

Spring 2013

Structural Overdelegation in Criminal Procedure

Anthony O'Rourke

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>



Part of the [Criminal Law Commons](#)

Recommended Citation

Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407 (2013).
<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss2/2>

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

STRUCTURAL OVERDELEGATION IN CRIMINAL PROCEDURE

ANTHONY O'ROURKE*

In function, if not in form, criminal procedure is a type of delegation. It requires courts to select constitutional objectives and to decide how much discretionary authority to allocate to law enforcement officials in order to implement those objectives. By recognizing this process for what it is, this Article identifies a previously unseen phenomenon that inheres in the structure of criminal procedure decisionmaking.

Criminal procedure's decisionmaking structure pressures the Supreme Court to delegate more discretionary authority to law enforcement officials than the Court's constitutional objectives can justify. By definition, this systematic "overdelegation" does not result from the Supreme Court's hostility to protecting criminal procedure rights. Instead, it arises from a set of institutional pressures that, in combination, differentiate criminal procedure from other forms of constitutional decisionmaking.

By identifying the problem of structural overdelegation, this Article clears away much of the confusion that complicates normative debates about the Supreme Court's criminal procedure decisions. Why does the Supreme Court so frequently grant discretionary authority to law enforcement institutions that other observers find untrustworthy? How can one tell whether the Court has granted "too much" discretion to law enforcement officials, and what does that phrase even mean? By turning attention to criminal procedure's structure, this Article offers a framework for answering these questions, and for deepening our understanding of criminal procedure decisionmaking.

* Associate Professor of Law, SUNY Buffalo Law School. For valuable discussions and comments on previous drafts, I am grateful to Guyora Binder, Michael Cahill, Erin Delaney, Matthew Dimick, Jim Gardner, David Gray, Lisa Kerr, Youngjae Lee, Adam Kolber, Dan Markel, Daniel Richman, Alice Ristroph, Amy Sepinwall, Matthew Steilen, Nicholas Stephanopoulos, Christine Varnado, Jim Wooten, and participants of workshops at Columbia, NYU, and SUNY Buffalo. Thanks also to Daniel Devoe and to the staff of the *Journal of Criminal Law and Criminology* for their excellent editorial work.

TABLE OF CONTENTS

INTRODUCTION.....	408
I. CRIMINAL PROCEDURE AND DELEGATION STRATEGY	415
A. Criminal Procedure as Delegation.....	415
B. What Do Courts Delegate?.....	422
II. OVERDELEGATION IN CRIMINAL PROCEDURE.....	427
A. Defining Overdelegation	428
1. Overestimating Uncertainty.....	430
2. Underestimating Policy Resistance	433
B. Identifying Overdelegation.....	437
C. Descriptive Limits	438
III. OVERDELEGATION'S STRUCTURAL SOURCES	441
A. Regulatory Complexity (and Single Institutionalism).....	443
B. Doctrinal Entrenchment Mechanisms.....	449
C. Political Economy of Litigation	455
D. Redistributive Rights.....	457
IV. OVERDELEGATION CYCLES	461
V. AVOIDING OVERDELEGATION	466
A. Announcing Constitutional Objectives	468
B. Deciding Whom to Regulate	469
C. Order of Comparative Analysis.....	471
CONCLUSION.....	473

INTRODUCTION

Over the past few years, the Supreme Court has eliminated the Fourth Amendment exclusionary rule as a remedy for negligent policing,¹ allowed officers to resume questioning suspects (including incarcerated suspects) fourteen days after they invoke their *Miranda* rights,² given trial courts broad latitude to admit statements by mortally wounded witnesses under the “ongoing emergency” exception to the Confrontation Clause,³ and declined to regulate the use of unreliable eyewitness testimony under circumstances where the police were not responsible for rendering it unreliable.⁴ In each of these cases, the Court had to choose between imposing constitutional

¹ *Herring v. United States*, 555 U.S. 135, 137 (2009).

² *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

³ *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

⁴ *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012).

constraints on law enforcement officials and granting them the discretionary authority to go about their business without risking judicial sanction. And, in each of these cases (and many others), the Court chose discretion.⁵

Why does the Supreme Court so often make this choice in criminal procedure cases? Is the choice “correct” with respect to whatever constitutional objective the Court is trying to achieve in a given case? If not, what can be done about it? This Article provides a framework that shows how deeply these questions are interrelated and suggests how they may be answered.

Specifically, this Article draws on scholarship from the social sciences and administrative law to defend two novel claims about the nature of criminal procedure decisionmaking. The first is that in function, if not in form, constitutional criminal procedure is a type of delegation.⁶ When deciding a criminal procedure case, a court must select some constitutional objective, such as ensuring that officials comply with what the court determines to be their obligations under the Fourth Amendment without threatening their ability to engage in effective law enforcement. Having selected this objective, however, the court must then act as a regulator and craft a set of doctrinal rules designed to ensure that law enforcement officials will implement the constitutional objective.⁷ Through these rules, the court creates what administrative law scholars call a “policy space” within which law enforcement officials have the discretion either to comply with the court’s constitutional objective or to deviate from it.⁸ Just as

⁵ Indeed, a persistent theme in the constitutional criminal procedure literature has been the Court’s failure to meaningfully constrain this discretion. Significant recent contributions to this massive literature include Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (arguing that the Supreme Court fails to adequately enforce constitutional separation of powers provisions designed to limit prosecutorial discretion); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781 (2006) (arguing that constitutional criminal procedure doctrine affords virtually unlimited discretion to police and prosecutors).

⁶ See *infra* Part I. This Article is the first to systematically examine the ways in which constitutional criminal procedure resembles traditional forms of delegation. One scholar, Michael Klarman, has observed that modern constitutional criminal procedure is consistent with, and perhaps tacitly motivated by, “a strong nondelegation doctrine” that is intended to limit legislators’ ability to shift decisionmaking out of the hands of politically unaccountable law enforcement officials. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763–68 (1991).

⁷ Cf. Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 4 (1984) (“The Supreme Court is a regulator.”).

⁸ Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2599 (2006) (describing congressional delegations of power to administrative agencies as creating “policy spaces” that agencies have the discretion to operate within).

Congress can choose the amount of discretionary authority it delegates to administrative agencies by drafting legislation broadly or narrowly, a court may choose how much discretionary authority to delegate to law enforcement institutions by crafting permissive or restrictive doctrinal rules.⁹

By recognizing this process for what it is—delegation—one can clear away a great deal of normative confusion about the Supreme Court's doctrinal choices. Scholars frequently criticize criminal procedure decisions for granting “too much” discretion to law enforcement officials.¹⁰ Rarely, however, do they differentiate between condemning the Court for choosing a constitutional objective that fails to impose meaningful obligations on law enforcement officials and criticizing the Court for choosing doctrinal rules that fail to implement its constitutional objective. By contrast, congressional delegation theorists are careful to draw a distinction between examining whether Congress has selected a laudable policy objective and evaluating whether it has chosen a delegation strategy likely to achieve that objective.¹¹

Building on this distinction, the second claim of this Article is that criminal procedure's decisionmaking structure creates pressure on the Supreme Court to delegate more discretionary authority to law enforcement institutions than can be justified by the Court's constitutional objectives. From police officers conducting investigations and arrests, to prosecutors and trial judges overseeing convictions, and to defense attorneys fighting those convictions, constitutional criminal procedure governs a diverse array of actors and activities within the criminal justice system. Notwithstanding this diversity, however, constitutional criminal procedure rights share a common decisionmaking structure that sets the rights apart from others in constitutional law.

In other contexts, political theorists such as Mark Graber and Keith Whittington have examined structural dynamics that lead other institutional actors to bolster the Supreme Court's authority over constitutional

⁹ See *infra* Part I.

¹⁰ E.g., Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247, 252–53 (2010) (arguing that the Supreme Court's Fourth Amendment jurisprudence “grants extraordinary discretion to police and prosecutors”).

¹¹ See, e.g., DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 52–85 (1999) (presenting a game theoretic model of Congress's equilibrium strategy for delegating power to an executive agency); Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1049–57 (2006) (modeling how Congress selects between agencies when delegating power).

interpretation.¹² Few scholars, however, have explored the structural conditions that may lead the Court to divest itself of authority in certain areas of law. This Article presents such an analysis, identifying a number of structural features that collectively distinguish criminal procedure adjudication from other forms of constitutional lawmaking and examining how these features pressure the Court to systematically delegate more power to law enforcement institutions than is warranted by the Court's constitutional objectives. It also addresses why the Court sometimes refrains from committing this error of overdelegation and examines how the Justices might modify their decisionmaking processes to create a better fit between their delegation choices and their constitutional aims.

As it is defined here, there are two ways in which a court is likely to commit the error of overdelegation. First, a court may overestimate the extent to which law enforcement officials require discretionary authority in order to implement a constitutional objective effectively under conditions of uncertainty. Specifically, the court may overestimate the likelihood that, for reasons it cannot know in advance, officials will be unable to comply with a doctrinal rule without sacrificing other important values such as safety or effective law enforcement, and would thus need to deviate from the rule in order to achieve the policy outcome the court intended.¹³ Second, the court may underestimate the extent to which law enforcement officials are unable or unwilling to implement a constitutional objective, and might therefore use the discretion they are accorded to undermine the objective.¹⁴

So defined, a judge does not overdelegate when she feels obligated as a matter of constitutional interpretation to preserve the discretionary authority of law enforcement officials. Instead, overdelegation typically occurs when judges entrust decisions regarding the implementation of some constitutional goal to other institutions without engaging in a sound comparative analysis of whether those institutions are *better* positioned than the court to make these decisions. Consider the Supreme Court's decision in *Herring v. United States* to eliminate the exclusionary rule as a remedy for Fourth Amendment violations involving ordinary negligence by police

¹² See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY*, at xi, xii (2007) (examining political competition between the executive and judiciary, and arguing that the executive is sometimes incentivized to bolster the Supreme Court's claim of judicial supremacy); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 37 (1993) (exploring institutional incentives for legislators to invite the Supreme Court to intervene on policy questions).

¹³ See *infra* Part II.A.1.

¹⁴ See *infra* Part II.A.2.

officers.¹⁵ The Court asserted that it was not seeking to alter the scope of suspects' Fourth Amendment rights, and that the controlling question in the case was whether the exclusionary rule effectively deters violations of those rights.¹⁶ If one were to accept these assertions at face value, then this inquiry should have involved a comparative analysis of whether the judiciary needed to involve itself in guarding against negligent Fourth Amendment violations, or whether this responsibility could be delegated to law enforcement officials. Such a comparative assessment would have required the Court to weigh (1) the deterrent value and social costs of the exclusionary rule and alternative Fourth Amendment remedies (such as civil liability) against (2) the training practices and cultural behaviors of local police departments.¹⁷

In practice, however, the Court appears to have narrowed the exclusionary rule, and thus delegated considerable discretionary authority to law enforcement officials, without adequately weighing these factors. First, with respect to the exclusionary rule's deterrence value, the Court asserted that the rule provided only "marginal deterrence" in cases of ordinary negligence, but offered neither theoretical nor empirical support for this proposition.¹⁸ Regarding the exclusionary rule's social costs, the Court simply asserted the qualitative nature of the rule's harm—"letting guilty and possibly dangerous defendants go free"¹⁹—but did not attempt to provide any sort of quantitative estimate of this harm.²⁰ Second, the Court did not consider how eliminating the exclusionary rule might affect the incentives and motivations of police departments to develop policies that ensure constitutional compliance in the absence of a strong remedial rule.

¹⁵ *Herring v. United States*, 555 U.S. 135, 137 (2009).

¹⁶ *Id.* at 141.

¹⁷ Indeed, the Supreme Court appears to have endorsed this comparative institutional approach by adopting an exclusionary rule intended to address systemic institutional misconduct rather than individual misfeasance. *See id.* at 146 ("In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system."); *see also* Jennifer E. Laurin, Essay, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 684–85 (2011) (discussing the Court's "systemic error" standard and observing that "no case prior to *Herring* had held that systemic Fourth Amendment misconduct could provide the basis for a motion to suppress"); *id.* at 738 ("*Herring* suggests the possibility of a world in which suppression hearings adduce evidence of departmental policies and training, or systemic patterns in law enforcement tactics . . .").

¹⁸ *Herring*, 555 U.S. at 147–48.

¹⁹ *Id.* at 141.

²⁰ In the absence of reliable empirical data on whether the exclusionary rule resulted in the release of a significant number of guilty defendants, the Court could have provided a theoretical argument for why it might expect this number to be high, but did not do so.

Instead, the Court appears to have been moved by the specter of “guilty and possibly dangerous defendants going free” to delegate power to law enforcement officials without undertaking a more thorough comparative institutional analysis of whether that delegation most effectively advances its constitutional objectives.

This analysis of overdelegation in *Herring* illustrates two significant contributions this Article makes to the current understanding of constitutional criminal procedure. First, it challenges the common assumption that criminal procedure decisions can be explained exclusively in terms of the political preferences of the Supreme Court’s members. While this “attitudinal” model of Supreme Court decisionmaking has considerable value in terms of predicting the outcomes of cases,²¹ it does not purport to explain why the Justices might settle on a particular doctrinal strategy for achieving their objectives.²² By using the concept of overdelegation to evaluate the Court’s decision in *Herring*, one might develop a more sophisticated, and ultimately more illuminating, account of why the Court is hostile to the exclusionary rule and how the structural features of criminal procedure decisionmaking shape Fourth Amendment jurisprudence.

For example, some argue that the Court has set up a deterrence rationale in its Fourth Amendment cases that enables it to avoid the sort of comparative analysis that a rational delegation strategy requires. If there is no evidence of deterrence, the Court can claim that the exclusionary rule is not necessary; if there is evidence of deterrence, the Court can claim that the exclusionary rule has too high a cost in terms of *overdetering* police from pursuing guilty defendants.²³ Such a doctrinal strategy suggests that the Court’s hostility may not be directed toward the nature of Fourth Amendment rights, but to the sort of comparative institutional analysis that is required to safeguard those rights. Thus, by framing our analysis in terms of overdelegation, we can turn our attention to the structural features of criminal procedure decisionmaking that might explain its broader doctrinal

²¹ See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 312–56 (2002) (describing the predictive validity of ideology with respect to Supreme Court Justices’ votes).

²² See Emerson H. Tiller & Frank B. Cross, *What Is Legal Doctrine?*, 100 NW. U. L. REV. 517, 523–28 (2006) (explaining the attitudinal model’s limitations with respect to understanding the ideological valence of specific doctrinal choices); Barry Friedman, *Taking Law Seriously* 266–68 (N.Y. Univ. Sch. of Law, Pub. L. & Legal Theory Research Paper Series, Working Paper No. 06-08, Law & Econ. Research Paper Series, Working Paper No. 06-19, 2006) (discussing the limitations of evaluating judicial ideology on the basis of case outcomes rather than on the content of legal opinions).

²³ See Laurin, *supra* note 17, at 708–09.

trajectory.

This Article's second significant contribution is to demonstrate that, while criminal procedure cannot be adequately explained as mere politics, it is also unlikely to reflect any doctrinally rational set of decisionmaking choices. Professor Orin Kerr, for example, has recently argued that the Supreme Court's Fourth Amendment jurisprudence can be explained by an "equilibrium theory," whereby the Court calibrates its doctrinal choices so that the Fourth Amendment offers the same level of protection in the wake of technological and social changes.²⁴ This Article's account of overdelegation suggests, however, that the structure of criminal procedure decisionmaking will make it particularly difficult to sustain such a doctrinal equilibrium over time, and thus calls Professor Kerr's hypothesis into question.

This Article proceeds in five Parts. Part I defends the premise that it is constructive to talk about criminal procedure decisionmaking as a delegation process. Part II defines the concept of overdelegation and addresses some of the benefits (and limitations) of employing such a carefully circumscribed definition. Part III then identifies a number of structural features of criminal procedure decisionmaking that may give rise to overdelegation. To the extent that this analysis of overdelegation is successful, it gives rise to the question of why the Supreme Court sometimes chooses *not* to delegate excessive discretion to law enforcement officials. Part IV takes on this question and draws on institutional choice theory to suggest why the Court might cycle between creating criminal procedure rules that greatly circumscribe the discretion of law enforcement officials and rules that overdelegate such discretion.

This Article's account of structural overdelegation in criminal procedure suggests that, absent radical structural reform to criminal procedure decisionmaking, criminal procedure doctrine will inevitably fail to implement adequately whatever constitutional guarantees the Supreme Court imagines itself to be protecting. This Article is thus intended as a prolegomenon to a more ambitious rethinking of the judiciary's appropriate role in safeguarding the Constitution's criminal procedure guarantees. However, while radical reform might be necessary to completely solve the problem of overdelegation, individual judges may be able to ameliorate the problem through modest changes in their decisionmaking processes. In the interest of developing such partial, but practical, solutions, Part V offers decisionmaking suggestions that may help judges create doctrinal rules that

²⁴ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 539–42 (2011).

delegate an optimal level of discretion to law enforcement officers with respect to the judges' constitutional objectives.

I. CRIMINAL PROCEDURE AND DELEGATION STRATEGY

This Article uses the term “overdelegation” to describe a type of judicial decisionmaking error, and this coinage presents two significant challenges which this Part addresses. Specifically, when inventing a new term to criticize judicial decisions, there is an intellectual obligation to demonstrate that it serves as more than a rhetorical device for describing decisions that one dislikes. This challenge is particularly serious when, as here, one is using a familiar term (“delegation”) in an unfamiliar way. Second, in describing a criminal procedure as a delegation process, one must clarify what it is the Supreme Court is delegating to law enforcement officials and show why it is consistent with our doctrinal understanding of the separation of powers between the executive and the judiciary.

A. CRIMINAL PROCEDURE AS DELEGATION

To accuse the Supreme Court of overdelegation in criminal procedure is to beg the question whether criminal procedure decisionmaking involves any type of delegation at all. Addressing this question requires a synthesis of two separate and vast areas of scholarship. In one area of the literature, administrative law scholars and political scientists have done much work on the concept of delegation. However, this scholarship largely concerns congressional delegations of power to administrative agencies,²⁵ and it is not immediately obvious how it relates to criminal procedure. In the other, criminal procedure scholars routinely examine the extent to which the Supreme Court's doctrinal choices afford discretion to police and prosecutors.²⁶ Rarely, however, do they frame these choices as a delegation of power to law enforcement officials.²⁷ To date, there appears to be no

²⁵ See, e.g., Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 600–04 (1989); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 961–67 (1999); Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 364 n.3 (2010); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 100 (1985); David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 398 (2002); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 101–02 (2000).

²⁶ See *supra* note 5.

