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INTRODUCTION

Midway through the oral argument in *NLRB v. Noel Canning*, it became clear that the government's position—authorizing the President to make recess appointments during pro forma sessions of the Senate[1]—hinged largely on a formality. A pro forma session qualifies as a "recess," Solicitor General Donald Verrilli, Jr., argued, as long as the Senate dispatches an order declaring that it shall conduct "no business."[2] In *Noel Canning*, the dispatch of such an order was undisputed: so President Obama's recess appointments to the NLRB were constitutional.[3]

In response to Verrilli's argument, Chief Justice Roberts offered a simple but pointed hypothetical: "What if, instead of saying 'No business shall be conducted,' the order said, 'It is not anticipated that any business will be conducted.' [Would] that suffice to eliminate that period as a recess?"[4] A colloquy ensued:

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* Visiting Fellow, Information Society Project, Yale Law School. For helpful conversations, I am grateful to the participants in the 2014 legal scholarship reading group, and most especially BJ Ard. I am also grateful to Jack Balkin, Paul Kahn, and Kara Lowentheil, for helpful conversations about the Article, and to the editors of the *William & Mary Bill of Rights Journal* who improved things immeasurably. Finally, the Article drew inspiration from the work of the scholar who first introduced me to constitutional law: Reva Siegel. Errors are my fault, of course.

[1] *See, e.g.*, Reply Brief of Petitioner at 20–25, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281) (arguing, broadly, that "[t]he Senate [i]s [i]n '[r]ecess' [u]nder [t]he Recess Appointments Clause [w]hen [i]ts [o]rder [p]rovides [t]hat, [f]or 20 [d]ays, [i]t [w]ill [h]old [o]nly [f]leeting '[p]ro [f]orma' [s]essions [a]t [w]hich '[n]o [b]usiness' [i]s [t]o [b]e [c]onducted"); *see also* Nicole Schwartzberg, *What is a "Recess"?: Recess Appointments and the Framers' Understanding of Advice and Consent*, 28 J.L. & POL. 231 (2013) (exploring what the increasing prevalence of pro forma recesses means for constitutional structure).

[2] Transcript of Oral Argument at 12, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281).

[3] 134 S. Ct. at 2550.

[4] Transcript of Oral Argument at 12, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281).

> GENERAL VERRILLI: I think that it's a—that's a different case and I think, concededly, a significantly harder case for the Executive because here—
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> CHIEF JUSTICE ROBERTS: Yeah. Well, it's difficult and harder, but it also suggests that you're just talking about a couple of magic words that the Senate can just change at the drop of a hat. So maybe the point is not that significant.
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> GENERAL VERRILLI: Well, I think it is significant, Mr. Chief Justice. It's a formal action by the Senate by rule saying that no business shall be conducted.[5]

No surprise that General Verrilli found "significan[ce]" in the Senate's "formal action."[6] Formality was the essence of the government's position. At the same time, Roberts's question captures a widespread intuition. Constitutional boundaries should not depend on how state actions are *named*. They should depend on what state actions actually *consist of*. Hence his pejorative use of the word "magic": to focus on labels rather than substance is to be taken in by an illusion.

This logic may sound familiar. In fact, it is the same logic that Chief Justice Roberts offered three terms ago, in *NFIB v. Sebelius*, to justify upholding the individual mandate of the Affordable Care Act (ACA).[7] His argument? That in spite of Congress's decision to call the ACA's levy for non-compliance with the individual mandate a "penalty," the levy operated, in practice, as a tax.[8] And for the purpose of deciding if the ACA was a legitimate exercise of Article I power, what mattered was how the levy *worked*, not how lawmakers happened to describe it.[9] To hold the opposite, Roberts wrote, would make the meaning of Article I hinge on whether "Congress

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[5] *Id.* at 12–13. In his opinion for the Court in *Noel Canning*, Justice Breyer picks up on this thread of skepticism. Responding to the argument that the nature of the Senate's convening is dictated by formal orders, Breyer writes: "the Senate's rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During any *pro forma* session, the Senate could have conducted business simply by passing a unanimous consent agreement." *Noel Canning*, 134 S. Ct. at 2555. In other words, regardless of how the Senate *refers* to its power during pro forma sessions, the nature of that power is undisputed: the Senate has the functional ability to conduct business, notwithstanding its formal order. *See also* Lyle Denniston, *Opinion Analysis: Pragmatism Triumphs Over Formalism*, SCOTUSBLOG (June 26, 2014 12:56 PM), http://www.scotusblog.com/2014/06/opinion-analysis-pragmatism-triumphs-over-formalism/ (describing *Noel Canning* as a decision grounded in "constitutional pragmatism").

[6] Transcript of Oral Argument at 13, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281).

[7] 132 S. Ct. 2566 (2012).

[8] *Id.* at 2594.

[9] *Id.* at 2595–96.

used the wrong labels."[10] It would let "magic words . . . disable an otherwise constitutional [enactment]."[11]

Behind the political fireworks of *NFIB*, interpretive questions loom unresolved. What role do labels play in legal analysis? What role *should* they play?

Broadly speaking, this Article has two goals. The first is to demonstrate the prominence of functionalism in the interpretive practices of the Supreme Court. Reading a case like *NFIB*, it would be easy to conclude that the tension between labels and function reflects a deep rift in our legal order. On reflection, though, the rift turns out to be something of a mirage. While judicial opinions do occasionally employ the *rhetoric* of label-formalism, we are all functionalists at heart.

The Article's second goal is to explore two exceptions to this norm. One is a faux exception—an exception to functionalism that actually reinforces its primacy. The second is a genuine exception, though very possibly a lamentable one.

The faux exception is the use of clear statement rules. In some domains, the Court has held that drafters—be they legislative bodies drafting statutes, or private parties drafting contracts—must use precise language when directing outcomes of an especially momentous or disruptive nature.[12] By imposing this requirement, clear statement rules tether interpretation to labels: they disable courts from looking beyond the words that drafters use. Clear statement rules are thus designed to *shut down* the interpretive enterprise. And in that sense, although clear statement rules call for label-formalism, they actually underscore the primacy of *functionalism*. The existence of clear statement rules—that they are necessary in the first instance—suggests that when judges are left to their own devices, they focus on function, not labels.

The second exception to functionalism—a real one, though not necessarily a wise one—is a specific doctrinal setting: race equality jurisprudence. There, the focus is often on labels, not function, because the labels in question—racial categories—are understood to work freestanding harm. When confronting race equality cases, the Court does ascribe magical power to labels, but it is a destructive kind of magical power: laws that employ racial labels are ipso facto suspect, no matter their operation or underlying purpose.[13] Drawing on Reva Siegel's work, I argue that the Court's aversion to racial labels is divisible into two conceptually distinct views.[14] From one view—the "color-blindness" view—*all* race-conscious lawmaking is suspect, and the presence of racial labels is troubling simply because it *evinces* race-consciousness.[15] From the

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[10] *Id.* at 2597.

[11] *Id.* at 2595 (citing Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992)).

[12] *See infra* notes 87–89.

[13] Of course, a law may—on some conceptions of equal protection—be redeemed from the stigma of racial labels *because of* its purpose or operation. But the doctrine focuses, in the first instance, on the presence of racial labels; that is the first step in the progression of strict scrutiny analysis. *See* Reva Siegel, *From Colorblindness to Anti-Balkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1288–89 (2011).

[14] *See id.* at 1281.

[15] *See id.*

other view—the "anti-balkanization" view—racial labels are intrinsically problematic.[16] The Constitution does not necessarily frown on laws that pursue race-related objectives, but it *does* frown on the use of racial labels to further those objectives.[17]

The Article closes on a normative note. I argue that the "anti-balkanization" view, by transforming racial labels as a source of taboo, clashes with functionalist interpretation. If the anti-balkanization view can be reconciled with our practices, it is because racial labels are genuinely exceptional—because, in light of our history, they *really do* have negative magic power. I conclude by expressing skepticism about this proposition.

Part I revisits *NFIB* to introduce the problem. Part II demonstrates the primacy of functionalist interpretation. Part III explains—and ultimately explains away—clear statement rules. Part IV takes up race equality jurisprudence. The last Part concludes.

