

THE SUPREME COURT  
2004 TERM

FOREWORD:  
A POLITICAL COURT

*Richard A. Posner*

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The notion that the genuine values of the people can most reliably be discerned by a nondemocratic elite is sometimes referred to in the literature as “the Fuhrer principle,” and indeed it was Adolph Hitler who said that “[m]y pride is that I know no statesman in the world who with greater right than I can say he is the representative of his people.” We know, however, that this is not an attitude limited to rightwing elites. “The Soviet definition” of democracy, as H.B. Mayo has written, also involves the “ancient error” of assuming that “the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote and decide freely.” Apparently moderates are not immune either.

— John Hart Ely<sup>1</sup>

Scholars discuss the work of the Supreme Court in two different ways. The less common is that of social science, with its emphasis on positive rather than normative analysis, its refusal to take at face value the “official” explanations for judicial phenomena proffered by insiders — in a word, its realism.<sup>2</sup> To a social scientist, or to a law professor or other jurist who is imbued with the social-scientific approach, the Supreme Court is an object of observation rather than of veneration or condemnation. The social scientist asks, without preconceptions drawn from the professional legal culture, why the Court de-

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<sup>1</sup> *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5, 51 (1978) (alteration in original) (footnotes omitted) (quoting ALAN BULLOCK, *HITLER: A STUDY IN TYRANNY* 367 (1952); H.B. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* 217 (1960)).

<sup>2</sup> A word that I am using in its everyday sense — not in the sense that it bears in discussions of the school of legal thought known as “legal realism.”

cides cases as it does and in the form in which it does (long, “scholarly” opinions, etc.), and what the consequences of the decisions are. The inquiry delves into such matters as the ideology and temperament of particular Justices; the appointments process; the Court’s caseload, procedures, and strategic interactions with Congress and other parts of government;<sup>3</sup> behavioral models of judges;<sup>4</sup> the influence of the *Zeitgeist* on judicial decisions; and — critically — the nature and strength of the constraints that operate on the Justices. The goal is not only to understand judicial behavior at the Supreme Court level, but also to understand the consequences of that behavior — for example, to estimate how the crime rate, the number of people in prison, and the incidence of error in the criminal process would be different had the Supreme Court decided landmark criminal cases, such as *Gideon v. Wainwright*<sup>5</sup> or *Miranda v. Arizona*,<sup>6</sup> in favor of the government, or how our politics would differ if the Court had not entered the legislative reapportionment thicket in cases such as *Baker v. Carr*<sup>7</sup> and *Wesberry v. Sanders*.<sup>8</sup> An interesting recent literature, written from a diversity of political perspectives — surprisingly, mainly from the Left — asks the disquieting question whether the net benefits of federal constitutional law are positive, including the subsumed question whether constitutional law has really made much of a difference in the nation’s policies, values, and practices.<sup>9</sup>

The other way in which to discuss the Court’s work — and the way more familiar to lawyers, law professors, and judges — is to subject it to normative analysis conducted from within the professional

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<sup>3</sup> For a lucid summary of the literature on the Supreme Court’s strategy in interacting with Congress and the President, see KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 422–28 (1997).

<sup>4</sup> See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 109–45 (1995); SHEPSLE & BONCHEK, *supra* note 3, at 405–31.

<sup>5</sup> 372 U.S. 335 (1963).

<sup>6</sup> 384 U.S. 436 (1966).

<sup>7</sup> 369 U.S. 186 (1962).

<sup>8</sup> 376 U.S. 1 (1964).

<sup>9</sup> See, e.g., ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117–18 (1996); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 227–48 (2004); RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 51–115 (1994); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–76 (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* 255–81 (1999); J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1003–06 (1998); Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 651–59 (1999); Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188–94 (1998). I discuss this literature in RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 15–27 (2001).

culture.<sup>10</sup> The analyst praises or condemns particular doctrines or decisions, or the reasons offered for them by the Court (textual, historical, pragmatic, and so forth) — more often condemns them, arguing that they are mistaken, unsound — more precisely, that they are mistakes of law, that the Court simply got the law wrong. This type of Supreme Court scholarship is a branch of rhetoric or advocacy — a continuation of brief writing and opinion writing by other means — but it is not wholly unrelated to the first type, the social-scientific study of constitutional law. The behaviors and consequences that a nondoctrinal perspective brings to light can be, or can explain, things the normative analyst deplors (more rarely approves). So if, like Professor Henry Hart in his famous Foreword,<sup>11</sup> you thought the Court was making frequent legal errors, you might attribute this to structural conditions — to the overuse of summary reversals<sup>12</sup> or, as Hart himself believed, to an excessive workload (the excess being due in part to the Court's proclivity for granting certiorari in unimportant cases).

My aim in this Foreword is to be realistic, though without hewing closely to any particular social-scientific methodology; indeed, I shall perforce rely to a degree on that most dubious of methodologies, introspection — specifically, on the impressions that I have gleaned from being a federal appellate judge for the last twenty-four years. I shall argue that, viewed realistically, the Supreme Court, at least most of the time, when it is deciding constitutional cases is a political organ, and (confining myself to constitutional law) I shall develop some implications of this view, drawing in part on earlier Forewords, such as Hart's.

Part I presents statistics that bear on two issues: the tendency of the Court to behave "legislatively" and the perception of the Court as an increasingly constitutional court. Part II presents my main thesis, which is that to the extent the Court is a constitutional court, it is a political body. I distinguish there between two forms of political judging, the "aggressive" and the "modest"; my preference is for the latter. Part III examines several alternatives to the political conception of the Court: the Court as expert administrator, the Court as institutionally constrained to behave in a lawlike manner, the Court as moral vanguard, and the Court as a cosmopolitan court searching for international legal consensus. The first two alternatives are descriptively in-

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<sup>10</sup> The skeptical works cited in the preceding footnote, all by lawyers, straddle this divide. For an important skeptical work by a political scientist, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

<sup>11</sup> Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

<sup>12</sup> See Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77, 80 (1958).

accurate; the latter two are aggressively political approaches covered by a veneer of legal reasoning. Part IV discusses, with reference to several recent cases, the Court's potential to be a pragmatic decision maker of the "modest" kind introduced in Part II.

### I. WHAT THE STATISTICS SHOW

Henry Hart was a pioneer in relating caseload to output. Other interesting correlations are possible. One might, for example, relate the length and superficial erudition of today's Supreme Court opinions to the increased ratio of law clerks to Justices<sup>13</sup> and to the practice of hiring as law clerks only individuals who have previous professional experience, usually as clerks to lower court judges, enabling them to write opinions more fluently. But let me stick to caseload and note the extraordinary growth in the ratio of lower court to Supreme Court decisions. That ratio has reached a point at which it is no longer feasible for the Court to control the lower courts by means of narrow, case-by-case determinations — the patient, incremental method of the common law. Instead, it must perforce act legislatively.<sup>14</sup>

The number of decisions reviewable by the Supreme Court is growing; the number of decisions reviewed by the Court is declining. In 2003, the federal Courts of Appeals decided 56,396 cases,<sup>15</sup> compared to only 3753 in 1959.<sup>16</sup> State courts of last resort decided more than 25,000 cases in 2002,<sup>17</sup> an unknown but probably substantial percentage of which presented a federal question, if one may judge from the fact that 13% of state supreme court decisions in the late 1960s — when constitutional law was not yet ubiquitous — presented questions

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<sup>13</sup> Until 1947, each Justice had only one clerk (though I am told that in the 1947 Term Chief Justice Vinson had two clerks). See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1996). Each is now entitled to four.