²⁷ One notable exception is Michael Klarman's account of modern constitutional criminal procedure as consistent with, and perhaps tacitly motivated by, “a strong

detailed examination of the ways in which criminal procedure decisionmaking resembles the process of congressional delegation, or why this resemblance might be theoretically interesting.²⁸ This section supplies such an examination.

To begin with the obvious, constitutional criminal procedure consists of judicially enforced individual rights that constrain law enforcement officials. Unless a court intervenes to regulate an area of criminal procedure, it is largely left to the discretion of police departments and prosecutors' offices whether to respect a criminal procedure right and how to formulate its policies with regard to the right.²⁹ When a court crafts a doctrine that safeguards a criminal procedure right, it narrows these law enforcement officials' discretionary authority, and in equal measure it asserts the judiciary's constitutional authority to regulate the processes of arrest and criminal prosecution.³⁰ Building from this account, one can frame constitutional criminal procedure doctrine as a means not only for taking discretionary authority away from law enforcement officials, but also for delegating it back to them piecemeal.

This is best illustrated by drawing on the congressional delegation

nondelegation doctrine" that limits the ability of legislatures to shift decisionmaking out of the hands of politically unaccountable law enforcement officials. See Klarman, *supra* note 6, at 763–68.

²⁸ There is, by contrast, a rich body of criminal law scholarship examining the causes and consequences involved in how legislatures choose to delegate power to police and law enforcement officials. See, e.g., Barkow, *supra* note 5; Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 480 (1996); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 777 (1999). Relatedly, there are many analyses of how much deference courts owe to these legislative delegation choices as a matter of normative constitutional theory. Compare Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) (arguing for deference), with David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999) (arguing against deference).

²⁹ This assumes, of course, that legislatures typically choose not to regulate law enforcement officials with respect to criminal procedure policies—an assumption that is supported by the history of modern criminal procedure. See Klarman, *supra* note 6, at 765 (observing that the Warren Court's criminal procedure revolution occurred in a political context in which legislatures "happily delegated" the task of formulating criminal procedure policy "to the unfettered discretion of politically unaccountable law enforcement officials"); cf. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 827–37 (2004) (arguing that Congress has a history of successfully protecting Fourth Amendment rights that are threatened by new technologies).

³⁰ See, e.g., Klarman, *supra* note 6, at 764–65 (arguing that modern constitutional criminal procedure developed in order for the judiciary to take away power from politically unaccountable law enforcement officials that had been delegated to them by legislatures).

literature to identify similarities between the judicial process of crafting a criminal procedure rule and the legislative process by which Congress decides whether to delegate power to administrative agencies. For Congress, the choice whether to delegate discretionary authority arises during statutory drafting. The purpose of enacting a statute, this literature assumes, is to achieve some policy outcome that Congress desires.³¹ In order to achieve this policy outcome—and perhaps to do so in a way that gives legislators credit for politically popular choices, shifts blame for politically unpopular ones, or advances some other secondary goal—Congress may draft a statute that provides little guidance as to how the policy should be implemented and vests an agency with broad discretionary authority to give effect to the policy.³² As long as the statute supplies an “intelligible principle” to which the agency is “directed to conform,” it is a constitutionally permissible delegation of power to the executive branch.³³ Conversely, by drafting extremely detailed legislation, Congress may grant officials little to no leeway to take a course of action that it did not specify. And by drafting with a level of precision that falls somewhere between these extremes, Congress can grant officials enough discretion to pursue the statute’s policy objectives efficiently while exercising enough oversight of the officials to guard against bureaucratic drift.³⁴ Political scientists have represented these choices as a set of continuous strategies (ranging from no delegation to complete delegation) from which Congress can choose in order to best approximate its ideal policy outcome, shift blame for unpopular choices, or advance some other goal it wishes to pursue.³⁵ Accordingly, determining the appropriate level of discretion to delegate is a context-sensitive question that will depend on the nature of the policy problem and on the competence and likely policy preferences of agency officials.³⁶

³¹ More precisely, much of the literature analyzes the most preferred policy of the median floor voter in Congress. See EPSTEIN & O’HALLORAN, *supra* note 11, at 54–55.

³² See *id.* at 32–33 (summarizing the blame-shifting model of congressional delegation and discussing its limitations).

³³ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (describing the constitutional requirement imposed by the nondelegation doctrine); *accord* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (invoking the “intelligible principle” standard in applying the congressional nondelegation doctrine).

³⁴ See EPSTEIN & O’HALLORAN, *supra* note 11, at 7–8.

³⁵ See, e.g., *id.* at 53–75; Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 97–108 (2008) (modeling a continuous delegation game).

³⁶ See EPSTEIN & O’HALLORAN, *supra* note 11, at 52–85; see also Lemos, *supra* note 25, at 372–78 (summarizing the administrative law scholarship on the reasons why Congress delegates to agencies).

This congressional delegation process closely resembles the adjudicative process by which courts construct criminal procedure rules. In the adjudicative process, the criminal procedure right that a court wishes to enforce serves as the equivalent of a policy objective that Congress seeks to implement through drafting legislation. In order to implement the right, a court must craft doctrinal rules that govern the conduct of law enforcement officials, and determine how significantly it wishes to limit, or expand, the officials' discretion about how best to implement the right—or whether to implement the right at all.³⁷ This requires courts to identify a constitutional objective, and craft a doctrine that either limits or expands the discretionary authority of law enforcement officials, based on which choice is more likely to achieve the court's objective.³⁸ Thus, while the task of expounding the Constitution's meaning might remain squarely within the province of the judiciary, courts must necessarily devolve the task of *implementing* that meaning to nonjudicial officials. And, in deciding how best to implement a particular constitutional criminal procedure objective, the court must decide how much discretionary authority to delegate to law enforcement officials.

One might object that, by calling this adjudicative process “delegation,” one is simply using a new term to describe a familiar process of constitutional lawmaking. Constitutional adjudication frequently requires courts to interpret the meaning of underdetermined texts, and thus involves precedent-based judicial lawmaking.³⁹ Therefore, in resolving a constitutional question, courts will frequently announce a vague constitutional principle and allow that principle to evolve in meaning as further constitutional challenges arise. In practice, this process gives nonjudicial actors considerable power to influence how constitutional principles are shaped.⁴⁰ In Establishment Clause cases, for example, the

³⁷ See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1133 (2000) (defining discretion in the context of criminal justice as the “power to choose between two or more courses of conduct”); see also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969) (“A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.”).

³⁸ See Luna, *supra* note 37, at 1140.

³⁹ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

⁴⁰ In addition to fleshing out the meaning of constitutional principles in subsequent cases, the Supreme Court may also invite nonjudicial institutions to help give meaning to constitutional principles through their own regulatory processes. For example, in the Court's recent ineffective assistance of counsel jurisprudence, it has announced with ever-increasing clarity that it will look to “codified standards of professional practice,” including American Bar Association Guidelines, in determining whether a defense attorney's performance falls below a constitutionally acceptable baseline. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012)

Court may lay out some loosely defined boundaries between government displays of religious imagery that are constitutionally permissible, and those that cross a line.⁴¹ However, because the Supreme Court intervenes only rarely to evaluate the constitutionality of such displays, it will largely be left to nonjudicial officials to give effect to the Court's announced principles when determining whether a particular government display is constitutional. This process of constitutional development—in which the Constitution's meaning evolves through case law, and nonjudicial officials play a role in shaping that meaning—is not unique to criminal procedure, and it would add little value to use a new theoretical vocabulary to describe this process.

This Article does not, however, use the term “delegation” to describe the process by which constitutional meaning evolves. Instead, this Article treats the Supreme Court's understanding of any particular constitutional objective as exogenous and uses delegation to describe the way that the Court goes about implementing its objective. The act of judicial delegation is not, therefore, something that this Article applauds or condemns as such. Instead, the question of how much power the Court should delegate to law enforcement officials in a given situation will vary depending on the Court's constitutional objective.

To appreciate the distinction between “delegation” and ordinary constitutional lawmaking, it is theoretically useful to appeal, as other

(holding that the Sixth Amendment requires criminal defense attorneys to inform their clients of plea bargaining offers that are favorable to them). *But see* *Bobby v. Van Hook*, 130 S. Ct. 13, 20 (2009) (Alito, J., concurring) (arguing that ABA guidelines have no “special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment”). In recent ineffective assistance cases, moreover, the Court has announced only open-ended constitutional principles, which it will presumably later clarify with assistance from the ABA and other professional organizations. In *Padilla v. Kentucky*, for example, the Court held in broad terms that the 6th Amendment right to counsel requires criminal defense attorneys to inform their clients of the potential “deportation consequences” of accepting a plea bargain where those consequences are “truly clear” as a matter of law. 130 S. Ct. 1473, 1483 (2010); *see also id.* at 1487 (Alito, J., concurring) (criticizing the majority for adopting a “vague, halfway test” that will “lead to much confusion and needless litigation”). By combining this broad principle with an expressed willingness to look to “prevailing professional norms” to establish the scope of an attorney's constitutional obligations during plea bargaining, *id.* at 1482–83 (majority opinion), the Court sends a clear signal that nonjudicial officials will play a role in clarifying its ineffective assistance jurisprudence. One might argue that this pluralistic lawmaking process can also be characterized as delegation. Doing so, however, would collapse the distinction this Article makes between ordinary constitutional lawmaking and the regulatory process that occurs in criminal procedure cases.

⁴¹ Compare *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (upholding Texas State Capitol's display of the Ten Commandments based on the context and history of the monument), with *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 865 (2005) (invalidating courthouse display of the Ten Commandments).

scholars have, to the “decision rules” taxonomy for constitutional adjudication, which separates constitutional doctrine into three analytically distinct categories.⁴² First, the Supreme Court must interpret the meaning of a specific constitutional guarantee (or what Mitch Berman calls a “constitutional operative proposition”).⁴³ Second, in order to implement that constitutional guarantee, the Court must construct a “decision rule” that directs courts on how to decide whether a constitutional guarantee has been satisfied, and thereby instructs officials as to what is required of them in order to avoid the risk of judicial sanction.⁴⁴ Third, the Court must construct a “remedial rule,” which specifies the consequences that courts should impose if they determine (by applying the decision rule) that the Constitution has been violated.⁴⁵

As it pertains to constitutional criminal procedure, this taxonomy highlights the ways in which the judicial crafting of constitutional remedies resembles the process of congressional delegation. In evaluating a criminal procedure case, one could offer a normative critique of how the Court interprets a constitutional operative proposition or—as this Article does—one may instead examine how a court decides to implement that proposition. Just as Congress must choose the delegation strategy that will best achieve its ideal policy outcome, the Court must choose an implementation strategy that is likely to minimize adjudicatory errors and ensure compliance with the constitutional guarantee in question.⁴⁶ A constitutional decision rule may closely track the operative proposition, but it may also substantially differ from it. The decision rule may, for example, overenforce a constitutional guarantee by requiring officials to do more than the Constitution requires of them in order to avoid the risk of judicial liability.⁴⁷ Or, the Court may create a decision rule that underenforces the

⁴² For a recent application of the decision rules model to *Herring v. United States*, see Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1022–29 (2010). Important theoretical contributions to the decision rules model—all of which draw upon criminal procedure cases for examples—include Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Kermit Roosevelt, III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1656 (2005); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

⁴³ Berman, *supra* note 42, at 9–10.

⁴⁴ *Id.* at 10–12.

⁴⁵ *Id.* at 12.

⁴⁶ See *id.* at 93–94 (addressing normatively legitimate aims of decision rules).

⁴⁷ See Monaghan, *supra* note 42, at 13–26.

constitutional guarantee, with the expectation (or hope) that other actors will nevertheless fulfill their constitutional obligations.⁴⁸ Similarly, when deciding upon the appropriate remedial rule, the Court must decide how best to optimize compliance with the constitutional operative proposition under the conditions that exist in the world, and these conditions may require it to design a rule that is more or less intrusive than it would decide is optimal under ideal circumstances. Whether the Court chooses a decision rule that over- or underenforces a constitutional guarantee will depend on considerations such as its institutional competence, the costs of imposing an overinclusive decision rule, and the frequency with which the underlying constitutional guarantee would be violated absent a strong decision rule.⁴⁹

The decision of how to craft a criminal procedure rule tailored to a constitutional objective thus resembles the way in which Congress chooses a delegation strategy to achieve an optimal policy outcome. By crafting a restrictive decision rule (which would impose heavy restrictions on how law enforcement officials conduct their affairs) or a strong remedial rule (which would impose a severe sanction for deviations from that conduct), the Court could retain considerable authority over criminal procedure regulation. By crafting a permissive decision rule (with few restrictions on law enforcement officials) or a weak remedial rule (that imposes light penalties for impermissible conduct), the Court could delegate considerable discretionary authority to law enforcement officials. And by crafting a decision rule and remedial rule between these extremes, the Court could retain some intermediate level of oversight over the conduct of law enforcement officials. In other words, just as Congress must do when drafting legislation, the Supreme Court must select from a (potentially uncountable) set of options for limiting or expanding its oversight over law enforcement officials when constructing a criminal procedure rule.⁵⁰

Consider, for example, how the Supreme Court's doctrinal choice in *Herring v. United States*⁵¹ may be framed as a delegation strategy for achieving a specific constitutional objective. Conceptually, the decision whether to apply the exclusionary rule in cases of ordinary negligence requires a court to select the appropriate remedial rule to penalize law enforcement officials for violating the Fourth Amendment. This presents the Court with an institutional choice question: between courts and police

⁴⁸ See Sager, *supra* note 42, at 1213–21.

⁴⁹ See Roosevelt, *supra* note 42, at 1658–66.

⁵⁰ Berman, *supra* note 42, at 12 (“As a conceptual matter, the number and variety of options in the making of constitutional decision rules is limited only by judicial imagination and by the (ever-changing) constraining norms of professional practice.”).

⁵¹ 555 U.S. 135 (2009).

departments, who is best situated to ensure that police officers comply with the Fourth Amendment when conducting searches? If the Court were to craft a strong exclusionary rule, its decision would undoubtedly deter some officers from violating the Fourth Amendment on some future occasions.⁵² However, the exclusionary rule's precise deterrent value might be difficult for the Court to discern, and preserving it may carry a high social cost in terms of "letting guilty and possibly dangerous defendants go free."⁵³ Moreover, the Court may reasonably suppose that police departments provide their officers with the training necessary to comply with the Fourth Amendment in most situations. Assuming that police officers make an effort to follow this training, then it acts as a substitute good for the exclusionary rule: the better the training officers receive, the less necessary it becomes to use the threat of the exclusionary rule to modify their behavior. Thus, determining whether the exclusionary rule should apply in cases of ordinary negligence will first require the Court to engage in the normative task of identifying what sort of police conduct it wishes to deter. Once this constitutional objective is set, the Court must then decide how much discretionary authority it can delegate to law enforcement officials without increasing the number of Fourth Amendment violations that are likely to occur.

B. WHAT DO COURTS DELEGATE?

One may further object that it mischaracterizes the judicial power to assert that the Supreme Court delegates "discretionary authority" to law enforcement officials. Discretion, according to Kenneth Culp Davis's classic definition, involves the power to choose "among possible courses of action or inaction."⁵⁴ The discretionary authority that this Article describes is, under this definition, effectively the power of law enforcement officials

⁵² Actually, not undoubtedly. If exclusionary rule skeptics are correct that civil liability sufficiently deters Fourth Amendment violations, then theoretically the exclusionary rule would have *no* added deterrent value—but also no adverse social costs. See Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209, 226–27 (2010) ("Abolition of the exclusionary rule means that the police would enjoy the full evidentiary benefit of illegal warrantless home invasions. There are two possible scenarios. If the specter of tort liability is strong enough, nothing will change. No extra evidence will be discovered (and so much for the exclusionary rule's social costs!); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1533 (1999) ("If the substitute sanctions were effective in deterring the misconduct, there would not be any fruits, and so there would be no net gain from the standpoint of accuracy in adjudication.").

⁵³ *Herring*, 555 U.S. at 141.

⁵⁴ DAVIS, *supra* note 37, at 4.

to decide how best to comply with a court's constitutional objective, or whether to comply with it at all.⁵⁵ However, as the "least dangerous" branch, the Supreme Court must rely on executive officials to enforce its constitutional judgments.⁵⁶ If the judicial power is thus limited to interpreting the Constitution, and other branches of government have an independent obligation to comply with the judiciary's judgments, it arguably makes little sense to say that the Supreme Court has the power to delegate discretion not to comply with its constitutional objectives.

This objection, however, overlooks both the extent to which questions of implementation are central to the process of constitutional lawmaking,⁵⁷ and how the Court's implementation decisions can legitimately expand or constrain the discretionary power of law enforcement officials. It has long been settled that the Supreme Court's judicial power under Article III is not merely limited to announcing constitutional violations, but also includes the power to construct equitable remedies for these violations.⁵⁸ Inherent in this equitable power is the ability to construct doctrinal rules that acknowledge the practical difficulty of ensuring that other institutions will accept a constitutional judgment. One of the most famous exercises of this power is the Court's decision to delay the enforcement of its decision in *Brown v. Board of Education* in the hope that the public would eventually reconcile itself to school desegregation.⁵⁹ However, such questions of compliance are also intrinsic to constitutional criminal procedure decisionmaking, as evidenced by the Supreme Court's consistent emphasis on the importance of formulating "workable rule[s]" that can guide law enforcement officers and be easily administered by courts.⁶⁰

Two principles follow from this understanding of the judicial power, which together establish a parallel between criminal procedure and more traditional forms of delegation. First, it is appropriate to characterize the Supreme Court as having constitutional objectives that go beyond simply

⁵⁵ See Luna, *supra* note 37, at 1134.

⁵⁶ THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

⁵⁷ See generally RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

⁵⁸ Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 33 (2003); see also Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 740 (1992).

⁵⁹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955) (ordering public schools to desegregate "with all deliberate speed"); see also Fallon, *supra* note 58, at 31–32 (identifying the Court's decision in *Brown* as a legacy of the judicial power as it was defined in *Marbury v. Madison*).

⁶⁰ *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2411 (2011) (internal quotation marks omitted) (describing the practical value of the *Miranda* rule).

pronouncing constitutional norms. These objectives include not only deciding what the Constitution means, but also making sure that the decision is followed and respected. In other words, in crafting constitutional doctrine, the Court might be motivated, and legitimately so, by a range of goals. These goals include, but are not limited to, minimizing adjudicatory errors—that is, making sure that trial courts correctly identify conduct as either constitutional or unconstitutional—and promoting constitutional compliance among police officers.⁶¹

Second, the doctrinal rules that courts construct to achieve their constitutional objectives will inevitably serve either to expand or to contract the discretionary authority of law enforcement officers to pursue their own, often conflicting, policy objectives. Sometimes, the effect of judicial decisions on law enforcement discretion is obvious and well recognized. John Hart Ely, for example, famously observed that the Warren Court's Fourth Amendment decisions served the purpose of limiting the "low visibility discretion" that law enforcement officers enjoyed in the absence of any meaningful legislative or judicial oversight.⁶² In other instances, the link is less direct, but nonetheless identifiable.