I. *NFIB*

The Affordable Care Act (ACA) prompts individuals with a choice, couched as a "mandate": buy health insurance or pay a levy.[18] The constitutional status of the Act hinged on whether the levy is best characterized as a "penalty" or a "tax." Construe the levy as a "penalty," and the ACA runs afoul of the Commerce Clause.[19] Construe it as a "tax," and the Act becomes a legitimate exercise of congressional power under the Taxing and Spending Clause.[20]

This question provoked fierce disagreement. Partly, of course, this had to do with the case's obvious political stakes. Beneath the surface, however, lurk deep interpretive questions. Writing for the Court in *NFIB v. Sebelius*, Chief Justice Roberts articulated the importance of focusing on substance, not labels, in constitutional analysis.[21] The idea is intuitive: when assessing constitutional boundaries, the controlling variables should be how laws actually operate, not how laws *describe* how they operate. Roberts furnished an example to gloss the point:

> Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status, and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment

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[16] *See id.* at 1302.

[17] *See id.* at 1300–03, 1307–09 (introducing the "anti-balkanization perspective" in race equality cases).

[18] *See* NFIB v. Sebelius, 132 S. Ct. 2566, 2580 (2012); *see also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148 § 1501(b), 124 Stat. 119 (2010).

[19] *See NFIB*, 132 S. Ct. at 2593–94.

[20] *See id.*; *see also* U.S. CONST. art. I, § 8, cl. 1 (outlining the Taxing and Spending power); art. I, § 8 cl. 3 (outlining the Commerce Clause power).

[21] 132 S. Ct. at 2595.

> is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment.[22]

In support of this interpretive orientation—the "functional approach"[23]—Roberts adduced various arguments. To begin with, there was precedent for the proposition that levies could be characterized as "taxes," even when they had not been so labeled.[24] Furthermore, there was also precedent for the mirror-image proposition. When putative taxes operate, in practice, as penalties, the Court has characterized them that way[25]—and what works in one direction, Roberts suggested, ought to work in the other.[26] Roberts's third argument rested on broader—and more consciously normative—principles of avoidance. Namely, a law should not be "struck down because Congress used the wrong labels," so long as "the Constitution [otherwise] permits Congress to do exactly what [it did]."[27] In other words, reading for substance can rescue state action that, on a superficial construction, might have been held unconstitutional.

On the other side, the joint dissent argued that the Court was required to treat the levy as written.[28] The relevant question was not "whether Congress had the *power*

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[22] *Id.* at 2597–98.

[23] *Id.* at 2595.

[24] *Id.* ("We have . . . held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets—for which the licensee had to pay a fee—could be sustained as exercises of the taxing power." (citing License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867))).

[25] *NFIB*, 132 S. Ct. at 2595 ("Our cases confirm this functional approach. For example, in *Drexel Furniture*, we focused on [the] practical characteristics of the so-called tax on employing child laborers that convinced us the 'tax' was actually a penalty." (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36–37 (1922)); *see also Drexel Furniture*, 259 U.S. at 36–37 (holding that a levy for the use of child labor, despite being labeled by Congress as a "tax," in fact operated as a penalty because of (1) the magnitude of its burden, (2) the existence of a *mens rea* requirement, and (3) the fact that the "tax" was administered by the Department of Labor, not the IRS).

[26] *NFIB*, 132 S. Ct. at 2595. This extrapolation was a key point of contention in the case. The joint dissent, for example, offered the following rejoinder: "In a few cases, this Court has held that a 'tax' imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held—*never*—that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power—even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty." *Id.* at 2651 (Scalia, J., dissenting). *See generally* Randy Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010) (laying out the academic argument against the individual mandate). Of course, the "it hasn't happened yet" logic runs both ways. Never before—one might argue—had a run-of-the-mill federal regulation been challenged as afoul of the Constitution.

[27] *NFIB*, 132 S. Ct. at 2597 (majority opinion).

[28] *Id.* at 2651 (Scalia, J., dissenting).

to frame the minimum-coverage provision as a tax"—which of course it had—"but whether [Congress actually] *did* so."[29] And the answer was clear: the levy that Congress built into the ACA was, in substance, just "what the statute call[ed] it—a penalty."[30] The rationales for this position were numerous. To recite but three: No case in the Court's history (before *NFIB*) had reframed as a tax what Congress labeled a penalty;[31] the levy clearly aimed to *penalize* those who do not comply with the individual mandate;[32] and textually, the levy was included in Title I of the Act, *not* Title IX, where the ACA's other "Revenue Provisions." could be found.[33] In short, contextual evidence implied that the ACA levy was, in reality, exactly as Congress had designated it: a penalty for non-compliance with the individual mandate.

The view of the joint dissenters is certainly understandable. But there is something awry in their argumentation. At day's end, the evidence marshaled by the dissent does not go to whether legal interpretations should focus on function or, instead, on labels; it goes to whether the levy actually does function as a tax.[34] Indeed, for all their bluster about the importance of parsing the ACA as written, the dissenting Justices were actually willing to concede the wisdom of the "functional approach," at least in concept.[35] At one point, they openly admit that avoidance considerations can make it salutary to focus on substance rather than labels: "if 'fairly possible,'" the opinion argued, "we must . . . construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional."[36] Appended to this admission, however, was a stern caveat: functional reading must not "pervert[ ] the purpose of a statute,"[37] or "do[ ] violence to the fair meaning of the words used."[38] And in the immediate case, the dissent thought the balance of reasons clear: "there is simply no way . . . to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty."[39]

Yet it is difficult to see how the dissent's hedge—admitting that statutes may be read for substance, but adding the proviso that no "violence" should be done to their words—is sustainable. The whole point of the "functional approach" is that it diverts attention away from a statute's labels.[40] So it cannot be that disregard for labels amounts, by itself, to the "perversion" of a statute's purpose; otherwise, the caveat would eviscerate the position it supposes to modify. At the same time, if the caveat is

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[29] *Id.*
[30] *Id.* at 2654.
[31] *Id.* at 2651.
[32] *Id.* at 2652.
[33] *Id.* at 2655.
[34] *Id.* at 2652.
[35] *Id.* at 2654.
[36] *Id.* at 2651 (internal citation omitted).
[37] *Id.* (citing Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986)).
[38] *Id.* (citing Grenada Cnty. Supervisors v. Brogden, 112 U.S. 261, 269 (1884)).
[39] *Id.*
[40] *Id.* at 2595 (majority opinion).

read to mean simply that functional reading should not subvert legislative will, it is difficult to see what work the caveat is doing; it would seem, in practice, to be little more than an admonition for the Court to take up the functional approach *responsibly*. If so, then the idea of staying true to the "fair meaning of the [statute's] words," though rhetorically appealing, simply mischaracterizes what is going on. The statute's words are exactly not what is at stake.

The most natural conclusion, therefore, is that the dissenting Justices in *NFIB* are not opposed to the functional approach *as such*. They are opposed to how Chief Justice Roberts's opinion for the Court deployed that approach. Put simply, they bridle at his conclusions, not his method. For the reasons traced above, the joint dissent rejects the conclusion that the ACA levy operates, in fact, like a tax. That view is perfectly defensible. It may well be correct. But it has no bone to pick with the functional approach. To the contrary, it *embraces* the functional approach—and offers a contrary interpretation within that methodological frame.

II. MAGIC

Ultimately, it comes as little surprise that the majority and the dissent in *NFIB* agree—if grudgingly—about the wisdom of the functional approach. Reading for substance rather than labels has a long pedigree, especially when it comes to issues of constitutional significance. Taxation provisions, as in *NFIB*, are one prominent example.[41] But the Court has repudiated the "magic words" approach in other statutory settings as well.[42] One especially prominent (though non-exclusive) example is the designation of a rule as "jurisdictional" rather than substantive, in light of the ripple effects of that threshold question.[43] Dissenting Justices, moreover, are fond of using

[41] *See id.* (enumerating examples); *see also* Quill Corp. v. North Dakota, 504 U.S. 298, 310 (1992); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 284 (1977); Ry. Express Agency, Inc. v. Virginia, 358 U.S. 434, 441 (1959).

[42] For examples of the Court's general aversion to parsing statutes by label rather than function, see, for example, *Key Tronic Corp. v. United States*, 511 U.S. 809, 823 (1994) (Scalia, J., dissenting) (arguing that Congress "need not incant the magic phrase 'attorney's fees'" in order to provide for their recovery). *See also* Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 112 (1992) (Kennedy, J., concurring) (arguing that preemption inquiry should turn on Congress's "clear and manifest purpose," not on "magic words"). The commitment to functionalism is also reflected—doctrinally—in settings that pose a pronounced risk of chill. For example, when it comes to assessing abortion-restrictive laws, the Court asks whether a given law imposes an "undue burden" in practice. Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992). It does not matter what language the law uses; it does not even matter if the law makes little to no mention of abortion. What matters is how the law *operates*. For a timely example, see *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 449 (5th Cir. 2014) (holding that it imposes an undue burden on abortion for Mississippi to require all physicians who work at an abortion facility to have admitting privileges at a local hospital—because the regulation would effectively cause the last abortion clinic in Mississippi to close).

