"POWER, NOT REASON": FOURTH AMENDMENT JURISPRUDENCE AS A HISTORY OF INTERPRETATIONS[*1]

I. INTRODUCTION

After House Democrats commenced the impeachment inquiry into President Donald Trump's use of power, the White House responded: "All of this violates the Constitution, the rule of law, and every past precedent."[2] Three days later, House Speaker Nancy Pelosi addressed her fellow House Democrats regarding an impeachment-related matter, claiming "[v]ictory for the Rule of Law and Constitution."[3] In that same week, an impeachment witness testified that he was concerned that the Trump administration's "effort to initiate politically motivated prosecutions" in Ukraine was "injurious to the rule of law."[4] Certainly, "the rule of law" loomed over the impeachment proceedings, but what does this nebulous concept even mean?

The rule of law is an ideal that has a long tradition within U.S. legal discourse.[5] Derived from the Magna Carta and English common law,[6] the rule of law has been an integral part of the U.S. legal system ever since the ratification of the Constitution.[7] Despite its historical significance, however, many disagree over what the rule of law actually *means*.[8] It is a "stretchy jurisprudential concept"[9] whose meaning "may be less

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1. The title of this Comment comes from Justice Marshall's dissent in Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

2. Letter from Pat A. Cipollone, Counsel to the President, to Nancy Pelosi, Speaker, House of Representatives, et al. 1 (Oct. 8, 2019) (emphasis omitted).

3. Press Release, Nancy Pelosi, Speaker, House of Representatives, Dear Colleague on Victory for the Rule of Law and Constitution (Oct. 11, 2019), http://www.speaker.gov/newsroom/101119 [https://perma.cc/9LW6-S2TJ].

4. Interview by Permanent Select Comm. on Intelligence, Comm. on Oversight and Reform, and Comm. on Foreign Affairs, House of Representatives, with George Kent, Deputy Assistant Sec'y of State for Eur. and Eurasian Affairs, in Washington, D.C. 264 (Oct. 15, 2019).

5. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (declaring that the U.S. government is "a government of laws, and not of men").

6. *See* TOM BINGHAM, THE RULE OF LAW 12 (2010).

7. Jeremy Waldron, *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), http://plato.stanford.edu/entries/rule-of-law/ [https://perma.cc/TRM3-T7PW]; *see also* United States v. Nixon, 418 U.S. 683, 708 (1974) (recognizing the United States' "historic commitment to the rule of law").

8. *See* Eric J. Segall, *Justice Scalia, Critical Legal Studies, and the Rule of Law*, 62 GEO. WASH. L. REV. 991, 995 (1994).

9. David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 169 (2018).

clear today than ever before."[10] Indeed, some critics claim that the rule of law has become nothing more than a rhetorical device used strategically to advance political agendas,[11] not unlike those involved in the impeachment inquiry into President Trump's conduct.

Nevertheless, in U.S. jurisprudence the rule of law is generally understood to be more than just a political slogan; it comprises certain principles, without which the legal system would be unable to function properly.[12] Its core principle is that public officials can only exercise power in accordance with established laws; they cannot make decisions based on their personal interests.[13] Otherwise, it would be difficult, if not impossible, to prevent public officials from using the government's coercive power to oppress private individuals.[14] Nothing would hold them accountable for violating the law,[15] and private individuals would be unable to predict whether their future affairs would be subject to government prosecution.[16] In essence, the rule of law is supposed to ensure that all persons, whether private individuals or public officials, are "[e]qual[] before the law."[17]

The fear of arbitrary prosecution often looms within the adjudicative process because courts must make interpretive choices whenever they apply the law.[18] To quell this fear, the rule of law maintains that the law must be determinate, neutral, and objective so that when courts interpret any given legal text, they can discern its intended meaning.[19] The rule of law purports to constrain courts' interpretive choices by framing the adjudicative process as an apolitical means through which courts interpret and apply the law objectively.[20]

When historically situated, however, the rule of law functions ideologically to obscure how judicial decisions consist of interpretive choices that reinforce the unequal

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10. Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997).

11. *See, e.g.*, Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987).

> It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.

Id.; *see also* JOSEPH RAZ, *The Rule of Law and Its Virtue* (noting how groups of people can appropriate a political ideal and use it as a slogan that obscures its original meaning), *in* THE AUTHORITY OF LAW 210, 210 (1979).

12. *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 42–43 (1984).

13. Rubenstein, *supra* note 9, at 169.

14. *See* John Leubsdorf, *Constitutional Civil Procedur*e, 63 TEX. L. REV. 579, 595 (1984).

15. *See* Kenney Hegland, *Goodbye to 2525*, 85 NW. U. L. REV. 128, 128 (1990).

16. *See* Ian Shapiro, *Introduction* to THE RULE OF LAW 1, 1 (Ian Shapiro ed., 1994).

17. *Overview – Rule of Law*, U.S. COURTS, http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law [https://perma.cc/NB8S-MWF7] (last visited Apr. 1, 2020).

18. *See* Ronald Dworkin, *Social Sciences and Constitutional Rights*, 41 EDUC. F. 271, 274 (1977).

19. See *infra* Section II for an analysis of these as the main principles of the rule of law.

20. *See* ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 76 (1990); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 762 (1982) [hereinafter Fiss, *Objectivity*].

distribution of power in society.[21] Attempts to ascribe determinate, neutral, and objective meaning to the law are futile because meaning is always contingent,[22] arising only through the situatedness of interpretation.[23] In other words, meaning and language are necessarily indeterminate,[24] but this situatedness furnishes the conditions that make language and interpretation possible.[25]

Power always operates within any language system,[26] which implies that interpretations are necessarily political.[27] Courts can never divest themselves of their prejudices and interests when interpreting legal texts,[28] so their interpretations always reinforce what they believe the law *should* be, not what the law *is*.[29] Judicial decisions

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21. *See* Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) [hereinafter Horwitz, *Rule of Law*] (book review); *infra* Part III.B and Section IV; *see also* Robert W. Gordon, *Some Critical Legal Theories of Law and Their Critics* (arguing that legal discourse does not merely "mask the realities of power and life, but participate[s] in constructing those realities"), *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 641, 653 (David Kairys ed., 3d ed. 1998) [hereinafter Gordon, *Critical Legal Theories*].

22. Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 100 (2000). See *infra* notes 95–113 and accompanying text for a discussion of the contingent, indeterminate nature of meaning.

23. Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur*, 68 B.U. L. REV. 523, 599 (1988). The concept of situatedness refers to the way in which human actors constitute and are constituted at the same time:

> We are *constituting* because meaning arises in the imaginative interaction of the human being with the environment. We are *constituted* because the situated quality of human existence means that both the physical and social environment with which we interact is already formed by the actions of those who have preceded us.

Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1486 (1990) [hereinafter Winter, *Indeterminacy*]. For an in-depth discussion on what "situatedness" means, see generally DAVID SIMPSON, SITUATEDNESS, OR, WHY WE KEEP SAYING WHERE WE'RE COMING FROM (2002).

24. *See infra* notes 95–117 and accompanying text. The late Patricia Wald, who served as the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, recognized that "language is inherently indeterminate" and expressed that she would "always depend upon both the writer's and the reader's context to give it any meaning." Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 302 (1990).

25. Stephen M. Feldman, *The Problem of Critique: Triangulating Habermas, Derrida, and Gadamer Within Metamodernism*, 4 CONTEMP. POL. THEORY 296, 316 (2005) [hereinafter Feldman, *Metamodernism*]; *see also* Mark Burton, *Determinacy, Indeterminacy and Rhetoric in a Pluralist World*, 21 MELB. U. L. REV. 544, 576 (1997) (arguing that it is possible to reconcile the indeterminacy and situatedness of language and meaning).

26. *See* Feldman, *Metamodernism*, *supra* note 25, at 300; *infra* notes 95–117 and accompanying text. See also *infra* Part III.A for an explanation of how power operates within language.

27. *See* Stephen M. Feldman, *Supreme Court Alchemy: Turning Law and Politics into Mayonnaise*, 12 GEO. J.L. & PUB. POL'Y 57, 80 (2014) [hereinafter Feldman, *SCOTUS*]; Allan C. Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1177, 1188 (1992) [hereinafter Hutchinson, *Identity Crisis*] (recognizing that power situates textual interpretations and that any interpretation is political).

28. Feldman, *SCOTUS*, *supra* note 27, at 80; *see also* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 182 (1996) [hereinafter Feldman, *Postmodern Jurisprudence*]; *infra* notes 114–117 and accompanying text.

29. Under the rule of law questions of what the law *should be* are resolved during the political process, not during the adjudicative process in which courts must determine what the law *is*.

See ALTMAN, *supra* note 20, at 76. In other words, there must be a separation between law and politics under the rule of law. *Id.* The law, however, cannot be insulated from politics. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 264 (2005).

are necessarily political, but the rule of law depoliticizes them by purporting that the law is determinate, neutral, and objective.[30]

The U.S. Supreme Court's Fourth Amendment jurisprudence exemplifies how the rule of law functions ideologically.[31] As the final authority on interpreting the Constitution, the Court has the most influence over the ideological construction of the Fourth Amendment.[32] In claiming that its interpretations are "reasonable"[33] or based on precedent,[34] the Court operates under the impression that the law provides determinate, neutral, and objective criteria to address any legal question—an impression that depoliticizes its decisions.[35] The Court "silences" the voices of those whom law enforcement has oppressed, as it legitimizes interpretations and narratives that reinforce the power imbalances between militarized police forces and communities of color, specifically young Black men and the poor.[36]

To uncover the silenced narratives of those whom law enforcement has oppressed, courts and legal scholars should adopt a critical historicist orientation toward law,[37] which perceives law as a history of interpretations rooted in power relations.[38] This orientation not only destabilizes prevailing legal interpretations[39] but also recognizes that legal interpretation involves a struggle over the production of meaning.[40] Rejecting the view that the law is determinate, neutral, and objective, the critical historicist

30. *See* David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, *supra* note 21, at 1, 12 [hereinafter Kairys, *Introduction*] (arguing the rule of law "remov[es] crucial issues from the public agenda").

31. *See infra* Part IV.B; *see also* Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2231 (1993) (arguing that "racial power" is almost always apparent in criminal law enforcement during police encounters with persons of color).

32. *See infra* notes 261–264 and accompanying text.

33. *See* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150 (2012) (arguing that "what the law considers reasonable is often just what those in positions of authority consider to be reasonable").

34. *See* THOMAS G. HANSFORD & JAMES F. SPRIGGS II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 19–20 (2006).

35. Kairys, *Introduction*, *supra* note 30, at 12.

36. *See* MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 25 (1995).

37. *See* ROBERT W. GORDON, *Critical Legal Histories*, *in* TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 220, 261 (2017) [hereinafter GORDON, *Critical Legal Histories*]; *see also* Winter, *Indeterminacy*, *supra* note 23, at 1454 ("For those who recognize the situatedness of meaning, nothing could be more appropriate than the turn to history and the self-conscious study of intellectual antecedents.").

38. *See infra* Section IV; *see also* TROUILLOT, *supra* note 36, at xxiii (explaining how history is a product of power that must be exposed).

39. ROBERT W. GORDON, *Introduction* to TAMING THE PAST, *supra* note 37, at 1, 5 [hereinafter GORDON, *Introduction*].

40. *See* GORDON, *Critical Legal Histories*, *supra* note 37, at 261; Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2609 (1992) (arguing the counterhistory of U.S. law reveals "a story of a body of law born of sustained struggle, the outcome of painful, passionate political and ideological contests between subordinate groups and dominant institutions"). For illustrations of a critical historicist orientation revealing how the rule of law obscures this struggle in the Fourth Amendment context, see *infra* Part IV.B.

orientation toward law exposes the rule of law's ideological force and serves as a reminder that the law is always amenable to change.[41]

The critical historicist orientation toward law, however, is not immune from linguistic indeterminacy and the influence of power relations. Ironically, critical historicist interpretations are still political,[42] but unlike traditional modes of legal interpretation, a critical historicist orientation does not obscure how power operates within legal discourse. On the contrary, it recognizes legal interpretations for what they really are—products of "power, not reason."[43]

This Comment aims to provide a cohesive account of the rule of law's ideological function by examining through a critical historicist orientation how power operates within language and contaminates the interpretive process. Section II outlines a traditional view of the rule of law that Section III challenges by explaining how the rule of law functions ideologically to obscure how judicial decisions reinforce power imbalances within legal discourse. Section IV then examines the Supreme Court's Fourth Amendment jurisprudence and illustrates how critical historicist legal interpretations can expose the rule of law's ideological function and the power underlying judicial decisions.

II. THE RULE OF LAW: A TRADITIONAL VIEW

The rule of law's primary purpose is to protect society from tyranny by establishing limits on government power.[44] Each law must express a "rule" that exists before it is applied and determines proper legal outcomes.[45] Courts must administer these rules through neutral procedures[46] and interpret them objectively.[47] In short, under the rule of law each law must embody the principles of determinacy, neutrality, and objectivity.[48]

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41. *See infra* note 441 and accompanying text.

42. *See infra* notes 114–117, 140–144 and accompanying text. Indeed, "irony is fundamental to the human condition," JONATHAN LEAR, A CASE FOR IRONY, at ix (2011), and makes it possible to recognize the situatedness of language and meaning "by drawing attention to the disturbing banality of linguistic stability," CLAIRE COLEBROOK, IRONY IN THE WORK OF PHILOSOPHY 42–43 (2002). Irony provides a "referential frame" for determining a text's meaning and serves as a constant reminder that something is always "beyond" any textual interpretation. TOM GRIMWOOD, IRONY, MISOGYNY AND INTERPRETATION 107, 109 (2012). Issues of irony are thus constitutive of any interpretation. Tom Grimwood, *The Problems of Irony: Philosophical Reflection on Method, Discourse and Interpretation*, 12 J. FOR CULTURAL RES. 349, 358 (2008).

43. *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting); *id.* at 855 ("Far from condemning [the state court's] blatant disregard for the rule of law, the majority applauds it."); *see also* Panu Minkkinen, *The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka*, 3 SOC. & LEGAL STUD. 349, 360 (1994) ("The power to command and to posit laws is, accordingly, the foundation of the rule of Law, of all conceptions of right and wrong.").

44. *See* Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63, 64 (2005).

45. Fallon, *supra* note 10, at 14.

46. *See* Romer v. Evans, 517 U.S. 620, 633 (1996) (recognizing that "the principle that government and each of its parts remain open on impartial terms to all who seek its assistance" is "[c]entral . . . to the idea of the rule of law").

47. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182–83 (1989).

48. Although the rule of law is not reducible to these three principles, each is necessary to prevent courts from exercising the government's power based on their political views. *See* Singer, *supra* note 12, at 60.

This Section focuses on principles of the rule of law. Part II.A examines the principle of determinacy, which relates to the law's ability to provide answers to particular legal questions. Part II.B examines the principle of neutrality, which refers to the procedural separation between law and politics. Part II.C examines the principle of objectivity, which implicates the standards used to evaluate whether a given judicial interpretation is "correct."

A. Determinacy

Determinacy refers to the law's capacity to provide required answers to specific legal questions.[49] This principle is essential to the rule of law because if the law did not provide such answers, it would be difficult, if not impossible, to prevent courts from deciding cases based on their political views,[50] which include any pragmatic or moral concerns.[51] Courts must rationally examine any relevant legal texts (e.g., constitutions, prior case law, statutes, and regulations) to determine which answers the law requires.[52] An answer to a legal question is determinate if any meticulous legal practitioner would decide that the law supplies that answer.[53] Although courts may disagree about the correct answer to a given legal question, few would deny that the law requires an answer.[54] As a result, most would agree that even though courts might occasionally provide incorrect answers (i.e., those not required by the law), correct answers do, in fact, exist.[55]

The law is determinate but only insofar as legal reasoning incorporates elements of determinacy.[56] Modes of legal reasoning provide methods for discerning which legal propositions and categories to apply in any given case and which inferences to draw based on the law and the facts.[57] These methods help courts distinguish between valid and invalid legal arguments.[58]

The law's capacity to provide determinate answers is apparent in so-called easy cases.[59] One of the most oft-cited examples is the presidential age requirement, which sets forth that "[n]o person . . . shall be eligible to the Office of President . . . who shall not have attained to the Age of thirty five Years."[60] Many have argued that this rule presents an easy case because the Constitution's text provides that anyone who is less

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49. Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 3 (1990).

