (same). Professor Cassel argues Miranda created safeguards designed to reduce the risk of Fifth Amendment violations, but not a rule rising to the level of a constitutional right. Id. Cassel writes:

This characterization of Miranda as a federal constitutional right fits with neither what the Court did in Miranda nor with what the Court now says that it did. The Miranda rules have no firm roots in either constitutional text or history.... Today, with the benefit of nearly thirty years of subsequent interpretations, we know the Miranda mandate is not a constitutional requirement. Rather, the Court has held specifically that Miranda rules are only "safeguards" whose purpose is to reduce the risk that police will violate the Constitution during custodial questioning.

Paul G. Cassel, The Costs of the Miranda Mandate: A Lesson in the Dangers of the Inflexible, "Prophylactic" Supreme Court Inventions, 28 Ariz. St. L.J. 299, 300 (1996). Another exception is found in Hotel Employees & Restaurant Employees Int'l Union v. Davis, 981 P.2d 990 (Cal. 1999).

[FN206]. See supra text accompanying notes 75-81.

[FN207]. The U.S. Constitution and Fascinating Facts About It 38, 39 (1993).

[FN208]. 517 U.S. 654 (1996).

[FN209]. Id. at 656.

[FN210]. Fed. R. Civ. P. 4(m). At the time of the Henderson decision, Rule 4(m) appeared as Rule 4(j) of the Federal Rules of Civil Procedure. Rule 4 is a statute. Although under the Rules Enabling Act, 28 U.S.C. § 2071 (1994), the federal courts normally create the Federal Rules of Civil Procedure, Rule 4 was passed by Congress as part of the Civil Procedure Amendments Act of 1982. Henderson, 517 U.S. at 668.

[FN211]. 46 U.S.C. app. § 742 (1988), amended by 46 U.S.C. app. § 742 (Supp. III 1997). ("The libelant [plaintiff] shall forthwith serve a copy of his libel [complaint] on the United States attorney for [the] district [where suit is brought] and mail a copy thereof by registered mail to the Attorney General of the United States ...."); Henderson, 517 U.S. at 654 (word "forthwith" in Admiralty Act "is indicative of a time far shorter than 120 days").

[FN212]. Henderson, 517 U.S. at 659.

[FN213]. Id.

[FN214]. Id. at 663, 665. "We are therefore satisfied that Rule 4's regime conflicts irreconcilably with Suits in Admiralty Act § 2's service 'forthwith' instruction, and we turn to the dispositive question: Does the Rule supersede the inconsistent statutory direction?" Id. at 663. The Court continued:

Before examining the text of § 742 to determine the character of the service "forthwith" provision, we note that the conflict with Rule 4 is of relatively recent vintage. The Suits in Admiralty Act, which allows in personam suits against the United States for maritime torts, was enacted in 1920, eighteen years before the advent of the Federal Rules of Civil Procedure. Furthermore, admiralty cases were processed, from 1845 until 1966, under discrete Admiralty Rules. Even after 1966, the year admiralty cases were brought under the governance of the Federal Rules of Civil Procedure, Rule 4 and the Suits in Admiralty Act service "forthwith" provision could co-exist. Rule 4, as just recounted, originally contained no time prescription, only the direction that, "[u]pon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service," generally to a United States marshal. It was only in 1983, when plaintiffs were made responsible for service without the aid of the marshal, that the 120-day provision came into force, a provision that rendered Rule 4's time frame irreconcilable with § 742's service "forthwith" instruction.

Id. at 664-65 (citation omitted).

[FN215]. Id. at 661.

[FN216]. Id.

[FN217]. Id. at 664.

[FN218]. Fed. R. Civ. P. 4.

[FN219]. More specifically, the United States argues that the service "forthwith" required by § 742 constitutes a prerequisite that plaintiffs must satisfy in order to secure waiver of sovereign immunity under section 5 of the Admiralty Act, 46 U.S.C. app. § 745. See Henderson, 517 U.S. at 664- 66. Congress may "condition its waiver of sovereign immunity upon strict compliance with procedural provisions attached to the waiver, with the result that failure to comply will deprive a court of jurisdiction." Id. at 672- 73 (Scalia, J., concurring). The United States argues that § 742 constitutes a procedural condition that must be strictly complied with in order to secure a waiver of sovereign immunity. Id. at 665-66.

[FN220]. Id. at 667.

[FN221]. Id. at 663, 670, 672.

[FN222]. See supra notes 208-21 and accompanying text.

[FN223]. See supra text accompanying notes 209-11.