[43] *See, e.g.*, Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817, 824 (2013) (holding that Congress need not "incant magic words" to make clear a grant of jurisdiction); FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012) (same); Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197,

the dismissive connotations of "magic words" to belittle the Court's reasoning. This tactic has emerged in numerous settings over the years—pleading,[44] post-conviction confinement,[45] administrative deference,[46] *Bivens* actions,[47] speedy trial provisions,[48] and most recently, the practical meaning of *Miranda*.[49]

All of this makes sense. The feebleness of label-formalism—as Roberts remarked, during the *Noel Canning* argument, distinctions balanced on "magic words" cannot be "that significant"[50]—proves very intuitive. It would be odd, to say the least, if our most fundamental commitments turned out to depend on law's contingent linguistic features. Words are malleable. They can mislead. If labels alone were sufficient to catalyze momentous decisions—like striking down the ACA, or barring entire categories of federal suit, or circumscribing the sweep of fundamental rights—it would suggest basic confusion about the enterprise. It would imply that judicial review, a solemn and cherished institution, had devolved into a triviality; a parlor game.

That is precisely why the phrase "magic words" is rhetorically effective. When dissenting and concurring opinions adopt the slur to criticize the majority's position, the point is to suggest that the Court has *trivialized* the question: that a dimension of legal meaning has been lost.[51] The phrase puts opponents on the defensive, because it

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1203 (2011) (concluding that "magic words" are unnecessary to make a rule jurisdictional); Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 272 (1992) (Scalia, J., dissenting) (accusing the majority of applying a "magic words" test for federal jurisdiction that "give[s] talismanic significance to any mention of federal courts") (internal citations omitted).

[44] Schiavone v. Fortune, 477 U.S. 21, 32 (1986) (Stevens, J., dissenting) (arguing that plaintiffs' claim should not be time-barred simply because they failed to include the proper "magic words" in their complaint).

[45] Foucha v. Louisiana, 504 U.S. 71, 118 n. 13 (1992) (Thomas, J., dissenting) (arguing that "[i]t is surely rather odd to have rules of federal constitutional law turn entirely upon the *label* chosen by a State" during post-conviction confinement proceedings).

[46] Zuber v. Allen, 396 U.S. 168, 208 (1969) (Black, J., dissenting) (arguing that deference to agency interpretation cannot hinge on whether the secretary has "incanted the proper magic words").

[47] Carlson v. Green, 446 U.S. 14, 31 n.2 (1980) (Burger, C.J., dissenting) (arguing that *Bivens* remedies should not be extended simply because Congress failed to use the right "magic words" of limitation).

[48] Reed v. Farley, 512 U.S. 339, 368 (1994) (Blackmun, J., dissenting) (arguing that defendant should not be deprived of dismissal remedy for violation of speedy trial rules simply because he failed to utter "magic words at the magic moment").

[49] Berghuis v. Thompkins, 560 U.S. 370, 410 (2010) (Sotomayor, J., dissenting) (arguing that criminal defendants should not have to invoke "magic words" to assert the right to silence). Of course—in a fun twist of meta—it stands to reason that the foregoing list is woefully underinclusive, since it was compiled using only the search terms "magic," "words," and "labels."

[50] Transcript of Oral Argument at 12, NLRB v. Noel Canning, 134 S. Ct. 2550 (2014) (No. 12-1281).

[51] At some level, the problem stems from the nature of language. Words refer to reality, but in an underdetermined sense; reality overflows the referential capacity of words. An entire field of linguistic theory—pragmatics—is dedicated to the exploration of this problem in everyday language. In legal settings, the analogous point is that the content of law cannot be exhausted

insinuates that no reasonable interpretive agent—no reasonable judge—could believe that the question depends on so unimportant-seeming a variable.

In light of all this, more noteworthy than what the "magic words" canon includes is what it conspicuously lacks. No Justice *ever* swerves to defend the opinion of the Court against the "magic words" accusation by trumpeting the sagacity of label-formalism. Scouring the Court's jurisprudence, I was unable to find *a single opinion* in which the following style of a parry emerges in the response to the "magic words" thrust:

> It is true: today's result depends on the words employed in the law, not the way the law operates in the world. But that is precisely what matters—and ought to guide the Court's hand—for the purposes of constitutional review.

Instead, the uniform response to the allegation of "magic words" is to deny the charge. Justices accused of privileging labels over substance respond, simply, that they have not done so; that their object of inquiry *has* been the law's substance, even if that substance happens to align, in practice, with the words the law adopts.

Two examples will help shore up the point. First, consider *Reed v. Farley*, a case about the speedy trial guarantee.[52] Under the Interstate Agreement on Detainers Act (IAD), prisoners serving time in one jurisdiction may be transferred elsewhere—temporarily—for the purpose of being tried for a different crime.[53] The Act includes a very clear "speedy trial" provision: the trial of the transferred prisoner "shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State," or else the charges are dismissed with prejudice.[54] While Reed, the petitioner, was serving a sentence in federal prison in Indiana, the State of Indiana decided to prosecute him for theft.[55] Pursuant to the IAD, Indiana authorities took

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by the a-contextual examination of its words. *See* STEPHEN BREYER, MAKING OUR DEMOCRACY WORK 91 (2010) ("[Interpretive] uncertainty does not arise because the statute's language has an unclear technical meaning or because ordinary readers fail to understand the general *kinds* of situations to which the statute's language refers . . . . Rather, [statutes are often] ambiguous or uncertain in respect to the scope of [their] coverage."). Examples of this phenomenon abound in the case law. To take but one recent example: in *Bond v. United States*, the Court held that a Pennsylvania woman who tried to give her adversary a chemical rash had not used a "chemical weapon" for the purposes of the Chemical Weapons Convention Implementation Act. *See* 134 S.Ct. 2077, 2084 (2014). The Court's argument, in relevant part, was that despite the fact that the Act literally reached Ms. Bond's conduct, no ordinary English speaker would think of that conduct as involving a "chemical weapon." *Id.* at 2090–91.

[52] 512 U.S. 339 (1994). The procedural posture of *Reed* is somewhat complicated—the petitioner was raising his Interstate Agreement on Detainers Act (IAD) timeliness challenge on habeas appeal, claiming that his clearly established federal rights had been violated but the core principles are very clear. *See id.* at 347–48.

[53] *Id.* at 341.

[54] *Id.* at 341–42.

[55] *Id.* at 342.

custody of Reed on April 27th, which meant, under the statute's terms, that a trial had to commence on or before August 25th.[56] Due to a variety of variables, a trial was set for September 13th, at the parties' consent—including Reed's.[57] On August 29th, however, a few days after the 120-day window had lapsed, Reed filed a petition for discharge, arguing that Indiana had failed to try him within the 120-day window, and that IAD therefore required his immediate release.[58]

Justice Ginsburg, writing for the Court, held against Reed—denying his habeas appeal—on two grounds. The first was that she did not find Reed's injury constitutionally significant; the assignment of a trial date twenty or so days outside the statutory window "rank[ed]," in her estimation, "with the nonconstitutional lapses we have [previously] held not cognizable" as grounds for a collateral appeal.[59] The second rationale was that Reed had numerous opportunities to raise the IAD problem during the course of scheduling, but he decided, instead, to stay mute—and then capitalize on the state's (and judge's) error to set the trial date outside the statutory window.[60] In Justice Ginsburg's words:

> At the pretrial hearings . . . Reed not only failed to mention the 120-day limit; he indicated a preference for holding the trial after his release from federal imprisonment, which was due to occur after the 120 days expired. Then, on the *124th day,* when it was no longer possible to meet Article IV(c)'s deadline, Reed produced his meticulously precise "Petition for Discharge."[61]

In other words, it appeared that Reed, far from being an innocent victim, may well have orchestrated the IAD conundrum as a means of exploiting a technicality to escape criminal liability. This result, Justice Ginsburg would not abide.[62]

Justice Blackmun, in dissent, took a rather different view of the case. The merits of the 120-day deadline were not at issue; what was at issue was the meaning of the IAD, which Blackmun saw as an issue of "unmistakable clarity."[63] Congress set a hard-and-fast deadline, and it articulated a clear consequence in the event of non-compliance: dismissal with prejudice.[64] The clarity—and gravity—of this remedy cannot change,

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[56] *Id.*

[57] *Id.* at 343.

[58] *Id.* at 344.