50. Singer, *supra* note 12, at 12.

51. *See* Stephen M. Feldman, *Do Supreme Court Nominees Lie? The Politics of Adjudication*, 18 S. CAL. INTERDISC. L.J. 17, 38 (2008) [hereinafter Feldman, *Politics of Adjudication*].

52. *See* Greenawalt, *supra* note 49, at 46–48.

53. *Id.* at 3.

54. *Id.*

55. *Id.*

56. *See* Ken Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 320–21 (1989).

57. *Id.* at 321.

58. *Id.* at 321–23.

59. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 414 (1985).

60. U.S. CONST. art. II, § 1, cl. 5; *see also, e.g.*, Schauer, *supra* note 59, at 414; Lee J. Strang, *An Originalist Theory of Precedent: The Privileged Place of Originalist Precedent*, 2010 BYU L. REV. 1729, 1776 (asserting that the presidential age requirement is arguably the most definitive phrase in the Constitution).

than thirty-five years old cannot be President of the United States.[61] Indeed, easy cases often arise when, as here, the relevant law's language is clear.[62]

In more difficult cases, however, the law is not wholly determinate.[63] For instance, in cases where the relevant legal text requires that the court apply a vague legal standard, like "reasonableness," the law cannot provide a required answer because such standards can always be interpreted in more than one way.[64] Nevertheless, the rule of law tolerates decisions based on such standards so long as the legal system as a whole upholds the other rule-of-law principles.[65] In other words, the principles of neutrality and objectivity are supposed to preserve the rule of law whenever the law is not wholly determinate.

B. Neutrality

The rule of law furnishes principles and practices that are necessary for the impartial administration of legal rules.[66] Legal procedures must ensure that courts will apply the law neutrally and consistently.[67] Otherwise, courts could make decisions based on their political views,[68] and if they were able to make such decisions, the fear of arbitrary prosecution would undermine individual freedom.[69] The rule of law, therefore, requires that public officials administer the law through neutral procedures that separate law and politics.[70]

Scholars have offered various explanations for how the rule of law separates law and politics: Some argue that the rule of law is necessary to protect values that

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61. *See, e.g.*, Schauer, *supra* note 59, at 404, 414. *But see* M.B.W. Sinclair, *Postmodern Argumentation: Deconstructing the Presidential Age Limitation*, 43 N.Y. L. SCH. L. REV. 451 (1999) (surveying the arguments of six different authors, including Anthony D'Amato, Stanley Fish, Gary Peller, Girardeau A. Spann, Mark V. Tushnet, and Peter C. Schanck, on why the presidential age requirement is indeterminate).

62. *See* Schauer, *supra* note 59, at 404, 414–16.

63. *See* Singer, *supra* note 12, at 11–12.

64. *See* H. L. A. HART, THE CONCEPT OF LAW 132 (2d ed. 1994); *see also, e.g.*, Hudson v. Palmer, 468 U.S. 517, 537–38 (1984) (O'Connor, J., concurring) ("The Fourth Amendment 'reasonableness' determination is generally conducted on a case-by-case basis, with the Court weighing the asserted governmental interests against the particular invasion of the individual's privacy and possessory interests as established by the facts of the case.").

65. *See* Fallon, *supra* note 10, at 49, 52.

66. *See id.* at 7–9; Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127, 129–30 (1993).

67. Segall, *supra* note 8, at 995.

68. *See* RONALD A. CASS, THE RULE OF LAW IN AMERICA 17 (2001).

69. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 788 (1989).

70. ALTMAN, *supra* note 20, at 76. The Supreme Court has acknowledged that neutrality is integral to the rule of law:

> An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.

See, e.g., Williams v. Pennsylvania, 136 S. Ct. 1899, 1909 (2016).

transcend politics.[71] Others argue that it is an apolitical, instrumental ideal that serves only to provide stability and predictability as "to direct and coordinate the behavior of countless individuals and groups."[72] Still, even if legal procedures formally establish two distinct processes in which public officials treat questions of what the law *should be* and what the law *is* as discrete issues,[73] courts could still make interpretive choices based on their political views to reach a decision.[74] Thus, under the rule of law the law must provide rules and standards that govern the adjudicative process to prevent courts from basing decisions on political concerns.[75] That is, the law itself must provide constraints that require courts to interpret and apply the law objectively.[76]

C. Objectivity

Legal interpretations can be objective because constitutions, existing case law, statutes, regulations, and other texts provide rules and standards that "transcend the particular vantage point of the person offering the interpretation."[77] These impersonal rules and standards, commonly referred to as "disciplining rules," are considered objective because the legal community has authorized them to constrain courts' interpretive choices in resolving legal questions.[78] An interpretation is objective if it complies with the disciplining rules that the legal community agreed upon.[79]

Disciplining rules refer to the set of rules that "constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged."[80] They include not only grammatical conventions but also any rules that the legal community establishes for interpreting the law.[81] Some examples include the rule requiring that courts consider the Framers' intent when interpreting the Constitution[82] and the rule requiring that courts consider the doctrine of stare decisis when making decisions based on case law.[83]

Under the rule of law the legal community must recognize the disciplining rules as authoritative because otherwise they would not constrain courts' interpretive

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71. *See, e.g.*, Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 405 (2005) ("What distinguishes our system of government in large part is the separation of powers [and] . . . an independent judiciary that ensures our adherence to the rule of law.").

72. MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 210 (2007).

73. ALTMAN, *supra* note 20, at 76.

74. *See* André LeDuc, *Originalism's Claims and Their Implications*, 70 ARK. L. REV. 1007, 1039–40 (2018).

75. *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1200 (2005).

76. *See* LeDuc, *supra* note 74, at 1039.

77. Fiss, *Objectivity*, *supra* note 20, at 744.

78. *Id.*

79. Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 183 (1985) [hereinafter Fiss, *Conventionalism*].

80. Fiss, *Objectivity*, *supra* note 20, at 744. But see *infra* note 193 for one critic's direct response to Professor Fiss's argument that disciplining rules constrain interpretation.

81. Fiss, *Conventionalism*, *supra* note 79, at 183, 188–89.

82. *Id.* at 183, 185.

83. *Id.* at 185.

choices.[84] Although individual members of the community may disagree over the correctness of a given interpretation, their disagreement does not undermine the interpretive process, because the legal community, as a whole, is committed to upholding the rule of law.[85] Despite their differences, members of the legal community reaffirm the authority of the disciplining rules by continuing to adhere to them.[86] The rules and standards to which the legal community adheres render the interpretive process objective.[87] As such, the disciplining rules furnish the standards for determining whether an interpretation is objectively "correct."[88]

III. THE IDEOLOGY OF THE RULE OF LAW

Although many consider the rule of law to be a necessary part of legal discourse, various scholars have argued that it operates ideologically to reinforce the unequal distribution of power in society.[89] The rule of law creates the impression that law and politics are separate, which provides the source of law's legitimacy and power.[90] This impression masks the political nature of judicial interpretations and, as a result, obscures how courts regularly make controversial political decisions.[91] The ideology of the rule of law thus reinforces the unequal distribution of power by depoliticizing legal questions that always relate to critical sociopolitical issues.[92]

This Section proceeds in two Parts. Part III.A provides an analytical framework to situate the claim that the rule of law is ideological; it explains how any interpretation is necessarily subjective and how legal discourse emerges within an interpretive framework predicated upon power relations. Part III.B examines how the rule of law functions ideologically to obscure how power operates within legal discourse.

A. Power and Interpretation

Traditional legal theorists and their critics disagree not only because they have competing views on the law's meaning and purpose but also because they rely on

84. Fiss, *Objectivity*, *supra* note 20, at 744–45, 750.

85. *Id.* at 746–47.

86. *See id.*

87. *Id.* at 744–45.

88. Fiss, *Conventionalism*, *supra* note 79, at 183.

89. *See, e.g.*, Mark Tushnet, *Critical Legal Studies and the Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW (Marti Loughlin & Jens Meierhenrich eds., forthcoming) [hereinafter Tushnet, *CLS*] (manuscript at 2), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135903 [https://perma.cc/36U9-LXBG]; *see also* VALERIE KERRUISH, JURISPRUDENCE AS IDEOLOGY 2 (1991) ("The claim of law's innocence is ideological.").

90. *See* Kairys, *Introduction*, *supra* note 30, at 2.

91. Singer, *supra* note 12, at 5.

92. *See* HOWARD ZINN, DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY 111 (1990); Kairys, *Introduction*, *supra* note 30, at 14; *see also* Luke Mason, *Idealism, Empiricism, Pluralism, Law: Legal Truth After Modernity* (recognizing that the rule of law is detached from "the realities of legal discourse"), *in* POST-TRUTH, PHILOSOPHY AND LAW 93, 97 (Angela Condello & Tiziana Andina eds., 2019).

different assumptions regarding the nature of language, texts, and interpretation.[93] These assumptions always underlie any conception of the rule of law because legal discourse emerges only through textual interpretations.[94] Part III.A.1 addresses these assumptions and explains how language and meaning are indeterminate yet cognizable through interpretations within the situatedness of social relations. Interpretations are necessarily political because they always reflect the interpreter's prejudices and interests; however, Part III.A.2 illustrates how power operates within discourses to obscure the politics of interpretation and, by extension, of legal discourse.

1. Interpretation

In asserting that the law is objective, traditional legal scholars assume that a text's meaning exists independently of the reader's experience in interpreting the text.[95] They presume that each word in any text has inherent meaning and that texts convey discernible ideas and instructions on how to apply the law.[96] Courts can discern any legal text's meaning, and those who comply with the relevant disciplining rules will be able to apply the law determinately, neutrally, and objectively.[97] Critics, though, contend that the law cannot be objective because the natures of social relations and interpretation render meaning indeterminate.[98] Legal texts cannot have objective meaning because they depend on historically and culturally contingent categories and concepts,[99] which are constructed through social relations.[100]

Individuals rely on contingent categories and concepts whenever they convey meaning to one another in their social experiences.[101] They can grasp their social

93. *See generally* LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992) [hereinafter LEGAL HERMENEUTICS] (examining the nature of interpretation and its implications for legal theory).

94. *See* J.M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911, 938 (1988) [hereinafter Balkin, *Interpretation*] (book review) ("If we are ruled by law, we are ruled by texts, and if we are ruled by texts, we are ruled by readings of texts.").

95. *See* Gary C. Leedes, *The Latest and Best Word on Legal Hermeneutics*, 65 NOTRE DAME L. REV. 375, 379 (1990) (book review).

96. *See* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1160–61 (1985); Allan C. Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L.J. 209, 210 (1984) [hereinafter Hutchinson, *Historical Deconstruction*] (book review).

97. *See supra* Section II.

98. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 63 (1998) (arguing that indeterminacy is "inevitable" in any liberal society); *cf.* STANLEY FISH, *Still Wrong After All These Years* (arguing that meaning only arises from "interpretive assumptions so deeply embedded that they have become invisible"), *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 356, 357–58 (1989) [hereinafter FISH, *Still Wrong*].

99. *See* VIVIEN BURR, SOCIAL CONSTRUCTIONISM 4–5 (3d ed. 2015); *see also* Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115, 121 (1994) [hereinafter Mootz, *Hermeneutics*] (reviewing LEGAL HERMENEUTICS, *supra* note 93) (arguing that legal discourse is the product of "particular historical forces").

100. BURR, *supra* note 99, at 4–5.

101. *Id.*

experiences but only insofar as they can describe them in words.[102] Stated differently, the categories and concepts that individuals use to structure their experiences are intelligible only because they are situated within language.[103] As a result, meaning emerges only through language.[104]

Language, like meaning, is indeterminate.[105] Words have no inherent meaning because the connection between any word and the object or concept to which it refers is always "arbitrary."[106] The speaker or author, however, does not create the connection between any word and its referent, because words cannot refer to anything unless they have already been given meaning.[107] The connection between any word and its referent does not emerge from anything inherent in either the word or its referent;[108] rather, their connection exists because language is always situated.[109] Therefore, whenever individuals process their social experiences through language, they must rely on shared linguistic conventions that are situated within a specific sociohistorical context.[110]

Trapped within the void between language's indeterminacy and situatedness, one must interpret a text to understand and apply its meaning in a particular context.[111]

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102. *Id.* at 73; *see also* NORMAN FAIRCLOUGH, LANGUAGE AND POWER 23 (1989) ("Social phenomena are linguistic . . . in the sense that the language activity which goes on in social contexts (as all language activity does) is not merely a reflection or expression of social processes and practices, it is a *part* of those processes and practices.").

103. *See* Kurt Queller, *Toward a Socially Situated, Functionally Embodied Lexical Semantics: The Case of (All) Over*, *in* 2 BODY, LANGUAGE AND MIND: SOCIOCULTURAL SITUATEDNESS 265, 266–67 (Roslyn M. Frank et al. eds., 2008).

104. Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 182; *see also* Peller, *supra* note 96, at 1170.

105. Mootz, *Hermeneutics*, *supra* note 99, at 121; Gina Cora, Book Note, *Revisionists in Legal Ethics: Searching for Integrity and Legitimacy*, 27 YALE L. & POL'Y REV. 509, 517 (2009); *see also* Andrei Marmor, *The Immorality of Textualism*, 38 LOY. L.A. L. REV. 2063, 2075 (2005) ("Vagueness, ambiguity, and other linguistic indeterminacies cannot be eliminated."). For more information on linguistic indeterminacy, see, for example, ROLAND BARTHES, ELEMENTS OF SEMIOLOGY (Annette Lavers & Colin Smith trans., Hill and Wang 1968) (1964); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., John Hopkins Univ. Press 2016) (1967); TERENCE HAWKES, STRUCTURALISM AND SEMIOTICS (2d ed. 2003); WILLARD VAN ORMAN QUINE, WORD AND OBJECT (new ed. 2013). Some of these sources are updated editions of suggested readings provided in Peller, *supra* note 96, at 1163 n.10.

106. Sheehan, *supra* note 22, at 100; *see also* Peller, *supra* note 96, at 1168 (arguing that interpretations cannot affix any word with objective meaning because "there is no necessary connection between word and object").

107. *See* Sheehan, *supra* note 22, at 100–01.

108. *See id.*

109. *See* Peller, *supra* note 96, at 1164, 1173; Queller, *supra* note 103, at 266–67; *see also* CREEL FROMAN, LANGUAGE AND POWER 13 (1992) (recognizing that language can only be described through language); *cf.* Yates v. United States, 135 S. Ct. 1074, 1082 (2015) ("In law as in life, however, the same words, placed in different contexts, sometimes mean different things.").

110. *See* Gordon, *Critical Legal Theories*, *supra* note 21, at 649; *see also* Hutchinson, *Historical Deconstruction*, *supra* note 96, at 236 (arguing that linguistic conventions not only allow individuals to "describe and view an independent reality" but also "constitute that reality").

111. *See* Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 649 (2017) (arguing legal texts are legitimized through language and interpretation, even though meaning is indeterminate); Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 177; *cf.* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 53 (2012) ("Any meaning derived from signs involves interpretation, even if the interpreter finds the task straightforward." (footnote omitted)).