[FN224]. Henderson, 517 U.S. at 673-75, 677; United States v. Holmberg, 19 F.3d 1062 (5th Cir. 1994) (holding that § 742 forthwith requirement was not superseded by Federal Rule of Civil Procedure 4 and that service within 103 and 106 days did not fulfill the forthwith requirement); Libby v. United States, 840 F.2d 818 (11th Cir. 1988) (holding that service within twenty-four days is forthwith); Amella v. United States, 732 F.2d 711 (9th Cir. 1984) (holding that service within sixty-three days is not forthwith); Battaglia v. United States, 303 F.2d 683 (2d Cir. 1962) (failure to mail copy of complaint to attorney general until four and one-half months after service on U.S. attorney was not improper service of process).

[FN225]. Henderson, 517 U.S. at 669-70.

[FN226]. Unlike most of the Federal Rules of Civil Procedure, Rule 4 was a direct creation of Congress, rather than a rule prescribed by the Supreme Court pursuant to the Rules Enabling Act. Id. at 668.

[FN227]. Id. at 663 ("We are therefore satisfied that Rule 4's regime conflicts irreconcilably with Suits in Admiralty Act § 2's service 'forthwith' instruction."); Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936). In Posadas, the Supreme Court held:

There are two well-settled categories of repeals by implication: (1) Where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest..." .

Id.

[FN228]. Henderson, 517 U.S. at 664.

[FN229]. The Court also disregards the presumption against implicit repeal. Neither the Court's opinion, nor the dissenting opinion, however, touch on this point.

[FN230]. Id. at 666.

[FN231]. Id. at 667.

[FN232]. Id. at 675 (Thomas, J., dissenting).

[FN233]. Id. (Thomas, J., dissenting) (citing United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992)).

[FN234]. Id. at 677 (Thomas, J., dissenting).

[FN235]. See Beacon Theatres, Inc v. Westover, 359 U.S. 500, 509 (1959) (holding that the courts must liberally construe pleadings requirements); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (holding that a complaint may be dismissed for failure to state a claim only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

[FN236]. "Dismissal with prejudice for failure to make service of process is warranted only 'in extreme situations

where there is a clear record of delay or contumacious conduct by the plaintiff." ' Gaspard v. United States, 713 F.2d 1097, 1105 n.20 (5th Cir. 1983) (citation omitted).

[FN237]. 443 U.S. 193 (1979).

[FN238]. Id. at 197.

[FN239]. Id.

[FN240]. See 42 U.S.C. § 2000e-2(d) (1994) (section 703(d) of The Civil Rights Act of 1964).

[FN241]. Weber, 443 U.S. at 197.

[FN242]. Id. at 198.

[FN243]. Id. at 199.

[FN244]. Id. at 199-200.

[FN245]. 42 U.S.C. § 2000e-2(d) (1994).

[FN246]. Weber, 443 U.S. at 230-51 (Rehnquist, J., dissenting).

[FN247]. Id. at 202-04.

[FN248]. Id. at 206 (quoting and citing 42 U.S.C. § 2000e- 2(j) (1994)).

[FN249]. Id. at 243-48 (Rehnquist, J., dissenting).

[FN250]. Id. at 207.

[FN251]. William N. Eskridge, Jr. & Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 84 (2d ed. 1995) (pointing out that "many of the commentators agree with Justice Rehnquist that the Court 'changed' the meaning of the statute by judicial fiat"); Daniel A. Farber, Statutory Interpretation and the Idea of Progress, 94 Mich. L. Rev. 1546, 1568-69 (1996) (reviewing William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994) and qualifying Justice Brennan's opinion in Weber as "unsatisfactory"); Martin H. Redish & Theodore T. Chung, Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation, 68 Tul. L. Rev. 803, 843-44 (1994) (challenging the dynamic interpretive approach exhibited by the Court in Weber); Bernard D. Meltzer, The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 U. Chi. L. Rev. 423, 439 (1980) ("Speaking for the Court, Justice Brennan passed over the more candid and superficially appealing [reading of Title VII] advanced by Kaiser and the

Department of Justice...."). But see William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1490-92 (1987) (arguing that both the Brennan opinion and the Rehnquist dissent in Weber can be supported).

[FN252]. See Philip P. Frickey, From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation, 77 Minn. L. Rev. 241, 245 (1992) (arguing that the Weber case was the most important single decision triggering a revival of interest in statutory interpretations as an important subject for legal scholars).

[FN253]. 19 N.E.2d 987 (N.Y. 1939).

[FN254]. 126 N.E. 814 (N.Y. 1920).

[FN255]. Richard A. Epstein, Torts § 6.4, at 147 (1999) (holding "a violation of [a] statute normally counts as negligence per se").