[59] *Id.* at 349–50 (citing Hill v. United States, 368 U.S. 424, 429 (1962) (holding that a trial court's failure, at sentencing, to invite a convicted defendant to present mitigating evidence did not provide sufficient grounds for collateral appeal—given that there was no evidence that the defendant actually intended to speak)).

[60] *Id.* at 350–51.

[61] *Id.*

[62] *Id.* at 352.

[63] *Id.* at 367 (Blackmun, J., dissenting).

[64] *Id.*

Blackmun reasoned, simply because the prisoner in this particular case was less than forthright about the IAD's requirements.[65] In Blackmun's words:

> surely [a] violation that Congress found troubling enough to warrant the severe remedy of dismissal cannot become trivial simply because the defendant did not utter what this Court later determines to be the magic words at the magic moment, particularly in the absence of any congressional requirement that the defendant either invoke his right to a timely trial or object to the setting of an untimely trial date.[66] Therefore, the case against Reed should be dismissed.

In response to the accusation that she was engaged in "magic words" analysis, one might have expected Justice Ginsburg to simply double-down. After all, her opinion *obviously* reads an invocation requirement (of some kind) into the IAD's speedy trial provision; which is to say, it *does* seem to make the efficacy of the IAD on the presence or absence of "magic words [uttered] at the magic moment."[67] What harm would result from acknowledging that outright? But Ginsburg opted for a different route. She fell back on principles. In the first instance, a structural principle: Ginsburg emphasized that federal habeas appeals play an important—but self-consciously rare—role in the judicial system, and that the system as a whole is poorly served when essentially inconsequential errors are allowed to disrupt its functioning.[68] And in the second instance, an equitable principle: it manifestly did not seem *right* to Ginsburg that a would-be defendant could evade the state's prosecutorial power by strategically keeping mum.[69] Formalities had nothing to do with it.

A second example is *Schiavone v. Fortune*.[70] On May 9th, 1983, the petitioners brought a libel action against *Fortune* magazine.[71] The complaint, which named "Fortune" as the exclusive defendant, was served on Time, Inc., the New York corporation that owned and controlled *Fortune* magazine; at which point Time's agent "refused service because Time was not named as a defendant."[72] Undaunted, the petitioners amended their complaint on July 18th, 1983, changing references to the defendant from "Fortune" to "Fortune, also known as Time, Incorporated."[73] Problem solved! Or so it would seem. In fact, Time promptly moved to dismiss the case on the grounds that New Jersey state law required libel actions to "be commenced within one year of

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[65] *Id.* at 368.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 348 (majority opinion).
[69] *Id.* at 350.
[70] 477 U.S. 21 (1986).
[71] *Id.* at 22.
[72] *Id.* at 22–23.
[73] *Id.* at 23.

the publication of the alleged libel,"[74] and—conveniently for Time—although the *initial* complaint had been filed within the one-year period, the amended complaint had not.[75] Therefore, Time argued, it had not received legally adequate notice of the allegations within the mandatory time frame, and Rule 15(c) of the Federal Rules of Civil Procedure required dismissal.[76] And the district court, "with great reluctance," agreed.[77] Petitioners appealed this determination, lost, and sought certiorari.[78]

Justice Blackmun, writing for the Court, agreed with the district and circuit courts: the case should be dismissed. Rule 15(c), he argued, permits "relating back" an amended complaint to an original complaint, including changing the named defendant, but *only* if the amendment occurs "within the period provided by law for commencing the action."[79] In *Schiavone*, the timing condition was not satisfied; and that was "fatal . . . to petitioners' litigation."[80]

Justice Stevens filed a spirited dissent, rejecting the Court's logic root and branch. Although the majority purported to rely "exclusively on the 'plain language' of Rule 15(c)," in Stevens' view, this claim rested on a faulty premise: the "relation back" test laid out in Rule 15(c) "is utterly irrelevant unless the amendment is one 'changing the party against whom a claim is asserted,'" and "[i]n this case, the technical correction filed in July added absolutely nothing to any party's understanding of 'the party against whom' the claims were asserted."[81] The effect of the majority's view, therefore, was to—unjustly—preclude a potentially meritorious cause of action, simply because petitioners had failed to "add[ ] the magic words" to their complaint on the right date.[82]

Just like in *Reed*, the majority in *Schiavone* did not squarely address the "magic words" accusation. Instead, it reframed the case in terms of substantive principles—in particular, the principle of "notice"—which in the majority's view form the "linchpin" of Rule 15.[83] Put simply, parties have the right to be made aware of the legal allegations

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[74] *Id.*

[75] *Id.* at 24.

[76] *Id.* at 26.

[77] *Id.* at 24.

[78] *Id.* at 25.

[79] *Id.* at 30.

[80] *Id.*

[81] *Id.* at 34-35 (Stevens, J., dissenting). Stevens provided a helpful analogy to gloss his point: "If an original complaint names Smith as the tortfeasor and the plaintiff does not decide to sue Jones until after the statute of limitations has run, there would be obvious prejudice in allowing 'an amendment changing the party against whom a claim is asserted" unless Jones had actual notice of the claim before the statute ran. . . . [By contrast], the difference between the description of the publisher of Fortune in the original complaints and the description of the publisher of Fortune in the amended complaints is no more significant than a misspelling, or perhaps a reference to 'Time, Inc.' instead of 'Time, Incorporated.'" *Id.* at 35–36.

[82] *Id.* at 32.

[83] *Id.* at 31 (majority opinion). In a similar vein, Blackmun—addressing the "magic words" issue more squarely—clarifies that "[w]e do not have before us a choice between a 'liberal' approach toward Rule 15(c), on the one hand, and a 'technical' interpretation of the Rule, on the

against them in a timely matter. To deprive Time, Inc.—and all other such defendants—of that right would work injustice the other way.

This is not to say that the majority's view is necessarily correct, or more high-minded than the dissent's. It is simply to note that, when the chips are down, the majority's view is hitched to principles, not technicalities—in fact, in defending his more formalistic position, Blackmun explicitly denounces the possibility of "mere technicalities" frustrating "decisions on the merits."[84] A striking sentence—given how easy it is to imagine a counterfactual opinion, utterly *steeped* in technicality that arrives at the same result. "It is not the role of this Court"—one can readily imagine Blackmun, or any other Justice, writing—"to pronounce on what seems fair in cases like this. The balance of interests has already been struck by universally-accepted practices of service. Plaintiffs must name the correct defendant in complaints—period. Call this 'magic words' if you like; but it is a basic requirement in our legal system."[85]

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What examples like these suggest is that few judges—perhaps none—truly embrace the view that labels trump substance. Rather, in *Reed* and *Schiavone*, no less than in *NFIB*, the dispute stemmed from competing notions *of* legal substance. That is, even when it appeared as though the Justices were disagreeing, in a basic way, about how to interpret legal texts, in fact they were disagreeing about the thing lawyers and judges have always disagreed about: what legal texts mean. When one side accuses the other of succumbing to the allure of labels, and the other side rejects that accusation, both are ultimately saying the same thing: *We have the correct view of the law*. "Magic words" may be an effective flourish. But in practice, that is all it is.

III. FALSE MAGIC

Fine—one might respond—but even if functionalist interpretation serves the default, clearly there are cases where judges look to labels to resolve interpretive questions—cases governed by clear statement rules. When clear statement rules are

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other hand. The choice, instead, is between recognizing or ignoring what the Rule provides in plain language." *Id.* at 30.

[84] *Id.* at 27 (citing Foman v. Davis, 371 U.S. 178, 181 (1962)). Presumably, the dissent's rejoinder would be that whatever the majority's intentions, its view still *ended up* hitched to a technicality. Indeed, that is always the point of the "magic words" accusation. But that is not how the majority in *Schiavone* understood its own machinations.

[85] After all, this kind of formalist argumentation is hardly foreign to our jurisprudence—especially when it comes to cases involving missed deadlines. *See, e.g.*, Dolan v. United States, 560 U.S. 605, 629 (2010) (Roberts, C.J., dissenting) (describing the unfortunate consequences associated with a sentencing court failing to issue a restitution order within the allotted 90-day window as the "unavoidable result of having a system of rules"). The point, of course, is not that this style of "deadline formalism" is necessarily availing. Reasonable minds will disagree. The point is that the argument is *intelligible*. It does not come off as a needless embrace of minutiae—in the way that the equivalent embrace of "magic words" no doubt would.

in effect, courts refuse to give force to statutory or contractual language solely on the basis that the relevant drafters—legislators in the case of statutory construction, private parties in the case of contract construction—did not "incant" the right words. How can this practice be squared with the proposition that labels are subordinate to substance?