These three "events"—understanding, application, and interpretation—are inseparable because they constitute a single interpretive act.[112] One cannot grasp any meaning outside of a textual interpretation because texts acquire meaning only through one's interpretations.[113]

Interpretations, therefore, are inherently political because they always reflect one's prejudices and interests, which "arise from and are constituted by experiences that are mediated through language."[114] These prejudices and interests are political in that they limit one's ability to fully grasp the context in which a given text is situated and thus require that one makes interpretive choices regarding what the text *should* mean.[115] Although one's prejudices and interests may change, one comes to embody them through social experiences.[116] Inescapably, then, any interpretation always reflects one's political views.[117]

2. Discourse and Power

The politics of interpretation is obscured because of how power operates within discourse.[118] According to philosopher and historian Michel Foucault, the term "discourse" refers to a system of rules and practices that systematically construct objects of knowledge.[119] Discourses encompass the linguistic conventions for discussing a given subject at a given moment and emerge through practices that necessarily influence the production of meaning.[120] These discursive practices consist

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112. Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 177; *see also* David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, *in* LEGAL HERMENEUTICS, *supra* note 96, at 173, 174.

113. *See* FISH, *Still Wrong*, *supra* note 98, at 358; MICHEL FOUCAULT, *Nietzsche, Freud, Marx*, *in* 2 AESTHETICS, METHOD, AND EPISTEMOLOGY 269, 275 (James D. Faubion ed., Robert Hurley et al. trans., 1998) [hereinafter FOUCAULT, *NFM*].

> [I]f interpretation can never be completed, this is quite simply because there is nothing to interpret. There is nothing absolutely primary to interpret, for after all everything is already interpretation, each sign is in itself not the thing that offers itself to interpretation but an interpretation of other signs.

Id. See Peller, *supra* note 96, at 1160 n.5, for another translation of this quote.

114. Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 181–82; *see also* Nicola Lacey, *Philosophy, History and Criminal Law Theory*, 1 BUFF. CRIM. L. REV. 295, 310 (1998) (recognizing that "language is itself marked by the viewpoints and interpretive presuppositions").

115. *See* Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 174, 181–82, 190, 202.

116. *Id.* at 181.

117. *See* Hutchinson, *Identity Crisis*, *supra* note 27, at 1176–77 ("[N]o interpretation stands innocent of the charge of political involvement.").

118. *See id.* at 1187–88; *see also* Hutchinson, *Historical Deconstruction*, *supra* note 96, at 231–32 ("Through the control of linguistic practices, power preserves and perpetuates itself. It constructs reality in its own image by silencing and excluding the powerless. The hidden agendas of power are secreted . . . and are most seductive when in discursive disguise.").

119. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 47–48 (A. M. Sheridan Smith trans., 1972) [hereinafter FOUCAULT, ARCHAEOLOGY]; *see also* Rachel Adams, *Michel Foucault: Discourse*, CRITICAL LEGAL THINKING (Nov. 17, 2017), http://criticallegalthinking.com/2017/11/17/michel-foucault-discourse/ [https://perma.cc/6P8H-ZWPW] (describing Foucault's use of the term "discourse" as denoting "a historically contingent social system that produces knowledge and meaning").

120. Stuart Hall, *The West and the Rest: Discourse and Power*, *in* FORMATIONS OF MODERNITY 275, 291 (Stuart Hall & Bram Gieben eds., 1992); *see also* Gerald J. Postema, *Custom, Normative Practice, and the*

of rules and categories that establish not only "what can and cannot be said at one moment, but also—and more importantly—what it is possible to say."[121]

Discursive practices allow readers to differentiate between permissible ("correct") and impermissible ("incorrect") interpretations within a particular form of discourse.[122] They also restrict interpretive possibilities; they delimit what is within—and what is beyond—the grasp of interpretation within a particular form of discourse.[123] Thus, discursive practices both enable and restrict interpretive possibilities by delineating and situating textual interpretations.[124]

Certain interpretations prevail over others within discourses, and these interpretations are never neutral because they emerge only through power relations.[125] As Foucault stated,

> Power is everywhere; not because it embraces everything, but because it comes from everywhere. . . . [P]ower is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.[126]

Social groups mutually constitute power through and within their participation in discourses,[127] whether economic,[128] racial,[129] sexual,[130] or any other form. Power is not confined to any particular discourse; instead, it is fluid, always operating through and within them.[131]

Law, 62 DUKE L.J. 707, 730 (2012) (recognizing that discursive practices enable "thoughtful, public adjusting of norms to changing circumstances, renegotiating . . . the terms of commitments within the practice").

121. According to Foucault, a "discursive practice" is a rule within "the system of rules governing the production of statements in a particular society at a certain moment in history." IAN BUCHANAN, *Discursive Practice*, A DICTIONARY OF CRITICAL THEORY (2010) (ebook).

122. *See id.*; Adams, *supra* note 119.

123. *See* BUCHANAN, *supra* note 121.

124. *See* FAIRCLOUGH, *supra* note 102, at 24–27.

125. *See* Burton, *supra* note 25, at 576 ("[T]he attribution of meaning is inescapably an act of power."); Lacey, *supra* note 114, at 305 (recognizing legal actors "have the power to stipulate meanings, and . . . to enforce their usage within a certain discursive arena").

126. 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 93 (Robert Hurley trans., 1978) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY].

127. *See* JOHN GAVENTA, POWER AFTER LUKES 3 (2003) (unpublished manuscript) (contending that power is "diffuse rather than concentrated, embodied and enacted rather than possessed, discursive rather than purely coercive, and constitutes agents rather than being deployed by them"); *see also* Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 741–42 (1996) (defining power as "the product of an interplay of actions and attitudes between social actors, each equipped with corresponding or complementary images of a particular social relation").

128. *See generally* JONATHAN NITZAN & SHIMSHON BICHLER, CAPITAL AS POWER (2009) (arguing that capital is not only an economic unit but also a measurement of power).

129. *See generally* Ashley ("Woody") Doane, *What Is Racism? Racial Discourse and Racial Politics*, 32 CRITICAL SOC. 255 (2006) (examining competing definitions of racism and how they are situated within a discourse involving a political struggle).

130. *See generally* FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 126 (exploring how power has influenced the development of "sexuality" as a discursive product).

131. *See* FOUCAULT, ARCHAEOLOGY, *supra* note 119, at 66–67.

Power relations are necessarily political.[132] They implicate questions regarding "privileged access to valued social resources," such as knowledge, force, wealth, status, information, cultural production, and communication,[133] and determine how these resources should be distributed in society.[134] As a result, because power is unequally distributed in society, social resources are unequally distributed as well.[135] The prevailing interpretations within discourse therefore reflect the unequal distribution of power and social resources.[136] Discursive practices reinforce these interpretations—and, by extension, how power and resources are distributed—by restricting interpretive possibilities.[137] Thus, discursive practices construct an interpretive framework that is necessarily political,[138] situated within a language system predicated upon power relations.[139]

These same practices, however, obscure the politics of interpretation because they are "conducive to the political rationality that underlies [their] production."[140] For example, textual interpretations generally appear apolitical,[141] especially in light of commentaries that reinforce the prevailing interpretations "without ever breaching the discursive paradigm."[142] Discursive practices produce prevailing interpretations that are historically and culturally contingent but appear apolitical and objective,[143] reflecting and reinforcing the dominant political ideology.[144]

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132. Zvi Lothane, *Power Politics and Psychoanalysis—an Introduction*, 12 INT'L F. PSYCHOANALYSIS 85, 95 (2003); *see also* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977, at 189 (Colin Gordon ed., Colin Gordon et al. trans., 1980) (1972) (explaining how the claim that "everything is political" affirms that power relations are inherent and pervasive within society).

133. *See* TEUN A. VAN DIJK, DISCOURSE AND POWER 66 (2008).

134. *See* Melanie Beth Oliviero, *Human Needs and Human Rights: Which Are More Fundamental?*, 40 EMORY L.J. 911, 914–15 (1991).

135. *See* Darren Lenard Hutchinson, *"Continually Reminded of Their Inferior Position": Social Dominance, Implicit Bias, Criminality, and Race*, 46 WASH. U. J.L. & POL'Y 23, 32 (2014).

136. *See* Burton, *supra* note 25, at 576. See also *infra* notes 155–161 and accompanying text for an explanation of how any interpretation arises from linguistic conventions that reinforce how power imbalances.

137. *See supra* notes 121–124 and accompanying text.

138. *See* Hutchinson, *Identity Crisis*, *supra* note 27, at 1176–77; *see also* E. D. Hirsch, Jr., *The Politics of Theories of Interpretation*, 9 CRITICAL INQUIRY 235, 235 (1982) ("All interpretations originate in politics . . . ."); *supra* notes 114–117 and accompanying text.

139. FROMAN, *supra* note 109, at 4 (arguing that power "establish[es] meaning in language"). For further reading on how power operates within language, see generally FAIRCLOUGH, *supra* note 102; ROBERT HODGE & GUNTHER KRESS, LANGUAGE AS IDEOLOGY (2d ed. 1993); LANGUAGE AND POWER (Cheris Kramarae et al. eds., 1984).

140. *See* Adams, *supra* note 119 (citing FOUCAULT, ARCHAEOLOGY, *supra* note 119, at 126–34).

141. *See* Margaret H. Lemos, *The Politics of Statutory Interpretation*, 89 NOTRE DAME L. REV. 849, 880 (2013) (reviewing SCALIA & GARNER, *supra* note 111).

142. Adams, *supra* note 119 (arguing that commentaries provide the chance "to say something other than the text itself, but on the condition that it is the text itself which is uttered [re-iterated] and, in some ways, finalised" (alteration in original) (quoting FOUCAULT, ARCHAEOLOGY, *supra* note 119, at 221)).

143. *Id.*

144. See *infra* note 149 for how this Comment defines "ideology."

B. The Ideological Construction of Legal Discourse

Because interpretation and legal discourse are necessarily political, various scholars have rejected the claim that the rule of law is determinate, neutral, and objective.[145] They have argued the rule of law operates as an ideology that reinforces the unequal distribution of power in society.[146] Part III.B.1 defines "ideology" and its relation to power and explains how the ideology of the rule of law induces the public to view law and politics separately. Part III.B.2 challenges this view by arguing that the law is indeterminate and thus cannot prevent courts from making interpretive choices based on their political views. The rule of law nevertheless obscures the law's indeterminacy through discursive practices such as the doctrine of stare decisis, which Part III.B.3 demonstrates is nothing more than a "doctrine of convenience."[147]

1. Ideology and the Rule of Law

The term "ideology," as used here, refers to a contingent "state of discourse"[148] within which social actors make political decisions that implicate and reinforce the unequal distribution of power in society.[149] Although social actors occupy different social roles, they share a mode of rationality that society's "general interest" dictates.[150] This rationality pervades social relations through the "formation, transformation, and application of other social cognitions, such as knowledge, opinions, and attitudes."[151] Therefore, social relations always reflect society's general interest.

The so-called general interest, however, "will never coincide with the specific interests of many of [society's] subordinated working parts."[152] Instead, it only reflects the interests of a small sect of society (i.e., the "dominant interest").[153] This specific set of interests constitutes a "dominant ideology" that pervades all forms of social relations.[154]

The dominant ideology is not always explicit but is ever-present because it is embedded within language through power relations.[155] Linguistic conventions are

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145. *See infra* Part III.B.2.

146. *See supra* note 89 and accompanying text.

147. Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1209 (2008).

148. JOHN FROW, MARXISM AND LITERARY HISTORY 83 (1986) (emphasis omitted).

149. *See* FAIRCLOUGH, *supra* note 102, at 2. Defining ideology as such not only dispels the metaphysical assumptions with which it is generally associated but also demonstrates "the extent to which we find ourselves in a world where ideology is a constantly present feature of social and political life." *See* Aletta J. Norval, *Reviewing Article: The Things We Do with Words - Contemporary Approaches to the Analysis of Ideology*, 30 BRIT. J. POL. SCI. 313, 315 n.13, 316 (2000).

150. BRIAN MASSUMI, POLITICS OF AFFECT 84 (2015).

151. VAN DIJK, *supra* note 133, at 34.

152. MASSUMI, *supra* note 150, at 84.

153. *Id.* at 84–85; *see also* Chandra Kumar, *Foucault and Rorty on Truth and Ideology: A Pragmatist View from the Left*, 2 CONTEMP. PRAGMATISM 35, 65 (2005).

154. *See* MASSUMI, *supra* note 150, at 84–87.

155. *See* FAIRCLOUGH, *supra* note 102, at 2.

always situated within a specific sociohistorical context in which certain interpretations prevail over others.[156] Although they make interpretation possible, linguistic conventions only emerge through interpretation.[157] As a result, they primarily reflect whichever interpretations prevail within the specific context in which social actors rely on them.[158] Linguistic conventions serve as mediums for reinforcing the prevailing interpretations within society,[159] as well as the power imbalances from which those interpretations emerge.[160] Language, therefore, carries ideological assumptions that legitimize those power imbalances.[161]

These assumptions, however, remain hidden because language is not only the basis of social relations but also the most common form of social activity.[162] Language is so familiar that individuals take for granted the ideological assumptions fixed within it.[163] Individuals come to view these dominant ideological assumptions as consistent with their own interests.[164] They become "willing instruments of their own domination,"[165] as they are unable to perceive how power operates through and within language to reinforce the dominant ideology.[166]

As an expression of the dominant ideology, the rule of law is embedded within both legal discourse and the very fabric of U.S. society; it is neither a rhetorical device nor a political slogan but a way of life.[167] It pervades public discourse,[168] always reminding Americans of their country's "historic commitment to the rule of law."[169] In

156. *See* Burton, *supra* note 25, at 576.

157. *See* FISH, *Still Wrong*, *supra* note 98, at 358; FOUCAULT, *NFM*, *supra* note 113, at 275.

158. *See* Peller, *supra* note 96, at 1175–78.

159. *See id.*; *see also* Burton, *supra* note 25, at 576.

160. *See* FAIRCLOUGH, *supra* note 102, at 2; FROMAN, *supra* note 109, at 14 (recognizing how language gives meaning to the inequalities that exist within language itself).

161. FAIRCLOUGH, *supra* note 102, at 2; *see also* Peller, *supra* note 96, at 1180–81.

162. FAIRCLOUGH, *supra* note 102, at 2.

163. *See id.*

164. MASSUMI, *supra* note 150, at 85.

165. *Id.*

166. *See* FAIRCLOUGH, *supra* note 102, at 2; FROMAN, *supra* note 109, at 67–68 (discussing how power is hidden within language).

167. As Justice Anthony Kennedy once eloquently put it,

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992); *see also* Kairys, *Introduction*, *supra* note 30, at 1 ("The concept of government of law, not people, is so familiar, so much a part of our national identity, that its meaning can be difficult to notice . . . .").

168. Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141, 152 (2001). *See generally* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91 (2005) (examining how law's portrayal in popular culture conveys certain ideological messages).

169. *See* United States v. Nixon, 418 U.S. 683, 708 (1974).

mediating their social experiences through language, most Americans come to respect the rule of law.[170] They consider those who criticize the rule of law as attacking U.S. society itself and seek to protect the separation between law and politics against the threat of tyranny.[171] As a result, the ideology of the rule of law induces Americans into believing that law and politics are separate.[172]

The rule of law thus masks the political nature of legal questions.[173] Courts make controversial political decisions daily, yet the rule of law obscures them by maintaining that the law is determinate, neutral, and objective.[174] In depoliticizing legal questions that bear on crucial sociopolitical issues,[175] the rule of law reinforces the unequal distribution of power in society.[176] Nevertheless, although the rule of law obscures the politics of law,[177] it can never fully suppress the fundamental struggle over the production of the law's meaning.