<sup>14</sup> As was remarked disapprovingly in a recent article, "the Court has cast itself in an 'Olympian' role — announcing rules and standards from on high." Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. (forthcoming Winter 2006) (manuscript at 3, on file with the Harvard Law School Library) (citing Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 403).

<sup>15</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2003 ANNUAL REPORT OF THE DIRECTOR 70 tbl.B (2004) [hereinafter 2003 ANNUAL REPORT], available at <http://www.uscourts.gov/judbus2003/contents.html>.

<sup>16</sup> ADMIN. OFFICE OF THE U.S. COURTS, 1959 ANNUAL REPORT OF THE DIRECTOR 170 tbl.B-1 (1960) [hereinafter 1959 ANNUAL REPORT]. I use 1959 and 2003 data (these are fiscal, not calendar, years — July 1, 1958, through June 30, 1959, and October 1, 2002, through September 30, 2003) because the cases decided in those years would be the principal source of cases for possible review by the Supreme Court in its 1960 and 2004 Terms.

<sup>17</sup> See SHAUNA M. STRICKLAND, COURT STATISTICS PROJECT STAFF, STATE COURT CASELOAD STATISTICS, 2003, at 105 tbl.1 (2004), available at [http://www.ncsonline.org/D\\_Research/csp/2003\\_Files/2003\\_SCCS.html](http://www.ncsonline.org/D_Research/csp/2003_Files/2003_SCCS.html).

concerning the constitutional rights of criminal defendants.<sup>18</sup> State intermediate appellate courts decided more than 130,000 cases in 2002,<sup>19</sup> some unknown fraction of which were final decisions that presented issues of federal law and therefore were also reviewable by the U.S. Supreme Court.

If one assumes, very conservatively, that the total number of decisions reviewable by the Supreme Court was at least 75,000 in 2003 (remember that there were more than 55,000 federal appellate decisions alone that year), then since certiorari was granted in only 87 cases,<sup>20</sup> the percentage of final decisions potentially eligible for review that the Supreme Court did review was only 0.12%. No corresponding figure is available for 1960 because the number of state court decisions reviewable by the Court then is unknown. But it is possible to compare the percentage just of federal court cases in which the Court granted certiorari in 2004 — 0.11% (64 divided by 56,396) — with the corresponding percentage in 1960 — 1.6% (60 divided by 3753).<sup>21</sup> This means that the Court reviewed, in relative terms, almost 15 times as many federal court cases in 1960 as in 2004.

These figures are potentially a little misleading because many of the cases terminated in the federal Courts of Appeals are not even remotely plausible candidates for further review — they were consolidated, or abandoned, or dismissed because of obvious jurisdictional defects. If attention is confined to cases that the Administrative Office of the U.S. Courts classifies as terminated “on the merits” or (the corresponding, though not identical, classification in 1959) “after hearing or submission,” the figures of 56,396 and 3753 in the preceding paragraph shrink to 27,009 and 2705, and this adjustment changes the percentage of federal court of appeals decisions reviewed by the Supreme Court

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<sup>18</sup> See Robert Kagan et al., *The Business of State Supreme Courts, 1870–1970*, 30 STAN. L. REV. 121, 147 n.63 (1977).

<sup>19</sup> See STRICKLAND, *supra* note 17, at 105 tbl.1. The comparable figures for 1960 are unknown; the earliest year for which nearly complete figures are available is 1981, and the totals that year were 50,737 decisions by state courts of last resort and 100,305 by state intermediate appellate courts. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, STATE COURT CASELOAD STATISTICS, 1977 TO 1981, at 5 tbl.3 (1983).

<sup>20</sup> *The Supreme Court, 2003 Term—The Statistics*, 118 HARV. L. REV. 497, 505 (2004). Cases in which the Court either granted certiorari and simultaneously reversed or remanded for further consideration in light of one of its recent decisions — that is, cases that did not receive plenary consideration — are excluded.

<sup>21</sup> For the total number of federal appellate decisions available for review in 2004, see 2003 ANNUAL REPORT, *supra* note 15, at 70 tbl.B. For the total number of federal appellate decisions available for review in 1960, see 1959 ANNUAL REPORT, *supra* note 16, at 170 tbl.B-1. A Lexis search produced all federal cases in which certiorari was granted; to determine how many received plenary review, I subtracted those cases that were either summarily reversed and remanded or remanded for further consideration. See Memorandum from Richard Posner to the Harvard Law Review (Sept. 21, 2005) (on file with the Harvard Law School Library).

from 0.13% and 1.7% to 0.27% and 2.4%.<sup>22</sup> Nevertheless the difference remains striking: the Court decided, in relative terms, almost nine times as many cases in 1960 as in 2004.

The Court has long emphasized that it is not in the business of correcting the errors of lower courts; cases that come to it have already had at least one tier of appellate review, which should be enough to reduce the error rate to a tolerable level. It is plain from the statistics in the preceding paragraph that the Court is indeed out of the error-correction business, and this is a clue to how far it has departed from the conventional model of appellate adjudication, and should prepare us to accept its basically legislative character. In principle, the Court could be making law the common law way, which is a form of legislating but of a type remote from how legislatures proceed. But then it would have little control over the development of the law because it would be providing, owing to the paucity of its decisions, very limited guidance to lower courts. So the Court tries to use the few cases that it agrees to hear as occasions for laying down rules or standards that will control a large number of future cases and thus allow the Court to turn its attention elsewhere.<sup>23</sup> It is true that the Court cannot always tidy up a field by announcing a crisp rule or standard, either because of an inability to agree on one or because it would be impolitic to regulate so broadly. I will illustrate both possibilities in the last Part of this Foreword with reference to the Ten Commandments decisions of last Term.<sup>24</sup> But more common are such rule-imposing decisions as *Roper v. Simmons*<sup>25</sup> and *United States v. Booker*<sup>26</sup> from last Term, which I shall also discuss.

The declining ratio of Supreme Court to lower court decisions may have another effect — that of feeding the widespread but inaccurate perception that a majority of the cases that the Court decides nowadays are constitutional cases. Figure 1 reveals that the percentage of Supreme Court cases that are primarily constitutional, although high, has not exceeded 50% in recent years. In fact, the Court is deciding a

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<sup>22</sup> For the total number of federal appellate cases decided on the merits in 2003, see 2003 ANNUAL REPORT, *supra* note 15, at 34 tbl.S-1. For the number of federal appellate cases disposed of “after hearing or submission” in 1959, see 1959 ANNUAL REPORT, *supra* note 16, at 170 tbl.B-1. Cutting the other way, however, is the fact that the Supreme Court’s certiorari jurisdiction with respect to federal cases is not limited to final decisions, as it is with respect to state court decisions. Compare 28 U.S.C. § 1254(1) (2000), with *id.* § 1257(a).

<sup>23</sup> See Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND U.S. CONSTITUTIONALISM 47, 60–61 (G. Nolte ed., 2005).