[FN256]. Id. (citing Ezra Ripley Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914)).

[FN257]. Tedla, 19 N.E.2d at 989.

[FN258]. Id. at 988.

[FN259]. Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311, 376 (1996) ("Martin lays down the rule that the unexcused violation of a statutory prohibition is negligence per se. Tedla carves out an exception to that rule." (citation omitted)).

[FN260]. Paul Yowell, Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?, 49 Baylor L. Rev. 109, 118 (1997) (suggesting that under rule of Tedla "negligence per se might be swallowed by its exceptions").

[FN261]. Tedla, 19 N.E.2d at 991 ("We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of the life and limb of pedestrians must be observed when observance would subject them to more imminent danger."); W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 36, at 229 & n.90 (5th ed. 1984) (citing Tedla and stating that "[t]here is respectable authority to the effect that at least a violation [of a statutory standard] will be excused whenever it would be more dangerous to comply with the statute"). Thus, after Tedla a statutory standard of conduct will supplant the common law reasonableness standard of conduct, unless the violation of the statute is reasonable!

[FN262]. See Nancy G. Itnyre, Comment, Civil Liability for Violations of Criminal Statutes, 75 U. Det. Mercy L. Rev. 681, 688 (1998) ("[O]ne must ask whether Judge Lehman actually carved out an exception for Tedla-type situations, or merely obliterated the concept of negligence per se, denying all the while that he was doing so. In distinguishing the statutes at issue in Martin v. Herzog and Tedla, he seems to have stated a distinction without a difference.").

[FN263]. Generally, First Amendment doctrine prohibits government regulation of content-based utterances. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.");

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (invalidating "Son of Sam" statute on grounds that it constituted content-based regulation on speech); Regan v. Time, Inc., 468 U.S. 641, 648- 49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment."); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (holding that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"); Laurence H. Tribe, American Constitutional Law § 12-2, at 790 (2d ed. 1988) (explaining that content-based regulations on speech are "presumptively at odds with the First Amendment").

[FN264]. 18 U.S.C. § 871 (1994).

[FN265]. See R.A.V., 505 U.S. at 382-83, 399-400 (majority and concurring opinions discussing limited categories of utterances not protected by general First Amendment doctrinal ban on content-based utterances); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984) ("there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend"); Chaplinsky v. New Hampshire, 315 U.S. 568, 571- 72 (1942) (enumerating obscene, profane, libelous, fighting words utterances as categories of speech enjoying no First Amendment protection); Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 270 (1981) (stating that the First Amendment does not protect, for example, utterances constituting price fixing, breach of contract, placing bets, or extortion).

[FN266]. 500 U.S. 173 (1991).

[FN267]. Id.

[FN268]. Id. at 178.

[FN269]. Id.

[FN270]. Id. at 179.

[FN271]. Id.

[FN272]. Id. at 180.

[FN273]. Id.

[FN274]. Id. at 192-201.

[FN275]. Id. at 203.

[FN276]. See supra note 208.

[FN277]. Rust, 500 U.S. at 190-91, 204-05.

[FN278]. Id. at 184-85.

[FN279]. Id. at 189.

[FN280]. Id. at 191.

[FN281]. Id. at 223 (O'Connor, J., dissenting) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Counsel, 485 U.S. 568 (1988)); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ( "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."); Asawander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936). In Asawander, the Court stated:

When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Id.

[FN282]. I borrow the term "avoidance canon" from Professor Lisa Kloppenberg. Lisa A. Kloppenberg, Avoiding Serious Constitutional Doubts, 30 U.C. Davis L. Rev. 1, 3, passim (1996).

[FN283]. Rust, 500 U.S. at 191.

[FN284]. Id. at 204 (Blackmun, J., dissenting).

[FN285]. Id. at 205 (Blackmun, J., dissenting).

[FN286]. Id. at 207-19 (detailing First and Fifth Amendment problems with agency regulations interpreting and implementing Title X).

[FN287]. Id. at 192-203 (discussing reasons why agency regulations do not violate First and Fifth Amendments).

[FN288]. 513 U.S. 64 (1994).

[FN289]. Id. at 65-66 (discussing The Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2252).

[FN290]. Id. at 68.

[FN291]. Id.

[FN292]. Id. at 68-69, 78-79.

[FN293]. Id. at 80-81 (Scalia, J., dissenting).

[FN294]. Id. at 86-87 (Scalia, J., dissenting).

[FN295]. 485 U.S. 568, 575 (J. White opinion joined by J. Rehnquist).