2. Legal Indeterminacy

The law emerges only through interpretations of legal texts,[178] and because texts have no inherent meaning, various scholars have argued that law is indeterminate.[179] Legal indeterminacy implies that any judicial decision is ultimately a political decision, involving various contextual factors.[180] The seemingly determinate texts on which courts may properly rely to resolve any legal questions always provide at least two contradictory answers, rendering determinacy impossible.[181]

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170. *See* Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) (acknowledging that "this country" is "dedicated" to the rule of law); *see also* Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q.J. SPEECH 1, 7 (1980) (claiming that people have been "conditioned to think of 'the rule of law' as a *logical* commitment," rather than "a unique ideological commitment").

171. *See* John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 201–02 ("[The rule of law] is an image that can command both the allegiance and affection of the citizenry. After all, who wouldn't be in favor of the rule of law if the only alternative were arbitrary rule?"); *cf.* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (stating that "the rule of law . . . is the great mucilage that holds society together"). *But cf.* Peller, *supra* note 96, at 1274–75 (arguing that distinguishing between law and politics is *itself* "an act of power" that marginalizes other ways of viewing the world).

172. *See* Hasnas, *supra* note 171, at 201–02; Singer, *supra* note 12, at 41.

173. *See* Kairys, *Introduction*, *supra* note 30, at 12.

174. Singer, *supra* note 12, at 5.

175. *See* Kairys, *Introduction*, *supra* note 30, at 14.

176. *See* ZINN, *supra* note 92, at 111; Horwitz, *Rule of Law*, *supra* note 21, at 566.

177. *See* Kairys, *Introduction*, *supra* note 30, at 14–15.

178. *See* Balkin, *Interpretation*, *supra* 94, at 932–33.

179. *See, e.g.*, Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI. L. REV. 541, 543, 556 (1989) ("Indeterminacy infiltrates all levels and dimensions of the law, energizing and debilitating the interpretive process and the search for meaning."); Singer, *supra* note 12, at 5–6 (noting the indeterminacy of legal reasoning); Tushnet, *CLS*, *supra* note 89, at 7.

180. David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 247 (1984) [hereinafter Kairys, *Law and Politics*].

181. Tushnet, *CLS*, *supra* note 89, at 7. Mark Tushnet explains that "[t]his is not a claim about the degree of controversy over the right outcome, or about the difficulty of discerning that outcome. The indeterminacy thesis asserts that no matter how hard one tries, or how skilled one is as a lawyer, legal propositions in the relevant range are indeterminate." Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 341, 346 (1996) [hereinafter Tushnet, *Indeterminacy*] (emphasis omitted).

Some legal doctrines are indeterminate because they contain highly abstract concepts that render them ambiguous.[182] For example, as previously suggested, the concept of "reasonableness" is not wholly determinate, because what is reasonable is always subject to competing interpretations within any legal context.[183] This is not merely because members of the legal community may disagree over which disciplining rules to apply in any given case but also because, more fundamentally, reasonableness can "only be defined in terms of legal consequences."[184] Those consequences are defined within legal texts, which always provide at least two different answers to any legal question.[185] Since legal texts are given meaning only through interpretation, any meaning attributed to those possible answers—and their legal consequences—always reflect the interpreter's prejudices and interests.[186] Whoever interprets what is "reasonable" interprets what those legal consequences *should be*, not what they *are*.[187] The interpreter, not the law, decides what the case's outcome will be.[188]

Courts must also make interpretive choices regarding the facts in any given case, thereby compounding legal indeterminacy.[189] Courts can never fully describe a case's facts because it is impossible "to recapture what had happened in the past."[190] Judges inevitably must make interpretive choices to construct the facts of any case, thus allowing them to choose which facts are significant and which facts to ignore.[191] Therefore, in any given case courts have the power to interpret both the law *and* the facts to reach whichever outcome they desire.[192]

Further, the very rules intended to constrain judicial interpretation (i.e., the disciplining rules) are themselves subject to interpretation.[193] In some instances, a court

182. *See* Singer, *supra* note 12, at 18–19.

183. *See supra* note 64 and accompanying text.

184. Peller, *supra* note 96, at 1227; *see also* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 826 (1935); Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence*, 69 MINN. L. REV. 277, 295 (1984) (explaining how reasonableness "describes a valued attribute of individual or social conduct, but it does not set forth the actual conduct itself").

185. *See supra* note 181 and accompanying text.

186. *See supra* notes 114–117 and accompanying text for a discussion of the political nature of legal interpretation.

187. *See* Lee, *supra* note 33, at 1150.

188. *See* Peller, *supra* note 96, at 1226–29 (citing Cohen, *supra* note 184).

189. *See* Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, 30 REPRESENTATIONS 42, 60–61 (1990); *see also* Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1974 (1947) ("When a court applies a legal rule—statutory or not—to the facts of a case, the court must interpret not only the rule but the evidence." (emphasis omitted)).

190. Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 36 CATH. U. L. REV. 361, 361 (1986).

191. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110–11 (2000); Anthony D'Amato, *Pragmatic Indeterminacy*, 85 NW. U. L. REV. 148, 175 (1990).

192. *See* Monroe Freedman, Howard Lichtenstein Distinguished Professor of Legal Ethics, Hofstra Univ., Speech to the Seventh Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 24, 1989), *in* 128 F.R.D. 409, 439 (1989).

193. *Compare* STANLEY FISH, *Fish v. Fiss* (arguing that disciplining rules "are texts" that "are in need of interpretation and cannot themselves serve as constraints on interpretation" (emphasis omitted)), *in* DOING WHAT COMES NATURALLY, *supra* note 98, at 120, 121, *with* Fiss, *Conventionalism*, *supra* note 79, at 186 (responding to Fish that although disciplining rules must be interpreted, this "does not reduce . . . the content

may claim that a text's language determined its decision and refuse to consider any legislative history or public policy.[194] However, any text's language is indeterminate, both semantically[195] *and* syntactically.[196] In other instances, a court could choose to rely on legislative history or public policy in reaching their decision.[197] Courts can properly rely on various disciplining rules, yet the weight they give to each always depends on their interpretive choices.[198]

Because the law is indeterminate and interpretations necessarily entail political choices, judicial decisions are necessarily political.[199] Judicial interpretations inescapably reflect the interpreting court's prejudices and interests, as well as underlying assumptions about which aspects of the relevant legal texts are meaningful.[200] Legal reasoning alone cannot determine a judicial decision, even though courts might sincerely believe their decisions are based on the law and not their political views.[201] Their decisions always mirror a "silent political force embodying a

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or meaning of a rule to its various interpretations, nor does it mean that [disciplining rules] cannot constrain the interpretation of another text" (footnote omitted)).

194. *See, e.g.*, United States v. Sullivan, 332 U.S. 689, 693 (1948).

195. *See* Sheehan, *supra* note 22, at 100; *see also supra* notes 105–110 and accompanying text. For a detailed discussion of semantic indeterminacy in legal discourse, see Christopher L. Kutz, *Just Disagreement: Indeterminacy and Rationality in the Rule of Law*, 103 YALE L.J. 997, 1004–14 (1994).

196. *See* BAS AARTS, SYNTACTIC GRADIENCE: THE NATURE OF GRAMMATICAL INDETERMINACY (2007). For example, in *Lockhart v. United States*, 136 S. Ct. 958 (2016), the Supreme Court's decision in a criminal case involving statutory interpretation ultimately turned on whether the last antecedent rule or the series-qualifier principle applied. *See* Hassan Shaikh, Comment, *May the Best Canon Win:* Lockhart v. United States *and the Battle of Statutory Interpretation*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 203, 212–13 (2017). Seven Justices concluded that the last antecedent rule applied, arguing that this the only "straightforward reading." *See Lockhart*, 136 S. Ct. at 962. Two Justices, however, argued that the series-qualifier principle applied, claiming that "it reflects the completely ordinary way that people speak and listen, write and read." *See id.* at 970 (Kagan, J., dissenting).

197. *See, e.g.*, Riggs v. Palmer, 22 N.E. 188, 189–91 (N.Y. 1889) (holding that although the New York Wills Act's text was clear, it would contravene "public policy" to allow a grandson who murdered his grandfather to receive the property devised to him in his grandfather's will).

198. *See* STANLEY FISH, *Introduction: Going Down the Anti-Formalist Road* (arguing that "there are no . . . constraints on interpretation that are not themselves interpretive"), *in* DOING WHAT COMES NATURALLY, *supra* note 98, at 1, 8.

199. Kairys, *Law and Politics*, *supra* note 180, at 247.

200. *See* Burton, *supra* note 25, at 576; *see also* J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1137 (1991) [hereinafter Balkin, *Ideology*] (reviewing ALTMAN, *supra* note 20) ("The very structure of individual perception, belief and desire, and thus the terms of individual choice, are already shaped by culture and ideology even before the individual begins to choose.").

201. *See* Balkin, *Ideology*, *supra* note 200, at 1137; *see also* Kairys, *Introduction*, *supra* note 30, at 5 (arguing that social and political factors guide judges' decisions "even when they are not the explicit or *conscious* basis of decision" (emphasis added)); Tushnet, *Indeterminacy*, *supra* note 181, at 352 (arguing courts unwittingly function as "vehicles for a complex political and ideological agenda"). This does not suggest that individual participants in the legal system consciously make decisions based on their political views. *See* Feldman, *SCOTUS*, *supra* note 27, at 80. But the law derives its power, in part, from courts and lawyers who are largely unaware of the political nature of their work and perform their duties in good faith.

> This is the great source of the law's power: It enforces, reflects, constitutes, and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality and the myth of nonpolitical, legally determined results.

contingent exercise of social power."[202] The law's indeterminacy necessarily undermines the rule of law because judges make the law through their interpretive choices.[203]

3. Precedent as Discursive Practice

The rule of law further masks law's indeterminacy through a nexus of discursive practices, which consist of any legal "categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals."[204] These practices reinforce the apolitical appearance of legal questions.[205] They thus reproduce and legitimize existing power imbalances under the rule of law.[206]

One of the most prevalent discursive practices in legal discourse is the doctrine of stare decisis, which asserts that courts "must follow earlier judicial decisions when the same points arise again in litigation."[207] This doctrine supposedly embodies the principles of determinacy,[208] neutrality,[209] and objectivity[210] and reflects the rule of law's core purpose: to establish a government of laws, not of men.[211] Stare decisis is supposed to ensure that courts do not exceed their authority, by limiting interpretive possibilities and maintaining the separation between law and politics.[212] It suggests that the law has some transcendental force, thereby instilling a "sense of stability" within legal discourse.[213]

A problem emerges, though, when courts justify their decisions upon "partial" readings of precedent because subsequent courts may rely on that partial reading to

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Kairys, *Introduction*, *supra* note 30, at 14–15.

202. Peller, *supra* note 96, at 1180.

203. *See* Balkin, *Interpretation*, *supra* note 94, at 933.

204. GORDON, *Critical Legal Histories*, *supra* note 37, at 255.

205. *See id.*

206. *See id.* at 254–55.

207. *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Chris Dent & Ian Cook, Stare Decisis, *Repetition and Understanding Common Law*, 16 GRIFFITH L. REV. 131, 132 (2007) (recognizing that stare decisis "reflect[s] a set of discursive practices of which the repetition of past legal statements is the most dominant").

208. Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

209. *See* HANSFORD & SPRIGGS, *supra* note 34, at 20.

210. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 697 (1999).

211. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991) ("The doctrine of stare decisis is of fundamental importance to the rule of law." (quoting Patterson v. McClean Credit Union, 491 U.S. 164, 172 (1989))); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 478–79, 494 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*."); City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 420 (1983) ("*[S]tare decisis* . . . is a doctrine that demands respect in a society governed by the rule of law."), *overruled by Planned Parenthood*, 505 U.S. at 833.

212. Randy J. Kozel, *Precedent and Constitutional Structure*, 112 NW. U. L. REV. 789, 793 (2018).

213. *Id.* at 793–94.

justify their own decisions.[214] However, any interpretation of precedent is "*necessarily* partial" because courts must always reinterpret precedents,[215] which implies that courts infuse precedents with their political interests.[216] As a result, courts may give significant weight to language that an earlier court intended to be "mere dicta,"[217] or they may disregard or distinguish language that had provided a key justification for establishing that precedent.[218]

Stare decisis has been referred to as "a doctrine of convenience"[219] because courts make interpretive choices based on their interests when deciding whether to follow, distinguish, or disregard any precedents.[220] The Supreme Court has attempted to provide criteria for determining whether to overrule a precedent;[221] however, its criteria consist of standards that render any such determination circular, as they require that courts make interpretive choices when deciding whether to follow, distinguish, and disregard a particular precedent.[222] Any decision that invokes the doctrine of stare decisis as such will inevitably reflect a court's political attitude towards the given precedent.[223] Still, courts often claim they were "bound by precedent" to justify their decisions.[224] Similarly, dissenting judges often argue that those in the majority ignored or contradicted precedent.[225] Moreover, as the body of precedential law grows, courts will more easily find precedents that support their decisions, while hiding behind the elusive doctrine of stare decisis.[226]

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214. Balkin, *Interpretation*, *supra* note 94, at 933.

215. *Id.* (emphasis added); *see also* David Couzens Hoy, *Legal Hermeneutics: Recent Debates* (arguing that precedent "is not a rule that determines its future applications, but itself comes to be reinterpreted"), *in* GADAMER AND LAW 479, 486 (Francis J. Mootz III ed., 2007).

216. *See supra* notes 114–117 and accompanying text.

217. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 296 (1995) (Thomas, J., dissenting); *see also, e.g.*, United States v. Watson, 423 U.S. 411, 437 (1976) (Marshall, J., dissenting) (arguing that "the dicta relied upon by the Court in support of its decision today are just that—dicta").

218. See *infra* notes 370–410 and accompanying text for an example found in the Supreme Court's exclusionary rule jurisprudence.

219. Cooper, *supra* note 147, at 402; Paulsen, *supra* note 147, at 1209.

220. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 818 (1983).

221. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

222. *See* Paulsen, *supra* note 147, at 1200, 1209 ("To put it bluntly: The doctrine of stare decisis, as presently formulated, constitutes its own circular firing squad.").

223. *See* HANSFORD & SPRIGGS, *supra* note 34, at 20–21; *see also* Paulsen, *supra* note 147, at 1209 (arguing that the "doctrine of stare decisis is unworkable, unsusceptible to principled application, inconsistent, unpredictable, and so unreliable as not to justify reliance upon it").

224. *See, e.g.*, United States v. Bailey, 468 F.2d 652, 669 (5th Cir. 1972) (concluding the opinion stating, "We deeply regret being compelled to affirm this conviction. We do so only because we are bound by precedent").

225. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 289 (1991) (White, J., dissenting) ("Today, a majority of the Court, without any justification overrules this vast body of precedent without a word and in doing so dislodges one of the fundamental tenants of our criminal justice system." (citation omitted)); Oregon v. Elstad, 470 U.S. 298, 320 (1985) (Brennan, J., dissenting) ("In imposing its new rule . . . the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led to nearly every lower court to reject its simplistic reasoning.").

226. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 831 (1982).

In sum, any decision involving an invocation of stare decisis involves a reinterpretation of precedent and carries political implications.[227] These implications arise whenever any subsequent court interprets those reinterpretations or any precedents derived therefrom.[228] Still, courts claim their interpretations are consistent with precedent,[229] even though interpretations of precedent are necessarily incomplete and biased.[230] In practice, whenever a court relies on the doctrine of stare decisis, it is only reinterpreting an interpretation within a series of fragmented political judgments.[231]

IV. LAW AS A HISTORY OF INTERPRETATIONS

Through discursive practices such as stare decisis, the ideology of the rule of law conceals legal indeterminacy, creating the impression that law and politics are separate.[232] It obscures how courts make political decisions that reinforce the unequal distribution of power in society.[233] As a result, courts and scholars should adopt a critical historicist orientation toward law that recognizes the politics of the courts' interpretive process.[234]

The project of critical historicism is not easy to summarize,[235] but one commentator has explained that it recognizes "that the meanings of words and actions are to some degree dependent on the particular social and historical conditions in which they occur, and to interpretations and criticism that are suggested by that perspective."[236] In the context of legal discourse, critical historicists look beyond the prevailing legal interpretations and narratives to "the social drama and contingency

227. *See* Balkin, *Interpretation*, *supra* note 94, at 933; Hoy, *supra* note 215, at 486.

228. Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1208 (1988); *see also* Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 637–38 (2004).

229. *See* Cornell, *supra* note 228, at 1208.

230. *See* Hasnas, *supra* note 171, at 210–11. See *supra* Part III.A for a discussion of the politics and power behind legal interpretation.

231. *See* Hoy, *supra* note 215, at 486.

232. *See supra* Part III.B.

233. See *supra* Part III.B for a discussion of the influence of politics on judicial interpretation.

234. *See* William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1097–1101 (1997) (discussing how a critical, or "new," historicist orientation can serve to "[l]iberate the political imagination by revealing suppressed alternatives" (quoting Robert W. Gordon, *Exchange with William Nelson on Critical Legal Studies*, 6 LAW & HIST. REV. 139, 178 (1988))). For the purposes of this discussion, the term "orientation" refers to "a system of interpretation . . . [that] interferes with its own revision." KENNETH BURKE, PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE 3 (3d ed. 1984). It connotes a method of interpretation that constantly recognizes the inherent limitations of its own interpretive method. *See id.*

235. *See* Suzanne Gearhart, *The Taming of Michel Foucault: New Historicism, Psychoanalysis, and the Subversion of Power*, 28 NEW LITERARY HIST. 457, 457 (1997) (acknowledging, like almost every other critical, or "new," historicist, "the difficulty of summarizing convincingly the project of the new historicism").

236. Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1017 n.1 (1981). *See generally* Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1026 (1997) [hereinafter Gordon, *Critical Historicism*] ("Every legal text is a historical artifact that must be brought into the present in order to be applied; every time it is applied it must be wrenched from its prior context and put to novel uses, often uses wholly unsuspected by its framers.").

underlying legal debates,"[237] for they acknowledge that courts always interpret the law within a particular sociohistorical context[238]—a moment in which interpretations *from* the past and interpretations *of* the past are interwoven.[239] They recognize that power situates the historical context in which courts interpret the law.[240] This orientation challenges the rule of law by conceptualizing law as an interpretive history situated within power, in which political actors engage and through which they produce rules and procedures for governing society.[241] A critical historicist orientation, as such, implies that courts should justify their decisions upon more than just descriptions of (and citations to) existing case law.[242] Courts should only rely on precedent if they interpret the sociohistorical context of the relevant precedential decision, as well as those of any decision from which that precedent derived.[243] Courts should also consider the assumptions underlying any precedent and whose interests they reflect.[244] Simply put, courts should only rely on precedent if they explain how their interpretation of the relevant sociohistorical context and assumptions influenced their decision.[245]

This Section is divided into three parts. Part IV.A discusses how the law constitutes an interpretive history rooted in power. Part IV.B situates the Fourth Amendment within a critical historicist orientation, framing the Amendment as a history of legal interpretations. Part IV.C examines certain Fourth Amendment precedents to illustrate how conceiving the law as a history of interpretations exposes the political nature of judicial decisions and the ideology of the rule of law.

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237. *See* Symposium, *The Critical Use of History*, 49 STAN. L. REV. 1021, 1021 (1997).

238. *See* Mootz, *supra* note 99, at 120. A critical historicist orientation toward law overcomes the problems of formalist and positivist legal theories that assume it is possible to discern a legal text's "intended meaning." *See* Fred Dallmayr, *Hermeneutics and the Rule of Law*, *in* LEGAL HERMENEUTICS, *supra* note 93, at 3, 13. These theories fail to recognize that when interpreting the law, courts participate in the production of an interpretive history. *Cf.* TROUILLOT, *supra* note 36, at 145 (arguing that to recognize "that historical production is itself historical is the only way out of the false dilemmas posed by positivist empiricism and extreme formalism").

239. *See* Gordon, *Critical Historicism*, *supra* note 236, at 1026; *see also* Cornell, *supra* note 228, at 1208 (arguing that interpretations of past decisions are "reinterpretations of the meaning of that past"); *cf.* Robin van den Akker, *Metamodern Historicity* (recognizing that the "present opens onto—in an attempt to bring within its fold—pasts possibilities and possible futures"), *in* METAMODERNISM 21, 22 (Robin van den Akker et al. eds., 2017).

240. *See* TROUILLOT, *supra* note 36, at 28 (arguing that power is an essential component in the production of history); *see also* Hutchinson, *Identity Crisis*, *supra* note 27, at 1188 (recognizing that any text "must always be read against and within the complex codes of power in which they arise and are attended to").

241. *See* Peller, *supra* note 96, at 1175; *cf.* MICHEL FOUCAULT, *Nietzsche, Genealogy, History* (recognizing that "if interpretation is the violent or surreptitious appropriation of a system of rules, which in itself has no essential meaning, . . . then the development of humanity is a series of interpretations"), *in* THE FOUCAULT READER 76, 86 (Paul Rabinow ed., 1984).

242. *See* Symposium, *supra* note 237, at 1021.

243. *See id.*; *cf.* Gordon, *Critical Historicism*, *supra* note 236, at 1026 ("Every important political or legal argument is an argument for either changing, preserving or recovering something in the past, which in turn relies on a narrative account of what has been and what has (or has not) changed and why.").

244. *See* Symposium, *supra* note 237, at 1021 ("Law must keep in step with changing needs, identities, and values, and remain conscious of its transformation.").

245. *See id.*

A. Historicizing the Law

The ideology of the rule of law obscures the political nature of judicial decisions, as well as any precedents from which they derive.[246] Precedential decisions are "historical artifact[s]" that courts reinterpret whenever they apply them.[247] These historical artifacts express past judicial interpretations of facts and legal texts that were at issue in concrete cases.[248] As discussed in Part III.B.3, whenever courts interpret precedent, they interpret past legal interpretations.[249] In this sense, a court is a participant in the production of a history—a history of legal interpretations.[250]

Legal discourse thus constitutes a history of legal interpretations in which courts participate both as "actors" and "narrators."[251] On the one hand, courts are actors in the production of this history in that they interpret legal texts and make factual determinations to decide concrete cases that are always situated within a specific sociohistorical context.[252] On the other hand, courts are narrators in that they produce opinions consistent with their decisions and intend that future courts will rely on them for guidance in similarly situated cases.[253] Any judicial opinion, therefore, reflects a specific narrative that conveys the deciding court's interpretations of the relevant facts and legal texts at issue in the case.[254]

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246. *See* Hasnas, *supra* note 171, at 210–11.

247. GORDON, *Introduction*, *supra* note 39, at 7.

248. *See* Cornell, *supra* note 228, at 1208.

249. *See* Hoy, *supra* note 215, at 486.

250. *See* Thomas, *supra* note 40, at 2608; *see also* Rachel F. Moran, *Race, Representation, and Remembering*, 49 UCLA L. REV. 1513, 1519 (2002).

> "[T]he hermeneutical situation of both the historian and the jurist seems to me to be the same in that, when faced with any text, we have an immediate expectation of meaning . . . . There can be no such thing as a direct approach to a historical phenomenon that would objectively yield its sense or status: the historian has to undertake the same task of reflection as the jurist."

Dallmayr, *supra* note 238, at 15 (quoting HANS-GEORG GADAMER, TRUTH AND METHOD 325–27 (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publ'g Corp. rev. ed. 1989) (1960))).

251. *See* AMSTERDAM & BRUNER, *supra* note 191, at 110–11. Courts, however, are not the sole participants in the production of this interpretive history. *Cf.* TROUILLOT, *supra* note 36, at 23–25. Rather, all individuals and institutions who engage within legal discourse influence how the law is interpreted to some degree. *Cf.* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 168 (2000) ("[T]he Constitution should also be understood as a material regime of judicial interpretation and practice that is exercised not only by jurists and judges but also by subjects throughout the society."). But because "the federal judiciary is supreme in the exposition of the law of the Constitution," *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), federal courts, over whom the Supreme Court reigns, seemingly have the most influence over the production of the interpretive history of federal law. *See infra* notes 255–264 and accompanying text.

252. *See* AMSTERDAM & BRUNER, *supra* note 191, at 110–11; *cf.* TROUILLOT, *supra* note 36, at 23. The term "actors" includes individuals, groups, and institutions who exist within a particular historical moment, defined both spatially and temporally, and who, by virtue of their situatedness within that moment, affect how that moment will be portrayed in history. *See id.*

253. *See* AMSTERDAM & BRUNER, *supra* note 191, at 110–11. The term "narrators" refers to the persons, groups, and institutions who provide an account of "that which is said to have happened." TROUILLOT, *supra* note 36, at 13.

254. *See* Jane B. Baron & Julia Epstein, *Is Law Narrative?*, 45 BUFF. L. REV. 141, 148–49 (1997).

Not all courts have equal influence over the production of the history of legal interpretations; rather, higher courts have more control.[255] For example, under federal law, the Judiciary Act of 1789 established a court system with a hierarchical structure,[256] in which lower courts are expected to "faithfully apply the precedents of superior courts."[257] Because the Supreme Court is "the highest court of the land"[258] and "the final arbiter of questions of federal statutory and constitutional law in the United States,"[259] it has the most influence over the production of the law's interpretive history. The Court has proclaimed: "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[260]

The Supreme Court is thus the most influential actor and narrator in the interpretive history of law.[261] While the Court makes decisions that create precedents that future Justices and both federal and state courts subsequently interpret,[262] the Court also issues opinions with its decisions, and each opinion conveys a specific narrative reflecting how the Court interpreted the relevant facts and legal texts.[263] Whenever the Supreme Court relies on precedent to reach a decision, its opinion conveys specific narratives on both the case itself and the precedents on which the Court relied.[264]

Although the ideology of the rule of law accounts for the Supreme Court's extensive influence, it assumes that the Court exercises this influence under determinate, neutral, and objective principles reflected in the law.[265] By contrast, a critical historicist orientation defines the Court's influence in terms of power, which the Court exercises over the production of constitutional interpretations to suppress

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255. Still, this history encompasses narratives told at any point during trial and throughout the appellate process.

> [T]he law is in a very important sense all about competing stories, from those presented at the trial court—elicited from witnesses, rewoven into different plausibilities by prosecution and defense, submitted to the critical judgment of the jury—to those retold at the appellate court, which must pay particular attention to the rules of storytelling and the conformity of narratives to norms of telling and listening, on up to the Supreme Court, which must tress together the story of the case at hand and the history of constitutional interpretation, according to the conventions of *stare decisis* and the rules of precedent, though often, because dissents are allowed, presenting two different tellings of the story, with different outcomes.

Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 14, 16 (Peter Brooks & Paul Gewirtz eds., 1996) [hereinafter Brooks, *Law as Narrative*].

256. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

257. Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255, 276 n.106 (1992).

258. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 2 (1986).

259. *Id.* at 14.

260. Hutto v. Davis, 454 U.S. 370, 375 (1982).

261. *See* Brooks, *Law as Narrative*, *supra* note 255, at 16.

262. *See supra* notes 256–257 and accompanying text.

263. *See* Peter Brooks, *Narrative in and of the Law*, *in* A COMPANION TO NARRATIVE THEORY 415, 419 (James Phelan & Peter J. Rabinowitz eds., 2005) [hereinafter Brooks, *Narrative*].

264. *See* AMSTERDAM & BRUNER, *supra* note 191, at 141.

265. *See supra* Section II.

narratives that are inconsistent with its political interests.[266] The history of legal interpretations "reveals itself only through the production of specific narratives," including those that the Court has suppressed.[267]

The critical historicist orientation examines these narratives by distinguishing between "what happened" and "that which is said to have happened" in any concrete case.[268] The former refers to a case's indisputable particularities, whereas the latter refers to a specific narrative of those particularities.[269] For instance, whenever the Supreme Court constructs its narrative of what happened in any case, it cannot possibly account for all the case's indisputable particularities.[270] Instead, the Court must choose which events, arguments, and stories are relevant to its decision, meaning it inevitably silences facts that others might consider relevant.[271] As a result, the Court always silences counternarratives about what happened whenever it decides a case.[272]

The critical historicist orientation acknowledges that these narratives are silent due to how power operates within the interpretive history of law.[273] The Supreme Court makes decisions that always express its interpretations of facts and legal texts, which necessarily reflect its prejudices and interests.[274] Given that indeterminacy is embedded within those texts and that the Court makes interpretive choices whenever it constructs

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266. *See* Gordon, *Critical Historicism*, *supra* note 236, at 1026; *see also* William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227, 227–28 (1988) ("The United States Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding.").

267. TROUILLOT, *supra* note 36, at 25; *see also* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 385 (1996) ("The legal discourse we observe, create, and participate in is already ordered into narratives. It is just that some are more visible than others.").

268. TROUILLOT, *supra* note 36, at 13; *see also* ROBERT W. GORDON, *Taming the Past: Histories of Liberal Society in American Legal Thought* (arguing that history consists of more than one "past"), *in* TAMING THE PAST, *supra* note 37, at 317, 357.

269. *See* TROUILLOT, *supra* note 36, at 2.

270. *See* Brooks, *Narrative*, *supra* note 263, at 419. See also *supra* notes 189–191 and accompanying text for a discussion of the Court's interpretation of facts as well as laws.

271. *See* AMSTERDAM & BRUNER, *supra* note 191, at 110–11.

272. *See* TROUILLOT, *supra* note 36, at 25. According to historian Michel-Rolph Trouillot, silences are constitutive of power and the production of history:

> Silences are inherent in history because any single event enters history with some of its constituting parts missing. Something is always left out while something else is recorded. There is no perfect closure of any event, however one chooses to define the boundaries of that event. Thus whatever becomes fact does so with its own inborn absences, specific to its production.

Id. at 49; *see also* Baron & Epstein, *supra* note 254, at 177 (noting how the privileging of one account "requires the suppression or subordination of other perspectives").

273. *See* Christopher Tomlins, *History in the American Juridical Field: Narrative, Justification, and Explanation*, 16 YALE L.J. & HUMAN. 323, 342–43 (2004) [hereinafter Tomlins, *History*]; *cf.* TROUILLOT, *supra* note 36, at xxiii (recognizing that history emerges from power relations).

274. See *supra* notes 114–117 and accompanying text for a more in-depth discussion of how any interpretation always reflects the interpreter's prejudices and interests. *See also* Mootz, *Hermeneutics*, *supra* note 99, at 120 ("[H]istorical inquiry necessarily is interpretive inasmuch as the historian always is guided by her interests and prejudices and can never simply describe the 'facts' of the past.").

the facts of any case, the Court's decisions cannot be determinate, neutral, or objective as purported under the rule of law.[275]

The Supreme Court's decisions are acts of power, constituted and obscured by the ideology of the rule of law, that silence counternarratives of what happened in any case. The history of legal interpretations emerges only through power relations because "the production of historical narratives involves the uneven contribution of competing groups and individuals who have unequal access to the means for such production."[276] Therefore, the actors and narrators who have more influence over the production of law's interpretive history provide the prevailing interpretations within legal discourse.[277]

The critical historicist orientation scrutinizes the Supreme Court's power over the production of legal interpretive history by focusing on the counternarratives underlying any Supreme Court decision.[278] It denies that precedents should be followed merely because the rule of law has deemed that the Court should be the final authority on questions of federal statutory and constitutional interpretation.[279] Instead, precedents must be situated and interpreted in light of their underlying assumptions as well as the sociohistorical context in which the Court decided them. The Court should only rely on precedents when it shows how its interpretation of these contexts and assumptions influenced its decision. Otherwise, the Supreme Court will continue to establish precedents that silence counternarratives simply because it has more power over the production of the law's interpretive history.[280]

B. Critical Historicism and the Fourth Amendment

The Supreme Court's criminal law jurisprudence starkly demonstrates why a critical historicist orientation toward law is necessary.[281] As a product of power

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275. *See* Peller, *supra* note 96, at 1154–55.