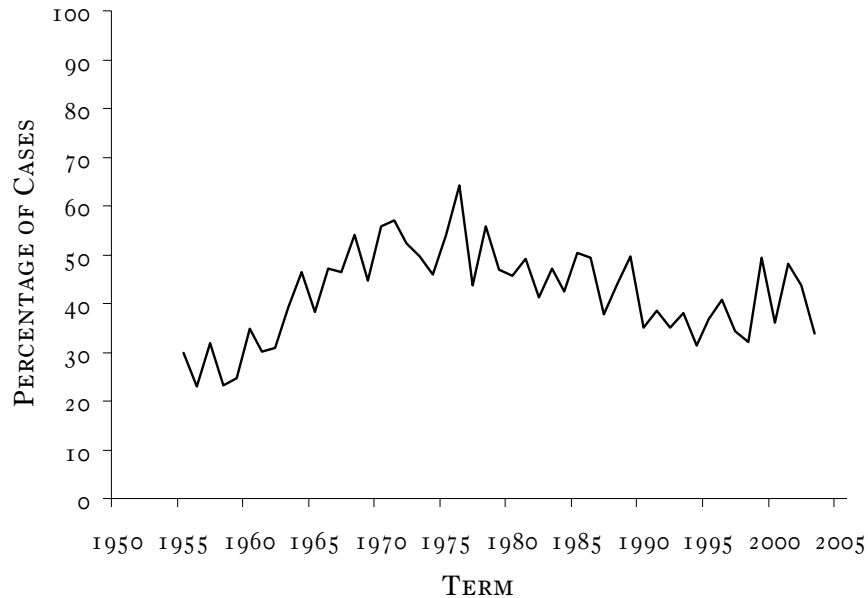
<sup>24</sup> *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005).

<sup>25</sup> 125 S. Ct. 1183 (2005).

<sup>26</sup> 125 S. Ct. 738 (2005).

smaller percentage of constitutional cases today than it did in the late 1960s and early 1970s.

FIGURE 1. PERCENTAGE OF SUPREME COURT CASES THAT ARE PRIMARILY CONSTITUTIONAL, 1955–2003 TERMS<sup>27</sup>



The impression that the Court is primarily a constitutional court may be due to the fact that constitutional cases draw more attention than statutory ones. They do so because on average they are more consequential, since Congress can override a nonconstitutional decision just by passing a statute (not that irrevocability is the only dimension of consequentiality), and also because they are more controversial even within the Court. Last Term, 80% of the Court's primarily constitutional decisions were by split vote, compared to 63% of its other decisions,<sup>28</sup> and a split decision is more likely to attract attention than a unanimous one, in part by generating more — and more contentious

<sup>27</sup> Data for this figure are drawn from the tables entitled "Subject Matter of Dispositions with Full Opinions" in the *Harvard Law Review* November issues for 1955 through 2003. See, e.g., *The Supreme Court, 2002 Term—The Statistics*, 117 HARV. L. REV. 480, 489 tbl.III (2003).

<sup>28</sup> See Harvard Law Review, Statistical Worksheet: October Term 2004 (Sept. 18, 2005) (unpublished statistical sheet, on file with the Harvard Law School Library). For information on how the *Harvard Law Review* determines whether a case is primarily constitutional, see *The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 419 (2005).



— opinions in the case. Although only 38% of all the Court's cases were primarily constitutional, 44% of all opinions (including concurrences and dissents) were issued in such cases.<sup>29</sup>

And the average constitutional decision has become more controversial because of the nation's increased polarization over just the sort of issue most likely to get the Court's attention these days, such as abortion, affirmative action, national security, homosexual rights, capital punishment, and government recognition of religion. *Why* the Court is drawn moth-like to these flames is something of a puzzle. Political ineptitude may be a factor, but probably a more important one is simply that these are the issues that tend to divide the lower courts, generating conflicts that only the Supreme Court can resolve.

Still another reason for the impression that the Court's docket has become dominated by constitutional cases is that as the number of cases the Court decides diminishes relative to the total number of lower court cases that present federal questions, it begins to seem as if the Court is abandoning large swaths of federal law to the lower courts. To specialists in those fields the Court is a *deus absconditus*.

The impression that the Court has become primarily a constitutional court is not entirely misplaced. Cases are not fungible: weighting numbers by consequence and controversiality and breadth of discretionary judgment, one can well believe that most of what the Court is doing is indeed the creation of constitutional law. If a constitutional court is a political court, then the U.S. Supreme Court is well on its way to becoming a political court.

## II. POLITICAL JUDGING

### A. *A Constitutional Court Is a Political Court*

The more the Supreme Court is seen, and perhaps sees itself, as preoccupied with polarizing, "hot button" constitutional cases, the more urgent is the question whether when deciding constitutional cases the Court should be regarded as essentially a political body (which is not to say that it is a *party* animal — "political" does not equal "partisan," as I will explain), exercising discretion comparable in breadth to that of a legislature. The question is urgent in four respects. First, because the federal Constitution is so difficult to amend, the Court exercises more power, on average, when it is deciding constitutional cases than when deciding statutory ones. Second, a constitution tends to deal with fundamental issues, and more emotion is invested in those issues than in most statutory issues, and emotion

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<sup>29</sup> See Harvard Law Review, Statistical Worksheet, *supra* note 28.

influences behavior, including the decisions of judges. Third, fundamental issues in the constitutional context are political issues: they are issues about political governance, political values, political rights, and political power. And fourth, constitutional provisions tend to be both old and vague — old because amendments are infrequent (in part because amending is so difficult) and vague because when amending is difficult a precisely worded constitutional provision tends to become an embarrassment because it will not bend easily to adjust to changed circumstances, and circumstances change more over a long interval than over a short one. The older and vaguer the provision at issue, the harder it is for judges to decide the case by a process reasonably described as interpretation rather than legislation.

A constitutional court composed of unelected, life-tenured judges, guided, in deciding issues at once emotional and politicized, only by a very old and in critical passages very vague constitution (yet one as difficult to amend as the U.S. Constitution is), is potentially an immensely powerful political organ — unless, despite the opportunities that are presented to the Justices, they manage somehow to behave like other judges. A court is supposed to be tethered to authoritative texts, such as constitutional and statutory provisions, and to previous judicial decisions; a legislature is not — it can roam free. But the Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment. To such cases the constitutional text and history, and the pronouncements in past opinions, do not speak clearly. Such cases occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.

Constitutional cases in the open area are aptly regarded as “political” because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms. Almost a quarter century as a federal appellate judge has convinced me that it is rarely possible to say with a straight face of a Supreme Court constitutional decision that it was decided correctly or incorrectly. When one uses terms like “correct” and “incorrect” in this context, all one can actually mean is that one likes (approves of, agrees with, or is comfortable with) the decision in question or dislikes (disapproves of, disagrees with, or is uncomfortable with) it. One may be able to give reasons for liking or disliking the decision — the thousands of pages of Supreme Court Forewords attest this to any doubter — and people who agree with the reasons will be inclined to say that the decision is correct or incorrect. But

that is just a form of words. One can, for that matter, notwithstanding the maxim *de gustibus non est disputandum*, give reasons for preferring a Margarita to a Cosmopolitan. The problem, in both cases, is that there are certain to be equally articulate, “reasonable” people who disagree and can offer plausible reasons for their disagreement, and there will be no common metric that will enable a disinterested observer (if there is such a person) to decide who is right. The most striking characteristic of constitutional debate in the courts, the classroom, and the media — and a sure sign that such debate eludes objective resolution — is its interminability. Everything is always up for grabs intellectually, though not politically. To borrow an apothegm from James Fitzjames Stephen: when there is disagreement on a constitutional issue, the “minority gives way not because it is convinced that it is wrong, but because it is convinced that it is a minority.”<sup>30</sup>

If this point is correct — I cannot prove that it is, but at least the realists reading this Foreword will find the point congenial and I shall try to present some evidence — it has implications for the role in our political system that an inherently, and not merely accidentally, lawless judicial institution should play. I use “lawless” in a nonjudgmental though unavoidably provocative sense. I mean the word simply to denote an absence of tight constraints, an ocean of discretion. If a judge decides to start a trial on Tuesday rather than on Monday, it would be laughable to think the decision dictated by “law” when all that had determined it had been the availability of witnesses or the state of the judge’s appointments book. The judge’s action would be the lawful act of a judicial officer, but it would not be determined by a legal rule or standard. He would neither be interpreting in the sense of searching out a meaning created by someone else — a legislature perhaps — nor following precedent. One could try to save professional appearances by saying that the judge was just obeying the law that told him to exercise discretion, but that too is just a form of words.