In either case, however, the judicial choice either to carve out a zone of discretionary authority, or to constrict a zone of discretionary authority, is an act of delegation. As both administrative law and political science scholars recognize, congressional delegations have the effect of creating a "policy space" within which an agency has the discretionary authority to operate.⁶³ In criminal procedure cases, the Supreme Court creates such spaces, giving law enforcement officials the discretion to comply with its constitutional objectives, but also to deviate from them and pursue their own policy objectives without having their decisions reversed or facing any other checks on their actions.

For example, consider a Confrontation Clause case where the delegation and discretionary authority at issue are not immediately obvious, but are nonetheless present. In *Michigan v. Bryant*,⁶⁴ the Court held that the Confrontation Clause did not bar the admission of statements that a mortally wounded witness made to police officers shortly before his death.

⁶¹ See Berman, *supra* note 42, at 92–96 (discussing the potential objectives of constitutional decision rules).

⁶² JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 97 (1980).

⁶³ Sunstein, *supra* note 8, at 2599; see also EPSTEIN & O'HALLORAN, *supra* note 11, at 109 (formally defining discretion as the delegation of power to agencies, minus the constraints that are placed on the exercise of that discretion).

⁶⁴ See *Michigan v. Bryant*, 131 S. Ct. 1143, 1150 (2011).

The Court held that the statements were admissible under an “ongoing emergency” exception to the Confrontation Clause, and that a police officer’s intent in conducting an interrogation is relevant to whether this exception applies.⁶⁵ This decision is unlikely to have any practical effect on whether police officers will question a dying witness, and one may therefore overlook the delegation issues that arise in *Bryant* if one conceives of the constitutional objective as being to alter the investigatory conduct of police officers.

The delegation issues may become more obvious, however, when one bears in mind that the Confrontation Clause accords a trial right. The Court’s constitutional objective in *Bryant*, then, includes minimizing adjudicatory errors involving the admission of evidence that violates the Confrontation Clause. Specifically, with its holding, the Court is seeking to ensure that trial courts correctly admit all dying declarations that police officers obtain for the purpose of preventing an ongoing emergency, while continuing to exclude all dying declarations that were not obtained for this purpose.

Having so framed the Court’s constitutional objective, one can see how its doctrinal decision expanded the discretionary authority of police and prosecutors. Specifically, the Court created what amounts to a decision rule with its analysis of whether the trial court properly admitted the interrogation at issue in *Bryant*, which was conducted twenty-five minutes after a shooting, by five different police officers, and continued for ten minutes.⁶⁶ Such an interrogation, the Court held, may be admitted into evidence if the interrogators credibly represent that their purpose was to stop an emergency. As a practical matter, this is a permissive decision rule, and it carves out a sizeable zone of discretionary authority for police and prosecutors. By instructing trial courts to consider the subjective motivations of police officers in evaluating whether the Confrontation Clause is violated, the Supreme Court gave prosecutors greater freedom to admit statements obtained by police officers who honestly (and perhaps correctly) believed they were conducting questioning necessary to address an ongoing emergency. By granting this freedom, however, the Court also gave police the opportunity to reframe their interrogation narratives in situations where a court might be unwilling to second-guess the officers’ stories.⁶⁷ And prosecutors, who have the responsibility to present these

⁶⁵ *Id.*

⁶⁶ *Id.* at 1150, 1170.

⁶⁷ *See, e.g., id.* at 1168 (Scalia, J., dissenting) (accusing the Court of accepting a factual narrative regarding the police interrogation that was “so transparently false that professing to believe it demeans th[e] institution”).

narratives to the trial court, were likewise given the discretion to frame an interrogation's purpose so that it will be rendered admissible. The Court's holding thus conferred upon two sets of law enforcement officials, police and prosecutors, the discretionary authority to honor their obligations under the Confrontation Clause (by honestly recounting the motivations behind an interrogation), or to disregard them (by recasting those motivations in ways that cannot easily be discredited).⁶⁸

One may argue that, in *Bryant*, the Court did not delegate authority to law enforcement officials, but simply chose not to punish the decision to act contrary to the Court's constitutional objectives. This objection gains force from the fact that, in ordinary delegation scenarios, the agent has an explicit fiduciary obligation to carry out the principal's policy objectives. In order to issue a regulation, for example, an agency must publish a "statement of basis and purpose" that justifies how its actions relate to the purposes of the governing statute.⁶⁹ It would thus be incorrect to characterize a transfer of power as delegation when its sole effect is to enable an agent to traduce the principal's policy objectives.

However, this objection ignores important features of both constitutional decisionmaking and the concept of delegation. First, with respect to constitutional decisionmaking, it is of course well established that federal judicial interpretations of the U.S. Constitution bind state law enforcement officials.⁷⁰ Thus, when the Supreme Court announces a constitutional objective, it gives law enforcement officials a legal obligation and, to the extent that the officials take their constitutional oaths seriously,⁷¹ a first-order normative obligation to comply with the objective. Decisions like *Bryant* may, for whatever reason,⁷² give law enforcement officials few

⁶⁸ See, e.g., *id.* at 1173 (arguing that the Court defined an "ongoing emergency" so expansively that it allows officers to "plausibly claim a potential threat to . . . the public" within hours, and thus created "an expansive exception to the Confrontation Clause for violent crimes") (internal quotations omitted).

⁶⁹ See 5 U.S.C. § 553(c) (2006) (requiring agencies to publish statements of basis and purpose when issuing regulations); *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 851–52 (D.C. Cir. 1987) (reversing an agency rule because the agency did not adequately explain why the rule served the governing statute's objectives); see also Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012) (arguing that courts should interpret agency regulations in light of the purposes set forth in the accompanying statements of basis and purpose).

⁷⁰ *Cooper v. Aaron*, 358 U.S. 1, 19–20 (1958) (holding that the Supremacy Clause requires state executive officials to comply with the Supreme Court's constitutional rulings).

⁷¹ See U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

⁷² See *infra* Part II.A (analyzing the reasons why courts may choose to delegate, and

additional practical incentives to honor a constitutional objective. Such decisions do not, however, give officials license to traduce that objective.

Second, while an act of delegation may create fiduciary responsibilities for an agent, it also empowers the agent to disregard its responsibilities and use the delegated authority to pursue its own objectives. Inherent in the concept of delegated policy discretion is the power to pursue goals that the principal did not agree upon when granting the discretion.⁷³ Therefore, any act of delegation involves this risk of “bureaucratic drift,” which occurs when an agent uses its discretionary authority to pursue policy goals that diverge from the principal’s.⁷⁴ While the Court might not find this bureaucratic drift desirable, or even legally permissible, it is the product of a discretionary authority that the Court itself created through its delegation choices.

II. OVERDELEGATION IN CRIMINAL PROCEDURE

If constitutional criminal procedure can be characterized as a set of delegation strategies for allocating discretionary power to law enforcement officials, it trivially follows that one can criticize some bad criminal procedure decisions as bad delegation strategies. Such loose talk, however, would do little more than provide a new vocabulary for condemning judicial decisions that one finds normatively unpalatable. By contrast, this Article presents a concept of overdelegation that highlights a structural problem in judicial decisionmaking and is conceptually distinct from a critique of how the court interprets any particular constitutional guarantee.

For example, imagine that two Supreme Court Justices agree that the Fourth Amendment exclusionary rule should be abolished altogether, but write separate opinions defending this outcome. One Justice’s decision to eliminate the exclusionary rule stems from a (potentially incorrect) belief that police departments are better positioned than the Court to establish the best regulatory regime for complying with their Fourth Amendment obligations. The second Justice, however, defends his decision on originalist grounds, arguing that the Supreme Court simply has no constitutional authority to mandate the exclusionary rule.⁷⁵ The first

sometimes overdelegate, discretionary authority to law enforcement officials).

⁷³ Calvert et al., *supra* note 25, at 589 (“Discretion consists of the departure of agency decisions from the positions agreed upon by the executive and legislature at the time of delegation and appointment.”).

⁷⁴ See Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise*, 23 J.L. ECON. & ORG. 469, 471 (2007) (defining bureaucratic drift).

⁷⁵ See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994) (arguing that the Framers did not countenance a Fourth Amendment

Justice's decision potentially reflects an erroneous comparative institutional analysis, while the second Justice's decision does not.

In order for overdelegation to serve as a concept for diagnosing problems in constitutional decisionmaking, its definition must be precise enough to differentiate between these two decisions. Accordingly, this Part presents an analytically precise definition of overdelegation—supported with examples of when it has potentially occurred and, just as importantly, when it has *not* occurred. It then clarifies the descriptive limits of this definition, and explains how these limits serve to create an account of overdelegation that does not rely on controversial, normative assumptions about how to interpret the Constitution's criminal procedure guarantees.

A. DEFINING OVERDELEGATION

In order to present a concept of delegation with this sort of diagnostic value, this Article defines it as follows: in criminal procedure cases, overdelegation occurs when a court grants law enforcement officials more discretion about whether to comply with a constitutional obligation than it is rational to grant in light of the court's objectives. This definition appeals to the conceptual distinction between a court's ability to determine the scope of a constitutional guarantee and its ability to implement that guarantee successfully in light of the uncertainty and contingencies that exist in the real world.⁷⁶ While a court may decide what obligations a constitutional right would impose on perfectly compliant law enforcement officials operating under ideal circumstances, it is more difficult to articulate a legal doctrine that perfectly enforces those obligations.⁷⁷ Instead, if it is deciding rationally, the court must choose the doctrinal rule most likely to achieve its ideal outcome.

The Supreme Court must make this choice in the face of considerable epistemic uncertainty, and with relatively limited power to enforce the rules it has created. Because rules of criminal procedure impose costs, there is an incentive to circumvent them. State legislatures can do this by enacting substantive criminal laws that make it easier for police to make arrests and prosecutors to obtain convictions, or by underfunding indigent defense

exclusionary rule).

⁷⁶ See *supra* notes 42–50 and accompanying text; see also Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *YALE L.J.* 2, 10 (2008).

⁷⁷ See Roosevelt, *supra* note 42, at 1651 (discussing the “fallacy of perfect enforcement,” which “assumes that doctrinal rules are simply a way of getting the right answers in constitutional cases”).

services.⁷⁸ Law enforcement officers themselves have innumerable ways to circumvent not only flexible standards that are intended to cabin their discretion⁷⁹ but also bright-line rules that clearly state the conduct they require.⁸⁰ Courts lack the authority to enforce their own constitutional decrees, as well as the ability to conduct sustained oversight over police practices.⁸¹ Thus, in order to protect criminal procedure rights in a meaningful way, courts require the information necessary to predict how states and law enforcement officers may attempt to circumvent their constitutional obligations, and to determine which regulatory measures are most effective for assuring their compliance.⁸² This doctrinal choice presents the Court with a relatively straightforward principal-agent

⁷⁸ See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (analyzing how legislatures may use substantive criminal law to circumvent the costs of constitutional criminal procedure rules); see also Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843–44 (2004) (“It should come as no surprise . . . that not only have states resisted adequate funding of indigent defense systems, but they also have differed about whether state or local jurisdictions should provide funding and have developed a variety of delivery methods.”).

⁷⁹ For example, police officers receive an extremely high level of deference about their determinations whether there was probable cause to conduct a stop, as long as they are prepared to invoke their “experience and expertise” as the basis of their decision. See *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996) (holding that appellate courts must review trial courts’ probable cause determinations de novo, but accord “due weight” to the inferences of police officers in light of law enforcement experience and expertise); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 301 (explaining that, in *Ornelas*, “the Court in effect declared that police officers should receive as much deference as trial judges”).

⁸⁰ See, e.g., Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407 (2011). For example, one instance of circumventing bright line rules is the practice of questioning “outside *Miranda*,” where police officers intentionally fail to comply with *Miranda* knowing that whatever evidence they gain will be admissible for impeachment purposes or under one of *Miranda*’s exceptions. See Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 189–92 (1998) [hereinafter Weisselberg, *Saving Miranda*] (documenting widespread practice); cf. Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1552–57 (2008) (documenting that questioning outside *Miranda* has largely ceased as a systemic practice, but that some agencies persist with the policy).

⁸¹ See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786 (1970) (“[T]he Supreme Court, like any other court, lacks the sort of supervisory power over the practices of the police that is possessed by the chief of police or the district attorney.”); see also *Terry v. Ohio*, 392 U.S. 1, 13–14 (1968) (discussing the limits of the exclusionary rule “as a tool of judicial control”).

⁸² Eric J. Miller, *Putting the Practice into Theory*, 7 OHIO ST. J. CRIM. L. 31, 32 (2009) (“Any discussion of the appropriate forms of regulation can (and must) exist separate from the rights debate and focus instead upon claims about the actual (descriptive) and appropriate (prescriptive) structure of police administration.”).

problem, in which it must decide *ex ante* how much power to delegate to low-level officials, but has relatively little power to monitor *ex post* how the officials exercise that power.⁸³

The Court must choose the optimal level of discretionary authority to delegate to law enforcement officials in light of these institutional constraints. With respect to this choice, the congressional delegation literature suggests that two considerations will play a particularly significant role in the Court's decision.⁸⁴

1. *Overestimating Uncertainty*

First, overdelegation occurs when a court overestimates how much discretionary authority law enforcement officials will need to implement a constitutional objective under conditions of uncertainty. According to the "uncertainty principle," a risk-averse principal should delegate a greater degree of discretion to an agent when it is unclear whether the policy being implemented will result in the outcome being sought.⁸⁵ For example, in a relatively simple regulatory environment, Congress might be confident that,

⁸³ See Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1290–91 (2013) ("The essence of the agency relationship is the superior information of the agent: the principal delegates to the agent in order to take advantage of the agent's expertise, but because the agent has better information than the principal, the principal will have difficulty monitoring the agent and ensuring that the agent acts in the principal's interest.").

⁸⁴ These considerations—the ally principle and the uncertainty principle—are by no means the only ones that scholars have deemed relevant to how legislatures choose to delegate power. See generally EPSTEIN & O'HALLORAN, *supra* note 11, at 14–33 (reviewing the congressional delegation literature). This Article's emphasis on the two considerations reflects an effort to distill and concisely articulate the findings of Epstein and O'Halloran's influential formal model of congressional delegation, which captures many of the insights of the congressional delegation literature. See *id.* at 52–85, app. A. As succinctly summarized by political scientist Craig Volden, this model's equilibrium establishes three hypotheses: "[L]egislators are more likely to delegate to bureaucrats (1) when executive and legislative preferences are aligned, (2) when legislators face high levels of uncertainty, and (3) when legislators are limited in their ability to gain information internally from within the legislature." Craig Volden, *Delegating Power to Bureaucracies: Evidence from the States*, 18 J.L. ECON. & ORG. 187, 189 (2002); see also EPSTEIN & O'HALLORAN, *supra* note 11, at 75 (summarizing their model's findings). Note that this Article uses the concept of uncertainty to analyze both how random shocks affect a policy outcome—which corresponds to the second hypothesis described above—and how policy outcomes will be affected by information that is theoretically obtainable, but is not within the court's purview—which corresponds to the third hypothesis.

⁸⁵ See Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1440 (2011) (describing the uncertainty principle, according to which "a principal will delegate more discretion to the agent (that is, it will expand the size of the discretionary window) when the link between policies and outcomes is less certain *ex ante*").

by drafting detailed legislation, it will be able to achieve the policy outcome it desires without delegating discretionary authority to an agency.⁸⁶ By contrast, in a relatively complex environment, Congress will be less confident about how much exogenous factors—such as new information about the problem a policy is supposed to address—will influence the policy outcome of a piece of legislation.⁸⁷ Faced with such conditions, Congress is more likely to delegate policymaking authority to an agency, which can then use its expertise to take account of the exogenous factors and reduce uncertainty over policy outcomes.⁸⁸

Analogously, in criminal procedure cases, a court must predict the degree to which uncertainty will threaten how effectively a doctrinal rule would serve its constitutional justification.⁸⁹ If the court is aware that exogenous factors may frustrate its ability to choose a rule that achieves its desired outcome, then it has an incentive to give officials enough discretion to adjust to those factors as they arise.⁹⁰ For example, in *City of Ontario v. Quon*, a police officer employed by the city brought a Fourth Amendment claim and argued that the city violated his reasonable expectation of privacy by reviewing the text messages on his work-provided pager as part of an

⁸⁶ See EPSTEIN & O'HALLORAN, *supra* note 11, at 75 (“The more uncertainty associated with a policy area, the more likely Congress is to delegate authority to the executive.”).

⁸⁷ See Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 440 (1989) (“If the best policy from the perspective of the winning coalition depends on arcane information or is uncertain because of frequent changes in the state of knowledge about the problem that the policy is supposed to ameliorate, . . . legislative specificity cannot identify the policy outcome that is embodied in the legislation.”); see also EPSTEIN & O'HALLORAN, *supra* note 11, at 60–62 (modeling Congress’s delegation strategy as a function of its degree of uncertainty concerning how random shocks might affect policy outcomes).

⁸⁸ See Stephenson, *supra* note 85, at 1440–41 (“Th[e] uncertainty principle may be thought of as a special case of a more general ‘expertise principle,’ according to which the principal’s willingness to delegate increases as the agent’s expected informational advantage increases. This hypothesis fits comfortably with one of the classic explanations (and justifications) for the growth of the administrative state: the bureaucracy’s superior expertise, especially on complex technical matters, is a key factor that leads Congress to delegate broad authority to agencies.”) (footnote omitted); see also EPSTEIN & O'HALLORAN, *supra* note 11, at 75 (concluding from the authors’ delegation model that “as the world becomes more and more complex, agency policy making becomes more attractive relative to [congressional] committee action alone”).

⁸⁹ See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 23–54 (1991) (describing rules as “entrenched generalizations” that are meant to serve an underlying “background justification”).