276. *See* TROUILLOT, *supra* note 36, at xxiii.

277. *See id.*

278. *See* Gordon, *Critical Historicism*, *supra* note 236, at 1028.

> One of the main uses of history in legal argument is to relegate the bad parts of history, the parts we no longer want or need—the past of slavery and legalized subordination of women, for example—to a thoroughly dead past that is over and done with. In response to this use of history, a critical historicism reveals traces of such pasts continuing pervasively into the present.

Id.

279. *See* Christopher L. Tomlins, *A Mirror Crack'd? The Rule of Law in American History*, 32 WM. & MARY L. REV. 353, 362–65 (1991) [hereinafter Tomlins, *Mirror Crack'd?*] (book review); *see also supra* notes 242–245 and accompanying text.

280. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 23–24 (1998) ("Given the extraordinary power of the Supreme Court's pronouncements, historians recognize that the Justices literally could create American history from the bench." (citing CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 25 (1969))).

281. *See* ALAN NORRIE, CRIME, REASON AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 10 (3d ed. 2014) ("Historical analysis shows that, far from being free-standing foundations for a rational criminal law, the central principles of the law are the site of struggle and contradiction. This can only work its way through the legal rules themselves."). For more arguments in favor of a critical historicist approach to criminal law, see generally Lacey, *supra* note 114; Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691

relations, the interpretive history of U.S. criminal law has been a site of political struggle,[282] centering on what, if anything, "justif[ies] the use of the state's coercive power against free and autonomous persons."[283]

This struggle is most salient in interpretations of the Fourth Amendment, whose fundamental purpose has always been to limit the discretion of officers in their exercise of the state's coercive power against private individuals[284]:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[285]

Fourth Amendment jurisprudence can provide concrete lessons for understanding the Supreme Court's power over the production of criminal law's interpretive history, especially considering the "touchstone" of the Fourth Amendment—"reasonableness"[286]—is indeterminate.[287] To an extent, the Supreme Court has acknowledged this indeterminacy.[288] But because the Court purports to make neutral and objective reasonableness determinations,[289] the indeterminacy embedded within the heart of the Fourth Amendment is mostly hidden.[290]

The Supreme Court, however, cannot evaluate reasonableness based on objective criteria, because such criteria do not exist.[291] In the Fourth Amendment context, reasonableness is a flexible, complex concept that subtly conveys the Supreme Court's

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(2003); Steven R. Morrison, *Toward a History of American Criminal Law Theory*, 32 U. LA. VERNE L. REV. 47 (2010).

282. *See* NORRIE, *supra* note 281, at 10 (recognizing that "[criminal legal] principles were established in the crucible of social and political conflict, and bear the stamp of history in the always-contradictory ways in which they are formulated").

283. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, at xix (2000).

284. *See* Carpenter v. United States, 138 S. Ct. 2206, 2213 (2018) (reaffirming that the fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials" (quoting Camara v. Mun. Court, 387 U.S. 523, 528 (1967))); *see also* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (explaining that the Founders adopted the Fourth Amendment "to curb the exercise of discretionary authority by officers").

285. U.S. CONST. amend. IV.

286. Birchfield v. North Dakota, 136 S. Ct. 2160, 2186 (2016).

287. *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 144–45 (1997). See also *supra* notes 183–187 and accompanying text for an explanation of why reasonableness is indeterminate.

288. *See, e.g.*, Scott v. Harris, 550 U.S. 372, 383 (2007) ("[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'"); Georgia v. Randolph, 547 U.S. 103, 125 (2006) (Breyer, J., concurring) (noting how the Fourth Amendment "recognizes that no single set of legal rules can capture the ever changing complexity of human life. It consequently uses the general terms 'unreasonable searches and seizures'").

289. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 464 (2011) ("Legal tests based on reasonableness are generally objective, and this Court has long taken the view that 'evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'" (quoting Horton v. California, 496 U.S. 128, 138 (1990))).

290. *See* Leonard, *supra* note 281, at 826 ("[T]he history of criminal law is a history of ambiguity and oscillation in the concerns that seem to drive judges.").

291. *See* KENNEDY, *supra* note 287, at 144–45.

political views on whether a particular method or instance of police conduct is reasonable.[292] The reasonableness standard can only be applied upon the Court's interpretation of the facts.[293] Accordingly, this means that any reasonableness determination is circular because how the Court constructs the facts will presume whether the conduct was reasonable.[294] Troublingly, then, is the Supreme Court's prevailing interpretation of reasonableness under the Fourth Amendment, which has marginalized persons of color and persons who are indigent.[295] Thus, whether a form of police conduct is "objectively reasonable" under the Fourth Amendment ultimately turns on whether the average wealthy, heterosexual, white man would have found the conduct reasonable.[296]

In challenging the prevailing colorblind interpretations under the Fourth Amendment, a critical historicist orientation recognizes that any interpretation implicates a multiplicity of narratives and values, some of which are privileged over others.[297] It takes as given the indeterminacy at the Fourth Amendment's "core"[298] and requires that the interpreter consider the sociohistorical context surrounding any texts, including Supreme Court precedents, related to the Fourth Amendment.[299] As Part IV.C shows, a critical historicist orientation exposes how the Supreme Court has constructed a political narrative under the Fourth Amendment that favors crime control and obscures the historical power imbalances between law enforcement and communities of color and the poor.

C. Examining the Fourth Amendment's Interpretive History

This Part examines certain Supreme Court precedents under the Fourth Amendment and shows how a critical historicist orientation operates in concrete settings. More importantly, however, this Part illustrates how Fourth Amendment jurisprudence is constructed through power relations and reinforced through the political interests reflected in the Supreme Court's interpretations. Specifically, Parts IV.C.1 and IV.C.2 review the Court's decisions in *Whren v. United States*[300] and *Florida v. Bostick*,[301] respectively, to support the claim that whiteness is embedded within the interpretive history of reasonableness. Part IV.C.3 demonstrates how the

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292. *Id.*

293. *See* Feldman, *Postmodern Jurisprudence*, *supra* note 28, at 177 (recognizing that interpretation and application are inseparable).

294. *See* Lee, *supra* note 33, at 1150 ("[W]hat the law considers reasonable is often just what those in positions of authority consider to be reasonable."); *cf.* Peller, *supra* note 96, at 1187–91 (making the same observation regarding how courts apply the concept of "consent" in sexual assault cases).

295. *See* Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of the Fourth Amendment*, 17 TEX. J. WOMEN & L. 153, 187 (2008).

296. *See, e.g.*, United States v. Leon, 468 U.S. 897, 922 (1984); *see also* Raigrodski, *supra* note 295, at 185 ("[T]raditional constructions of reasonableness represent particular life experiences of those socially enlisted with the power to define reality on their own terms.").

297. *See* Tomlins, *Mirror Crack'd?*, *supra* note 279, at 364.

298. *See* GORDON, *Critical Legal Histories*, *supra* note 37, at 271–72.

299. *See* Symposium, *supra* note 237, at 1021.

300. 517 U.S. 806 (1996).

301. 501 U.S. 429 (1991).

criminally accused are often denied relief, even when the police violate their Fourth Amendment rights, because of how the Supreme Court has treated its precedents on the exclusionary rule.

1. *Whren v. United States*

The claim that the Supreme Court's interpretations of reasonableness reinforce whiteness contradicts the Court's precedent in *Whren* that the Fourth Amendment is colorblind.[302] In this case, decided in 1996, undercover vice officers Efrain Soto and Homer Littlejohn were patrolling a "high drug area" in southeast Washington, D.C.[303] They were driving in an unmarked car when they noticed a Nissan Pathfinder with temporary license plates waiting at a stop sign at a three-way intersection.[304] The Pathfinder's occupants were two young Black men: James L. Brown (driver) and Michael Whren (front passenger seat).[305]

The officers observed Brown looking down towards Whren's lap, as the Pathfinder waited at the intersection for over twenty seconds.[306] The government argued, based on Officer Soto's testimony at a later suppression hearing, that the Pathfinder was "obstructing at least one car that was stopped behind it,"[307] even though Officer Littlejohn had testified that no cars were stopped behind it.[308] In any event, as the officers made a U-turn to follow the Pathfinder, Brown made a right turn without signaling and drove off at an "unreasonable" speed.[309]

At the suppression hearing, Officer Soto testified that he never intended to give Brown a ticket; he wanted "simply to warn him" and ask "why did he stay at the stop sign for so long length [sic] of a time."[310] Officer Soto acknowledged that police regulations generally prohibited such "warnings" and that as a vice officer, he could only "issue tickets . . . [for] reckless driving."[311] However, when the Pathfinder stopped at a red light with cars surrounding it to its front, back, and right, the officers pulled up and parked right next to the driver's side, facing and blocking oncoming traffic.[312] After exiting their vehicle and ordering Brown to put the car in park, the officers observed Whren holding either one or two large plastic bags containing what appeared

302. *See Whren*, 517 U.S. at 812–13; *see also* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1033 (2002) (arguing that the *Whren* Court established that claims of racial profiling cannot be brought under the Fourth Amendment).

303. Brief for the Petitioners at *3–4, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 75758.

304. *Id.* at *4.

305. Brief for the United States at *2, *Whren*, 517 U.S. 806 (No. 95-5841), 1996 WL 115816.

306. *Id.* at *2–3.

307. *Id.* at *3.

308. Brief for the Petitioners, *supra* note 303, at *5.

309. *Whren*, 517 U.S. at 808.

310. Brief for the Petitioners, *supra* note 303, at *5–6.

311. *Id.* at *6–7.

312. *Id.* at *7–8.

to be crack cocaine.[313] As a result, Brown and Whren were arrested, charged, and later convicted of trafficking crack cocaine, among other charges.[314]

Brown and Whren argued that the vice officers used the traffic violation as a pretext to investigate whether they were engaging in any drug activity.[315] They proposed that the test for minor traffic violations should be whether a reasonable officer would have conducted the stop with the intent of enforcing the traffic violation at issue.[316] Brown and Whren provided the Court with data showing how persons of color are subject to traffic stops at disproportionate rates and that police rarely issue traffic citations during such stops.[317] They provided statements from officers who had previously admitted that minor traffic violations serve as convenient pretexts for stopping suspicious vehicles and occupants.[318] Brown and Whren ultimately argued the stop in their case was unreasonable because a reasonable plainclothes vice officer in an unmarked car would not have violated department regulations to enforce a minor traffic violation.[319]

The Supreme Court, however, rejected Brown and Whren's argument and held that a police officer's ulterior motives, even racial profiling, for enforcing the law cannot "invalidate[] objectively justifiable behavior under the Fourth Amendment."[320] Notably, although the Court claimed that the officers' conduct was reasonable, it did not apply a reasonableness standard.[321] Rather, it suggested that "the traditional common-law rule that probable cause justifies a search and seizure" determined its decision.[322] Although the Court acknowledged that any Fourth Amendment case "turns upon a 'reasonableness' determination," it concluded that a police officer's actions are per se reasonable "where the search or seizure is based upon probable cause."[323] As a result, the Court upheld Brown and Whren's convictions because the vice officers had

313. *Compare id.* at *8 (noting that although both officers had the same line of sight, Officer Soto testified that he saw Brown holding two bags, and Officer Littlejohn testified that he saw only one), *with Whren*, 517 U.S. at 808–09 (explaining that the officers saw Brown holding two bags of crack cocaine).

314. *Whren*, 517 U.S. at 809.

315. *Id.*

316. Brief for the Petitioners, *supra* note 303, at *30–37.

317. *Id.* at *24–26.

318. *Id.* at *21.

> "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made."
>
> "You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway."
>
> "In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search."

Id. (quoting LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 131 (1967)).

319. *Id.* at *37–49.

320. *Whren*, 517 U.S. at 812–13.

321. *See id.* at 819.

322. *Id.*; *see also* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt." (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949))).

323. *Whren*, 517 U.S. at 817.

probable cause to conduct the traffic stop once they observed Brown make an illegal turn.[324]

For all practical purposes, the Supreme Court established the precedent that selectively enforcing the law based on racial prejudice is not "unreasonable" under the Fourth Amendment.[325] This decision derived from "precedents" that *literally* would have remained footnotes in the law's interpretive history had the *Whren* Court not considered them precedential.[326] The Court explained that its decisions in *United States v. Robinson*[327] and *United States v. Villamonte-Marquez*[328] had established that an officer's ulterior motives cannot invalidate police conduct that is based on probable cause.[329] However, these so-called precedents were each contained in the footnotes of those opinions.[330] As a result, *Whren* has been criticized for its intellectual dishonesty, as well as its hypocrisy, because the Court relied on these same footnotes to criticize Brown and Whren for relying on a footnote found in a separate Court opinion.[331] Thus, how the Supreme Court treated precedents in *Whren* illustrates how—as the final authority on the law's interpretive history—it has the power to construct specific narratives for legal propositions that otherwise might never have been considered to have precedential force.

In deciding that claims of selective law enforcement based on racial profiling are not cognizable under the Fourth Amendment,[332] the *Whren* Court "dismissed the

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324. *See id.* at 819.

325. *See id.* at 812–13. *But see* United States v. Botero-Ospina, 71 F.3d 783, 790 (10th Cir. 1995) (en banc) (Seymour, J., dissenting) (arguing that the standard later adopted in *Whren* "frees a police officer to target members of minority communities for the selective enforcement of otherwise unenforced statutes").

326. *See Whren*, 517 U.S. at 812–13.

327. 414 U.S. 218 (1973).

328. 462 U.S. 579 (1983).

329. *Whren*, 517 U.S. at 812–13.

330. *See id.* (claiming that the *Robinson* Court "held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search'" (quoting *Robinson*, 414 U.S. at 221 n.1)); *id.* at 812 (claiming that the *Villamonte-Marquez* Court "held that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid 'because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana'" (quoting *Villamonte-Marquez*, 462 U.S. at 584 n.3)).

331. *See Whren*, 517 U.S. at 812; *see also* David O. Markus, Whren v. United States: *A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 100 (1998) ("[T]his statement comes in a footnote, and even Justice Scalia must have realized that *Robinson* did not address the problem of pretext."). The petitioners had relied on a footnote from the Court's opinion in *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam), but "[w]hy would it be 'anomalous, to say the least, to treat a statement in a footnote in the per curiam Bannister opinion,' as an indication of the law, but not a footnote from the *Villamonte-Marquez* decision?" Markus, *supra*, at 99 n.92 (citation omitted) (quoting *Whren*, 517 U.S. at 812).