From a practical standpoint, constitutional adjudication by the Supreme Court is also the exercise of discretion — and that is about all it is. If, to take an example from last Term, the Court is asked to decide whether execution of murderers under the age of eighteen is constitutional,<sup>31</sup> it is at large. Nothing compels a yes or a no. The Justices who formed the majority in *Roper* did not have to worry about being reversed by a higher court if they gave the “wrong” answer, let alone being removed from office for incompetence or having their decision

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<sup>30</sup> JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 70 (Univ. of Chi. Press 1991) (1873).

<sup>31</sup> *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

nullified by Congress, the President, or some state official. That is, there were no external constraints on the Justices' decision.

This is not to say that there are never such constraints. One can imagine decisions that would evoke constitutional amendments or provoke budgetary or other retaliation by Congress. One can even imagine decisions that the President would refuse to enforce or that would incite a Justice's impeachment and removal from office. Moreover, because the Court, though powerful, does not have its hands on all the levers of power, it is often possible for Congress or the President, without visibly retaliating, to pull the sting from a constitutional decision. Last Term provided several examples, including *Booker* and *Kelo v. City of New London*.<sup>32</sup> *Booker* enlarged the sentencing discretion of federal judges, and there are rumblings in Congress, which suspects that judges will use the additional discretion to impose more lenient sentences; but Congress can prevent this from happening by increasing the minimum sentences specified in federal criminal statutes. *Kelo* interpreted the "public use" criterion of eminent domain broadly, but Congress and the states can deprive the interpretation of its significance by placing limits on the use of the eminent domain power; the fact that a statutory power is upheld against constitutional challenge does not prevent the legislature from voluntarily curtailing the power.

So the Court is not omnipotent; but no branch of government is, and the claim of the Justices and their defenders that the judiciary is the "weakest" branch<sup>33</sup> is mostly pretense. There was little danger that the *Roper* decision, whichever way it went, was going to provoke a reaction from the other branches of government. There are political limits on what the Court can do, but they are capacious.

There was no internal constraint — some sense internalized by the Justices of the proper limits of judicial authority — in *Roper* either. As in most constitutional cases that the Court decides, the Justices didn't have to worry that someone or something (their own judicial consciences, perhaps) would harrow them for disregarding controlling text. The Eighth Amendment's prohibition of "cruel and unusual punishments" is a sponge. A sponge is not constraining; nor, it seems, is precedent. For the Court in *Roper* brushed aside *Stanford v. Kentucky*,<sup>34</sup> which sixteen years earlier had held that executing a sixteen- or seventeen-year-old does *not* violate the prohibition against cruel and unusual punishments.<sup>35</sup> The adjudication of constitutional cases at the Supreme Court level is dominated by cases in which the conventional

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<sup>32</sup> 125 S. Ct. 2655 (2005).

<sup>33</sup> See, e.g., *United States v. Hatter*, 532 U.S. 557, 567 (2001) (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>34</sup> 492 U.S. 361 (1989).

<sup>35</sup> See *id.* at 380.

sources of legal authority, such as pellucid constitutional text or binding precedent (the Court does not consider itself bound by precedent, as witness what it did to *Stanford*), do not speak in a clear voice. If they did, the Court would rarely have to get involved in the matter; it could leave it to the lower courts. For I do not suggest that judges, or even for that matter Supreme Court Justices, are indifferent to playing what I have elsewhere called (not intending disrespect) the judicial “game.”<sup>36</sup> The game entails a certain respect for the conventional materials of decision. In the case of lower court judges, those materials include Supreme Court decisions, and this makes it easier for the judges to play the game. But the Supreme Court is not bound by its decisions; it has to decide whether to adhere to a previous decision, and that is a discretionary judgment. The Court is reluctant to overrule its previous decisions, but the reluctance is prudential rather than dictated by law itself; I shall have more to say about this distinction shortly.

One might think that if not the text of the Eighth Amendment, then its history could disambiguate the meaning of “cruel and unusual punishments.” That would have made a quick end to young *Simmons*. But the Court frequently disregards the history of constitutional provisions on the sensible if not necessarily compelling ground that vague provisions (and even some rather definite ones) should be interpreted with reference to current values rather than eighteenth-century ones. Even Justice Scalia does not think that flogging criminals, or putting them in stocks, would pass muster under the Eighth Amendment today,<sup>37</sup> as it would have in the eighteenth century.<sup>38</sup>

I said that the Court gives some weight to precedent. But it does so for reasons that have nothing to do with thinking that precedent has some intrinsic authority, as a clear statutory text has intrinsic authority, or as a precedent of a higher court has intrinsic authority in the decision making of lower courts, which are not free to disregard such precedents. The Court always has a choice whether to follow a precedent. If it follows it because it thinks the precedent correct, then the precedent has no independent force, no “authority,” any more than a law review article that the Court thought correct would have authority. Precedent does have some authority even in the Supreme Court, but it is not epistemic. That is, following precedent is not a warrant that a decision is correct; it is not even evidence of correctness.

To explain, suppose the Court issues decision *A*, and years later an indistinguishable case *B* comes up for decision. Actually this is rather

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<sup>36</sup> See POSNER, *supra* note 4, at 131–34.

<sup>37</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–62 (1989).

<sup>38</sup> See *Ex parte Wilson*, 114 U.S. 417, 427–28 (1885).

unlikely to happen, because the lower courts would have followed *A* in *B* and so there would be no occasion for the Court to agree to hear *B*. But put that point to one side, though it is an important reason for doubting that precedent would determine many Supreme Court decisions even if the Justices felt themselves bound to follow precedent — in which event, moreover, decisions would be narrowly written and narrowly interpreted, and so the area in which precedent dictated outcomes would still be small.

If *B* does come before the Court, then even if all the current Justices disagree with *A*, the Court may decide to reaffirm it — perhaps to create the impression that the Court is rule-bound rather than rulerless, or perhaps because people have relied on and adjusted to *A*. So the Court decides *B* the same way. If later *C* comes up for decision and is indistinguishable from *A* and *B*, the fact that both *A* and *B* would have to be overruled for *C* to be decided as the Court would prefer to decide it becomes an even stronger reason to decide *C* the same way as the two previous cases. There is nothing in the existence of this lengthening line of precedent to suggest that *C* is “correct.” The decision to depart from precedent would be “correct” too, if the benefits of deciding *C* differently would exceed the costs; and this is a policy judgment, a discretionary call, rather than anything to do with law or legal reasoning in some distinct sense.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>39</sup> Justices O’Connor, Kennedy, and Souter in their joint opinion let slip the mask, and, in a part of the opinion that commanded a majority of the Court, explicitly grounded the policy of adhering to precedent in concerns for the Court’s rhetorical effectiveness:

There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.<sup>40</sup>

I do not think these Justices meant that it would be “implausible” to impute vast error to earlier Supreme Court Justices — for there is nothing implausible about that; it is possible to disagree on entirely plausible grounds with immense reaches of Court-fashioned constitutional law, including the use of the Fourteenth Amendment to make the Bill of Rights (with minor exceptions) applicable to the states,<sup>41</sup> a

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<sup>39</sup> 505 U.S. 833 (1992).