⁹⁰ Cf. EPSTEIN & O'HALLORAN, *supra* note 11, at 52–75 (modeling Congress’s optimal delegation strategy as dependent on the institution’s estimate of how external factors will influence its desired predicted policy outcomes).

investigation.⁹¹ The Supreme Court rejected the plaintiff-officer's claim, but expressly declined to use the facts of the case to "establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices."⁹² Instead, the Court assumed *arguendo* that the officer had a Fourth Amendment privacy interest in the content of his text messages.⁹³ The Court then narrowly held that inasmuch as the City's review of those texts constituted a search, the search was reasonable based on the facts of the case. The narrow holding, the Court explained, was justified by the risks that uncertainty creates when applying the Fourth Amendment to new technologies. Specifically, the Court observed that "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior."⁹⁴ In light of this technological and social flux, the Court explained, "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."⁹⁵

Thus, because of uncertainty, the Court in *Quon* declined to create doctrinal rules that would impose clear constitutional constraints on public institutions with respect to accessing their employees' communications.⁹⁶ This does not necessarily mean the Court *overestimated* the degree to which uncertainty required them to leave public institutions with discretion over when to access workplace communications without a warrant. However, the fact that the Court declined to establish *any* clear rules governing this question suggests that this may be the case. In a concurring opinion, Justice Scalia seems to suggest that the Court indeed overestimated the extent to which its judicial minimalism was justified by conditions of uncertainty:

Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court's implication that

⁹¹ 130 S. Ct. 2619, 2624 (2010). For another recent discussion of how the Court treated the problem of uncertainty in *Quon*, see Kerr, *supra* note 24, at 539–42 (contending that *Quon*'s holding supports Kerr's "equilibrium-adjustment" theory of the Fourth Amendment).

⁹² *Quon*, 130 S. Ct. at 2629.

⁹³ *See id.* at 2631.

⁹⁴ *Id.* at 2629; *cf.* *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (suggesting that Fourth Amendment doctrine may need to evolve to accommodate changes in police surveillance technology and in social attitudes regarding the privacy of information shared with third parties).

⁹⁵ *Quon*, 130 S. Ct. at 2629.

⁹⁶ *Cf.* Kerr, *supra* note 24, at 541 (observing that the *Quon* Court avoided creating any doctrinal rules, and arguing that it is preferable to create temporary Fourth Amendment rules to govern evolving technologies).

where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards or issuing opaque opinions—is in my view indefensible.⁹⁷

Both the Court's caution and its candor in *Quon* illustrate how uncertainty shapes the Court's delegation choices in cases that involve rapid technological change. However, the problem of estimating uncertainty—and the risk of overestimating uncertainty—is also present in cases that do not concern evolving technologies. For example, in *Herring v. United States*,⁹⁸ the Court had to decide whether it should weaken the exclusionary rule, by refusing to apply it in cases involving ordinary negligence, in order to achieve an optimal level of compliance with the Fourth Amendment.⁹⁹ In order to make the correct delegation choice, the Court would have to consider the unknown consequences of disrupting a well-established doctrinal rule, such as whether trial courts would be able to determine accurately whether an officer's conduct was negligent or intentional if the distinction became relevant. In addition, the Court's optimal delegation choice will be influenced by uncertainties that would call for giving officers more discretion to deviate from the Court's doctrinal rules, such as the possibility that new social practices will make it more difficult for the government to obtain evidence.¹⁰⁰ Thus, even in cases that do not involve cutting-edge technologies, conditions of uncertainty may induce a court to delegate to law enforcement officials the discretionary authority to deviate from its decision rule in order to better conform their conduct to that justification. However, to the extent that a court *overestimates* the degree to which these conditions merit granting discretionary authority to law enforcement officials, it will have engaged in overdelegation.

2. Underestimating Policy Resistance

Second, a court will overdelegate if it underestimates the extent to which law enforcement officials will resist implementing a constitutional objective. Often, such resistance will result from the distance that exists between the court's constitutional objectives and the law enforcement officials' own policy preferences. According to what Matthew Stephenson

⁹⁷ *Quon*, 130 S. Ct. at 2635 (Scalia, J., concurring in part and concurring in the judgment) (citation omitted).

⁹⁸ 555 U.S. 135 (2009).

⁹⁹ See *supra* notes 51–53 and accompanying text.

¹⁰⁰ See Kerr, *supra* note 24, at 480 (arguing that the Supreme Court reduces Fourth Amendment protections when “changing technology or social practice makes evidence substantially harder for the government to obtain”).

describes as a corollary to the ally principle, a principal will consider whether an agent shares its policy goals in deciding how much discretion to afford the agent.¹⁰¹ Congressional delegation theorists typically assume, for example, that an agency will use any discretionary authority it is given to produce policy outcomes that come as close as possible to its ideal outcome given the constraints under which the agency is operating.¹⁰² Therefore, in deciding how much power to delegate to an agency, Congress will consider the extent to which the agency's ideal policy outcome differs from its own ideal policy outcome.¹⁰³

Analogously, in deciding how much power to delegate to law enforcement officials, a rational court will consider the likely extent to which those officials will be opposed to the court's constitutional objectives. If the court is aware that law enforcement officials are particularly hostile to the court's desired outcome, then it has an incentive to limit the officials' discretion.¹⁰⁴ For example, in *Hudson v. Michigan*, the Supreme Court cited "the increasing professionalism of police forces, including a new emphasis on internal police discipline," as a reason not to categorically apply the exclusionary rule for "knock-and-announce" violations.¹⁰⁵ If this "increasing professionalism" were evidence that law enforcement officials had become increasingly committed to honoring their Fourth Amendment obligations, then it would indeed weigh in favor of delegating greater discretionary authority. However, as police officers become more familiar with the intricacies of Fourth Amendment doctrine, their knowledge may enable them to manipulate their encounters with suspects (and their testimony during suppression hearings) to ensure that

¹⁰¹ See Stephenson, *supra* note 85, at 1440 (describing a corollary to the "ally principle" whereby a principal who "is not able to select a perfect ally as its agent . . . will locate the discretionary window to (partially) offset the agent's predicted bias").

¹⁰² See EPSTEIN & O'HALLORAN, *supra* note 11, at 52–75 (modeling Congress's optimal delegation strategy as dependent on the distance between its ideal policy outcome and the agency's ideal policy outcome).

¹⁰³ See *id.*

¹⁰⁴ See Stephenson, *supra* note 85, at 1440. Arguably, there also may be occasions when law enforcement officials' hostility toward a constitutional objective could incentivize courts to grant them *more* discretion over implementing the objective. For example, the Court's decision not to order immediate enforcement of *Brown v. Board of Education* is widely regarded to reflect a strategy of gradually diffusing official opposition to school desegregation. See Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 624–26 (1983) (analyzing the controversy over *Brown II*'s "all deliberate speed" standard); see also *supra* note 59 and accompanying text. Provided that such a strategy of increased discretion is justified by the practical difficulties of implementing a constitutional objective, it may not necessarily be one of overdelegation. See *supra* note 60 and accompanying text.

¹⁰⁵ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

any evidence they obtain will be admissible under one of the exclusionary rule's many exceptions. Thus, increased professionalism could also indicate that police officers have become increasingly adept at violating the Fourth Amendment without having a court detect the violation or impose a penalty.¹⁰⁶ A court should therefore examine the ways in which law enforcement institutions' training practices influence their policy aims before deciding whether or not those practices provide a reason for delegating greater discretionary authority.

Likewise, if law enforcement officials are simply not competent to use the discretion afforded to them in order to address any future circumstances that might arise, then the Court will have an incentive to limit their discretion. These competency questions will arise not only when law enforcement officials are undertrained or ignorant of their constitutional duties, but also when highly trained law enforcement officials confront a problem that they lack the institutional resources to address. In *Maryland v. Shatzer*, for example, the Supreme Court addressed when officers may question a suspect who had previously invoked his *Miranda* right to counsel while detained for questioning, but who has since been released from custody.¹⁰⁷ The Court reasoned that, under its earlier precedents, an officer should be free to reinitiate questioning once a defendant is both released from custody and free from its "lingering effects."¹⁰⁸ Ideally, because custody will affect people in very different ways depending on the circumstances of their detention and their psychological makeup, a court might wish to have law enforcement officials (or perhaps neutral magistrates) make this determination on a case-by-case basis. However, neither trial judges nor law enforcement officials are likely to have the information or psychological training necessary to decide, on a prompt

¹⁰⁶ See Dripps, *supra* note 52, at 238 ("[T]here is substantial evidence tending to show that police professionalism actually *increases* the risk that the police will exploit weaknesses in the remedial scheme by violating substantive Fourth Amendment rights for the sake of incriminating evidence. The exclusionary rule gives cities and departments an incentive to train their forces, but the training the police receive seems to be more concerned with admissibility than with legality.").

¹⁰⁷ See *Maryland v. Shatzer*, 130 S. Ct. 1213, 1217 (2010); *see also* *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (holding that because of the inherently compelling pressures of custody, a police officer may not reinitiate an interrogation after the defendant had invoked this right); *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966) (holding that police must inform a suspect prior to interrogation that he has the right to an attorney, and must cease questioning if the suspect invokes this right). The defendant in *Shatzer* was, in fact, incarcerated for an unrelated conviction when police reinterrogated him. The Court held, however, that the defendant's release into the general prison population constituted a break in custody for *Miranda* purposes. *See Shatzer*, 130 S. Ct. at 1224–25.

¹⁰⁸ *Shatzer*, 130 S. Ct. at 1222.

basis, whether a particular defendant is free from the “lingering effects” of custody. Accordingly, the Court did not grant officials unconstrained discretion to determine when they should reinterrogate a suspect who invoked his *Miranda* right to counsel, but instead ruled that law enforcement officials must wait at least fourteen days before resuming interrogation.¹⁰⁹

Thus, because law enforcement officials typically lack the competence to evaluate how incarceration operates on a suspect’s psyche, the Court chose not to delegate to them the discretionary authority to make this assessment. However, there remains a question as to whether the Court in *Shatzer* nonetheless granted officers too much authority in light of their likely hostility to the constitutional objective of safeguarding the *Miranda* right to counsel. If officers are in fact hostile to this objective, they may exploit *Shatzer*’s holding by attempting to interrogate suspects every two weeks until they break down.¹¹⁰ To the extent that the Court underestimated this possibility, or failed to consider it at all, then *Shatzer*’s holding represents an instance of overdelegation. And, regardless whether such overdelegation occurred, *Shatzer* presents a clear instance of when it is conceptually useful to frame the Court’s constitutional decisionmaking as a delegation strategy.

* * *

These two considerations—how external factors might frustrate the court’s constitutional objectives and the degree to which law enforcement officials are unwilling or unable to advance these objectives—form the measure of whether a court has engaged in overdelegation. If a court is making an optimal criminal procedure decision, it will delegate as much discretion to law enforcement officials as the considerations warrant. However, if the court delegates *more* discretion to law enforcement officials than these considerations warrant, then it has unnecessarily provided law enforcement officials the freedom to disregard the court’s constitutional objectives in favor of their own policy aims. Accordingly, the court will engage in overdelegation if, in deciding how much discretion to confer on low-level officials, it either: (1) overestimates the threat that law enforcement officials will be unable to comply with a court’s constitutional objective if they are not given the flexibility to adjust their policies; or (2) underestimates the extent to which law enforcement officials are either

¹⁰⁹ *Id.* at 1223.

¹¹⁰ See Fan, *supra* note 80, at 1411 & n.11 (discussing how police officers may circumvent *Shatzer*).

hostile to that objective or unable to use their discretion to work toward achieving it.

B. IDENTIFYING OVERDELEGATION

Thus defined, the concept of overdelegation offers a useful tool for critiquing the allocations of institutional power that result from the Supreme Court's doctrinal decisions. Moreover, this tool can be shared by people who have deep (and potentially intractable) theoretical disagreements about the scope of the Constitution's criminal procedure protections.¹¹¹ This is because the concept allows for an analytical framework that distinguishes between a court's constitutional objectives, which can be treated as exogenous to the analysis, and the Court's strategy for achieving those objectives, which can be treated as endogenous. This, in turn, makes it theoretically possible to use the concept of overdelegation to evaluate whether a Justice is setting a level of law enforcement discretion that optimizes her ideal constitutional outcome, without making a normative assessment of that outcome's value.

For example, the concept of overdelegation can be used to disentangle two points of disagreement, one normative and one institutional, between the majority and dissent in *Michigan v. Bryant*¹¹² regarding the scope of the ongoing emergency exception to the Confrontation Clause. In his dissent, Justice Scalia argues that the Confrontation Clause does not permit courts to consider a police officer's intent in eliciting the witness's statements. This criticism reflects a normative disagreement between the dissent and the majority regarding the proper scope of the Confrontation Clause. In addition to this normative critique, however, Justice Scalia essentially accuses the majority of irrationally delegating more authority to law enforcement officials than its own constitutional objective warrants. Specifically, Scalia can be understood as critiquing the decision rule the Court created with its holding that the statements at issue in *Bryant* were admissible despite the police having questioned the witness before conducting any investigation of the crime scene and continued the interrogation for ten minutes.¹¹³ Essentially, Scalia argued, this holding gave police and prosecutors the discretion to have statements admitted under the ongoing emergency exception even when it is manifestly clear that the interrogation was conducted to investigate "a past crime with no

¹¹¹ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1751–54 (1994).

¹¹² 131 S. Ct. 1143 (2011).

¹¹³ See *supra* note 66 and accompanying text.

ongoing or immediate consequences.”¹¹⁴

In making this second argument, Scalia essentially accuses the majority of overdelegation, and framing it in these terms makes it possible to examine the Court's decision with greater conceptual clarity. In order to resolve Scalia's normative dispute with the majority, one would have to stake a position on a normatively contentious constitutional question: the proper scope of the Confrontation Clause. With respect to the delegation question, however, the merits of Scalia's critique can be evaluated by considering two sets of facts: (1) the extent to which external factors might cause the decision rule to fall short as a way of achieving the Court's constitutional objective; and (2) the extent to which the policy preferences of law enforcement officials diverge from the Court's constitutional objectives. The concept of overdelegation can thus lend tractability to a debate that might otherwise get conflated with a deeper normative debate about the true meaning of the Confrontation Clause.

C. DESCRIPTIVE LIMITS

By defining overdelegation narrowly, the concept can be used to differentiate between delegation decisions that are normatively misguided and those that are simply irrational. This narrowing, however, comes at the cost of complete descriptive accuracy. In practice, the conceptual distinction between determining the content of a constitutional norm and crafting a set of doctrinal rules that successfully implement that norm often may be blurred.¹¹⁵

First, a decision that appears to involve overdelegation may, in fact, be motivated by hostility to the right at issue. That is, a court may profess fidelity to a well-established constitutional objective but intentionally craft decision and remedial rules that permit law enforcement officials to undermine that objective.¹¹⁶ Thus, the doctrinal rules will overdelegate authority with respect to the court's stated constitutional objective, but optimally delegate authority with respect to its actual objective.

For judges hostile to constitutional interpretations that redound to the

¹¹⁴ *Bryant*, 131 S. Ct. at 1171–73 (Scalia, J., dissenting).

¹¹⁵ Stephenson, *supra* note 76, at 10–11; see also David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 544, 546 (1991).

¹¹⁶ See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996) (arguing that, since the Warren Court era, “[r]ather than redrawing in any drastic fashion the line between constitutional and unconstitutional police conduct, the Supreme Court has revolutionized the consequences of deeming conduct unconstitutional”).

benefit of criminal defendants, this delegation strategy is an attractive option for achieving their substantive goals. As explained above, the Supreme Court stands in a principal-agent relationship to low-level officials in criminal procedure cases, in which the Court can control how much discretion to accord the officials but has relatively little power to monitor how the officials exercise that discretion.¹¹⁷ Congressional delegation scholars have posited that, under a “blame-shifting” model of Congressional delegation, principals are more inclined to delegate power to agents when doing so will enable them to avoid responsibility for unpopular policy choices.¹¹⁸ This principle helps explain why a Supreme Court Justice who is hostile to the rights of suspects and defendants might adopt a decision rule that empowers low-level officials to self-monitor their protection of a constitutional right rather than simply deny the existence of that right. Some constitutional criminal procedure rights are firmly entrenched in the public imagination, and a decision that repudiates these rights might create considerable backlash against the Court.¹¹⁹ Such backlash may be less severe, however, if the Court continues to affirm the existence of the right but implements decision rules that ensure that the right is rarely protected.¹²⁰ In criminal procedure cases, the Court has the option to delegate the decision whether to honor a constitutional right to agents who have obvious incentives not to do so—police and prosecutors. A Supreme Court Justice who is hostile to the rights of suspects and defendants can reasonably expect these agents to share his political aims, and (all other things equal) can thus be expected to delegate power to them.

Conversely, a set of doctrinal rules might appear to be optimal with respect to the Court’s stated constitutional objective, but only because delegation pressures have influenced the judge’s interpretation of the underlying constitutional right.¹²¹ Instead of revising a decision rule in

¹¹⁷ See *supra* note 83 and accompanying text.

¹¹⁸ See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 48–49 (2d ed. 1989); cf. EPSTEIN & O’HALLORAN, *supra* note 11, at 32–33 (noting the controversial assumptions underlying the blame-shifting model, but arguing that it nonetheless “captures some of the motivations behind legislators’ decision to delegate”); DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 81–82 (1991) (observing that the blame-shifting model relies on the controversial assumptions that voters will be constantly fooled by congressional blame-shifting efforts, and will not pressure Congress to develop better oversight mechanisms).

¹¹⁹ See, e.g., MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 181 (2001) (discussing how the Court’s decisions in *Miranda* became entrenched in the public culture).

¹²⁰ See Steiker, *supra* note 116, at 2548–51.

¹²¹ See, e.g., Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that “[r]ights are dependent on remedies not just

order to better obtain a constitutional objective, the judge might (consciously or otherwise) choose a different constitutional objective that is easier to implement. Thus, a judicial opinion that appears to be motivated by the Court's interpretation of a constitutional guarantee may in fact be motivated by delegation concerns. For example, consider the Supreme Court's decision in *Perry v. New Hampshire*.¹²² In *Perry* the Court held that the Due Process Clause does not bar the use of unreliable eyewitness testimony in cases where police did not arrange the circumstances that rendered the testimony unreliable.¹²³ As a practical matter, this holding arguably gives prosecutors considerable leeway to introduce unreliable (but nonetheless persuasive) evidence that would be constitutionally barred in other circumstances.¹²⁴ Nevertheless, on its face the Court's holding does not suggest that the Court engaged in overdelegation. Instead, the Court simply determined that it had no constitutional authority to regulate the use of unreliable eyewitness identification evidence when the police had no role in rendering it unreliable, and constructed its doctrine accordingly. However, while the Court's holding was ostensibly based on the scope of the Due Process Clause, it also expressed concerns about endorsing a constitutional objective that would "open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications."¹²⁵ If this concern motivated the Court to adopt a view of the Due Process Clause with which it otherwise disagreed, then the decision in *Perry* would in fact be a form of overdelegation.

These two forms of overdelegation—where the Court either does not say what it means or does not know what it means—are not detectable under a definition that draws a sharp distinction between a court's constitutional objective and its strategy for implementing that objective. In order to create the concept of overdelegation that captures such decisions, one would have to redefine it in terms of some fixed theory of constitutional interpretation rather than simply by reference to whatever constitutional theory the Court chooses for itself. Ultimately, there would be considerable value in defining a concept of irrational delegation that is rooted in a

for their application to the real world, but for their scope, shape, and very existence").