332. *Whren*, 517 U.S. at 813–14. Although the Court stated that remedies for such claims may be brought under the Fourteenth Amendment's Equal Protection Clause, *id.* at 813, its interpretation of the Fourteenth Amendment has "authorized certain forms of state action that perpetuate[] racial stratification *as consistent with* constitutional guarantees of equal protection." Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997) (emphasis added). Thus, the Court has, despite its denials, constitutionalized race-based policing. *See* Steven R. Morrison, *Will to Power, Will to Reality, and Racial Profiling: How the White Male Dominant Power*

salience of race in contemporary times and established greater latitude for police powers that have been used historically and contemporarily to oppress communities of color."[333] It failed to recognize any narrative recounting the history of race-based policing including that the police have used aggressive tactics, like pretext stops, against communities of color for decades.[334] Instead, the Court created a specific colorblind narrative about what happened between the vice officers, Brown, and Whren: the officers observed Brown commit a traffic violation, so their decision to stop him and Whren was "reasonable" even if their motive was racial profiling.[335] As a result, the Court silenced a counternarrative in which the vice officers *did* racially profile them:

> The claim would be that, but for Whren's race (he is black), the officers' suspicions would not have been aroused, and they would not have stopped the vehicle. Put another way, if Whren were white, the police likely would not have noticed the Pathfinder and Whren would have escaped the encounter altogether.[336]

Had the Court adopted this narrative, the law's interpretive history would reflect that the vice officers used the traffic stop as a pretext for race-based policing.[337] Instead, the *Whren* Court's colorblind narrative established the precedent that the police may selectively enforce the law based on race as long as they have probable cause to do so.[338]

The *Whren* decision is not an aberration.[339] As the *Whren* Court recognized, "[W]e [have] never held, outside the context of inventory search or administrative

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Structure Creates Itself as Law Abiding Citizen Through the Creation of Black as Criminal, 2 NW. J.L. & SOC. POL'Y 63, 67 (2007).

333. KAREN S. GLOVER, RACIAL PROFILING: RESEARCH, RACISM, AND RESISTANCE 25 (2009). Some lower courts, however, have recognized that race relations are inextricable from the nature of law enforcement:

> [W]e cannot help but be aware that the burden of aggressive and intrusive police action falls disproportionately on African-American, and sometimes Latino, males. . . . [A]s a practical matter neither society nor our enforcement of the laws is yet color-blind. Cases, newspaper reports, books, and scholarly writings all make clear that the experience of being stopped by the police is a much more common one for black men than it is for white men.

E.g., Washington v. Lambert, 98 F.3d 1181, 1187 (9th Cir. 1996).

334. *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 326–27 (2016) (noting that federal law enforcement used pretext traffic stops at the outset of the war on drugs and that the Drug Enforcement Agency launched a program in the mid-1980s to train officers on how to effectively conduct pretext stops); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 130 (rev. ed. 2012) ("The dirty little secret of policing is that the Supreme Court has actually granted the police license to discriminate."); Robert Staples, *White Power, Black Crime, and Racial Politics*, 41 BLACK SCHOLAR 31, 32 (2011) ("Racial profiling, then, has endured as a tool of white power, systematically activated and codified into law, and not merely a collection of individual offenses."). For in-depth discussions of the history of race-based policing and mass incarceration, see generally HINTON, *supra*.

335. *See Whren*, 517 U.S. at 819.

336. Carbado, *supra* note 302, at 1032.

337. *See id.* at 1032–33.

338. *See Whren*, 517 U.S. at 812–13, 819; *see also* Carbado, *supra* note 302, at 1032–33.

339. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983) (dismissing, for lack of standing, an Black male's civil suit alleging that police, without justification, put him in a chokehold following

inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted to the contrary."[340] But given the historical tension between communities of color and the police, the dynamics involved during an encounter between the police and a Black male are necessarily different from those between police and the so-called reasonable person.[341]

2. *Florida v. Bostick*

Consider the Supreme Court's 1991 decision in *Bostick*, a case involving a twenty-eight-year-old man named Terrance Bostick who was traveling on a Greyhound bus from Miami to Atlanta.[342] While the bus was at a scheduled stop in Fort Lauderdale, Florida, police officers boarded and began questioning passengers specifically to determine whether any of them possessed drugs.[343] After Bostick presented his identification and ticket to the police upon their request, they asked if they could search his bags[344] even though they lacked a sufficient basis for suspecting that he had committed a crime.[345] Bostick complied and the police arrested him for drug trafficking after they found cocaine in his bag.[346]

Without acknowledging the races of the officers or Bostick, the Supreme Court reversed the state court's decision to exclude the cocaine from evidence.[347] It held that whether a police encounter amounts to a "seizure" depends on whether, under the totality of the circumstances, the police officers' conduct "would have communicated to a reasonable person that the person was not free to decline the officers' requests or

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a traffic stop); United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (finding that a border patrol agent unreasonably stopped petitioner of Mexican descent, but holding that even though "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, . . . it does not justify stopping all Mexican-Americans to ask if they are aliens"); Terry v. Ohio, 392 U.S. 1, 14–15 (1968) ("The wholesale harassment by certain elements of the police community, of which minority groups, particular Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial." (footnote omitted)).

340. *Whren*, 517 U.S. at 812.

341. Tracey Maclin, *"Black and Blue Encounters" - Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250 (1991).

342. Florida v. Bostick, 501 U.S. 429, 431–32 (1991); *see also* ALEXANDER, *supra* note 334, at 64.

343. *Bostick*, 501 U.S. at 431–32.

344. *Id.*

345. *See id.* at 440 (Marshall, J., dissenting) (describing the police's conduct as "suspicionless").

346. *Id.* at 431–32 (majority opinion).

347. *Id.* at 439–40. In stark contrast with Justice O'Connor's opinion, the Florida Supreme Court condemned the police officers' actions against Bostick:

> "[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in Government. . . . This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification, tickets, ask to search luggage—all in the name of 'voluntary cooperation' with law enforcement . . . ."

Bostick v. State, 554 So. 2d 1153, 1158 (Fla. 1989) (alteration in original) (quoting State v. Kerwick, 512 So. 2d 347, 348–49 (Fla. Dist. Ct. App. 1987)), *rev'd*, 501 U.S. 429 (1991).

otherwise terminate the encounter."[348] The Court remanded the case to determine whether a seizure occurred,[349] and the Florida Supreme Court upheld Bostick's conviction.[350]

The *Bostick* opinion reflected the Court's political position that reasonableness determinations under the Fourth Amendment should be colorblind.[351] In declining to recognize that the officers were white and that Bostick was Black, the Court expressed its view that race should not matter[352] and that individuals should be treated as *individuals* without regard to their race.[353] Thus, the Court expressed that courts should be colorblind when determining whether a reasonable person would have felt "free to decline" police requests.[354]

The legal concept of colorblindness, however, is nothing more than a proxy for whiteness.[355] Any claim that reasonableness must be colorblind implies that reasonableness should be viewed through the lens of whiteness.[356] Such claims discourage critical reflection[357] and obscure how police encounters with persons of color are situated within a history of race relations and police militarization.[358]

The *Bostick* Court's colorblind narrative silenced a counternarrative in which a reasonable person in Bostick's situation would not have felt free to decline the police officers' request.[359] Because Bostick was Black, the dynamics surrounding his encounter with the police were different from those that would surround an encounter

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348. *Bostick*, 501 U.S. at 439.

349. *Id.* at 439–40.

350. Bostick v. State, 593 So. 2d 494, 495 (Fla. 1992) (per curiam).

351. Carbado, *supra* note 302, at 977–78.

352. *Id.* at 977–80.

353. *Id.* at 980–82; *see also* Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. CONST. L. 781, 785 (2015) (discussing "colorblind individualism," the view that rights belong to individuals, not the racial groups to which an individual may belong).

354. *See Bostick*, 501 U.S. at 428–29; Raigrodski, *supra* note 295, at 186.

355. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren,* Brown*, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 168 (1998); Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 DENV. U. L. REV. 329, 368–69 (2006).

356. *See* Raigrodski, *supra* note 295, at 186.

357. *See* Owen J. Dwyer & John Paul Jones III, *White Socio-Spatial Epistemology*, 1 SOC. & CULTURAL GEOGRAPHY 209, 210 (2000).

358. *See Bostick*, 501 U.S. at 440 (Marshall, J., dissenting) ("At issue in this case is a 'new and increasingly common tactic in the war on drugs': the suspicionless police sweep of buses in interstate or intrastate travel."). See generally HINTON, *supra* note 334, for an in-depth discussion of how the seeds of mass incarcerations were sown in the social welfare programs developed in the 1960s at the apex of the civil rights era.

359. *See In re* J.M., 619 A.2d 497, 512–13 (D.C. 1992) (en banc) (Mack, J., dissenting). In a case involving facts similar to those in *Bostick*, Judge Julia Cooper Mack stated in her dissent:

> Whether the courts speak of it or not, race is a factor that has for many years engendered distrust between black males and law enforcement personnel. . . . I respectfully venture to suggest that no reasonable innocent black male (with any knowledge of American history) would feel free to ignore or walk away from a drug interdicting team.

Id.

between the police and the so-called reasonable person.[360] Unlike the average white man, the average Black man would not feel free to leave in a situation where the police conduct a suspicionless bus sweep.[361] By refusing to consider Bostick's race and the police officers' motives, the Court's colorblind narrative sustained the illusion that reasonableness determinations are objective.[362] In practice, the Supreme Court perpetuates whiteness "as the norm, as the embodiment of neutrality and objectivity, and as the essence of reasonableness" whenever it applies this "colorblind" reasonableness standard.[363]

When properly contextualized under "the totality of the circumstances,"[364] a critical historicist orientation rejects the assumption that any reasonableness determination could be neutral and objective (let alone colorblind).[365] Because reasonableness is indeterminate, courts should not rely on any particular set of criteria for determining what is reasonable. Instead, courts must consider the surrounding circumstances and situate any relevant actors by recognizing the intersectionality of their identities.[366] Courts must consider how social factors, such as race, class, gender, sexuality, and able-bodiedness, affect how individuals perceive their encounters with police, and vice versa.[367] Courts must acknowledge that "race is a factor that has for many years engendered distrust between Black males and law enforcement personnel."[368] Had the Supreme Court adopted a critical historicist orientation, it would have seen that Bostick did not feel free to leave and that, as a result, the police officers' conduct was unreasonable.

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360. *See id.*

361. *See id.*

362. *See supra* notes 286–296 and accompanying text.

363. Raigrodski, *supra* note 295, at 186; *see also* ALEXANDER, *supra* note 334, at 130; *cf.* State v. Spears, No. 2017-001933, 2020 WL 701812, at *16 (S.C. Feb. 12, 2020) (Beatty, J., dissenting) ("[T]he regrettable and unsettling conclusion is that the question of what is 'reasonable' [under the Fourth Amendment] is viewed solely from the perspective of Americans who are White.").

364. Florida v. Bostick, 501 U.S. 429, 437 (1991).

365. *See* Tomlins, *Mirror Crack'd?*, *supra* note 279, at 363–65 (recognizing that, when properly contextualized, a critical use of history "controverts rule-of-law ideology's imputation of an objectively determinate content to law" (citing GORDON, *Critical Legal Histories*, *supra* note 37, at 271–72)).

366. *See* Gary Peller, *History, Identity, and Alienation*, 43 CONN. L. REV. 1479, 1481–82, 1495–96 (2011) (arguing that traditional methods of legal analysis fail to consider the intersectional backgrounds of actors).

367. *See, e.g.*, MALCOLM D. HOLMES & BRAD W. SMITH, RACE AND POLICE BRUTALITY: ROOTS OF AN URBAN DILEMMA 116 (2008) ("Many minority citizens stereotype the police as authoritarian thugs."); KENNETH MEEKS, DRIVING WHILE BLACK: HIGHWAYS, SHOPPING MALLS, TAXICABS, SIDEWALKS: HOW TO FIGHT BACK IF YOU ARE THE VICTIM OF RACIAL PROFILING 9 (2000) ("[The police] use a profile known as CARD, an acronym for class, age, race, and dress. Any lower-class, young black person wearing baggy jeans, a T-shirt, and a backward-facing baseball cap can expect to be stopped by a police officer or followed around upon entering an upscale department store in an upscale neighborhood.").

368. *In re* J.M., 619 A.2d 497, 512 (D.C. 1992) (en banc) (Mack, J., dissenting).

3. Suppressing the Exclusionary Rule

The Supreme Court's most egregious exercises of power under the Fourth Amendment, arguably, are embodied in its exclusionary rule decisions.[369] In *Mapp v. Ohio*,[370] the Court held that the exclusionary rule, which precludes the admission of evidence the police illegally seize, applies in both federal and state criminal trials.[371] It emphasized that considerations of due process were at the core of the exclusionary rule.[372] By incorporating this rule through the Fourteenth Amendment's Due Process Clause, the *Mapp* Court expressed its view that the rights of the accused should be protected regardless of whether such protection impedes crime control efforts.[373] It asserted that holding otherwise would deny the accused of their right to be free from unreasonable searches and seizures.[374]

In effect, the *Mapp* Court constructed a determinate exclusionary rule: whenever the police obtain evidence through an unreasonable search or seizure, that evidence is inadmissible in a criminal trial against the individual whose person or property the police unreasonably searched or seized.[375] The Court's reasoning shows, however, that this interpretation was political in that it reflected the Court's view that the criminally accused should be afforded broad constitutional protections.[376]

The *Mapp* Court justified its interpretation of the exclusionary rule on two grounds: (1) the need "to deter" police misconduct,[377] and (2) the need to preserve the judiciary's integrity.[378] Regarding deterrence, the Court explained that the exclusionary rule is necessary "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[379] If the exclusionary rule did not exist, the police would be incentivized to conduct unreasonable searches and seizures because any evidence they obtained would be

369. *Cf.* Stringer v. State, 491 So. 2d 837, 849–50 (Miss. 1986) (Robertson, J., concurring) ("[T]he adoption of the new federal modified exclusionary rule more reflects a shift in judicial/political ideology than a judicial response to demonstrable and felt societal needs.").

370. 367 U.S. 643 (1961).

371. *Mapp*, 367 U.S. at 657–58. Previously, the Court held that the exclusionary rule only applied in federal criminal trials. Wolf v. Colorado, 338 U.S. 25, 33 (1949), *overruled by Mapp*, 367 U.S. 643 (1961).

372. *See Mapp*, 367 U.S. at 660; *see also* Nadia B. Soree, *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753, 767 (2013) ("[T]he *Mapp* Court . . . adhered to the due process model of exclusion").

373. *See Mapp*, 367 U.S. at 657 (claiming that the "exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments"); Bradley C. Canon, *Ideology and Reality in the Debate over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 578 (1982) (recognizing that the exclusionary rule values the rule of law more than crime control).

374. *Mapp*, 367 U.S. at 657.

375. *Id.* at 655; *see also* Frank Cross et al., *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 32 ("*Mapp* applied and extended a strict rule of exclusion and rejected any balancing test or any other form of standard.").

376. *See* William J. Stuntz, *The American Exclusionary Rule and Defendants' Changing Rights*, 1989 CRIM. L. REV. 117, 118.

377. *Mapp*, 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

378. *Id.* at 659.

379. *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217).

admissible at trial.[380] The Court concluded that the exclusionary rule is necessary to protect the Fourth Amendment right to be free from unreasonable searches and seizures.[381]

The *Mapp* Court also explained that the need to preserve the integrity of the judiciary justifies the exclusionary rule.[382] If any evidence obtained through an unreasonable search or seizure is admissible at trial, the government would have failed to enforce its laws.[383] Failure to apply the exclusionary rule under such circumstances would not only undermine the legitimacy of the courts but also the rule of law itself.[384] Justice Potter Stewart, who joined the majority in *Mapp*, later explained that "although the Constitution does not explicitly provide for exclusion, the need to enforce the Constitution's limits on government—to preserve the rule of law—requires an exclusionary rule."[385] If the government was allowed to convict defendants using evidence obtained in violation of their Fourth Amendment rights, it would commit the very tyrannous acts that the rule of law is supposed to prevent.[386] Based on the *Mapp* Court's interpretation, then, the rule of law requires that such evidence be excluded.[387] The *Mapp* decision thus reflects the Court's political commitment to safeguarding the rights of the accused even when those safeguards undermine the police's efforts to apprehend and punish criminals.[388]

But, as the Supreme Court's exclusionary rule jurisprudence has developed over time, the Court has distanced itself from its political position in *Mapp* through reinterpretations of precedent, which the doctrine of stare decisis has obscured.[389] In *United States v. Calandra*,[390] the Court retained the deterrence rationale for exclusion yet silenced the narrative in which the need to preserve judicial integrity requires the exclusion of illegally obtained evidence.[391] It dismissed the idea that the rule of law requires a determinate exclusionary rule, explaining that the rule is merely a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its

380. *See* Terry v. Ohio, 392 U.S. 1, 13 (1968).