Although the question is an intuitive one, ultimately, the analysis runs the other way. It is easy to see how clear statement rules could be taken to vindicate label-formalism; their purpose, after all, is to create specific linguistic triggers. But the necessity of clear statement rules in fact underscores the *primacy* of functionalist interpretation. As an exception, they do not undermine the norm. They reinforce it.

Clear statement rules incent cautious drafting. They impose a "clarity tax"[86] on actors that express their intentions in anything less than the exact—magic—words. For example, there are numerous constitutional domains in which the Court requires Congress to signal its intentions very explicitly—like when it conditions federal funding under the Spending Clause,[87] or when it seeks to give new rules a retroactive effect,[88] or when it intends for laws to apply extraterritorially.[89] Likewise with respect to private contracting. When parties seek to "opt out" of default contract terms, courts sometimes require that this intention be codified in crystal-clear language.[90] In both

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[86] *See* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 403 (2010).

[87] *See, e.g.*, Arlington Cent. Sch. Dist. v. Murphy, 548 U.S. 291, 304 (2006) (holding that Congress had not acted with sufficient clarity to trigger its Spending Clause power, despite the existence of ample legislative history suggesting that Congress intended to bind state governments); South Dakota v. Dole, 483 U.S. 203, 208 (1987) (emphasizing the importance of Congress having "clearly stated" its intent to tie federal funding to the enforcement of a twenty-one year minimum drinking age); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) ("The crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice."); *see also* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246 (2009) (rationalizing the *Pennhurst* rule in terms of "notice" to state governments).

[88] *See, e.g.*, Johnson v. United States, 529 U.S. 694, 701 (2000) ("Absent a clear statement of [legislative] intent, we do not give retroactive effect to statutes burdening private interests."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (outlining a blanket presumption against statutory retroactivity). For an overview of retroactivity-related clear statement rules—and their rationales—see Manning, *supra* note 86, at 410–12.

[89] *See, e.g.*, Morrison v. Nat'l Australian Bank, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 442 (2007) (giving a limited construction to the extraterrorially applicable section of the Patent Act—Section 271(f)—on the grounds the decision is one for Congress to make); *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (discussing the policy justifications underlying the presumption against extraterritoriality).

[90] *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L. J. 2032, 2048–49 (2012) (arguing that clear statement rules are one of four possible ways of regulating "opt-out" decisions in private contracting—they make specification of intent both *necessary and sufficient* for producing a particular legal outcome). For background on this conceptual description of clear statement rules—which Ayres draws on—see Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2119–23 (2002).

settings, the same underlying rationale obtains: stability. Before adopting statutory and contractual constructions with potentially destabilizing effects, courts look for additional assurance that the parties intended those effects to come about.[91]

In one sense, then, clear statement rules collar the latitude of non-judicial actors: they require adherence to rigid drafting rules. But at the very same time, however, clear statement rules also *empower* non-judicial actors. Structurally, the purpose of clear statement rules is to transfer "interpretive jurisdiction," so to speak, away from the judiciary, to grant to other actors (legislators or private parties) authority over a specific set of questions.[92] To accomplish this, clear statement rules supplant the natural dynamics of interpretation with rigid "if-then" functions. Instead of asking—dynamically—what a statute means, or what a contract requires, clear statement rules require judges to look for specific linguistic triggers: magic words.[93] If the words are present, result one; if not, result two. In this sense, clear statement rules strip courts of interpretive latitude—they compel judges to adopt a wooden reading of a statute or contract, even when (as is nearly always the case) a more natural interpretation is available.

This aspect of clear statement rules has eluded full elaboration. For some scholars, the fact that clear statement rules have the capacity to thwart the will of non-judicial actors, which they plainly do, is evidence that the rules empower judges.[94] Indeed, even

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[91] *See, e.g.*, Terry Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Litigation*, 84 TUL. L. REV. 1067, 1114–16 (2010) (compiling normative rationales for clear statement rules); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L. J. 2, 2, 62 (2008) (thinking about clear statement rules as "enactment cost manipulation"—i.e., conservative measures designed to make the costs of any change, positive or negative, greater); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331–32 (2000) (discussing the role that clear statement rules play in maintaining a stable balance of power between Congress and executive agencies); *see also* Ayres, *supra* note 90, at 2046, 2061–63 (discussing the inherent tradeoff between cost and error in the calibration of opt-out rules); Rosenkranz, *supra* note 90, at 2119–23.

[92] Rosenkranz, *supra* note 90, at 2155.

[93] *See* Ayers, *supra* note 90, at 2048–49.

[94] *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–97 (1992) (describing the rise of clear statement rules as ushering in a new era of judicial activism—and hence empowerment—in the realm of statutory construction); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983) (arguing that the "avoidance" canon—which is effectively a clear statement rule requiring legislatures to force constitutional questions explicitly to the surface—has led to the creation of "penumbra" that tip the balance of power in favor of judges); Seligmann, *supra* note 91, at 1067 (describing clear statement rules as a tool that the "Supreme Court's conservative members have developed and begun to use . . . aggressively" to frustrate legislative prerogatives); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1605 (2000) (describing clear statement rules as a way that courts re-empower themselves in light of "the lack of strong, invalidation-type limits" on the power of other parties).

among those who defend clear statement rules, there is a tendency to describe the rules as tools, wielded by judges, to enforce constitutional norms and boundaries.[95] The judge-empowering view is understandable—but conceptually, it gets something importantly backwards.[96] Although it is certainly true that, in practice, clear statement rules can frustrate drafters' intentions, this observation is fully compatible with the claim that clear statement rules empower drafters. Indeed, in many cases, the frustration of drafters' intentions is likely to occur *because of*, not in spite of, their empowerment.[97]

Take an everyday example. Jack and Jill run a hedge fund. Jill is the mastermind investor; Jack is in charge of implementing Jill's decisions (placing orders in the market, and so forth). To ensure that Jack performs his role properly, the two of them have devised a clear statement rule: Jack will not execute any trades until Jill says, "Make the trade." One day, Jill is out of the office, and she decides that the fund's portfolio should have some Apple stock. So she sends the following text message to Jack: "Would be a good idea to buy 1,000 shares of Apple." When Jill returns to the office a few hours later, she asks Jack how the Apple purchase went. To which Jack responds: "Apple purchase? You didn't say 'Make the trade,' so I didn't purchase any Apple!" Jill—beset with human foibles, as many money managers are—gets upset with Jack. When he declined to buy Apple stock, Jill believes that Jack undermined her will.

In this example, two things are true simultaneously. First, Jill's claim is correct: Jack's decision not to buy Apple stock—we can reasonably surmise—did thwart Jill's intentions. Second, it is Jill, not Jack, who has the greater interpretive authority in this arrangement, for it is Jill, not Jack, who is entrusted with ultimate decision-making power. One implication of the example, then, is that from the observation that an actor's will was not vindicated, it does not follow that the actor does not possess interpretive authority. But the point can be sharpened further. Here, the subversion of Jill's will is not merely *compatible* with her having the interpretive authority. In fact, the subversion of her will was almost certainly *the direct result of* her having the interpretive authority, since the mechanism establishing that authority—the clear statement rule—was precisely the cause of the problem.

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[95] *See, e.g.*, Sunstein, *supra* note 91, at 317 (suggesting that courts use non-delegation doctrines—of which clear statement rules are a subset—to establish conditions of "democracy-forcing minimalism"); Young, *supra* note 94, at 1585–93 (describing clear statement rules—in a laudatory way—as a mechanism that courts employ to enforce constitutional values).

[96] To be fair, certainly not every scholar has committed this error. For example, John F. Manning has suggested that clear statement rules, when understood against the background of other possible approaches to regulation of legislative action, are comparatively disempowering of judges, since "[c]lear statement rules almost surely intrude less than would *Marbury*-style judicial review." Manning, *supra* note 86, at 403. Similarly, Brian Galle has argued that clear statement rules actively empower legislative bodies, even as they impose constraints on how legislators must wield that power. *See* Brian Galle, *Getting Spending: How to Replace Clear Statement Rules With Clear Thinking About Conditional Grants of Federal Funds*, 37 CONN. L. REV. 155, 157 (2004) ("In effect, the Supreme Court has given Congress free reign to legislate under the Spending Clause, but only if Congress legislates badly.").

[97] *See* Galle, *supra* note 96, at 180.