¹²² 132 S. Ct. 716 (2012). Since the Supreme Court had last addressed the constitutional limits of using eyewitness testimony, see *Manson v. Brathwaite*, 432 U.S. 98 (1977), a wealth of scholarship had established it to be a particularly untrustworthy form of evidence. See *Perry*, 132 S. Ct. at 732–33, 739 nn.6–11 (Sotomayor, J., dissenting) (summarizing the scholarship).

¹²³ See *id.* at 730 (majority opinion).

¹²⁴ E.g., *Brathwaite*, 432 U.S. at 113 (barring the use of unreliable eyewitness testimony obtained through "unnecessarily suggestive" police procedures).

¹²⁵ *Perry*, 132 S. Ct. at 727.

normative constitutional theory, as the concept may offer a richer and more descriptively accurate concept for critically analyzing judicial decisionmaking.

However, the aim of this Article is simply to make the case that overdelegation is conceptually distinct from bad constitutional theorizing and that, given the structure of criminal procedure decisionmaking, it plausibly accounts for many of the Supreme Court's doctrinal choices in that area of law. For all its merits, a more robust concept of overdelegation would frustrate this aim by sparking theoretical disagreements about its normative underpinnings and inviting the accusation that the concept is merely a rhetorical device for condemning bad constitutional reasoning. The circumscribed concept of overdelegation presented here, by contrast, errs on the side of being underinclusive in order to avoid false positives—decisions that appear to be instances of overdelegation but which are actually rational delegation choices in light of the Court's constitutional objectives. The concept thus preserves a sharp distinction between disapproving of a court's delegation choices and disliking its constitutional aims.

III. OVERDELEGATION'S STRUCTURAL SOURCES

The possibility that the Supreme Court is likely to overdelegate power in criminal procedure cases, while perhaps intuitively obvious to those familiar with the doctrine, is theoretically puzzling. By definition, overdelegation is a suboptimal strategy for a court to achieve its constitutional aims. One would not, therefore, necessarily expect to see courts doing it systematically.

Moreover, to the extent that courts do commit some sort of systemic delegation error in their decisionmaking, conventional wisdom suggests it would be one of *underdelegation*. This is because developing an effective delegation strategy requires courts to critically assess their own competence to construct decision rules that are likely to achieve their constitutional objectives, and compare it to the competence of law enforcement officials to achieve those objectives using the discretionary authority that is delegated to them.¹²⁶ Most institutional choice theorists assume the error one is most likely to commit when engaging in this type of comparative institutional analysis is to accord *less* deference to other institutions than a comparative institutional analysis would dictate.¹²⁷ As much as anyone

¹²⁶ See *supra* Part II.

¹²⁷ See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Cass R. Sunstein & Adrian Vermeule,

(and probably more so), judges are susceptible to egocentric bias, which leads them to overestimate their own competence and decisionmaking ability relative to others.¹²⁸ Moreover, judges' goals often align with the interests of the courts on which they serve and, what's more, are partly shaped by those interests.¹²⁹ Traditional separation of powers theory thus assumes that a court's members will have "personal motives" to protect and enhance the institution's power vis-à-vis the executive and legislature—thus ensuring that "[a]mbition" is "made to counteract ambition."¹³⁰

The doctrinal trajectory of criminal procedure, however, invites the hypothesis that the Court systematically overdelegates discretionary authority to law enforcement officials in this area of law. It is therefore worth examining the structural features of constitutional criminal procedure that differentiate it from other areas of constitutional decisionmaking and analyzing whether they might incentivize the Supreme Court to delegate authority to law enforcement officials irrationally. Accordingly, this Part

Interpretation and Institutions, 100 MICH. L. REV. 885, 937 & n.177 (2003).

¹²⁸ Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811–15 (2001) (describing egocentric biases and reporting findings from an empirical study on judges' susceptibility to them).

¹²⁹ See Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 988 (2009) (arguing that "[t]he matrix of constitutionally established roles not only shapes and limits what officials *can* do, but presumably also influences what they *want* to do"); Stephen Skowronek, *Order and Change*, 28 POLITY 91, 94 (1995) ("[I]nstitutions do not simply constrain or channel the actions of self-interested individuals, they prescribe actions, construct motives, and assert legitimacy. That indeed is how institutions perpetuate the objectives or purposes instilled in them at their founding; that is what lies at the heart of their staying power."); Keith E. Whittington, *Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 615 (2000) (reviewing SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999)) ("[I]nstitutions are both regulative and constitutive. They constrain choices by structuring incentives, but they also shape preferences by influencing ideas."); see also James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 922 (1978) (evaluating how role orientation constrained the judicial ideology of a set of state supreme court justices).

¹³⁰ THE FEDERALIST NO. 51, *supra* note 56, at 319 (James Madison); see also Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 66 (Cornell W. Clayton & Howard Gillman eds., 1999) [hereinafter SUPREME COURT DECISION-MAKING] (noting that new institutionalists "shift their focus away from the long-standing question of how institutions are affected by the personal characteristics of judges and toward the question of how judges are affected by the institutional characteristics within which they are embedded"); Dripps, *supra* note 52, at 237 (arguing that "[t]he Court consistently has jealously guarded its power over criminal procedure").

identifies four features of criminal procedure decisionmaking that, in conjunction, make it a structurally unique area of constitutional law. It also explores the ways in which these features incentivize the Supreme Court to delegate more power to law enforcement officials than the Court's constitutional objectives might warrant.

A. REGULATORY COMPLEXITY (AND SINGLE INSTITUTIONALISM)

When an institution's members realize the limits of their organization's competence to address an issue, they may be prone to divest the institution of power without reflecting on whether any other institution is, in fact, more competent to address the issue. This error is an instance of what Neil Komesar describes as the fallacy of "single institutionalism."¹³¹ Typically, the fallacy is associated with a failure to entrust other institutions with decisions that they are relatively well positioned to make. The structure of constitutional criminal procedure decisionmaking, however, creates the possibility not only that judges will commit this fallacy, but that the error will lead them to overdelegate discretionary authority to law enforcement officials.

The risk that courts will commit the single institutionalist fallacy arises from constitutional criminal procedure's regulatory complexity. In crafting criminal procedure doctrine, the Supreme Court creates rules that govern nearly a million federal, state, and local law enforcement officials.¹³² This

¹³¹ NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 25 (2001).

¹³² This collective figure of police and prosecutors employed nationwide has not been reported in any publication, but reflects the best available data. *See* U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010, at 2 (2010), *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf (reporting that 6,075 full-time attorneys were employed in U.S. Attorneys' offices nationwide, and that 79% of this personnel worked exclusively on criminal prosecutions); STEVEN W. PERRY & DUREN BANKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2007—STATISTICAL TABLES 4 tbl.2 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf> (reporting that in 2007 state prosecutors' offices employed approximately 27,000 prosecutors); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (2012), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fleo08.pdf> (reporting that federal agencies employed approximately 120,000 full time law enforcement officers with arrest authority in September 2008); BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslla08.pdf> (reporting that in September 2008, state and local law enforcement agencies employed about 765,000 personnel with general arrest powers). Collectively, this data suggests that, nationwide, there are approximately 885,000 federal, state, and local police officers; and 31,800 federal and state prosecutors. The Bureau of Justice Statistics does not report the number of municipal and county prosecutors

task is complicated by the fact that, at least theoretically, the scope of the Constitution's criminal procedure guarantees may not "vary from place to place and from time to time."¹³³ The Court must therefore construct rules meant to impose the same constitutional obligations on an official in Montana as on an official in Brooklyn, notwithstanding the geographic and demographic differences between their jurisdictions.¹³⁴ Such regulation requires courts to determine both what level of discretion state-level actors must be accorded in order to perform their work safely and effectively, and how much judicial restraint of those actors is necessary to protect suspects' rights.¹³⁵

Crafting criminal procedure decision rules thus requires courts to adopt what one scholar has aptly called "regulatory strategies" for governing the conduct of low-level state actors.¹³⁶ As the Supreme Court frequently emphasizes, the success of a particular decision rule depends on whether it effectively implements the constitutional guarantee in question while respecting the general societal interest in law enforcement.¹³⁷ For example, when deciding whether the exclusionary rule is a sound decision rule for enforcing the Fourth Amendment's prohibition against unreasonable searches, the Court must assimilate information concerning the institutional culture of police,¹³⁸ their training,¹³⁹ the extent to which there is oversight

employed nationwide. *See* PERRY & BANKS, *supra*, at 1. It is plausible to assume, however, that these officials would put the nationwide population of police and prosecutors at over one million. (For some reason, the U.S. Department of Justice's 2011 Annual Statistical Report does not provide data on the staffing of U.S. Attorneys' offices. *See* U.S. ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2011 (2011), available at http://www.justice.gov/usao/reading_room/reports/asr2011/11statrpt.pdf).

¹³³ *Whren v. United States*, 517 U.S. 806, 815 (1996) (holding that the scope of the Fourth Amendment's search and seizure protections is not contingent on the police regulations in place in a given jurisdiction).

¹³⁴ *Cf.* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1629 (2006) (challenging the premise that constitutional protections must invariably "apply in the same way as against federal, state, and local governments").

¹³⁵ *See* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1736–45 (2006); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 16–17 (1997).

¹³⁶ Miller, *supra* note 82, at 38.

¹³⁷ *Cf.* *United States v. Janis*, 428 U.S. 433, 448–49 (1976) ("Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.").

¹³⁸ *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 598 (2006) (rejecting a categorical rule of suppressing evidence for knock-and-announce violations as unnecessary in light of "the increasing professionalism of police forces, including a new emphasis on internal police

over their interactions with suspects,¹⁴⁰ and an array of other institutional factors.¹⁴¹

Criminal procedure cases thus present challenges for which courts are institutionally ill equipped. In most constitutional adjudication, the court reviews a regulatory strategy that was designed by a legislature or executive agency, both of which typically possess large staffs of fact-gatherers.¹⁴² In crafting criminal procedure rules, however, judges must design regulatory strategies with the benefit of only a few law clerks helping research and draft opinions (and, in the case of Supreme Court clerks, select cases for review).¹⁴³ Moreover, beyond these institutional handicaps, judges who adhere to a strict “party presentation model of adjudication” might view gathering facts from outside the record to be incompatible with their duty to limit themselves to arguments presented by the parties to the case before them.¹⁴⁴

This complexity creates a strong temptation for the Court to delegate authority to law enforcement officials without carefully and critically evaluating whether the delegation is warranted. In order to adopt a rational delegation strategy when confronted with the choice of which institution should be entrusted to make a decision, one must weigh the comparative strengths and weaknesses of *both* institutions. The fact that a particular institution may be ill equipped to make certain judgments does not necessarily mean that the institution *should not* be entrusted to make those judgments; one must also determine whether any other institution is better equipped to make them. In other words, when there are only bad options, the best choice will still be a bad choice.¹⁴⁵

discipline”); *see also* Sklansky, *supra* note 135, at 1797–99 (discussing how research on police culture has influenced criminal procedure scholarship).

¹³⁹ *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (requiring appellate courts to defer to police inferences about suspicious behavior in light of their “experience and expertise”).

¹⁴⁰ *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 448–49 (1965) (emphasizing the secrecy of the custodial interrogation process).

¹⁴¹ *See* Sklansky, *supra* note 135, at 1704 (discussing how social science has influenced the “jurisprudence of policing and academic commentary on that jurisprudence”); *cf.* Miller, *supra* note 82, at 33 (demonstrating that modern criminal procedure “rests upon a variety of untested regulatory assumptions about the ways in which the police do and ought to interact with the public”).

¹⁴² *See* Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 55 (1998).

¹⁴³ *Id.* at 53.

¹⁴⁴ Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1870 (1998).

¹⁴⁵ KOMESAR, *supra* note 131, at 24.

Selecting the least-worst choice, however, presents judges with two significant problems in the criminal procedure context. First, the decision to regulate officials using a constitutional criminal procedure rule is not easily correctable if it turns out to have been a mistake.¹⁴⁶ Because constitutional decisions are mandatory, any new criminal procedure rule that later proves misguided will be impossible for the legislature to revise, and difficult for the Court to overturn.¹⁴⁷ This reversibility problem deprives the Court of a particularly desirable strategy for addressing problems under conditions of uncertainty: using a series of small, reversible steps that place few *ex ante* burdens on the initial decisionmaker and few *ex post* burdens on any subsequent decisionmaker (a second-order strategy that Cass Sunstein and Edna Ullmann-Margalit refer to as “Low-Low”).¹⁴⁸

Second, when relying on law enforcement officials to implement a constitutional objective, the Court faces a classic agency problem. In a principal–agent relationship, the agent will have superior information regarding the task being delegated, and the principal will have difficulty ensuring that the agent uses that informational advantage to act in the principal’s interest.¹⁴⁹ In criminal procedure cases, much of the information courts require to create effective criminal procedure decision rules—the measures necessary to ensure police safety, whether failing to present mitigation evidence in a capital case constitutes a viable defense strategy, etc.—is in the hands of the actors criminal procedure rules are meant to regulate. Accordingly, criminal procedure adjudication requires courts to harness the informal knowledge that low-level officials possess about how to perform their jobs effectively, and translate that informal knowledge into

¹⁴⁶ See ARTHUR L. STINCHCOMBE, *WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS* 36–37 (2001) (explaining the concept of correctability and arguing that a formal system of governance must be correctable in order to be stable).

¹⁴⁷ Howard Gillman, *What’s Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465, 480–85 (2001) (discussing disagreements among political scientists and legal scholars about the extent to which precedent influences judicial decisionmaking); Stuntz, *supra* note 5, at 792–93 (arguing that the mandatory nature of criminal procedure rules makes it costly for legislatures to create additional protections for criminal suspects).

¹⁴⁸ Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 *ETHICS* 5, 7 (1999).

¹⁴⁹ Cox & Posner, *supra* note 83, at 1290–91; see also T. Bendor et al., *Theories of Delegation*, 4 *ANN. REV. POL. SCI.*, 235, 240 (2001) (explaining that “informational asymmetries between [the] principal and agent” are regarded as “central to delegation”); Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 *GEO. WASH. L. REV.* 859, 885 (2009) (explaining that in principal–agent relationships, “[t]he agent does not have the same incentives as the principal and also can have superior information”).

rules that effectively implement constitutional protections.¹⁵⁰ This process is complicated, however, by the fact that these officials do not necessarily share the courts' constitutional aims, and thus have an incentive to withhold that information.¹⁵¹ Thus, if the Court wishes to assess how the day-to-day realities of law enforcement will influence the outcomes of a doctrinal rule it is contemplating, it has to do so based on information that those officials possess and may not be willing to share.

Faced with these decisionmaking difficulties, a rational court would attempt to estimate both its own uncertainty about how unknown factors might thwart its policy objective and law enforcement officials' desire and ability to disregard that objective in favor of their own. The court would then choose to delegate no more power to law enforcement officials than would be necessary under that estimate. However, a court may not want to go through the trouble of making such an estimate or might feel underequipped to do so. In either case, the court might be tempted to delegate discretionary authority to law enforcement officials without first analyzing whether they are better equipped than the court to implement a constitutional objective. In other words, a judge deciding whether to retain power within her own institution or to delegate it to another institution may simply select the option she knows the least about—and which therefore strikes her as less unappealing than the option with which she is familiar.

This is a symptom of humans' cognitive architecture that influences (and sometimes distorts) decisionmaking where information is limited and decisions must be made quickly.¹⁵² Specifically, judges facing a complex problem and acting on incomplete information may rely to their detriment on the availability heuristic, such that the institutional limitations of their court are far more salient to them than the limitations of an institution to which it is able to delegate authority.¹⁵³ When this happens, the court may

¹⁵⁰ Cf. STINCHCOMBE, *supra* note 146, at 29 (discussing the difficulty that managers face in translating the informal knowledge of effective workers into rules that will guide new workers).

¹⁵¹ See *supra* Part II.A.

¹⁵² See BRYAN D. JONES, *POLITICS AND THE ARCHITECTURE OF CHOICE: BOUNDED RATIONALITY AND GOVERNANCE* 131–59 (2001); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 130–32 (2006) (describing the decisionmaking conditions of courts); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 100–05 (2002) (describing judges' institutional and cognitive constraints).

¹⁵³ See Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 743 & n.73 (2011) (summarizing literature on the availability heuristic and discussing its relevance to criminal procedure interpretation).

reflexively overestimate the decisionmaking ability of other institutions on the assumption (or perhaps the hope) that they will be better equipped to handle the problem at issue.

Consider, for example, the Court's decision in *Herring* to eliminate the exclusionary rule as a remedy for Fourth Amendment violations involving ordinary negligence.¹⁵⁴ As explained above, the *Herring* Court appears to have overdelegated power to law enforcement officials because it failed to adequately evaluate either the exclusionary rule's social costs and deterrent value or the Fourth Amendment training practices and cultural behaviors of local police departments.¹⁵⁵ Crucially, however, the Court's failure to consider information relevant to its delegation decision was not because it lacked access to the information. For example, the Court failed to justify its claim that the exclusionary rule had only marginal deterrent value for negligent misconduct, despite the dissent highlighting that it lies "counter to a foundational premise of tort law . . . that liability for negligence . . . creates an incentive to act with greater care."¹⁵⁶ Moreover, an amicus brief submitted by two influential Supreme Court litigators (Walter Dellinger and Pamela Harris) documented the strong empirical evidence of the exclusionary rule's value in deterring negligent misconduct.¹⁵⁷ This brief included evidence that the exclusionary rule has served as a catalyst for improved police training, and suggests that limitations on the exclusionary rule have an adverse effect on police training.¹⁵⁸

Of course, the Court should have evaluated these claims against potential counterarguments, and the government presented some theoretical justification for the idea that the exclusionary rule would not effectively deter the type of clerical errors at issue in *Herring*.¹⁵⁹ However, rather than undertake such an analysis, the Court merely declared, *ipsa dixit*, that the exclusionary rule cannot be justified in deterrence cases in light of its substantial costs. The Court's error thus appears to have been one of reflexive overdelegation, resulting from a healthy appreciation of its own institutional limitations, and a failure to consider whether any other institution was competent to fill the regulatory void that narrowing the exclusionary rule would create.

¹⁵⁴ *Herring v. United States*, 555 U.S. 135, 137 (2009).

¹⁵⁵ See *supra* notes 15–20 and accompanying text.

¹⁵⁶ *Herring*, 555 U.S. at 148 (Ginsburg, J., dissenting).

¹⁵⁷ See Brief for Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner at 3–13, *Herring v. United States*, 555 U.S. 135 (2009) (No. 07-513).