[FN296]. See Rust, 500 U.S. at 184-85, 189; DeBartolo Corp., 485 U.S. at 575, 577 (J. White opinion joined by J. Rehnquist).

[FN297]. Rust, 500 U.S. at 191; DeBartolo Corp., 485 U.S. at 575.

[FN298]. Rust, 500 U.S. at 190; DeBartolo Corp., 485 U.S. at 575.

[FN299]. DeBartolo Corp., 485 U.S. at 577.

[FN300]. Rust, 500 U.S. at 191; see also Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 Yale L.J. 969, 988-89 (1992) (pointing out that in DeBartolo Corp. the Court used the canon of construction instructing courts to avoid statutory interpretations which raise serious constitutional issues to "trump" Chevron deference to an agency statutory interpretation, but in Rust did the opposite).

[FN301]. See generally Kloppenberg, supra note 282, at 39-55 (discussing Rust and X-Citement).

[FN302]. Id. at 42.

[FN303]. Rust, 500 U.S. at 191.

[FN304]. Kloppenberg, supra note 282, at 42, 45.

[FN305]. Id. at 10-11, 24, 53.

[FN306]. Id. at 26-27; X-Citement, 513 U.S. at 78.

[FN307]. Kloppenberg, supra note 282, at 51.

[FN308]. Id. at 49.

[FN309]. See Stenberg v. Carhart, 530 U.S. 914 (2000) (discussing partial birth abortion ban); Mazurek v. Armstrong, 520 U.S. 968 (1997) (per curiam) (discussing requirement that licensed physicians perform abortions);

Dalton v. Little Rock Family Planning Servs., 516 U.S. 474 (1996) (per curiam) (upholding state law that restricted use of public funds to abortions except when necessary to save the mother's life even though Medicaid law allowed funding in cases of rape and incest as well); Benten v. Kessler, 505 U.S. 1084 (1992) (per curiam) (preventing importation of a single dose of RU 486); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (concurring in part and dissenting in part) (voting to uphold informed consent requirement, twenty-four hour waiting period, parental consent, reporting requirement, and spousal notification and stating that none of the above are an undue burden on abortion); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding law which prohibits federally funded clinics from counseling patients about abortion); Hodgson v. Minnesota, 497 U.S. 417 (1990) (discussing parental notification); Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502 (1990) (same); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (banning use of public employees and facilities for non-therapeutic abortions); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986), overruled by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (discussing reporting requirements, second physician requirements without exception for medical emergency, and degree of care requirements); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983), overruled by Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (discussing hospitalization requirement, parental consent, informed consent, twenty-four hour waiting period, and disposal of fetal remains); Planned Parenthood Ass'n of Kan. City Mo. v. Ashcroft, 462 U.S. 476 (1983) (discussing requirements of hospitalization, presence of a second doctor, pathology report, and parental consent); Simopoulos v. Virginia, 462 U.S. 506 (1983) (discussing hospitalization requirement); Harris v. McRae, 448 U.S. 297 (1980) (discussing government funding of abortions); Williams v. Zbaraz 448 U.S. 358 (1980) (same); Colautti v. Franklin, 439 U.S. 379 (1979) (discussing vague viability requirements); Beal v. Doe, 432 U.S. 438 (1977) (discussing government funding of abortion); Maher v. Roe, 432 U.S. 464 (1977) (same); Poelker v. Doe, 432 U.S. 519 (1977) (discussing city's refusal to allow usage of publicly funded hospitals for abortions); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (discussing viability test requirement, patient consent, spousal consent, parental consent, prohibition on use of a particular procedure, and requirement that physician use professional care to preserve fetus's life); Roe v. Wade, 410 U.S. 113 (1973) (dissenting in landmark case which established the right to abortion and created the trimester and viability analysis); Doe v. Bolton, 410 U.S. 179 (1973) (discussing hospitalization requirement, required approval by hospital abortion committee, additional physician confirmation of medical necessity, and residency requirements).

[FN310]. I assume here only what is reflected in legal practice--that all textual legal norms have a range of plausible meanings (which may vary from very narrow to very broad) wholly apart from doctrinal interpretations given to textual norms. In other words, legal practice rejects the postmodern idea that a textual norm has no meaning apart from the interpretation that a court (or any other interpreter) attributes to that textual norm, as well as the extreme formalist notion that a given textual norm has only one meaning, or a meaning which inheres in its textually inscribed words. See supra text accompanying notes 63-74. In short, given the extant principles and practices of legal interpretation, and given common understandings shared by participants in the legal community, all textual norms may mean more than one thing, but do not mean an infinite number of things.

[FN311]. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (1986) (discussing the counter-majoritarian difficulty).