<sup>40</sup> *Id.* at 866.

<sup>41</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 345–51 & nn.128–29 (1985); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *YALE L.J.* 1193, 1224–29 (1992); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 18–19 (1959).

move that has spawned thousands of questionable decisions. And think of all the decisions that went down the drain when the Supreme Court overruled *Swift v. Tyson*.<sup>42</sup> Probably the trio meant only that whatever the Justices may think of particular prior decisions, they must adhere to most of them lest the public realize the epistemic shallowness of the body of constitutional law that the Supreme Court has erected upon the defenseless text of the Constitution. It is because so many of the Court's decisions could so easily be questioned that error must not be acknowledged more than very occasionally. More than public relations is involved, however: the Justices realize that the more casual they are toward precedent, the less durable their own decisions will be. But this is just another strategic judgment.

Honoring precedent injects path dependence into constitutional law: where you end depends to a significant degree on where you began. Today's law may be what it is not because of today's needs but because of accidents of judicial appointment many years ago that resulted in decisions that no one agrees with today but that the Court lets stand as a matter of prudence. The authors of the joint opinion in *Casey* made clear that they thought the famous case they were reaffirming (actually just the core of it) had been decided incorrectly; probably a majority of today's Court disagrees with a very large number of the decisions rendered by a much more liberal Court in the turbulent 1960s. Judicial opinions may give good reasons for reaching similar results in similar cases, but they will be reasons of policy or politics, not reasons of "law" understood as something distinct from the policy or political views of particular Justices. A newly appointed Supreme Court Justice may pay lip service to most of the Court's earlier decisions even if he dislikes the policies on which they rest. But he will construe those decisions narrowly in order to minimize their impact. And when he finds himself (as so often in the Court) in the open area in which conventional sources of law, such as clearly applicable precedents, give out, he will not feel bound by those policies. So if he is in the majority the law will veer off in a new direction. Eventually the old precedents will be interpreted to death or, finally, overruled explicitly.

Against all this it may be argued that the decisional process that I am calling political is no different from common law, which the judges make up as they go along; yet common law rulemaking is generally thought to be a lawlike activity. It is true that common law is suffused with policy, but it differs from constitutional law in critical respects: (1) it is a decentralized, competitive system of lawmaking because each of the fifty U.S. states is sovereign in the common law fields; (2) it is sub-

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<sup>42</sup> 41 U.S. (16 Pet.) 1 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71–78 (1938).

ject to legislative override; (3) it tends to deal with subjects on which there is a considerable degree of political consensus (who opposes enforcing contracts or providing a remedy for negligent injuries?), so that decision making does not require political choices; and (4) the judges really do proceed incrementally, (5) giving much weight to precedent. As a result, it is a more disciplined, more lawlike, body of law than constitutional law.

The evidence of the influence of policy judgments, and hence of politics, on constitutional adjudication in the Supreme Court lies everywhere at hand. Consider the emphasis placed, in confirmation hearings for nominees to the Supreme Court, on the nominee's ideology to the exclusion of his or her legal ability. I don't believe a single question directed to then-Judge Roberts in his hearings for confirmation as Chief Justice was designed to test his legal acumen. Nowadays a certain minimum competence is demanded (and Roberts did receive some grudging respect for his outstanding credentials), but above that, contenders get little credit for being abler legal analysts than their competitors, and sometimes negative credit: the fate of Robert Bork, whose intellectual distinction was held against him as making him more dangerous.<sup>43</sup>

Or glance back through fifty years of Supreme Court Forewords and ask yourself whether the positions urged in the "substantive" Forewords, as distinct from those that deal with procedural or institutional questions, could be thought interpretive (in a deferential sense, interpretation as discovering rather than imposing meaning), rather than legislative. When, for example, Professor Frank Michelman proposed that the Equal Protection Clause be interpreted to require minimum welfare benefits for poor people,<sup>44</sup> could he have thought his proposal a discovery of the meaning of equal protection? What he was saying, at least *sotto voce*, was that he as a liberal would like to see the Supreme Court do something for poor people and that the Court could do this, without being laughed at *too* hard, by employing the rhetoric of equal protection deployed in his Foreword. If one is not a liberal in the welfare-state sense, Michelman's argument — his brief, really — falls completely flat even if one would bow to a persuasive argument that welfare rights really are "found in" the Equal Protection Clause; no such argument is available.

In *Roper*, then, the Supreme Court was not interpreting a directive text, hewing to a convincing historical understanding of the Constitution, or employing apolitical principles of stare decisis or common law

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<sup>43</sup> See Lawrence C. Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 NW. U. L. REV. 832, 833, 836-37 (1990).

<sup>44</sup> See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).



adjudication. It was doing what a legislature asked to allow the execution of seventeen-year-old murderers would be doing: making a political judgment. That is true of most of the Court's constitutional decisions. It is true even of the most celebrated constitutional decision of modern times, *Brown v. Board of Education*.<sup>45</sup> On strictly legal grounds, *Brown* could have been decided the other way by a (defensibly) narrow reading of the Equal Protection Clause and a respectful bow to *Plessy v. Ferguson*<sup>46</sup> and the reliance that the southern states had placed on *Plessy* in configuring their public school systems. But *Brown* illustrates a small class of Supreme Court decisions that seem at once political and right, because sometimes the considerations of policy and morality that (along with interest group pressures, ignorance, and emotion) drive political judgments all line up on the same side. The segregation of public facilities in the South was intended to keep black citizens in a servile state by stamping them with a badge of inferiority. This was contrary to basic American ideals, gratuitously cruel, and an embarrassment to the United States in its conflict with international communism. It was also based on inaccurate beliefs about the capabilities of black people — and to show that a policy is based on factual error is an especially powerful, because objective, form of criticism. That is why sophisticated modern religions avoid making claims that could be falsified empirically, such as that tossing a goat into a live volcano will bring rain.

Three things can be said against the decision in *Brown*, but none of them undermines my point. First, if instead of forbidding segregation the Court had insisted that states spend as much money per black as per white pupil, the sheer fiscal cost to the southern states of maintaining parallel public school systems might have forced integration more rapidly than the Court's actual decision, which was not fully implemented for decades.<sup>47</sup> But this is sheer speculation. Second, the Court's opinion was unsatisfactory to many conventional legal analysts of the era because the Court had to overrule a long-established decision, heavily relied on by the segregationist states in fashioning their institutions, educational and otherwise; and it had to do so in the face of evidence that the framers and ratifiers of the Equal Protection Clause had intended only to protect blacks against the withdrawal of the standard police protections that whites received, so that blacks

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<sup>45</sup> 347 U.S. 483 (1954).

<sup>46</sup> 163 U.S. 537 (1896).

<sup>47</sup> In 1951 and 1952, the average expenditure per pupil in white public schools in the South was \$132.38, compared to \$90.20 for black public schools. TRUMAN M. PIERCE ET AL., WHITE AND NEGRO SCHOOLS IN THE SOUTH: AN ANALYSIS OF BIRACIAL EDUCATION 165 tbl.39 (1955); see also ROBERT A. MARGO, RACE AND SCHOOLING IN THE SOUTH, 1880-1950: AN ECONOMIC HISTORY 25 (1990).

would not be outlaws in a literal sense.<sup>48</sup> And finally, for reasons of *politesse* the Court was unwilling to state forthrightly that segregation was racist and instead had to cite unconvincing social science evidence concerning the psychological effect of segregated schooling.<sup>49</sup> But the second and third criticisms just identify *Brown* as a political decision and the opinion as a political document. It was a politically sound decision and a politically sound opinion; and apparently that is good enough, for no responsible critic of the Court questions the soundness of *Brown* anymore.