¹⁵⁸ See *id.*

¹⁵⁹ See Brief for the United States at 22–23, *Herring v. United States*, 555 U.S. 135 (2009) (No. 07-513).

B. DOCTRINAL ENTRENCHMENT MECHANISMS

Even if courts avoid the single institutionalism fallacy when deciding cases, criminal procedure's regulatory complexity creates an additional risk. As discussed above, one factor relevant to designing an optimal delegation strategy is whether the officials will be hostile to the court's objective.¹⁶⁰ If this simply involved observing the officials' existing policy preferences, the task would be relatively straightforward. However, when assessing the relative competence of two institutions, it is dangerous to assume that one institution's choices will not affect the other's competence. If a court treats another institution's goals and abilities as static, it may fail to recognize how its own doctrinal choices might affect the institution's competence.¹⁶¹ Thus, if a court were to assume that a law enforcement institution's policy preferences were fixed, but those preferences were in fact dependent on the court's doctrinal choices, the court may overdelegate.

The structure of criminal procedure suggests that, in fact, judicial doctrine and law enforcement institutions' policy objectives are interrelated in ways that are often difficult to recognize. For all its regulatory intricacy, constitutional criminal procedure is at bottom a normative exercise, in which courts identify constitutional goals and devise doctrinal rules to implement them.¹⁶² Like all constitutional rights, these rules will be effective only insofar as government officials commit themselves to abide by them, even when it is apparently against their interests to do so.¹⁶³ Accordingly, scholars of constitutional design have elaborated on Madisonian theory to examine how the Constitution's structural provisions selectively empower decisionmakers whose ambitions and incentives are aligned with constitutional values.¹⁶⁴ However, the actors governed by criminal procedure rules are not members of elected legislatures, but are instead low-level officials who do not occupy any positions within the Madisonian structure of incentive compatibility. It is, therefore, not immediately obvious how these actors become structurally invested in upholding constitutional values that the Supreme Court articulates.

¹⁶⁰ See *supra* Part II.A.

¹⁶¹ See Stephenson, *supra* note 85, at 1482 (“[T]he Legal Process insight that institutional design choices must take into account the relative competence of different government agents is incomplete, and potentially misleading, because it neglects the extent to which institutional choices may *change* the relative competence of different government agents.”).

¹⁶² See *supra* notes 42–50 and accompanying text.

¹⁶³ Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1586 (2010) (“[I]deas of entrenchment are central to the notion of constitutions.”).

¹⁶⁴ See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 663 (2011) (describing Madisonian theory).

One easy—but incomplete—answer is that judicial review is meant to ensure the constitutional compliance of police and prosecutors. The question of why government actors are willing to pay attention to what courts demand is a particularly difficult one in the criminal procedure context. Certainly, court oversight serves to punish officials who violate criminal procedure rules by depriving them of a conviction (if they are police or prosecutors), or by calling attention to their incompetence and exposing them to the risk of professional sanction (if they are ineffective defense attorneys).¹⁶⁵ However, the threat of such a sanction does not adequately explain the level of compliance—however imperfect—that criminal procedure rules enjoy. The vast majority of police encounters—in the form of traffic stops, stop-and-frisks, and other techniques of patrol—do not result in prosecutions that aggrieved individuals can challenge if a rights violation occurred,¹⁶⁶ and civil remedies for these individuals are sharply limited.¹⁶⁷ Moreover, even when police officers face the risk of rendering evidence inadmissible, they may nevertheless have strong incentives to violate suspects' constitutional rights. Beyond trying to obtain prosecutions, police officers may engage in unconstitutional arrests because they think that harassment is an effective form of law enforcement, or they may decide to illegally seize evidence for the sake of getting it off the streets.¹⁶⁸ Furthermore, if police have their eye on prosecution, evidence that is inadmissible under the exclusionary rule can be used to impeach

¹⁶⁵ Cf. Ginsburg & Posner, *supra* note 163, at 1590 (explaining that through judicial review courts “reduce agency costs by ensuring that violations will be exposed and punished”).

¹⁶⁶ See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 818–19 (2011) (surveying NYPD data showing that only a fraction of police stops and interrogations result in felony arrests); see also *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (“Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”) (footnote omitted).

¹⁶⁷ See Dripps, *supra* note 52, at 213 (arguing that “[l]egal recognition of municipal liability is both difficult to establish and practically irrelevant” with respect to deterring Fourth Amendment violations); O’Rourke, *supra* note 153, at 773–74 (“Current doctrine sharply limits the opportunities for victims of criminal procedure violations to use civil class actions as a means of redressing law enforcement officers’ violations of their criminal procedure rights, and essentially forecloses any civil opportunities to vindicate violations of trial rights for those who have not been acquitted or had their sentences vacated.”) (footnote omitted).

¹⁶⁸ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 351 (2d ed. 2008).

defendants, thus deterring them from bringing cases to trial.¹⁶⁹ Finally, the chance that unconstitutionally obtained evidence will be admissible under some doctrinal exception provides a significant incentive for officers to risk seizing the evidence.¹⁷⁰ It thus seems that, as a mere sanction, constitutional review of criminal procedure cases is a weak tool for directly influencing police behavior.

This raises the question of why low-level officers pay as much attention as they do to what courts demand.¹⁷¹ Arguably, local officials' acceptance of court-driven criminal procedure may be of a piece with the larger public's acceptance of judicial supremacy.¹⁷² However, this claim is difficult to square with studies suggesting that police culture is governed by very different rule-of-law norms than those governing the public. For example, the classic study of police culture suggests that officers at one time rejected the normative force of criminal procedure rules, believing them to fall outside the "moral class" of laws that should command their respect.¹⁷³ While these attitudes may have evolved to some degree, there remains a perception that police departments continue to "operate outside the normal processes of local government, accountable to no one."¹⁷⁴ It thus seems imprudent to assume that most municipal police and prosecutors are part of the web of institutional relationships and shared values that commit political actors to a common constitutional cause. It is, of course, plausible that many of these officials feel a normative obligation to comply with the Supreme Court some of the time, and that some of them feel an

¹⁶⁹ *United States v. Havens*, 446 U.S. 620, 626–28 (1980) (permitting use of evidence obtained in violation of the Fourth Amendment for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 225–26 (1971) (permitting use of confessions obtained in violation of *Miranda* for impeachment purposes). Such evidence may also be used in parole revocation hearings, *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998); deportation proceedings, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042–44 (1984); and other significant civil proceedings. See Fan, *supra* note 80, at 1478.

¹⁷⁰ See Steiker, *supra* note 116, at 2470.

¹⁷¹ See Levinson, *supra* note 164, at 661 ("Casting courts as constitutional enforcers merely pushes the question back to why powerful political actors are willing to pay attention to what judges say . . .").

¹⁷² See, e.g., James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 364–65 (2003) (concluding that the American public has a high degree of "institutional loyalty" toward the Supreme Court that exists independently of how decisions in individual cases are perceived); Jamal Greene, *Giving the Constitution to the Courts: Political Foundations of Judicial Supremacy*, 117 YALE L.J. 886, 901–11 (2008) (arguing that "members of the public, more than institutional political actors, have laid the foundations for judicial supremacy").

¹⁷³ See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 176 (4th ed. 2011).

¹⁷⁴ DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 125 (2008).

obligation to do so all of the time. However, these officials' principal occupational duties are to make arrests and obtain convictions, and it is unclear why they would habitually prioritize the Court's constitutional pronouncements over these first-order goals.¹⁷⁵

The impact of judicial review makes more sense, however, when one looks beyond its normative pull and examines how it affects the growth and trajectories of law enforcement institutions, and thereby shapes the behavior of those institutions' members. As Daryl Levinson has observed, there are a number of institutional mechanisms through which constitutional arrangements, including judicial review, can become entrenched in institutional policies and practices.¹⁷⁶ One of these mechanisms seems particularly effective in committing actors to adhere to constitutional criminal procedure rules that the Supreme Court has articulated: asset-specific investment.¹⁷⁷ That is, police departments and prosecutor offices often make large organizational investments in complying with particular decisions, and individuals working within the institutions will develop their own capabilities to work within the new organizational structure.¹⁷⁸ To the extent that these investments cannot easily be reallocated toward other organizational uses, the actors will have a stake in maintaining the existing systems of ensuring constitutional compliance.¹⁷⁹

Moreover, even if law enforcement institutions could cheaply reallocate their investments in following a constitutional rule, they may simply come to take these investments for granted. As organizational decisionmaking theorists have observed, some "cognitive scripts" have the power to perpetuate patterns of policies and practices that are not necessarily in an organization's best interest.¹⁸⁰ Specifically, individuals

¹⁷⁵ See Levinson, *supra* note 164, at 707 (observing that officials who are inclined to comply with their constitutional obligations "will not necessarily prioritize the rightness of legal compliance over the rightness (real or perceived) of their first-order political and policy goals when the two conflict").

¹⁷⁶ See *id.*

¹⁷⁷ See generally Oliver E. Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, 36 ADMIN. SCI. Q. 269, 281–82 (1991) (describing the role of asset specificity in creating bilateral dependencies between actors and institutions).

¹⁷⁸ See Levinson, *supra* note 164, at 686 (discussing asset specificity as a mechanism of constitutional entrenchment).

¹⁷⁹ See *id.* ("To the extent these investments are specific and cannot easily be reallocated to alternative organizational structures or processes, political actors will want to avoid duplicating these investments and so will have a stake in maintaining existing arrangements and resisting reforms.").

¹⁸⁰ Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 496; *id.* at 482–

working in an organization may internalize certain behaviors appropriate to specific organizational situations, and take these behaviors for granted as part of “the way the world works.”¹⁸¹ Thus, some institutional policies and practices may not be the result of some conscious decision about how the institution should best allocate its resources, but are instead in place simply because nobody has thought of changing them.¹⁸²

Over time, constitutional law can supply this sort of cognitive script to law enforcement officials who otherwise have little reason to comply with a court’s criminal procedure decisions.¹⁸³ Just as asset-specific investments may motivate an institution to maintain a system of constitutional training and compliance, so too may simple inertia. As law enforcement officials who are hostile to a new constitutional criminal procedure regime retire, they will be replaced by newcomers who have been trained under the new regime and do not think of questioning whether to comply with it. Thus, while officers may express hostility to a court that thrusts criminal procedure rules on them, they may eventually come to internalize the rules themselves and accept them as their own. For example, one influential study on the deterrent effects of the exclusionary rule documented how the Chicago Police Department substantially revised its training protocols in response to the Supreme Court’s decision in *Mapp v. Ohio*; interviewed decades later, Chicago police officers expressed acceptance of the exclusionary rule in principle—even while criticizing how courts interpret the rule.¹⁸⁴

84, 492; see also Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 136 & n.118 (1997) (describing “script-based cognitive conservatism” in organizational decisionmaking). See generally Dennis A. Gioia & Peter P. Poole, *Scripts in Organizational Behavior*, 9 ACAD. MGMT. REV. 449, 450 (1984) (describing the explanatory value of cognitive scripts with respect to understanding organizational decisionmaking).

¹⁸¹ Suchman, *supra* note 180, at 482; see also Gioia & Poole, *supra* note 180, at 449 (defining “scripts” as “schema-based knowledge of behavior and behavior sequences appropriate to specific organizational situations and contexts”).

¹⁸² See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1867–68 (2012) (“[W]hen an organization acts, its action is often motivated less by a calculation about the desirability of a particular outcome than by the reality that ‘it would be unthinkable to do otherwise.’”) (quoting Christine Oliver, *Strategic Responses to Institutional Processes*, 16 ACAD. MGMT. REV. 145, 149 (1991)).

¹⁸³ See Suchman, *supra* note 180, at 492 (arguing that “the law often provides a system of *taken-for-granted social groundrules* [sic] that operate to constitute and reify basic assumptions of the social order”).

¹⁸⁴ See Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1028 (1987) (describing the revision of training protocols); *id.* at 1051–52 (reporting officers’ perceptions of the

Of course, the lessons the officers actually internalize through this process may be problematic. Police departments may (and likely do) focus on training officers how to ensure that evidence is admitted, rather than on how to conduct legal searches and interrogations.¹⁸⁵ Accordingly, even as police officers accept the reality of living with criminal procedure rules, they may become adept at circumventing them.¹⁸⁶ However, insofar as officers become habituated to following criminal procedure rules, it is clear that the locus of criminal procedure's success is in how it affects the policies and training priorities of organizations, rather than how individual officers respond to specific court decisions.¹⁸⁷

The fact that judicial review's success comes this indirectly, through slow institutional changes rather than through spontaneous acceptance, makes it easy for courts to overlook that success. When Supreme Court Justices observe the practices of police departments—or, more accurately, when they look to secondary research on those practices—they may simply see “modern police forces” that are “staffed with professionals” and understand “what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline.”¹⁸⁸ That is, the motivations of low-level officials to honor constitutional rights will appear to be independent of judicial action, when they are in fact interdependent.

Thus, the path through which judicial decisions affect behavior is a factor that may lead the Supreme Court to overdelegate. A doctrinal choice that would be optimal if law enforcement officials' goals were exogenous may turn out to be suboptimal when those goals are endogenous.¹⁸⁹ If the Court does not engage in a careful comparative institutional analysis, it may treat the competence of police and prosecutors as exogenous with respect to its own constitutional decisions. Frequently, however, the Court's criminal procedure decisions will influence behavior of low-level officials only indirectly, through institutional investments that gradually shape the

exclusionary rule).

¹⁸⁵ See *supra* note 106 and accompanying text.

¹⁸⁶ See Steiker, *supra* note 116, at 2535–37; Weisselberg, *Saving Miranda*, *supra* note 80, at 189–92.

¹⁸⁷ Cf. Dripps, *supra* note 52, at 220 (“[T]he law influences street-level behavior primarily by giving police administrators incentives to train and discipline the force to comply with constitutional requirements.”).

¹⁸⁸ *Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

¹⁸⁹ Cf. Stephenson, *supra* note 85, at 1482 (“Institutional choices that appear prudent when government agents' expertise is treated as exogenous may turn out to be counterproductive when such agents' expertise is endogenous.”).

officials' practices and beliefs. That sort of doctrinal impact may not be easily visible, and is thus liable to be overlooked.

C. POLITICAL ECONOMY OF LITIGATION

An additional factor that could drive the Supreme Court to overdelegate is the effective demand that exists for criminal procedure litigation. In terms of volume, the number of Supreme Court certiorari petitions that raise criminal procedure claims (including those filed *in forma pauperis*) dwarfs the number raising other constitutional claims. The best available data indicate that over 81% of the 8,857 certiorari petitions filed in the October 2006 Term involved criminal cases.¹⁹⁰ Thus, an overwhelming amount of the Supreme Court's agenda space is occupied by claims that something has gone wrong in the administration of criminal justice. If Supreme Court Justices are paying attention to this agenda space, then the magnitude and complexity of any systemic constitutional problems in the criminal system will be very clear to them.

Indeed, assuming that the certiorari process is the principal vehicle by which the Supreme Court learns about constitutional problems it could address,¹⁹¹ the structure of constitutional litigation should make the Court far more attuned to problems that exist in the criminal justice system than in other areas of government regulation. As I explained in a previous article, the political economy of constitutional criminal procedure litigation, which involves thousands of litigants motivated by individual interests, differs from other forms of constitutional litigation, which are typically dominated by a few policy entrepreneurs who are litigating in order to effect systemic

¹⁹⁰ This figure reflects the filings reported in the 2007 Year-End Report of the Federal Judiciary, and data obtained for a thorough study on certiorari filing practices in criminal cases the prior Supreme Court Term. See JOHN ROBERTS, 2007 YEAR-END REPORT OF THE FEDERAL JUDICIARY 9 (2008), available at <http://www.supremecourt.gov/publicinfo/year-end/2007year-endreport.pdf> (reporting that 8,857 cases were filed in the October 2006 Term); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211, 247–48 n.178 (2008) (identifying 347 of the certiorari petitions filed through paid counsel in the October 2006 Term as criminal, and 6,854 of the petitions filed *in forma pauperis* as potentially criminal based on the case captions). Significantly, 3,117 of the certiorari petitions filed *in forma pauperis* in the October 2006 Term were filed through paid counsel. See Shay & Lasch, *supra*, at 247–48 n.178. Thus, even disregarding cases filed *pro se*, it appears that an overwhelming percentage of the October 2006 petitions filed through counsel arose out of criminal cases.

¹⁹¹ Cf. VANESSA A. BAIRD, ANSWERING THE CALL OF THE COURT: HOW JUSTICES AND LITIGANTS SET THE SUPREME COURT AGENDA 4, 10–11 (2007) (arguing that the Supreme Court signals issues that it would like litigators to place on its agenda).

constitutional changes.¹⁹² This aspect of criminal procedure litigation, I argued, provides Supreme Court Justices with more opportunities to vote according to their ideological preferences in criminal procedure cases than they have in other areas of constitutional litigation.¹⁹³

In addition to this effect on ideological voting opportunities, the political economy of criminal procedure litigation creates pressure for Justices to devolve power to law enforcement officials regardless of their attitudinal preferences. In most areas of constitutional review, a policy entrepreneur can constrain the Supreme Court's agenda by deciding which cases to file.¹⁹⁴ Through this agenda control, policy entrepreneurs can act as filters of information that the Court receives about a constitutional issue. If the Court becomes aware of complexities that might arise from a proposed doctrinal change, it may be reluctant to disrupt the status quo.¹⁹⁵ A savvy policy entrepreneur may therefore attempt to shield the Court from information highlighting the complexity of the problem that the policy entrepreneur wants the Court to address. Of course, if the policy entrepreneur chooses to file a certiorari petition in a given case, then its opponent will have the opportunity and incentive to highlight that complexity in its response. This adversarial opportunity will not arise, however, unless the policy entrepreneur decides that the facts of the case are sufficiently favorable to its position to file a certiorari petition in the first place.¹⁹⁶

¹⁹² O'Rourke, *supra* note 153, at 731; *see also* Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, in *SUPREME COURT DECISION-MAKING*, *supra* note 130, at 255, 256.

¹⁹³ O'Rourke, *supra* note 153, at 731. A political science article published contemporaneously with my previous article appears to support its hypothesis. *See* Brandon L. Bartels, *Choices in Context: How Case-Level Factors Influence the Magnitude of Ideological Voting on the U.S. Supreme Court*, 39 *AM. POL. RES.* 142, 169 n.11 (2011).

¹⁹⁴ O'Rourke, *supra* note 153, at 731.

¹⁹⁵ *See supra* Part II.A.