In other words, it is very likely that Jack, were he liberated from the strictures of the clear statement rule and empowered to parse Jill's statements naturally, would have construed her text message—correctly—as an authorization to buy Apple stock. What this suggests is that clear statement rules are a prophylactic measure. They provide a means, in Scott Shapiro's terms, of "compensating for [the] distrust" of a specific actor's ability (in this case, Jack's) to properly interpret the will of another (in this case, Jill's).[98] Put otherwise, the rationale for the clear statement rule is not that it will always yield more perspicuous results than would allowing Jack to naturally interpret Jill's commands. The rationale is that Jack cannot be trusted to naturally interpret Jill's commands—that if he were so entrusted, grave errors might result—such that even in cases (like the foregoing example) where Jack's natural interpretation *would* yield more perspicuous results than the clear statement rule, the former still must give way to the latter.

What is true for Jack in the hedge fund example is also true for judges, *mutatis mutandis*, in settings governed by clear statement rules. When such rules are in effect, the court's role transforms. Instead of making an interpretive decision in its own right, the court defers to the interpretive decision of a different body.[99] In this sense, the label-formalism of clear statement rules is not so much a different method of judicial interpretation as it is, in effect, the *absence* of judicial interpretation. Like other modes of formalism, label-formalism diverts interpretive authority away from the actors who parse legal documents—judges—to the actors who draft them—legislators and private parties.[100] In other words, clear statement rules are, by their nature, deferential to non-judicial actors. Even if they rely on specific triggers in order to *go* into effect, when they *are* in effect, the effect is precisely to divest courts of interpretive authority—just as Jack and Jill's clear statement rule divested Jack of the same.

To be sure, this discussion has not resolved—indeed, it has not even addressed—the policy question of when clear statement rules are salutary. I have no prescriptions

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[98] *See* SCOTT SHAPIRO, LEGALITY 331–53 (2011) (arguing that law distributes interpretive authority across different classes of actors in order to "compensate for distrust," on the one hand, and "capitalize on trust," on the other). For an excellent summary of Shapiro's position, see Joshua P. Davis, *Legality, Morality, Duality*, 2014 UTAH L. REV. 55, 60–61 (2014). There are many reasons, of course, that we might "distrust" the ability of judges to parse legislative intent. One particularly interesting argument is that the nature of language—and the specific ways in which lawyers and judges are taught to think about language—fates us to a certain amount of interpretive error. *See* Jill Anderson, *Misreading Like A Lawyer*, 127 HARV. L. REV. 1521, 1522, 1525 (2014).

[99] *See* Fred Erick Schauer, *Formalism*, 97 YALE L. J. 509, 544 (1988).

[100] *See generally id.* (describing formalism as either the "denial" of choice or the "limitation" of choice). This description speaks to—and is borne out by—the main *criticism* of formalism, which is precisely that judicial "choice" is not, in fact, limited; that the judge who claims strength from formalist precept is confused (or simply being dishonest) about the interpretive labor. *See id.* 517–20 (exploring the anti-formalist critique that there is "always a choice"); *see also* Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 550 (2009).

on that front. The point is that whatever the optimal distribution of clear statement rules, their nature is clear. They diminish the interpretive authority of courts; they nip the interpretive process in the bud. And in this sense, clear statement rules are the natural outcropping of functionalist interpretation. If legal content were generally thought to inhere in labels, garden variety interpretation would naturally light the way. Clear statement rules would be unnecessary, and they would not exist. But in practice, just the opposite is true. Functionalist interpretation reigns supreme, and clear statement rules are exceptions to that norm.

IV. EVIL MAGIC

Yet there is another exception—a genuine exception, unlike clear statement rules—to the norm of functionalist interpretation, a setting in which words really *do* take on a magical quality: race equal protection. In these cases, racial labels are treated as evil magic, casting inherent doubt on a law's constitutional status. This Part draws on *Parents Involved in Community Schools v. Seattle School District No. 1*[101] and the work of Reva Siegel, to suggest that the Court's aversion to racial labels is divisible into two conceptually distinct views—the "colorblindness" view and the "anti-balkanization" view—and that while the former is compatible with functionalist precepts, the latter is not.

As it is presently understood, the Fourteenth Amendment erects a "tiered" system of scrutiny.[102] A law or policy that is facially discriminatory—that draws distinctions on the basis of race ("white," "black," etc.)—triggers strict scrutiny.[103] To overcome strict scrutiny, the government must demonstrate that the law or policy is "narrowly tailored" to advance a compelling state interest—an extremely tall order.[104] If, on the other hand, a law or policy is facially neutral, but it yields a "disparate impact" in practice, it is reviewed for rationality.[105] As long as the law or policy has a "rational basis" and was not enacted for a discriminatory purpose, it stands.[106]

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[101] 551 U.S. 701 (2007).

[102] *See id.* at 800.

[103] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 694–96 (4th ed. 2011); *see also Parents Involved*, 551 U.S. at 720 (2007) ("In order to satisfy this searching standard of review, the [government] must demonstrate that the use of individual racial classifications . . . is 'narrowly tailored' to achieve a 'compelling' government interest.") (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)).

[104] *See, e.g.*, Jed Rubenfeld, Essay, *Affirmative Action*, 107 YALE L.J. 427, 433–34 (1997).

[105] *Id.* at 452.

[106] This, of course, is not the only way that the race equality doctrine could be operationalized. Indeed, scholars have long been clamoring for an "anti-subordination" approach to race equality protection, which would look to the purpose of laws—whether the law works to reify, or instead undo past and present racial hierarchy. For the classic statement of this view, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 160–61 (1976). For a historical genealogy of competing interpretations of race equality, see generally Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in*

By emphasizing the language of a given law or policy—not what the law does, but instead, if the law draws on racial labels *to do* what it does—the tiered framework of race equality analysis is an outlier to the trend of functionalist interpretation. The rationale for this is not mysterious. Racial labels, precisely as *labels*, have a sordid legacy in our constitutional order.[107] The use of such labels, therefore, is inherently cause for constitutional concern. Put simply, if the government is explicitly discriminating on the basis of race, it better have a good reason.

In *Parents Involved*, the Supreme Court considered whether it violated the Equal Protection Clause for public school districts across the country to adopt a racial quota system for rebalancing the demography of their elementary and secondary schools.[108] Because the racial quota systems unambiguously drew distinctions on the basis of race, the Court applied strict scrutiny.[109] On this point, all nine Justices agreed: the quotas involved an inherently suspect use of racial labels.[110] The question—and source of disagreement—was whether the school districts had an interest that was sufficiently compelling, and narrowly enough tailored, to vindicate the use of racial labels.[111]

In his plurality opinion for the Court, Chief Justice Roberts concluded that the quota systems failed strict scrutiny.[112] He argued, first, that the school districts had demonstrated no compelling interest in racial rebalancing, since the history of segregation in Seattle and Louisville had been "de facto," not sanctioned by law;[113] and

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Constitutional Struggles Over Brown, 117 HARV. L. REV. 1470, 1470 (2004). For a record of this road-not-taken in the case law, see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288 (1978) (entertaining—and ultimately rejecting—the proposition that strict scrutiny "should be reserved for classifications that disadvantage 'discrete and insular minorities'" (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))). This "anti-subordination" approach is effectively the analytic inverse of the currently existing "anti-classification" paradigm. Whereas the current paradigm (which, by way of contrast, has been called the "anti-classification" approach) strikes a permissive stance toward laws that happen to yield disparities along racial lines, the anti-subordination framework would be especially *sensitive* to such laws.

[107] This, of course, is not the only lesson that one might draw from *Brown* and its ilk. One might say that racial subordination has a sordid legacy in our constitutional order, or even that colorblindness—if that term is understood to refer to law's disregard for racial reality—has a sordid legacy. For an insightful discussion of how *Brown* has come to be "branded," see Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS. L. REV. 385, 401–05 (2009). *See also* Scarlet Kim, Note, *Judicial Opinion as Historical Account: Parents Involved and the Modern Legacy of* Brown v. Board of Education, 23 YALE J.L. & HUMAN. 159, 159–60 (2011).

[108] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–11 (2007).

[109] *Id.* at 720.

[110] *Id.* at 741.

[111] *Id.* at 740.

[112] *Id.* at 745.