It is the unusual constitutional case, however, in which it is possible to elide the issue of conventional legal soundness by observing, yes, it is a political judgment but unquestionably a sound one and it would be pedantic to demand more. Usually there is political disagreement, and rarely can a political disagreement be bridged without (often not even with) evidence; and the legal process is not geared to producing solid enough evidence regarding the stakes in, or consequences of, a constitutional decision to sway judgment. And when there is no evidence, the judges perforce fall back on ideology, temperament, and other influences remote from the model of legal reasoning.

Amicus curiae briefs sometimes try to fill empirical gaps (as in the *Kelo* case, which I discuss in the last Part of this Foreword), but these are advocacy documents, not subject to peer review or other processes for verification.<sup>50</sup> And often the needed evidence is unobtainable because it lies beyond the research frontier. Whether the evidence is unobtainable or is either not presented to the Justices or cannot be presented to them in a form they can digest, the Justices have only their intuitions, by whatever shaped, to guide their decision.

It is no longer open to debate that ideology (which I see as intermediary between a host of personal factors, such as upbringing, temperament, experience, and emotion — even including petty resentments toward one's colleagues — and the casting of a vote in a legally indeterminate case, the ideology being the product of the personal factors) plays a significant role in the decisions even of lower court judges when the law is uncertain and emotions aroused.<sup>51</sup> It must play an

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<sup>48</sup> See CURRIE, *supra* note 41, at 348–49 & n.143.

<sup>49</sup> See Dennis J. Hutchinson, *Perspectives on Brown*, 8 GREEN BAG 2D 43, 47 (2004) (citing *Brown*, 347 U.S. at 494 & n.11).

<sup>50</sup> For a comprehensive study of amicus curiae briefs in the Supreme Court, see Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000). The authors do not, however, distinguish systematically between the informational and the argumentative content of such briefs.

<sup>51</sup> See DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* (2003); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1472 (2003); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 237 (1999); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Aca-*

even larger role in the Supreme Court, where the issues are more uncertain and more emotional and the judging less constrained.<sup>52</sup> The literature on the personal factor in judging still has not been integrated into the dominant academic commentary on the Supreme Court (including the Forewords). That commentary continues to pretend that the Justices are engaged in a primarily analytical exercise that seeks “correct” answers to technical legal questions, even though the commentary itself is suffused with the commentators’ politics, as in the example I gave of Michelman’s Foreword.<sup>53</sup>

My argument may seem undermined by the fact that the empirical studies of the voting patterns of Supreme Court Justices never find that ideology explains anywhere near 100% of the Justices’ votes. Indeed, there are many examples of the Justices’ voting against the grain — more precisely, voting for results that they would not favor if they were legislators or other policymakers, and in that role were unconstrained by political considerations. Examples from last Term include *Florida v. Nixon*,<sup>54</sup> in which Justice Ginsburg wrote the Court’s opinion reinstating a death sentence that the state supreme court had reversed on federal constitutional grounds,<sup>55</sup> and *Illinois v. Caballes*,<sup>56</sup> in

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*democratic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 759 (2005); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

<sup>52</sup> On ideological voting in the Supreme Court, see, for example, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 279–326 (2002); Jilda M. Aliotta, *Combining Judges’ Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277 (1988); Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court’s Criminal Docket*, 104 MICH. L. REV. 71 (2005); James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1093–94 (2001); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 AM. POL. SCI. REV. 355 (1981); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916–88*, 35 AM. J. POL. SCI. 460 (1991). Consistent with this point, Professors James Spriggs and Thomas Hansford found that the Court behaves in a more conventionally lawlike manner in statutory, as distinct from constitutional, cases — for example, it is much more likely to follow precedent in statutory cases. See Spriggs & Hansford, *supra*, at 1103. These authors also argue rather implausibly that the fact that constitutional decisions decided by a narrow majority — or distinguished or criticized in subsequent cases — are more likely to be overruled indicates the operation of legal norms as well as ideological preferences in constitutional adjudication by the Supreme Court. *Id.* at 1103–05 & tbl.1. An alternative explanation is that a split decision in a constitutional case is likely to reflect political disagreement and is of course more vulnerable to the effects of a change in membership; a Court divided five to four on political grounds would be tempted to change course if one of the five were replaced by a political confrère of the four.

<sup>53</sup> On the political underpinnings of constitutional law scholarship, see Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, 151–57.

<sup>54</sup> 125 S. Ct. 551 (2004).

<sup>55</sup> See *id.* at 555.

<sup>56</sup> 125 S. Ct. 834 (2005).

which Justice Stevens wrote the Court's opinion holding that a dog sniff conducted during a lawful traffic stop was not a search because it could not reveal anything other than an unlawful substance and so did not invade a legitimate interest in privacy.<sup>57</sup>

Justices occasionally, and sometimes credibly, issue express disclaimers that a particular outcome for which they voted is one they would vote for as a legislator. I believe Justice Scalia when he says that his vote to hold flag burning constitutionally privileged<sup>58</sup> was contrary to his legislative preferences;<sup>59</sup> and I believe Justice Thomas when he says he wouldn't vote for a law criminalizing homosexual sodomy even as he dissented from the decision invalidating such laws.<sup>60</sup> But such discrepancies between personal and judicial positions usually concern rather trivial issues, where the judicial position may be supporting a more important, though not necessarily less personal, agenda of the Justice. No one (except, naturally enough, the two military veterans on the Supreme Court — Chief Justice Rehnquist and Justice Stevens — both of whom dissented in the flag-burning cases) could get excited over flag burning. Not only is it rare and inconsequential, it is likely to be even more rare if it is *not* punishable — for then the flag burner is taking no risks and his action, being costless to him, does not signal deep conviction to others and so its symbolic and hortatory significance collapses. (Where would Christianity be without its martyrs?) And only someone deeply disturbed by homosexuality could mourn the passing of the sodomy laws, since by the time the Supreme Court declared them unconstitutional they had been repealed or invalidated on state law grounds in most states and had virtually ceased to be enforced in the remaining ones,<sup>61</sup> though people hostile to homosexuality may have valued the laws as symbolic statements. One of the things that is important to Justice Scalia is promoting a textualist approach to the Constitution that would, if adopted, entail the eventual overruling of *Roe v. Wade*<sup>62</sup> and other decisions of which he deeply disapproves. And one of the things that is important to Justice Thomas (as also to Justice Scalia) is opposing the kind of “living con-

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<sup>57</sup> See *id.* at 837.

<sup>58</sup> See *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

<sup>59</sup> See, e.g., James F. McCarty, *Scalia Says His Beliefs, His Feelings Can Differ: He Tells How He Had To Side with Flag Burner*, PLAIN DEALER (Cleveland), Mar. 20, 2003, at B4; Dennis O'Brien, *Scalia Discusses Flag Burning, His Job on High Court*, BALTIMORE SUN, Apr. 13, 1995, at 5B; Frank Sikora, *Justice Scalia: Constitution Allows 'Really Stupid' Things*, BIRMINGHAM NEWS, Apr. 14, 1999, at 3D; Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, NEW YORKER, Mar. 28, 2005, at 40, 42–43; see also Richard Carelli, *Scalia Speaks Out Against Impeaching "Activist" Judges*, LEGAL INTELLIGENCER, May 21, 1997, at 4.