¹⁹⁶ This analysis glosses over the Supreme Court decisionmaking norms that might lead a policy entrepreneur to file a certiorari petition in a case regardless of whether it presents facts that are optimal to the policy entrepreneur's position. For example, a Supreme Court litigator may wish to file a petition in the first case that creates a circuit split because it is much more likely that the Court will accept such a case for review. *See* Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 *N.Y.U. L. REV.* 131, 138–45 (2011) (describing certiorari filing pressures when a circuit split arises). This phenomenon will certainly draw the Court's attention to complexities that the policy entrepreneur would otherwise like to conceal. At the same time, however, the sort of sustained litigation strategy that leads to such circuit splits requires the sort of financing and resources that typically requires a coordinated "support structure for legal mobilization." Epp, *supra* note 192, at 256. Therefore, the information-disclosing

However, because criminal procedure litigation is primarily undertaken by thousands of individual litigants, individual policy entrepreneurs are unable to filter the information the Court receives. Consequently, the Court will be presented with a great deal more information about potential constitutional problems in the criminal justice system than in other areas of public life, and that information will be presented with a great deal less care. This, in turn, makes the Court more aware of the complexities of using constitutional criminal procedure to regulate criminal justice than other areas of public life, and to feel less equipped to handle those complexities.

Constitutional criminal procedure, therefore, is not only a field with complex regulatory dimensions, but one in which the Supreme Court is not sheltered from that complexity by policy entrepreneurs seeking to frame their positions in the best possible light. Without the information-filtering mechanisms that shape the Court's agenda in other constitutional areas, the Court is potentially vulnerable to the sort of decisionmaking problems in criminal procedure cases that scholars typically associate with other, more explicitly regulatory fields such as administrative and corporate law.¹⁹⁷ The political economy of criminal procedure litigation may therefore create overdelegation pressure.

D. REDISTRIBUTIVE RIGHTS

The third feature of constitutional criminal procedure that differentiates it from most other constitutional law, and incentivizes overdelegation, is its resemblance to a system of positive rights. Notwithstanding the oft-repeated shibboleth that the Constitution “is a charter of negative rather than positive liberties,”¹⁹⁸ a number of criminal procedure rights require the government to do more than merely forbear from doing certain things to its citizens. As David Sklansky has argued, most of the Constitution's criminal procedure provisions require the government to affirmatively act, and often to invest considerable resources, in order to protect its citizens.¹⁹⁹ The affirmative nature of some of these

effect of these practices may be diminished because the cases that create a circuit split are often the ones that policy entrepreneurs chose to litigate in the first instance.

¹⁹⁷ See, e.g., Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1351–72 (2010) (analyzing decisionmaking failures caused by the lack of information filters in administrative law).

¹⁹⁸ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989). For classic articles defending this view, see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

¹⁹⁹ David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*,

obligations, such as the need to provide indigent criminal defendants with publicly funded lawyers and a speedy trial, is obvious.²⁰⁰ However, even the Fourth Amendment—a right that seems “obviously negative in character”²⁰¹—requires officers to obtain a warrant before conducting most arrests²⁰² and for the state to “promptly” provide a judicial assessment of the grounds of any warrantless arrests.²⁰³ Likewise, if government officials wish to obtain a confession from a suspect, they may either do so in violation of *Miranda* (and risk letting the suspect escape conviction), or invest the resources necessary to ensure that police officers are trained to comply with *Miranda* before trying to get a suspect to talk.²⁰⁴

These obligations place the Court in the unusual position of making resource-allocation decisions when deciding on the scope of a constitutional right. The entire enterprise of criminal law, Louis Seidman has argued, can be viewed as “a form of redistribution,” since it reallocates public money to “provide protection for those who lack the private resources to protect themselves, in much the way that social security or welfare reallocates results reached in private markets.”²⁰⁵ Within this system, constitutional protections for suspects and defendants make it more costly for the government to achieve its aims, and thus increase the redistributive costs of criminal justice.²⁰⁶ Granted, the affirmative obligations (and resource expenditures) imposed by the Constitution’s criminal procedure provisions are triggered only when the government chooses to act in certain ways toward the rights-holder, prompting Sklansky to characterize them as “quasi-affirmative rights” that “occupy a kind of middle ground between affirmative rights and negative rights.”²⁰⁷ However, these triggering actions—including the arrest, interrogation, and prosecution of suspected crime-doers—are ones that “realistically, the government cannot entirely forego.”²⁰⁸ Accordingly, constitutional rules of criminal procedure require courts to make implicit and, occasionally, explicit decisions about whether to expand the cost of state and local government.

88 VA. L. REV. 1229, 1233–38 (2002).

²⁰⁰ U.S. CONST. amend. VI; *see also* Sklansky, *supra* note 199, at 1238–39.

²⁰¹ Sklansky, *supra* note 199, at 1240–41.

²⁰² U.S. CONST. amend. IV; *see also* Sklansky, *supra* note 199, at 1241–42.

²⁰³ *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

²⁰⁴ U.S. CONST. amend. V; *see also* Sklansky, *supra* note 199, at 1239–40.

²⁰⁵ Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2315 (1998) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)).

²⁰⁶ *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2015–17 (2008).

²⁰⁷ Sklansky, *supra* note 199, at 1234.

²⁰⁸ *Id.*

This feature of criminal procedure doctrine creates two incentives for courts to devolve power to law enforcement officials. First, it increases the regulatory complexity of the Court's decisionmaking and thereby tempts the Court to reflexively delegate authority to law enforcement officials.²⁰⁹ Specifically, the resource-allocation implications of criminal procedure create information costs beyond those arising from the regulatory complexity of governing a vast and heterogeneous population of police and prosecutors. Moreover, these resource-allocation implications mean that constitutional criminal procedure rules will tie not only the hands of law enforcement officials, but also, indirectly, those of the state legislators who must fund the rights. Criminal procedure cases thus involve budgetary consequences that may be difficult to foresee and that courts are institutionally ill equipped to address.

Given these difficulties, Supreme Court Justices may be reluctant to adopt constitutional decision rules that, as a textual and doctrinal matter, would be legitimate.²¹⁰ And because resource-allocation questions are traditionally within the legislative purview, the Court may overestimate the states' ability and willingness to determine how best to fund criminal procedure rights if they are entrusted to do so through deferential decision rules. One way for the Court to address this problem is to articulate a strong constitutional norm, but to adopt a decision rule that gives low-level officials considerable discretion over how to implement the norm. Delegation thus allows the Supreme Court to announce a quasi-affirmative criminal procedure right that theoretically imposes an unfunded mandate on the states, but gives the states latitude over how generously they wish to fund it.

Second, beyond any substantive apprehensions that Supreme Court Justices might have about implementing quasi-affirmative rights, the institutional role they occupy suggests that they simply may be disinclined to do so. Because most constitutional guarantees impose limits on government rather than affirmative obligations,²¹¹ judicial review is typically "more useful for hampering the expansion of government than for hampering the reduction of government, regardless of any policy disagreements between the Court and the elected branches."²¹² Therefore,

²⁰⁹ See *supra* Part III.A.

²¹⁰ See, e.g., Sklansky, *supra* note 199, at 1244–92 (arguing that the Court has shied away from adopting legitimate and sensible doctrinal strategies in criminal procedure cases because the quasi-affirmative nature of the strategy was particularly salient).

²¹¹ See, e.g., Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1579–85 (2000).

²¹² WHITTINGTON, *supra* note 12, at 43–44.

the opportunities that Supreme Court Justices have to enact their policy preferences through judicial review are usually asymmetric, with those Justices who wish to set limits on government being much better positioned than those who wish to aid its expansion.²¹³ Accordingly, criminal procedure is one of the few areas of constitutional law that gives Justices the policy opportunity to grow the government.

However, recent scholarship in behavioral economics and social psychology suggests two reasons why Supreme Court Justices might not welcome this policy opportunity. First, the agenda space that judges occupy is likely to have a selection effect on the type of individuals who are attracted to the judiciary.²¹⁴ A prospective judge (including a prospective Supreme Court Justice) can expect the Supreme Court's agenda space to be devoted largely to the enforcement of core constitutional rights,²¹⁵ and absent of the issues that are of greatest national concern at any given time.²¹⁶ This, in turn, means that a person who is ideologically invested in limiting the size of government might find the judiciary to be a relatively attractive career, while a person interested in resource-intensive policymaking will be deterred from it.

Second, notwithstanding their ideological predilections before taking office, individuals who are appointed to the Supreme Court may cultivate an aversion to the sort of quasi-affirmative lawmaking that criminal procedure adjudication requires. This observation is rooted in role theory, which examines how individuals adopt the behaviors they associate with whatever organizational role they are expected to play.²¹⁷ Drawing upon

²¹³ *Id.*

²¹⁴ See Adrian Vermeule, Essay, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 966 (2005) (identifying the "opportunity to promote the officeholder's vision of good government" as a form of implicit compensation that will affect which individuals are attracted to the position); cf. Stephen J. Choi et al., *Professionals or Politicians: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 26 J.L. ECON. & ORG. 290, 328 (2010) (suggesting, based on data from a comparative study, that "electoral judgeships attract and reward politically savvy people, whereas appointed judgeships attract more professionally able people").

²¹⁵ See Cross, *supra* note 211, at 1579–85.

²¹⁶ See Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 8–9 (2006).

²¹⁷ See generally B. J. Biddle, *Recent Development in Role Theory*, 12 ANN. REV. SOC. 67, 73–74 (1986) (describing "organizational" role theory); *id.* at 80–81 (describing scholarship on how individuals shift their behavioral preferences in response to others). For a recent application of this organizational role theory to explain the development of strict liability doctrines in American tort law, see Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1401 (2010).

this work, political scientists have shown that the institutional role Supreme Court Justices occupy will not only constrain them from pursuing certain aims, but may also help determine the aims they wish to pursue.²¹⁸ Because the majority of the Supreme Court's constitutional agenda is devoted to limiting the actions of government, it is conceivable that a Justice might come to envision her judicial role exclusively in these terms and become skeptical of any claims (however doctrinally sound) that the Constitution imposes affirmative obligations on the government. (Indeed, this view of the Supreme Court Justice's role is consistent with the popular assumption that the Constitution is exclusively a "charter of negative rather than positive liberties."²¹⁹)

Such a conception of the judicial role may serve to explain what Sklansky has characterized as the Supreme Court's reluctance in criminal procedure cases to pursue doctrinal strategies that impose new obligations on the government, even when there is a sound constitutional basis for doing so.²²⁰ More precisely, the institutional norms and incentives that shape Supreme Court decisionmaking may motivate the Court to shift as much authority to low-level officials as necessary to avoid imposing a clear mandate on state governments. Thus, the redistributive nature of criminal procedure may incentivize the Supreme Court to overdelegate.

IV. OVERDELEGATION CYCLES

The decisionmaking process in constitutional criminal procedure thus has a number of structural features that, one might hypothesize, give rise to overdelegation. If this hypothesis is correct, however, it begs the question why the Supreme Court adopts constitutional rules that constrain law enforcement officials in the first place. This is, of course, a question that lacks an easy answer. In thinking about the question, however, it is helpful to consider similarities that might exist between how the Supreme Court decides to involve itself in criminal procedure regulation and what regulation looks like in corporate law. Much like administrative agencies and common law courts do when regulating market relationships, the Supreme Court faces a problem of organizing and processing information when deciding how best to enforce constitutional criminal procedure rules.²²¹ It is therefore worth borrowing from the literature of economic and

²¹⁸ See *supra* note 129.

²¹⁹ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

²²⁰ Sklansky, *supra* note 199, at 1244–92.

²²¹ See *supra* Part III.

administrative regulation to examine how these information-processing problems shape the Supreme Court's doctrinal choices.

This literature suggests that one effect of the complexity of criminal procedure decisionmaking is to incentivize judicial delegation at precisely the times when it might be least warranted. In the context of market regulation, Neil Komesar has analyzed how different institutions—courts and the market, in his examination—concurrently become less able to address problems as those problems become more urgent. Komesar argues that, in areas of law in which there is little complexity and few disputes, courts tend to articulate simple, over- and underinclusive rules.²²² However, as problems grow more complex and numerous, nonjudicial institutions become unable to engage successfully in the sort of balancing and negotiation that is required to make those rules work.²²³ Therefore, a greater number of disputes will find their way to the courts, and judges will be pressured to develop increasingly nuanced and context-dependent standards for resolving those disputes.²²⁴

Such standards, however, create additional labor for courts, which cannot build their institutional capacity at nearly the same rate at which the problems they address increase in complexity.²²⁵ Accordingly, as problems grow even more numerous and complex, judges will have to adopt strategies that help their institution cope with an increased workload. At times, a court may once again attempt to issue simple rules in the hope of making a problem more tractable, but in doing so may risk creating more disputes (this time about the new rule) that will find their way onto judges' dockets. Another strategy, however, is for the courts to shift their problems onto other institutions by deferring to markets and political processes. Increased numbers and complexity may therefore result in "rules of judicial abdication produced by the inevitable effect of the demand for judicial resources outstripping the supply."²²⁶ Thus, as economic and political institutions deteriorate in their ability to address conflicts between parties (thereby causing the parties to turn to courts), judges will be increasingly tempted to create doctrines that defer to those deteriorating institutions.²²⁷

²²² KOMESAR, *supra* note 131, at 157–58.

²²³ *Id.* at 158.

²²⁴ *Id.* at 158.

²²⁵ See Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 *LAW & SOC. INQUIRY* 959, 968 (1997) (reviewing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994)) ("Higher-level appellate courts . . . cannot expand their capacity to resolve disputes at the same rate as the economy grows.").

²²⁶ KOMESAR, *supra* note 131, at 163.

²²⁷ *Id.* at 158.

Accordingly, as problems grow more complex, one may expect to see courts cycle between strong rules, flexible standards, and deference to other institutions.²²⁸

This account offers a powerful framework for evaluating how appellate courts react as a problem grows more complex and numerous, and recent empirical scholarship suggests that the framework is to some degree accurate.²²⁹ It is an open question, however, whether the framework is useful for describing doctrinal shifts in constitutional law. While Komesar posits that constitutional law is subject to judicial cycling between strong rules and deference to other actors,²³⁰ he does not address the mechanisms at the Supreme Court's disposal to reduce its workload without resorting to judicial abdication. The most important of these mechanisms is the writ of certiorari, which gives the Court almost complete discretion over its docket by permitting it to decide which cases to accept for review.²³¹ Moreover, for those cases it decides to accept for review, the Court has a range of interpretive canons, justiciability doctrines, and procedural techniques—devices that Alexander Bickel famously describes as the “passive virtues”—which allow it to avoid deciding an issue until it is institutionally better positioned to do so.²³²

The Supreme Court thus has the statutory authority to manage its agenda without resorting to a strategy of judicial abdication, and has additionally cultivated a number of adjudicatory techniques to resist the pressure caused by an increased demand for judicial resources. One might therefore wonder: if the Court faces extraordinary structural pressure to

²²⁸ *Id.* at 160–61.

²²⁹ See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1127–37 (2011) (discovering a positive correlation between appellate court deference to district courts in civil cases and caseload increases in another area of law).

²³⁰ KOMESAR, *supra* note 131, at 161.

²³¹ See O'Rourke, *supra* note 153, at 745–46 & nn.78–80. In recent years, the Court has taken advantage of this discretion by reducing its caseload relative to its recent historical levels. See Donald A. Dripps, *On Reach and Grasp in Criminal Procedure: Crawford in California*, 37 N.C. J. INT'L L. & COM. REG. 349, 361 (2012) (discussing the Supreme Court's reduced caseload as a “crude but consequential device” for the Court reducing its power of direct review in criminal procedure cases).

²³² ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1986); see also Henry Paul Monaghan, Essay, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 677–79 (2012) (tracing the constitutional avoidance canon's development); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 416 (1997) (defining “passive virtues” as Bickel's name for “the strategic use by courts (particularly the Supreme Court) of justiciability doctrines and other procedural techniques to avoid deciding issues the Court believes are best deferred to a later date”).

delegate authority to law enforcement officials in criminal procedure cases, why would it regularly decide to take those cases? And, when it does take them, why does the Court sometimes introduce expansive new constitutional protections—as the Warren Court did for a range of contexts and as the Supreme Court has recently done in the *Crawford* and *Booker* lines of cases²³³—before later engaging in overdelegation?

Whatever its faults as a general account of the Supreme Court's constitutional decisionmaking, Komesar's account of how courts respond to complexity and volume can, with some modification, shed considerable light on the trajectory of contemporary criminal procedure doctrine. First, both the structure and the substance of criminal procedure litigation create significant pressure for the Supreme Court to intervene in the area and, at least initially, craft strong constitutional rules. At the structural level, the Supreme Court has adopted a range of institutional norms that govern its decision whether to accept a case for review.²³⁴ For example, notwithstanding its apprehensions about grappling with the substance of certain matters, the Court is likely to accept a case if doing so would resolve a circuit split, or if an issue has been “percolating” in the lower courts.²³⁵ The extraordinary volume of criminal procedure petitions submitted to the Court each year ensures that at least some cases will exhibit these features.²³⁶ Of course, this volume provides the Court's Justices with an extraordinary degree of freedom over *which* case involving a certain issue to accept for review (because its docket may, for example, include multiple petitions on an issue on which there is a circuit split).²³⁷ However, the volume will also ensure that that the Court is pressured to review *some* case involving that issue.

Moreover, once it has accepted a particular case for review, the Supreme Court has relatively few procedural tools at its disposal for avoiding the merits of a constitutional criminal procedure question. The vast majority of criminal procedure questions on the Court's docket arise from cases in which a defendant has been criminally convicted, thus precluding claims of ripeness, mootness, or standing. Moreover, even if the Court is able to strategically avoid the merits of a constitutional criminal

²³³ See *United States v. Booker*, 543 U.S. 220, 226 (2005); *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

²³⁴ See, e.g., H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 216–70 (1991) (explaining the institutional norms that govern the Supreme Court's agenda setting).

²³⁵ *Id.* at 230.

²³⁶ See *supra* note 190 and accompanying text.

²³⁷ See O'Rourke, *supra* note 153, at 728–29.

procedure question in a certain case, the subsidized nature of criminal procedure litigation will ensure that the issue will keep arising on its docket again and again until it is resolved.²³⁸

Beyond these structural pressures, the substance of constitutional criminal procedure further incentivizes the Supreme Court to occasionally intervene in the criminal justice system by crafting expansive constitutional protections. As described above, the Court frequently allocates power between itself and other institutions in criminal procedure cases, which makes institutional choice analysis a useful descriptive lens for understanding the doctrine.²³⁹ However, in order to determine which institution is most competent to address a constitutional problem, the Court must first make normative choices about what the problem is and how it should be addressed.²⁴⁰ One might therefore expect that, on issues that are particularly normatively fraught, the Supreme Court's doctrinal choices may not reflect the outcomes envisioned by institutional choice scholars who focus only on the "costs" of judicial decisionmaking without inquiring into the normative assumptions that underpin how those costs are defined.²⁴¹ Because the Constitution's criminal procedure provisions are indeterminate with respect to the problems in the contemporary criminal justice system,²⁴² criminal procedure has long been normatively contested.²⁴³ It is, therefore, precisely the sort of morally fraught area of constitutional law that the Supreme Court perceives, for good historical reasons, as being within its bailiwick.²⁴⁴

Moreover, the fact that legislators have historically been inactive on criminal procedure matters may further incentivize the Court to involve

²³⁸ See *supra* Part III.C.