[113] *Id.* at 736. The only interests that Chief Justice Roberts identified as legitimate—based on precedent—were (1) ameliorating the effects of past de jure discrimination and (2) promoting diversity in higher education. *Id.* at 720–22.

second, that even assuming *arguendo* that a compelling state interest existed, the plan had not been narrowly tailored.[114] In the primary dissent, Justice Breyer—joined by Justices Stevens, Ginsburg, and Souter—offered a number of impassioned rejoinders, both as to the plurality's assessment of the state interests involved and as to its subsequent analysis.[115] Put simply, Breyer thought that the plurality got the lesson of *Brown*—perversely—backwards.[116] It stands for the proposition that racial subordination will not persist with redress, not for the proposition that race-conscious lawmaking is categorically suspect.[117]

The most noteworthy opinion in *Parents Involved*, however, is Justice Kennedy's concurrence—both because it effectively states the law, and because of his distinctive approach to the case. Though he agreed, ultimately, with Chief Justice Roberts's conclusion that the quota systems were unconstitutional, Kennedy disagreed with the plurality's logic on two fronts. First, he argued that the plurality had neglected an important state interest: "[d]iversity," which, "depending on its meaning and definition," can be a "compelling educational goal [for] a [school] district [to] pursue."[118] Second, Kennedy bristled at the idea—which was central to the plurality's logic—that the Constitution only permits school districts to redress de jure segregation.[119] To Kennedy, it seemed clear that "reach[ing] *Brown*'s objective of equal educational opportunity" will sometimes require addressing de facto segregation as well.[120] To conclude otherwise, Kennedy thought, would be to disregard the fact that in spite of the "[t]he enduring hope . . . that race should not matter[,] the reality is that too often it does."[121]

At the same time, Kennedy was also dissatisfied with the dissent, which seemed to him too deferential to the school districts.[122] Specifically, Kennedy thought that Seattle and Louisville had failed to meet their burden in two ways. First, the districts had not established that the specific racial categories adopted by the quota systems—"white" and "non-white"—were closely tethered to the interest in "diversity" that the labels supposedly meant to advance.[123] Second, the school district failed to show that the quota systems were administered so as to avoid caprice.[124] For these reasons, Kennedy was impelled to depart from the main dissent. Although he agreed, more or less, with its treatment of the compelling interest issue, Kennedy disagreed with its tailoring

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[114] *Id.* at 735.
[115] *Id.* at 843–55 (Breyer, J., dissenting).
[116] *Id.* at 863, 868.
[117] See *id.* at 803–04; *see also id.* at 798–99 (Stevens, J., dissenting) ("There is a cruel irony in The Chief Justice's reliance on our decision in *Brown v. Board of Education*.").
[118] *Id.* at 783 (Kennedy, J., concurring).
[119] *Id.* at 787–88.
[120] *Id.* at 788.
[121] *Id.* at 787.
[122] *Id.* at 790.
[123] *Id.* at 787.
[124] *Id.*

analysis. Simply put, there were better ways for the school districts to accomplish the same objectives.[125]

Justice Kennedy's legal position in *Parents Involved*—that the school districts had a compelling interest in recomposing the racial demography of their student bodies, but that their quota systems were not properly tailored to achieve that goal—is not so remarkable. In settings that involve strict scrutiny, tailoring often becomes the site of dispute. Far more interesting is the principle *underlying* Justice Kennedy's dismay. Over the course of his concurrence, it becomes clear that "narrow tailoring," though certainly the doctrinal vocabulary through which Kennedy expressed his concerns, was actually something of a misnomer.[126] The *real* problem was that Kennedy frowns on the use of racial labels—period. And by decrying the "tailoring" of the programs, what Kennedy meant to convey is that the districts opted to use such labels even though it was not strictly necessary to do so.[127] Hints of this position were peppered throughout the opinion, but the full explication was reserved for the end, when Kennedy wrote that "[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society,"[128] and even more pointedly, that racial labels "threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand."[129]

It is against this vivid—and somewhat lurid—backdrop that Kennedy's solution comes to the fore. In his view, school districts should be allowed—perhaps they should even be encouraged—to "pursue the goal of bringing together students of diverse backgrounds and races," alongside other "race-conscious" goals. But these must be pursued without the taint of racial labels.[130] To this end, Kennedy enumerated a list of possible approaches that school administrators might take, in the future, to realize their policy goals while circumventing (his particular notion of) constitutional harm. These include: "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; [and] recruiting students and faculty in a targeted fashion."[131] Indeed, on Kennedy's view, these efforts would not only be likely to survive strict scrutiny; they probably

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[125] *Id.* at 783–84.

[126] *Id.* at 787.

[127] *Id.* at 796 ("The State must seek alternatives to the classification and differential treatment of individuals by race, at least absent some extraordinary showing not present here."). Notice that this transforms the "tailoring" inquiry entirely—Kennedy is *not* asking for the most direct and efficient way of advancing the state interest (a la the "least restrictive means" test). He is asking for policies that are consciously circuitous—that is, *less* narrowly tailored to the objective at hand—in order to avoid a different kind of harm.

[128] *Id.* at 797.

[129] *Id.* at 798.

[130] *Id.* at 789.

[131] *Id.* Kennedy's list also includes "tracking enrollments, performance, and other statistics by race," but I leave this out for the sake of clarity. For it is unclear, by the lights of his own theory, how race-based tracking would count as a race-neutral means.

would not even *trigger* strict scrutiny because, despite being "race conscious," they do "not lead to different treatment based on a classification that tells each student he or she is to be defined by race."[132]

Reva Siegel has shown that the difference between the plurality opinion in *Parents Involved* and Justice Kennedy's concurrence ultimately comes back to fundamentally distinct conceptions of "equality."[133] As Siegel aptly puts it, "the position that Justice Kennedy stakes out, is not intelligible within a framework that treats government efforts to integrate as morally indistinguishable from government efforts to segregate. If a race-conscious purpose is unconstitutional, how does concealing the aim enhance its legitimacy?"[134]

That is no doubt exactly what Chief Justice Roberts—and the other Justices in the plurality—were wondering when they read Kennedy's concurrence. In the plurality's view, the harm of the quota systems is their race-conscious nature.[135] That they use racial labels is *evidence* of this harm, but it is not coextensive with the harm. Efforts to retool the racial demography of public schools without resorting to racial labels—such as "cleverly drawing attendance zones"[136]—would fare no better on the plurality's view. They would simply be more difficult to detect. For Chief Justice Roberts, in other words, the enemy is not racial labels. The enemy is "racial balancing,"[137] and the relevant equality norm is colorblindness. Any policy that deviates from that norm—whether or not its deviation is explicitly announced—should arouse constitutional suspicion.[138]

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[132] *Id.*

[133] *See* Siegel, *supra* note 13, at 1308.

[134] *Id.*

[135] *Id.* at 1283.

[136] *Id.* at 1308.

[137] Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 (2007) ("Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that '[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'" (internal citations omitted)).

[138] This is not to say that the colorblindness view *necessarily* leads to suspicion of all race-conscious but facially neutral programs. Formally, it may be possible to reconcile colorblindness principles with the use of race-conscious but facially neutral policies. *See* Siegel, *supra* note 13, at 1309–10, 1314 n. 107 (discussing ambiguities as to what the color blindness position implies for race-conscious but facially neutral policies). At the same time, numerous proponents of the colorblindness view seem to believe the two are irreconcilable. This is certainly the direction in which Chief Justice Roberts's opinion in *Parents Involved* seems to shade, and it is a position that Justice Scalia, for one, has explicitly endorsed in other race equality cases. *See* Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring) (arguing that Title VII's disparate impact provision—to the extent that it requires government employers to be race-conscious in their evaluation and implementation of policies, in order to avoid liability—collides with equal protection principles). *Cf.* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 495 (2003) (noting that "there are serious conceptual tensions

Not so for Justice Kennedy. As Siegel has persuasively shown, Justice Kennedy begins from an entirely different equality norm than the *Parents Involved* plurality—the "anti-balkanization" principle.[139] The core of this principle is social cohesion; it begins from a keen awareness of the fact that "both racial stratification *and* its repair" have the capacity to stoke tension and resentment within the polity.[140] For Kennedy, the practical implication of this view is that racial labels—which, again, "threaten to reduce [people] to racial chits"[141]—must be avoided at all costs. Kennedy sees "individualized racial classification" as "especially likely to affront individual dignity and so to exacerbate group division,"[142] which is why he goes to such pains to emphasize that "[h]ad the school districts simply relied on race-conscious but facially neutral attendance zones to promote integration," instead of "using race to evaluate individual student applications to magnet schools," he "would have upheld the policy."[143] In other words, what disturbed Kennedy was not the function of the quota systems. If anything, he found the function laudable. What disturbed Kennedy was the specific labels—the magic words—that the quota systems employed.

Justice Kennedy's *Parents Involved* concurrence is not the first opinion, nor is Kennedy the first Supreme Court Justice,[144] to distinguish race-conscious ends from race-conscious means—and to exalt the former while decrying the latter. The anti-balkanization view has a clear upside. In a society committed to the "enduring hope . . . that race should not matter,"[145] the view is sensitive to how corrosive race-conscious lawmaking can become. And there is certainly normative appeal to the proposition—a modest proposition, after all—that racial labels should be avoided unless absolutely necessary.