<sup>60</sup> See *Lawrence v. Texas*, 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting).

<sup>61</sup> *Id.* at 2479–80 (majority opinion).

<sup>62</sup> 410 U.S. 113 (1973).

stitution” rhetoric deployed by Justice Kennedy in homosexual rights cases,<sup>63</sup> a rhetoric that invites conforming constitutional law to the personal preferences of “progressive” jurists. In effect, Justices Scalia and Thomas trade a minor preference for a major one.

Justice Scalia’s vote in *Booker* (and in the cases leading up to it, *Apprendi v. New Jersey*<sup>64</sup> and *Blakely v. Washington*<sup>65</sup>) may seem to cut against his legislative preferences more sharply than his vote in the flag-burning cases because he is not sympathetic to criminal defendants. I doubt it. Neither *Booker*, nor the version of *Booker* that Justice Scalia would have preferred, which would not have required the qualified adherence to the Guidelines that Justice Breyer’s majority opinion requires, is likely to cause a reduction in the average severity of criminal sentences. Congress has the last word on how severely to punish federal crimes. Justice Scalia has no objection to sentencing schemes that give judges untrammelled discretion within the minimum and maximum sentences prescribed by Congress. So by raising some minimum sentences, Congress (or state legislatures in the case of state crimes) can easily negate whatever effect *Booker* may be expected to have. (More on the effect of *Booker* on criminal defendants later.)

So it is misleading when a Justice replies to a criticism of a controversial decision that he or she joined by saying that it was a vote against the Justice’s “desire.” People have multiple desires, often clashing, and then they must weigh them against each other. A Justice may desire that burning the American flag be punished but desire more that constitutional standards such as freedom of speech be recast as rules that have very few exceptions. The second desire is as personal or political as the first; it is not submission to the compulsion of the constitutional text or some other conventional source of legal guidance because there are no such compulsions in the cases that I have been discussing. The predictive limitations of the ideological voting studies show that conventional “left” and “right” ideologies are not the only things that matter to Supreme Court Justices. But the other things that matter to them need not be professional legal norms, especially ones incapable of guiding decision because their application requires a clear text, a binding precedent (and remember, the Court is never bound by precedent), a clear legislative history, or some other conventional source of legal decision making that is unavailable in the majority of constitutional cases that the Supreme Court decides.

Sometimes, moreover, what is involved in voting against one’s seeming druthers may be a calculation that the appearance of being

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<sup>63</sup> See, e.g., *Lawrence*, 123 S. Ct. at 2484 (“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”).

<sup>64</sup> 530 U.S. 466 (2000).

<sup>65</sup> 124 S. Ct. 2531 (2004).

“principled” is rhetorically and politically effective. It fools people. So it is worth adhering to principle when the cost to competing desires is slight.

I do not mean to be portraying the Justices as cynics who consciously make the tradeoffs that I have been describing. I assume they accept the conventional law-constrained conception of judges and believe they conform to it. They would be uncomfortable otherwise. Most jobholders sincerely believe that their job performance conforms to their employer’s reasonable expectations, but many are mistaken. The rise of the law clerk has brought with it an increase in the judicial comfort level. Law clerks are more numerous<sup>66</sup> and experienced<sup>67</sup> than they used to be; they are also on average abler, because law schools draw a higher average quality of applicant than they used to,<sup>68</sup> probably as a consequence of higher relative salaries for elite lawyers. There is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish. So a Supreme Court Justice — however outlandish-seeming his position in a particular case — can, without lifting a pen or touching the computer keyboard, but merely by whistling for his law clerks, assure himself that he can defend whatever position he adopts with sufficient skill and force to keep the critics at bay.

Nor do I mean to suggest that merely because an issue is ideological it is fated to be a political football for the Justices. In most societies, including our own, there is a large area of ideological consensus. The point is obscured when one is speaking of constitutional adjudication in the Supreme Court only because an issue usually doesn’t get all the way to the top of the judicial hierarchy unless it is highly controversial, which often means that it’s at the intersection of clashing ideologies.

I do not even mean to deny that some constitutional cases can be decided as conventional legal cases by lining up the facts alongside the constitutional text. Those tend, however, to be hypothetical cases. If Congress passed a law requiring that all books be submitted to a presidential board of censors for approval (which would be withheld if the book criticized any federal official), adjudging the statute unconsti-

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<sup>66</sup> RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1996).

<sup>67</sup> In 2004, every clerk on the Supreme Court had previous clerking experience at the federal appellate level. See Supreme Court Library, Law Clerk Database 2004 (on file with the Harvard Law School Library). In contrast, it appears that none of the clerks in the 1960 Term had previous clerkship experience. See Supreme Court Library, Law Clerk Database 1960 (on file with the Harvard Law School Library). (These data, I am informed by the Supreme Court’s librarian, may not be completely accurate, but they correspond to my own recollection of the 1962 Term, when I clerked on the Court.)

<sup>68</sup> See, e.g., William D. Henderson & Andrew P. Morriss, *Student Quality As Measured by LSAT Scores: Migration Patterns in the U.S. News Ranking Era*, 81 IND. L.J. 16 (2005).

tutional would not require a political judgment. But cases that clear arise very infrequently, and when they do they rarely reach the Supreme Court. And the cases that are unclear in the “legal” sense are rarely clear in the political sense, *Brown* being the exception.

But maybe I am exaggerating the rational indeterminacy of such cases, their personal and “subjective” character, by raising the threshold for what should count as “objective” too high. Maybe I am mistakenly confining “reason” to the procedures of the physical sciences and mathematics — ignoring Aristotle’s reminder that the attainable level of analytical precision is relative to the subject matter,<sup>69</sup> ignoring too Aristotle’s concept of “rhetoric” as not oratory but rather as the reasoning process designed for issues that because of lack of information cannot be resolved by methods of exact inquiry, such as logic and science.<sup>70</sup> I acknowledge that sound decisions — by which I mean decisions that seem correct to most thoughtful observers — can be based on inexact inquiry. *Brown* is not the only example, or law the only field in which one finds such examples. Almost all Americans believe that the United States was correct to invade Afghanistan in 2001 both in retaliation for the 9/11 attacks and to prevent that nation from being used as a staging area for further attacks on the United States. This belief is not observer-independent, like a belief that water boils at one hundred degrees Celsius at sea level, because there is no way to persuade the Taliban and al Qaeda to share the belief. But it is correct within the U.S. frame of reference because within that frame there is sufficient agreement about the premises (mainly the right of the United States to self defense and the defensive character of the Afghanistan operation) to enable the decision to attack Afghanistan to be cast as the “objectively” correct solution to a problem. The agreement on premises that enables many decisions to be confidently pronounced correct within the relevant frame of reference is missing in most constitutional cases.

Think of all the landmark Supreme Court decisions of the past one hundred years, thus including even *Lochner v. New York*<sup>71</sup> — which has its perfectly respectable present-day defenders.<sup>72</sup> There probably

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<sup>69</sup> See ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 3.

<sup>70</sup> See ARISTOTLE, RHETORIC bk. I, chs. 2–3; *id.* bk. II, ch. 22.

<sup>71</sup> 198 U.S. 45 (1905).