381. *Mapp*, 367 U.S. at 657.

382. *Id.* at 659 (quoting *Elkins*, 364 U.S. at 222).

383. *Id.*

384. *See id.*; Scott E. Sundby, *Everyman's Exclusionary Rule: The Exclusionary Rule and the Rule of Law (or Why Conservatives Should Embrace the Exclusionary Rule)*, 10 OHIO ST. J. CRIM. L. 393, 405 (2013) ("[A]lthough the Court did not discuss judicial integrity expressly in terms of the 'rule of law,' the underpinnings of the rule of law that make it so crucial to our constitutional system run throughout the rationale.").

385. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1383–84 (1983) (footnote omitted).

386. Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH L. REV. 391, 395–98 (2010).

387. *See Mapp*, 367 U.S. at 659; *see also* Hock Lai Ho, *The Criminal Trial, the Rule of Law and the Exclusion of Unlawfully Obtained Evidence*, 10 CRIM. L. & PHIL. 109, 129–30 (2016).

388. *See* Stuntz, *supra* note 376, at 118.

389. *See* Sundby & Ricca, *supra* note 386, at 398–99.

390. 414 U.S. 338 (1974).

391. *See Calandra*, 414 U.S. at 347; *id.* at 360 (Brennan, J., dissenting) (arguing that the majority's holding "discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct").

deterrent effect, rather than a personal constitutional right of the party aggrieved."[392] Over the next decade, the Supreme Court relied on *Calandra* as a precedent for advancing the narrative that the exclusionary rule's sole purpose is to deter police misconduct.[393]

Eventually, in *United States v. Leon*,[394] the Supreme Court relied on *Calandra* and its progeny to justify creating a "good-faith exception" to the exclusionary rule.[395] Originally, this exception applied only to "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant."[396] Since then, however, the Court has expanded the good-faith exception,[397] such that some scholars believe the exclusionary rule may become irrelevant in the future.[398] In *Herring v. United States*,[399] the Court held that the exclusionary rule does not cover evidence obtained through "isolated negligence attenuated from" an unlawful search or seizure.[400] However, in *Davis v. United States*,[401] the Court omitted the word "attenuated" from its opinion.[402] As a result, there is uncertainty about whether the *Davis* holding should be interpreted as consistent with *Herring* or as espousing a much broader limitation on the exclusionary rule, under which exclusion would be "unwarranted in all cases where police reasonably believed their conduct complied with the law."[403]

A few Supreme Court Justices have also expressed concern over the fate of the exclusionary rule.[404] Justice Breyer, with whom Justice Ginsburg joined, dissented in *Davis*:

> [I]f the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply

392. *Id.* at 348 (majority opinion). *But see* Mapp v. Ohio, 367 U.S. 643, 660 (1961).

393. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 223 (1983) ("The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."); United States v. Payner, 447 U.S. 727, 734 (1980) (finding that "the exclusionary rule 'has been restricted to those areas where its remedial objectives are most efficaciously served'" (quoting *Calandra*, 414 U.S. at 348)); United States v. Ceccolini, 435 U.S. 268, 275 (1978); Stone v. Powell, 428 U.S. 465, 486–87 (1976) (invoking *Calandra* to explain that the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons").

394. 468 U.S. 897 (1984).

395. *Leon*, 468 U.S. at 909–13.

396. *Id.* at 922.

397. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that the exclusionary rule does not apply to evidence obtained in violation of the knock-and-announce rule); Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (expanding the good-faith exception to cover evidence obtained in objectively reasonable reliance on a court employee's clerical error); Illinois v. Krull, 480 U.S. 340, 355 (1987) (extending the good-faith exception to cover evidence obtained in objectively reasonable reliance on a statute later deemed unconstitutional).

398. *See* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1190, 1206–07 (2012).

399. 555 U.S. 135 (2009).

400. *Herring*, 555 U.S. at 137, 147–48.

401. 564 U.S. 229 (2011).

402. *Davis*, 564 U.S. at 238; Maclin & Rader, *supra* note 398, at 1206–07.

403. Maclin & Rader, supra note 398, at 1190, 1206–07; *see also Davis*, 564 U.S. at 238.

404. *See Davis*, 564 U.S. at 257 (Breyer, J., dissenting).

> the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule.[405]

Through the good-faith exception, the Supreme Court has retained and appropriated the deterrence rationale from *Mapp* to frame the issue of exclusion in terms of deterrence and police culpability.[406] As the Court developed and expanded the good-faith exception, it relied on precedent to advance a particular political vision.[407] Now, the exclusionary rule is no longer considered necessary for the preservation of the rule of law.[408] In effect, the interpretive history of the exclusionary rule shows that a political interest in crime control has subverted the rule of law under the Fourth Amendment.[409]

The prevailing exclusionary rule narrative suggests that apprehending and convicting criminal defendants is more important than protecting the right of the accused to be free from unreasonable searches and seizures.[410] This narrative "portrays officers as necessarily law-abiding and chiefly motivated by law enforcement interests," despite recurring instances of police brutality and targeting persons of color—most often, young Black men.[411] As a result, it promotes a "pro-police bias" and a negative public opinion toward Black men, creating a nearly insuperable obstacle for them in suppression hearings and cases involving police misconduct.[412] The prevailing narrative legitimizes the curtailment of Fourth Amendment protections for Black men on the basis that exclusion carries "substantial social costs"[413]—namely,

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405. *Id.* at 258.

406. Herring v. United States, 555 U.S. 135, 144 (2009).

407. *See* Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1521–24 (2018); *cf.* Canon, *supra* note 373, at 578–59 (arguing that conservatives and liberals are "ideologically committed" to their competing positions regarding the exclusionary rule).

408. As a result, persons of color, particularly young Black men, are disproportionately prejudiced:

> "So, you are saying that the rule of law in all its majesty never holds for us, but always for our adversaries or for empowered groups?"
>
> "In general, yes," Rodrigo said. . . . "The police can search or arrest you without a warrant if they can show good faith, which sometimes takes the form of simply pointing out that you were a black man walking or standing in the wrong neighborhood."

Richard Delgado, *Rodrigo's Ninth Chronical: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 393 (1994) (footnotes omitted) (citing United States v. Leon, 468 U.S. 897, 922 (1984)); *see infra* notes 411–420 and accompanying text.

409. *See Davis*, 564 U.S. at 257 (Breyer, J., dissenting); *Herring*, 555 U.S. at 142.

410. *See* George M. Dery III, *"This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in* Davis v. United States *Makes Evidence Suppression Impossible To Swallow*, 23 GEO. MASON U. C.R. L.J. 1, 22 (2012).

411. Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumption of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 157 (1994); Megan Quattlebaum, *Let's Get Real: Behavior Realism, Implicit Bias, and the Reasonable Police Officer*, 14 STAN. J. C.R. & C.L. 1, 4 (2018). For a survey of studies revealing racial biases in policing practices and the criminal-justice system, see generally Radley Balko, Opinion, *There's Overwhelming Evidence That the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018, 9:00 AM), http://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/ [https://perma.cc/E7SA-TEQG].

412. Magee, *supra* note 411, at 213.

413. *Leon*, 468 U.S. at 907.

"the risk of releasing dangerous criminals into society" and the need to efficiently apprehend and punish criminals.[414]

This false narrative reflects the Supreme Court's concern for "law and order,"[415] which is a well-known "dog whistle" that carries racist connotations.[416] Ever since it emerged as a rhetorical device in response to the race rebellions of the 1960s civil rights movement,[417] the phrase "law and order" has been used to justify the expansion of aggressive policing practices in urban communities, particularly those of color.[418] As this rhetorical device has become more common within U.S. political discourse over the last several decades, incarceration rates have reached unprecedented levels and show a substantial disparity between the incarceration rates of Black people and those of white people.[419] Throughout this period, overenforcement in Black urban communities has produced the racist image of "black criminality," in which Black people are perceived as more likely to commit crimes than white people.[420]

Accordingly, whenever the Supreme Court justifies its exclusionary rule decisions by claiming that "releasing dangerous criminals into society" is a "substantial social cost,"[421] it reinforces the crime-control narrative and the racist image of Black criminality.[422] The Court suppresses counternarratives, including those alleging that an implicit bias against persons of color pervades law enforcement culture[423] and that officers might engage in negligent conduct motivated by money or power.[424] In

414. Hudson v. Michigan, 547 U.S. 586, 595 (2006).

415. *See* Candance McCoy, *Congress Is (Not) Repealing the Exclusionary Rule! Symbolic Politics and Criminal Justice (Non)Reform*, 21 CRIM. JUST. REV. 181, 181 (1996); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 876–77 (1982) (noting that exclusionary rule critics "generally contend that the rule . . . promotes disrespect for law and order by releasing criminals on technicalities").

416. *See* John P. Gross, *Dangerous Criminals, the Search for Truth and Effective Law Enforcement: How the Supreme Court Overestimates the Social Costs of the Exclusionary Rule*, 51 SANTA CLARA L. REV. 545, 546 (2011) ("[T]he Court's erroneous assumption that every person charged with a crime is a 'dangerous criminal' inevitably leads to the conclusion that the use of the exclusionary rule puts ordinary citizens in danger."). For further reading on dog whistles and their impact on law and politics, see generally IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS (2013).

417. Lonnie T. Brown, Jr., *Different Lyrics, Same Song: Watts, Ferguson, and the Stagnating Effect of the Politics of Law and Order*, 52 HARV. C.R.-C.L. L. REV. 305, 334–43 (2017).

418. *Id.* at 353 ("[W]hen African-Americans behave in a manner that can be characterized as unlawful, the habitual response has been to emphasize and reinforce the concept of law and order.").

419. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), http://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/39DV-TRY8]; *Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/criminal-justice-fact-sheet/ [https://perma.cc/HNF2-KJEZ] (last visited Apr. 1, 2020) ("African Americans are incarcerated at more than 5 times the rate of whites.").

420. *See* Morrison, *supra* note 332, at 82.

421. Hudson v. Michigan, 547 U.S. 586, 594–95 (2006); United States v. Leon, 468 U.S. 897, 907 (1984).

422. *See supra* notes 409–420 and accompanying text.

423. *See* Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, The Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 573–74, 574 n.21 (2017).

424. Cynthia Barmore, *Authoritarian Pretext and the Fourth Amendment*, 51 HARV. C.R.-C.L. L. REV. 273, 276–82 (2016).

silencing these narratives, the Court has constructed an exclusionary rule that justifies aggressive policing practices that disproportionately harm communities of color.[425]

Another factor complicating exclusionary rule jurisprudence is that the good-faith exception turns on an "objectively reasonable" standard.[426] Hence, the Court's political interest in crime control is further obscured because the police officers' motives are irrelevant,[427] and the Court has the power to determine what reasonableness means.[428] In sum, the Supreme Court, through its interpretations of precedent, has transformed the exclusionary rule narrative from a story about protecting the rights of the accused from the tyranny of the government to a story about how the government must reestablish law and order—a familiar story throughout the era of mass incarceration.[429]

V. CONCLUSION

The Supreme Court's Fourth Amendment jurisprudence reflects a particular political vision regarding police encounters—a vision in which both courts and law enforcement are colorblind and individual rights should not prevent the police from apprehending and punishing so-called criminals. The Court reinforces this vision through interpretations of reasonableness, which reflect how power operates within language,[430] and by reinterpreting precedents.[431] The Court thus silences counternarratives and other interpretive possibilities within Fourth Amendment jurisprudence.

The ideology of the rule of law obscures the political nature of the Supreme Court's Fourth Amendment decisions, as well as how power operates within the language of its opinions. In maintaining that the law is determinate, neutral, and objective, the rule of law depoliticizes decisions that reflect the politics of crime control.[432] The Court is not bound by determinate, neutral, and objective doctrines when it decides cases under the Fourth Amendment. Instead, it is bound only by its prejudices and interests.[433] In sum, the Supreme Court's Fourth Amendment decisions illustrate how the rule of law functions ideologically to obscure how judicial decisions consist of interpretive choices that reinforce the unequal distribution of power in society.[434]

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425. *See* HINTON, *supra* note 334, at 325–26.

426. *See* TROUILLOT, *supra* note 36, at 47 ("Historical power is not a direct reflection of a past occurrence, or a simple sum of past inequalities measured from an actor's perspective or from the standpoint of any 'objective' standard, even at the first moment.").

427. *See* Whren v. United States, 517 U.S. 806, 812–13 (1996).

428. *See supra* notes 286–296 and accompanying text.

429. Danielle Hayes, Note, *He Say, She Say:* Utah v. Strieff *and the Role of Narrative in Judicial Decisions*, 61 HOW. L.J. 611, 614 (2018); *see also* Sundby & Ricca, *supra* note 386, at 395–99 (describing how "the impending tyranny narrative" has been reduced to "nothing more than 'expansive dicta'" (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006))).

430. *See* Feldman, *Metamodernism*, *supra* note 25, at 300; Lee, *supra* note 33, at 1150.

431. *See supra* Part III.B.3.

432. *See supra* Part IV.B.

433. *See supra* notes 114–117 and accompanying text.

434. *See* JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION 205 (1999) (arguing that function of criminal laws and their enforcement is "to

Courts and scholars should recognize the inherent limitations of legal interpretation and their political implications.[435] They should acknowledge the paradox presented by the indeterminacy of language: the law is indeterminate yet situated within an inescapable sociohistorical context.[436] Whichever interpretations prevail within legal discourse should be viewed through a critical historicist orientation—not as determinate, neutral, or objective but as constitutive of a history of legal interpretations that have been constructed through power relations.

Recognizing that the law is always situated within a sociohistorical context in which power operates reveals not only how the law is indeterminate[437] but also how the pursuit of an unattainable ideal has historically defined legal discourse.[438] Courts have preserved the rule of law not by faithfully adhering to an enduring historical tradition but by denying that the rule of law is historically contingent.[439] This denial does nothing more than reinforce the unequal distribution of power and obscure the struggle over the production of meaning within legal discourse.[440] When situated within a history of legal interpretations, however, the rule of law collapses upon itself, revealing that this present moment within legal discourse is amenable to change.[441]

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protect and maintain the status, privileges, and power of dominants"); *see also* Tomlins, *History*, *supra* note 273, at 395 ("History within the juridical field is history within a field of power—power to set 'the key terms of legitimacy.'").

435. *See* Feldman, *SCOTUS*, *supra* note 27, at 79–80; Peller, *supra* note 96, at 1180.

436. *See* Winter, *Indeterminacy*, *supra* note 23, at 1454.

437. *See* Morton J. Horwitz, *The Historical Contingency of the Role of History*, 90 YALE L.J. 1057, 1057 (1981) [hereinafter Horwitz, *Historical Contingency*] (arguing historical conceptions of law have subversive potential, the capacity to show that "the rationalizing principles of the mainstream scholars are historically contingent").

438. *See* Singer, *supra* note 12, at 60–62; *see also* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 877 (2003) ("If the application of a rule requires deliberation about its meaning, then the rule cannot be a guide to action in the way that a commitment to the rule of law appears to require . . . .").

439. *See* Horwitz, *Historical Contingency*, *supra* note 437, at 1057.

440. *See* Thomas, *supra* note 40, at 2609.

441. *See* ROBERT W. GORDON, *The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument*, *in* TAMING THE PAST *supra* note 37, at 282, 303; Gordon, *Critical Legal Theories*, *supra* note 21, at 658–59 ("Things seem to change in history when people break out of their accustomed ways of responding to domination . . . . [B]ut they never knew they could change them at all until they tried.").