[FN312]. See Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1046 (1984) (referring to countermajoritarian difficulty as a "platitude"); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 495 (1994) (stating that a generation of constitutional scholars has been "[p]reoccupied with the 'countermajoritarian difficulty" '); Steven G. Calabresi, Textualism and the Countermajoritarian Difficulty, 66 Geo. Wash. L. Rev. 1373 (1998) (stating "the principal focus of constitutional law [has been] the division of authority between the states and the federal government, and the allocation of powers among the branches of the central government"); Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. Rev. 333, 334 (1998) (stating that the central obsession of the modern constitutional debate especially in academia has been the "countermajoritian difficulty"); Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94 Yale L.J. 1567 (1985); Kenneth Ward, Alexander Bickel's Theory of Judicial Review Reconsidered, 28 Ariz. St. L.J. 893 (1996) (describing Bickel's theory as having exerted enormous influence on debates in constitutional theory); Steven

L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal. L. Rev. 1441, 1521 (1990) (discussing "mid-century obsession with the countermajoritarian difficulty").

[FN313]. Guido Calabresi has discussed the ability of administrative agencies in updating anachronistic statutory norms. See Guido Calabresi, A Common Law for the Age of Statutes 44-58 (1982). Though admitting that "[t]he power to issue regulations and to make prospective rulings could clearly be used, and indeed has been, to renovate statutes before they get out of date," Calabresi nonetheless concludes that agencies often are unable to avoid implementing statutes that could no longer muster majoritarian support. Id. at 45-49.

[FN314]. See, e.g., Badaracco v. Commissioner, 464 U.S. 386, 398 (1984). The Court stated:

The cases before us, however, concern the construction of existing statutes. The relevant question is not whether, as an abstract matter, the rule advocated by petitioners accords with good policy. The question we must consider is whether the policy petitioners favor is that which Congress effectuated by its enactment of § 6501. Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement. See TVA v. Hill, 437 U.S. 153, 194-195 (1978). This is especially so when courts construe a statute of limitations, which "must receive a strict construction in favor of the Government." E.I. Dupont de Nemours & Co. v. Davis, 264 U.S. [456,] 462 [(1924)]. We conclude that, even were we free to do so, there is no need to twist § 6501(c)(1) beyond the contours of its plain and unambiguous language in order to comport with good policy, for substantial policy considerations support its literal language.

Id.

Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 542 (1943).

We are inclined to agree that the guest statute is unreasonable. Plaintiff is widow who spent twenty-two months in hospitals.... In fact, unreasonable may be too kind an expression.... We sympathize with those who find the statute unjust, but we are bound to exercise judicial restraint (a great deal of it in this case) and not substitute our judgment and wisdom for that of the legislature.

Behrns v. Burke, 229 N.W.2d 86, 107-08 (S.D. 1975).

[FN315]. Thus, where a litigant suggests a doctrinal interpretation of a constitutional passage, courts will reject the suggested doctrinal interpretation if not reconcilable with the meaning of the constitutional passage in question, even where the suggested doctrinal interpretation, but not the constitutional passage, could gain current majoritarian support. Oregon v. Mitchell, 400 U.S. 112 (1970), probably represents such a case. In Mitchell, the Supreme Court found the Voting Rights Act Amendments of 1970, which had set the minimum voting age at eighteen for state and local election, to lie beyond any plausible reading of Congress's Section 5 of the Fourteenth Amendment legislative powers. One year later, ratification of the Twenty-Sixth Amendment, which specifically guarantees the right to vote to citizens eighteen years of age or older, overturned the unpopular Mitchell holding. U.S. Const. amend. XXVI; see also Hotel Employees & Rest. Employees Int'l Union v. Davis, 981 P.2d 990, 1011 (Cal. 1999) (invalidating statute passed by direct democracy procedure authorizing tribal casinos as in conflict with the California Constitution's prohibition on casinos of the type operating in Nevada and New Jersey).

[FN316]. U.S. Const. art. V. Article V provides for formal amendment to the Constitution via ratification of proposed constitutional amendments by three-fourths of the states based on specially assembled popular constituent constitutional conventions. Id. The constituent convention method of ratification, however, has been employed only once, in ratification of the Twenty-First Amendment. Brendon Troy Ishikawa, Everything You Always Wanted to Know About How Amendments Are Made, But Were Afraid To Ask, 24 Hastings Const. L.Q. 545, 557 n.41 (1997).

[FN317]. U.S. Const. art. V.

[FN318]. See generally Bruce Ackerman, We the People: Foundations (1991); Bruce Ackerman, We the People: Transformations (1998); Amar, supra note 311.

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