But for all of its virtues, the anti-balkanization view is also beset with an important flaw. Justice Souter made the point eloquently in his dissent in *Gratz v. Bollinger*, which struck down an affirmative action program at the University of Michigan that awarded applicants "bonus points" based on race.[146] One of the arguments in support of this holding—drawing strength from anti-balkanization norms—was that Michigan, like sibling states that had confronted the problem of racial underrepresentation in

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between modern equal protection doctrine," which go to the heart of what race equality means and disparate impact law).

[139] *See* Siegal, *supra* note 13, at 1308.

[140] *Id.* at 1308 (emphasis added).

[141] *Parents Involved*, 551 U.S. at 798 (Stevens, J., dissenting).

[142] Siegal, *supra* note 13, at 1308.

[143] *Id.*

[144] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298–99 (1978) ("Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."); *see generally* Siegel, *supra* note 13, at 1293–1300 (arguing that Justice O'Connor, and to some extent, Justice Powell, also fall into the anti-balkanization camp).

[145] Siegel, *supra* note 13, at 1306.

[146] 539 U.S. 244, 291 (2003) (Souter, J., dissenting).

higher education, was free to pursue the same objectives by race-neutral means: for example, by "guaranteeing admission to a fixed percentage of the top students from each high school."[147]

At this submission, Justice Souter cried foul:

> While there is nothing unconstitutional about [this solution], it nonetheless suffers from a serious disadvantage. It is the disadvantage of deliberate obfuscation. The "percentage plans" are just as race conscious as the point scheme (and fairly so), but they get their racially diverse results without saying directly what they are doing or why they are doing it. In contrast, Michigan states its purpose directly and, if this were a doubtful case for me, I would be tempted to give Michigan an extra point of its own for its frankness. Equal protection cannot become an exercise in which the winners are the ones who hide the ball.[148]

Souter's dismay is as easy to understand. To reward officials for "hid[ing] the ball" does seem to set odd precedent—and yield perverse incentives. And this is even more acutely the case in a constitutional setting like race equality jurisprudence, which is partly motivated by concern about the alienation that occurs when citizens receive less-than-dignified treatment from the state.[149]

Here, in fact, the anti-balkanization logic verges on self-defeating. In the abstract, there is little reason to think that policies which "camouflage"[150] their chief purpose are more conducive to social cohesion than policies which—candidly—adopt racial labels. This is not to apologize for the use of such labels, or to downplay the possibility of their having divisive effects in practice. It is simply to put the question in comparative perspective. The effort to stake out middle ground is just as likely to come off inauthentic—and exacerbate controversy—as it is to make progress. Which result is more likely in which settings is an empirical question, and not one that can be answered to satisfaction here. The point is that the anti-balkanization view, in its enthusiasm to avoid the tension created by racial labels, easily loses sight of another possible source of tension: pretending that laws are race-neutral when everyone knows they are not.

But this underscores another, more enduring problem which the anti-balkanization view. The problem with encouraging race-conscious but facially neutral policies is not *only* that such policies fail to "say[ ] directly what they are doing [and] why they

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[147] *Id.* at 297, 290–98.

[148] *Id.* at 297–98.

[149] For an argument along similar lines—apropos of affirmative action specifically—see Rubenfeld, *supra* note 104, at 471 ("[I]nstitutions with affirmative action plans should be open about them or scrap them. If the burdens that an honest affirmative action program imposes on its beneficiaries are too great to bear, the correct response is not to prevaricate, but to try something new.").

[150] *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).

are doing it."[151] On top of the seeming dishonesty that comes from bifurcating labels and substance, the bigger problem is that the anti-balkanization view emphasizes the wrong variable of the two. If Justice Souter's point is that law's labels ought to track its substance, there is another point to be made here: to the extent that law's labels *do not* track its substance, jurisprudence should focus on the latter, not the former.

Ultimately, then, the point is not that racial labels are constitutionally irrelevant, just that they should not drive the analysis. It may be that racial labels are troubling insofar as they bespeak, in the words of Chief Justice Roberts, a "sordid" effort on the part of state officials to "divvy[ ] us up by race."[152] In other words, it might be that racial labels are heuristically meaningful, because they call attention to impermissible state action. And of course it is also possible that racial labels are troubling *because of* the functional effect they have. Racial labels, after all, are not like other labels. They have an outsized capacity—perhaps a unique capacity—to harm, to terrorize, to reopen old wounds. It is possible, therefore, that the basic insight of the anti-balkanization view is correct, even if its remedy goes awry. Put simply, the presence of racial labels in the law *can* work freestanding harm. Even when two laws have the exact same practical effect, it matters that one of them uses particular words and the other does not.

For constitutional analysis to proceed this way, a functional theory would be required; courts would need to develop criteria of harm, and to decide how, in practice, such harm could be measured. There would be little reason to assume—as the anti-balkanization view does—that the harm of labels is necessarily more pronounced than *other* harmful aspects of race-conscious laws, or more pronounced than the ongoing harms which, given our social reality, persist in the absence of race-conscious laws. What would be required, in other words, is a theory of the Fourteenth Amendment: the outcomes it mandates, the outcomes it forbids, and what role racial labels have to play in such analysis. Where the anti-balkanization view turns racial labels into taboos, a functionalist approach would make them one variable among many: part of the complex equation of race and equality in American society.

This is not an easy task. At some level, it may be an impossible task, for the very thing that one camp understands equality norms to demand—consciously redressing the past and present subordination of certain groups—is, for the other camp, precisely what equality norms forbid.[153] But fixation on labels can be no substitute for this labor.

CONCLUSION

The reality of interpretive practice is, at every moment, a threat to law's authority. Considered at a high level of abstraction, the promise of judicial legitimacy—that our

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[151] *Gratz*, 539 U.S. at 297–98 (Souter, J., dissenting).

[152] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).

[153] *See* Fiss, *supra* note 106, *passim* (discussing the tension between individual- and group-centric understandings of equal protection).

bulwark against anarchy would be nothing sturdier than the interpretive proclivities of older men and women who happen to wear robes and boast impressive resumes—verges on absurd. To an outsider, the arrangement no doubt seems implausible on its face. Of course, this is how the legal system works and how it has always worked. But the specter of chaos is always with us. It has captured our constitutional imagination since the founding era, and there is little reason to think it will abate.

The allure of labels is the allure of shorthand. Because they are rule-based and predictable, labels provide—or seem to provide—a hedge against the perceived excess of judicial will. In this respect, there is a kind of hidden symmetry between the two exceptions to functionalist interpretation traced in this Article. Clear statement rules constrain judicial authority by substituting the natural dynamics of interpretation with a rigid determination about the presence of specific language—the sort of determination that could be made by a precocious schoolchild. Clear statement rules do this because, rightly or wrongly, they rest on the premise that judicial interpretation is not to be trusted.

Race equality jurisprudence in general—and the anti-balkanization view in particular—also seeks to constrain judicial authority. It endeavors to supplant the difficult question of how constitutional law should contend with the shameful history of racial subordination in the United States with an easy-to-execute test of words. In doing so, the anti-balkanization view leads to an unorthodox sort of "negative clear statement rule," which, unlike normal clear statement rules, conditions state action on the *absence* of specific words rather than their presence. The endgame, however, is the same. By emphasizing the law's surface rather than its depth, by drawing inflexible lines, the anti-balkanization view strips courts of interpretive authority. Instead of settling on a principled view of what the Fourteenth Amendment requires, it ropes off a subset of laws and policies (those that employ racial labels) as impermissible at the threshold, irrespective of motivation or effect.[154]

There is something noble, and perhaps something tragic, in this celebration of compromise over consistency. The *Ethos* is one of diplomats and administrators, consummate minimalists in our exuberantly minimalist age. Modest and spare, it is an *ethos* oriented toward the negative: reducing friction, avoiding disappointment, minimizing cost. Under its reign, *Brown* and *Plessy* would have been equally untenable—indeed, equally unimaginable. For it is an ethos that knows neither triumph nor horror. It works in fine, small strokes; it makes minor adjustments. And it seeks, most of all, to keep things intact as they are.

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[154] The sense in which clear statement rules serve to occlude merits analysis has been noted in other constitutional settings. *See, e.g.*, Galle, *supra* note 96, at 157 (arguing, apropos of Spending Clause cases, that clear statement rules "constrict[ ] the reach of federal constitutional norms," because they allow "[f]ederal judges [to] use statutory interpretation as a substitute for constitutional adjudication").