²³⁹ See *supra* notes 131–144 and accompanying text.

²⁴⁰ William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2053–54 (2006) (reviewing VERMEULE, *supra* note 152).

²⁴¹ Cf. *id.* at 2052–54 (criticizing Adrian Vermeule's approach to constitutional interpretation for failing to attend to the normative underpinnings of institutional choice theory).

²⁴² Cf. Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 378 (2007) (arguing that "open[-]ended" constitutional provisions tend to "invite constitutional decisionmaking that expresses national ideals").

²⁴³ See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 274–77 (2009) (describing the role the Warren Court's criminal procedure decisions played in the 1968 presidential election).

²⁴⁴ See, e.g., THE FEDERALIST NO. 78, *supra* note 56 (Alexander Hamilton) (on the judicial correction of wrongs).

itself in the field.²⁴⁵ Members of the Court may reasonably extrapolate from such inactivity to conclude (accurately or otherwise) that criminal procedure is an area in which legislatures cannot be trusted to protect the rights of criminal defendants.²⁴⁶ This perception makes judicial intervention in criminal procedure both more normatively justifiable, because it does not trespass on the lawmaking prerogatives of a coordinate branch, and more urgent, because the Court cannot assume that lawmakers will fill the constitutional void if it fails to intervene.

The structure of criminal procedure litigation thus creates both strategic and normative pressures for the Supreme Court to act as Komesar might predict. Before a criminal procedure issue reaches a certain level of complexity, one may expect the Court to craft expansive constitutional decision rules to regulate the conduct of low-level officials. These decision rules will, in turn, create new constitutional conflicts. Because of the subsidized nature of criminal procedure litigation (and the stakes of that litigation for individual defendants), these conflicts will be placed on the Supreme Court's agenda at an exponentially greater rate than other constitutional disputes.²⁴⁷ Moreover, because policy entrepreneurs cannot filter which cases wind up on the Court's agenda, they cannot shield the Court from cases that highlight the administrative complexity of the constitutional rules it has created.²⁴⁸ Over time, the Court's awareness of these complexities may shape (or, arguably, distort) its views about which decision rules are appropriate for implementing the Constitution's criminal procedure protections. Thus, as the rules the Court has created start to generate new conflicts and complexities, the structure of criminal procedure litigation creates greater institutional pressures for the Court to overdelegate authority.

V. AVOIDING OVERDELEGATION

The structure of criminal procedure decisionmaking offers little cause for optimism that the Supreme Court will consistently make delegation

²⁴⁵ See *supra* note 29.

²⁴⁶ Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (arguing that "legislators undervalue the rights of the accused for no more sinister, and no more tractable a cause than that a far larger number of persons, of much greater political influence, rationally adopt the perspective of a potential crime victim rather than the perspective of a suspect or defendant"). *But see* Kerr, *supra* note 29, at 827-37.

²⁴⁷ See *supra* Part III.C.

²⁴⁸ See *supra* Part III.C.

choices that are appropriate to its constitutional objectives. By definition, however, overdelegation is a losing strategy for any court, and judges thus have a strong incentive to avoid the problem regardless of what their substantive constitutional objectives may be. Fortunately, while overdelegation may be a problem that inheres in the structure of criminal procedure, it is also one that judges are capable of addressing on a case-by-case basis. This Article has attempted to lay the groundwork for such judicial efforts by presenting an analytically precise definition of overdelegation, and by describing both how and why it tends to occur in criminal procedure cases.²⁴⁹

It is beyond this Article's scope to offer judges more precise guidance on how to craft doctrinal rules that avoid overdelegation. Moreover, any scholarly efforts to provide such guidance should be undertaken with a healthy dose of modesty. As this Article shows, the optimal delegation strategy with respect to a judge's particular constitutional objective is highly context-specific. It requires the judge to predict what factors might undermine a doctrinal rule's effectiveness in implementing a constitutional objective, and to assess whether law enforcement officials are sufficiently competent and trustworthy to deviate from a rule when doing so would better advance that objective.²⁵⁰ Moreover, once a judge has selected the optimal level of delegation in a given case, it may require considerable imagination to construct a doctrinal rule that constrains law enforcement officials to precisely the degree that the judge intended.²⁵¹

The task of crafting an optimal delegation strategy thus requires exercising the prudential wisdom and "situation sense" that judges can obtain only through experience and professional habituation.²⁵² Any

²⁴⁹ To be exact, Part II of this Article describes how overdelegation occurs, and Part III.A identifies a common reason why it occurs. As to the how: overdelegation arises when judges (1) underestimate either law enforcement officials' competence to implement a criminal procedure rule or their hostility toward the constitutional objective underlying the rule, or (2) overestimate the extent to which uncertain conditions will require law enforcement officials to deviate from the criminal procedure in order to better implement its underlying objective. *See supra* Part II. As to the why: criminal procedure's structure can tempt judges to commit the fallacy of "single institutionalism," making them so overwhelmed by criminal procedure's regulatory complexity (relative to other areas of constitutional law) that they fail to undertake a comparative institutional analysis before delegating power to law enforcement officials. *See supra* Part III.A.

²⁵⁰ *See supra* Part II.

²⁵¹ *Cf.* Berman, *supra* note 42, at 12 ("As a conceptual matter, the number and variety of options in the making of constitutional decision rules is limited only by judicial imagination and by the (ever-changing) constraining norms of professional practice.").

²⁵² KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 59–61 (1960); *see also* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and*

doctrinal rules that are proposed without the benefit of such experience, or that are too abstracted from the empirical realities which must inform a court's delegation strategy, are likely to be of limited practical value. However, this Article's account of overdelegation in criminal procedure does point toward a few decisionmaking suggestions that judges and scholars may wish to explore.

A. ANNOUNCING CONSTITUTIONAL OBJECTIVES

Before deciding how much discretionary authority to delegate to law enforcement officials, a judge must, of course, decide what constitutional objective she is seeking to accomplish. This is a normative task that requires the judge to interpret the scope of the constitutional right in question.²⁵³ While this Article takes no position on how best to interpret the Constitution's criminal procedure provisions, its analysis does highlight the value of having judges flesh out their interpretations thoroughly, and articulate them sincerely.²⁵⁴

Part II of this Article identifies at least two ways that a judge may overdelegate power to law enforcement officials, only one of which is identifiable without knowing the judge's subjective motivations.²⁵⁵ First, the judge may faithfully articulate a constitutional objective, and then design a set of doctrinal rules that grant law enforcement officials more discretionary authority than is appropriate for achieving that objective.²⁵⁶ Second, the judge may announce a constitutional objective that appears to conform with the policy preferences of law enforcement officials when she in fact believes that a different constitutional objective is normatively preferable.²⁵⁷

This second, obfuscatory method of overdelegation imposes particularly high costs in criminal procedure cases, where courts must regulate the activities of a diverse array of low-level officials.²⁵⁸ In any adjudicatory context, one of the principal virtues of judicial reason-giving is

Some Problems for Constitutional Law, 125 HARV. L. REV. 1, 77 (2011) (discussing "situation sense").

²⁵³ See *supra* notes 43–45 and accompanying text.

²⁵⁴ See generally Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091 (2010) (arguing that both the requirements of judicial sincerity and its value are context-dependent); Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375 (2011) (defending a robust conception of judicial sincerity).

²⁵⁵ See *supra* Part II.

²⁵⁶ See *supra* Part II.A.

²⁵⁷ See *supra* Part II.B.

²⁵⁸ See *supra* note 132 and accompanying text.

that it provides guidance to law-abiding officials and citizens about what the law requires of them.²⁵⁹ With respect to constitutional criminal procedure, there will be some law enforcement officials who feel a normative obligation to comply with the Constitution, even if they lack any content-independent reasons to do so.²⁶⁰ By sincerely articulating its view of a constitutional criminal procedure right's scope, the Supreme Court instructs these law-abiding officers about what conduct they must undertake in order to comply fully with their constitutional obligations.

Of course, the Court must also establish doctrinal rules that regulate the conduct of ill-motivated law enforcement officers, who believe that they have no content-dependent reason for obeying whatever rule the Court imposes. In order to maximize the likelihood that these officers fulfill their constitutional obligations, the Court must impose a set of doctrinal rules that places clear constraints on the conduct officers can engage in without being penalized. For reasons of epistemic uncertainty or administrative manageability, however, these decision and remedial rules may underenforce the true scope of a constitutional right.²⁶¹ If the Court were to conflate these underenforcing rules of implementation with the scope of the right itself, it would deprive sincerely motivated actors of the opportunity to honor their constitutional obligations fully.²⁶²

B. DECIDING WHOM TO REGULATE

American law enforcement is not a monolithic entity. It is composed of thousands of different institutions, operating in vastly different cultural contexts under very different resource constraints.²⁶³ Therefore, by asserting that an optimal delegation strategy requires courts to consider the competence and policy aims of law enforcement institutions, this Article raises an obvious question: *which* law enforcement institutions? Should a court select its delegation strategy with an eye toward regulating the *worst* law enforcement institutions—those most likely to flout the court's rules?

²⁵⁹ See Cohen, *supra* note 254, at 1111–15 (discussing consequentialist arguments in favor of judicial sincerity); see also JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214 (1979) (arguing that as a conceptual matter, the law “*must be capable of guiding the behaviour of its subjects . . . [and] must be such that they can find out what it is and act on it*”).

²⁶⁰ See *supra* notes 165–175 and accompanying text; see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* 35 (1986) (“A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason.”).

²⁶¹ See Sager, *supra* note 42, at 1213–21.

²⁶² Cf. Berman, *supra* note 42, at 87–88 (discussing the obligations of “conscientious state actors” toward underenforced constitutional rights).

²⁶³ See *supra* notes 133–135 and accompanying text.

Or should the court instead try to consider some (hypothetical) *average* law enforcement institution?

There is no easy answer to this question. Instead, this Article's delegation framework suggests that a judge's normative commitments should determine which law enforcement institutions' policy preferences and capabilities will inform her delegation strategy. This is because the choice necessarily implicates questions about the federal judiciary's proper role in enforcing the Constitution's criminal procedure guarantees against the states and against coordinate branches of government. For example, a judge with a traditional conception of judicial supremacy—according to which the Constitution simply “means what the Supreme Court says it means”—may wish to maximize the overall level of law enforcement compliance with the Court's constitutional pronouncements.²⁶⁴ Ideally, in order to accomplish this goal, the judge might want to determine the *average* (mean) level of law enforcement competence and hostility toward a constitutional guarantee, weighted by the number of occasions on which the guarantee is implicated.²⁶⁵ This would enable the judge to develop a delegation strategy that reflects the preferences and abilities of every law enforcement institution that would be bound by her constitutional pronouncements. By trying to measure the *overall* level of law enforcement hostility toward a constitutional objective, the judge might be able to produce a constitutional policy outcome that most closely approximates her ideal outcome.

By contrast, a judge might think that the federal judiciary should only seek to reinforce constitutional consensuses that emerge through the political process, and to use its power to discipline “outliers” from those consensuses.²⁶⁶ This theoretical commitment might motivate the judge to

²⁶⁴ Greene, *supra* note 172, at 888 (describing a view of judicial supremacy that has come under academic criticism).

²⁶⁵ Implicit in this claim is the assumption that law enforcement officials' attitudes toward a court's constitutional objective can be represented as a set policy of outcomes that, together with the court's constitutional objective, can be characterized as points on a one-dimensional policy space. See Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CALIF. L. REV. 813, 839–44 (2010) (defending the explanatory value of one-dimensional judicial decisionmaking models).

²⁶⁶ See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 453 (2004) (arguing that “[m]ore constitutional law than is commonly supposed reflects th[e] tendency to constitutionalize consensus and suppress outliers”); Post & Siegel, *supra* note 242, at 394 & n.103 (suggesting that Klarman's thesis could be read as a normative claim that the role of courts is to suppress outliers and consolidate conclusions reached through the political process); see also David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV.

limit the scope of a particular constitutional guarantee so that it does not impose more obligations on most law enforcement institutions than they have already assumed for themselves. But in selecting the optimal doctrinal strategy to enforce this guarantee, the judge would not wish to devolve more discretionary authority than could be entrusted to those law enforcement officials who are the most hostile to honoring the guarantee, and to those institutions that are the least competent to honor it. That is, the judge will consider only the attitudes and competency of “outlier” law enforcement officials in selecting her optimal delegation point. Thus, the judge’s normative constitutional theory would lead her to develop a maximin strategy by attempting to eliminate the worst constitutional violations.²⁶⁷

Thus, without fleshing out a richer normative theory of constitutional interpretation, this Article cannot offer more precise guidance as to whose motivations and competence a court should consider. For the purposes of this Article, however, it is sufficient to urge courts to consider *some* set of law enforcement institutions’ competence and ideological interests before deciding whether to devolve discretionary authority away from the judiciary. Through engaging in such an analysis, courts can escape from the sort of single-institutional analysis that typically plagues constitutional criminal procedure decisionmaking.

C. ORDER OF COMPARATIVE ANALYSIS

After setting a constitutional objective, a judge will have to assess the relative competence of both the court and the law enforcement institutions that will be charged with implementing that objective. As Part II explains, this analysis requires the judge to evaluate (1) law enforcement officials’ attitudes toward the court’s constitutional objective and their competence to implement the objective, and (2) the extent to which conditions of uncertainty warrant delegation to the officials. For a number of reasons, a judge would be well advised to undertake these inquiries sequentially, starting with the assessment of law enforcement motivations and competence.

157, 222–23 (2012) (“Many of the debates in criminal procedure scholarship over the past several decades have been about the relative merits of what can be seen as two different mechanisms of accountability: on the one hand, representative democracy, and on the other, the rule of law, which in this context has meant judicial protection of constitutional rights.”).

²⁶⁷ See Daniel A. Farber, *Uncertainty*, 99 GEO. L.J. 901, 919 (2011) (“Maximin, called maximin by other scholars, means selecting the strategy that has the least bad worst case outcome—the decision maker ‘maximizes’ the ‘minimum’ utilities possible across the strategy space.”).

First, as an analytical matter, the court will need to go no further in its comparative institutional analysis if it decides that law enforcement officials are simply too incompetent or too hostile to the constitutional right in question to benefit from a doctrinal rule that gives them any meaningful degree of discretion. Second, as a prudential matter, the problem of overdelegation typically arises when a judge commits the fallacy of single institutionalism and decides to devolve authority from her court simply because she recognizes that it will have difficulty coping with the complexity of a problem. By evaluating the competence of law enforcement officials *before* assessing the magnitude of these factors, the judge compensates for this heuristic bias and engages in a more accurate comparative institutional analysis.

Third, the judge's assessment of law enforcement officials' policy preferences is relevant to how confident she can be in estimating how conditions of uncertainty might affect her delegation choice. Much of the information relevant to the uncertainty inquiry is likely to be in the hands of law enforcement officials. Because these officials stand to gain more discretionary authority if the judge overestimates the difficulty of crafting an accurate decision rule, they have an incentive to mislead the judge as to the scope of what she does not know.²⁶⁸ As such, the judge must have a good working estimate of law enforcement officials' hostility to the right in question in order to better estimate whether there are factors she does not know *ex ante* that might merit devolving authority away from the court.

If the judge is satisfied that law enforcement officials are capable of responsibly using whatever discretion the court might grant them, she should then decide whether it is necessary to delegate that discretion so that the officials can adapt to conditions of uncertainty. This step of the delegation process is likely to be the one that is the most difficult, and the least accurate. Granted, when assessing the competence and motivations of law enforcement officials, a judge may have limited information upon which to base her analysis. But while this information may be difficult for a judge to obtain or to assess accurately, it is at least theoretically knowable. The task of estimating uncertainty, however, forces the judge to assess the magnitude of what she does *not* know. Because judges cannot predict the future, they are not likely to be able to estimate their own institutional ignorance with any degree of accuracy.

In order to avoid overdelegation, however, it is essential that the judge not simply throw up her hands when confronted with these difficulties and delegate authority without reflecting on whether it is truly necessary to do

²⁶⁸ See *supra* note 149 and accompanying text.

so. Instead, the judge must attempt to estimate some sort of plausible upper limit of how badly a decision rule might fail to serve its background justification. In this endeavor, the adversarial nature of the litigation process can help the judge make a sensible prediction. The judge can be reasonably confident that, as a party to the litigation, the government will seek to identify all conceivable worst-case scenarios that would justify delegating authority to them. Likewise, she can be confident that the defendant will attempt to supply whatever information might cast doubt on the plausibility of these scenarios. While a judge's assessment of this information is unlikely to be perfect—or perhaps even good—her ultimate delegation choice will be much better for having made the effort.

CONCLUSION

These decisionmaking suggestions may go some way toward ameliorating the problem of overdelegation. But, ultimately, overdelegation is unlikely to be eliminated without rethinking the normative and structural foundations of criminal procedure decisionmaking. However, between radically restructuring the constitutional law of criminal procedure and encouraging individual judges to take greater care in their delegation choices, there are other possibilities worth serious exploration. For example, the Supreme Court could set its criminal procedure agenda in ways that are likely to provide it with more information about the competence and attitudes of law enforcement officials with regard to the Constitution's criminal procedure guarantees. Instead of granting certiorari on cases involving relatively well-trained federal officers, the Court could take cases involving law enforcement officials who are less disposed to honor a criminal suspect's criminal procedure rights.²⁶⁹ Alternatively, the Court could permit class action habeas corpus actions that would allow criminal defendants to pool information about the practices of a range of law enforcement officials.²⁷⁰

These modest reforms could potentially make the consequences of overdelegation more salient to the Supreme Court. Ultimately, however, the core aim of this Article is not reparative; it is diagnostic. By framing criminal procedure decisionmaking as a delegation process, it is possible to disentangle the normative questions that preoccupy much of the criminal procedure scholarship from often-overlooked institutional questions. Thus,

²⁶⁹ Cf. Shay & Lasch, *supra* note 190, at 249–50 (observing that a disproportionately large number of criminal certiorari petitions involve federal cases).

²⁷⁰ See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 402–04 (2007) (discussing class action habeas petitions).

by presenting a new conceptual vocabulary for understanding criminal procedure cases, this Article aims to deepen our understanding of a doctrinally peculiar area of constitutional law.