<sup>72</sup> See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 211–18, 222–23 (2004); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128–29, 279–82 (1985); Bernard H. Siegan, *Protecting Economic Liberties*, 6 CHAP. L. REV. 43, 91–96, 100–01 (2003); see also David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 6 nn.16 & 18 (2003) (collecting literature defending *Lochner*); cf. Douglas H. Ginsburg, *Delegation Running Riot*, REGULATION, Winter 1995, at 83 (reviewing

isn't a single one that would not have been decided differently but equally plausibly had the Court been differently but no less ably manned. Most of them were decided by close votes, but even *Brown*, which was unanimous, might have been decided differently had Earl Warren not been Chief Justice.<sup>73</sup> One can argue pro and con these decisions — argue eloquently, learnedly, and at great length — but in substance, as well as in motivation, the arguments are at once political and inconclusive, and indeed for the most part easily rebuttable — by arguments themselves easily rebuttable.

*B. Aggressive Versus Modest Approaches to Political  
Judging in Constitutional Cases*

If neither “law” in the sense of an analytical technique that differs from policy analysis, nor policy analysis (in some sense “objective,” to distinguish it from political judgment) itself, is going to dictate the outcome of most of the constitutional cases that reach the Court, then how should the self-conscious Justice, the Justice (improbably) persuaded by my analysis, conceive of his or her role? There are two main alternatives. One is for the Justice to accept the political character of constitutional adjudication wholeheartedly and vote in cases much as legislators vote on bills. The other alternative is, feeling bashful about being a politician in robes, to set for himself or herself a very high threshold for voting to invalidate on constitutional grounds the action of another branch of government. The first, the “aggressive judge” approach,<sup>74</sup> expands the Court’s authority relative to that of other branches of government. The second, the “modest judge” approach,<sup>75</sup> tells the Court to think very hard indeed before undertaking to check actions by other branches of government. Judges can often be sorted into one or the other of these categories even if they do not, as most do not, think in these terms; a social scientist insists on the importance of unconscious motivations.

Formulations of the modest approach include James Bradley Thayer’s principle that statutes should be invalidated only if they are contrary to any reasonable understanding of the constitutional text<sup>76</sup>

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DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) (lamenting the “Constitution-in-exile”).

<sup>73</sup> See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 302 (2004).

<sup>74</sup> Often called “judicial activism”; but I shall avoid the term because it has become a portmanteau term of abuse for a decision that the abuser does not like, rather than a description of decisions that expand the judicial role relative to that of other branches of government. See POSNER, *supra* note 66, at 304–82.

<sup>75</sup> In the conventional terminology, a “modest judge” is an apostle of “judicial restraint.”

<sup>76</sup> See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 138–52 (1893).



and Justice Holmes's "can't help,"<sup>77</sup> or "puke," test: a statute is unconstitutional only if it makes you want to throw up.<sup>78</sup> Holmes was not speaking literally, of course; he meant only that a conviction of error is not enough — there must be revulsion. There is a subtle but important difference between the two approaches. Thayer's is a one-way approach, Holmes's a two-way. Thayer's approach limits, it never expands, judicial review. Holmes's approach allows stretching the constitutional text when necessary to avoid extreme injustice. Holmes's Constitution has, in effect, no gaps.

The difference between the two modest approaches is illustrated by *Griswold v. Connecticut*,<sup>79</sup> which invalidated a Connecticut statute — anachronistic in 1965 (only Massachusetts, another heavily Catholic state, had a similar statute) and well-nigh incomprehensible today — that forbade the use of contraceptives, with no exception even for married couples.<sup>80</sup> A Thayerian would disapprove of the decision because the Connecticut statute certainly was not unconstitutional beyond a reasonable doubt; indeed, it is very difficult to find a provision of the Constitution on which to hang one's hat in a case about contraception. A Holmesian might find the statute so appalling (not only because of its theocratic cast, but also because its only practical effect was, by preventing birth control clinics from operating, to deny poor married couples access to contraceptive devices other than condoms<sup>81</sup>) that he would vote to invalidate it despite the difficulty of grounding his vote in the constitutional text. That is my reaction not only to *Griswold*, but also to the issue in *Harmelin v. Michigan*,<sup>82</sup> in which the Court refused to invalidate as cruel and unusual a life sentence for possessing a small quantity of cocaine.<sup>83</sup> Actually there was a bigger constitutional handle in that case to reverse the sentence — the Eighth Amendment — than there was to invalidate the statute in *Griswold*.

Thus, in the modest role, the Justice is still a politician, but he is a timid politician. He wants the Supreme Court to play a role a bit like that of the House of Lords after its authority was limited to delaying legislation enacted by the House of Commons. The Court can keep its

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<sup>77</sup> Letter from Justice Holmes to Harold Laski (Jan. 11, 1929), reprinted in 2 HOLMES-LASKI LETTERS 1124 (Mark DeWolfe Howe ed., 1953).

<sup>78</sup> See Letter from Justice Holmes to Harold Laski (Oct. 23, 1926), reprinted in 2 HOLMES-LASKI LETTERS, *supra* note 77, at 888.

<sup>79</sup> 381 U.S. 479 (1965).

<sup>80</sup> See *id.* at 484–86.

<sup>81</sup> The use of condoms was permitted on the ground that their purpose was to prevent the spread of venereal diseases — which is, of course, only one of their purposes. For a discussion of the invalidated statute, see RICHARD A. POSNER, SEX AND REASON 325–26 (1992).

<sup>82</sup> 501 U.S. 957 (1991).

<sup>83</sup> See *id.* at 995–96.

thumb in the dike only so long; if public opinion is overwhelming, the Justices must give way, as any politician would have to do.

If the Justices acknowledged to themselves the essentially personal, subjective, and indeed arbitrary character of most of their constitutional decisions, then — deprived of “the law made me do it” rationalization for the assertion of power — they probably would be less aggressive upsetters of political and policy applecarts than they are. That, in my opinion, would be all to the good. But it is too much to expect. People don’t like to be in a state of doubt. Judges don’t like to think they are tossing a coin when they decide a difficult case. I have had the experience — I think all judges have — that sometimes when I start to work on a case I am uncertain how it should be decided — it seems a toss-up. Yet I have to decide (the duty to decide is the primary judicial duty), and the longer I work on the case, the more comfortable I become with my decision. And “comfortable” is the word; there is a psychological need to think one is making the right decision rather than just taking a stab in the dark. This need is related to my earlier point about judges rarely acknowledging to themselves the political dimension of their role, an acknowledgement that would open a psychologically disturbing gap between their official and their actual job descriptions. A judge who did not become comfortable with his decision by the time it was handed down might be tormented in the future by doubts about whether the decision had been correct. No one likes to be tormented; and judges do not like to look back and worry about how many of their thousands of votes may have been mistaken because they were really just stabs in the dark. (I have voted in almost 5000 argued cases.) So as the years pass they become more confident, because they have behind them an ever-longer train of decisions that they no longer doubt are sound.

Some judges agonize over their decisions (that is, over their votes); some even pray over them. Yet for the most part an agonizer’s decisions, too, are quite predictable once he’s been placed in his particular ideological slot. Justice Blackmun was not a happy camper,<sup>84</sup> but his decisions were no less predictable, and certainly no less aggressive in their assertion of judicial power, than those of Justices who take a more relaxed attitude toward their judicial duties.

Judicial modesty is not the order of the day in the Supreme Court. I instanced *Roper*; another example from last Term is *Booker*, in which the Court invoked the constitutional right to a jury trial and to be judged by the standard of proof beyond a reasonable doubt to invalidate the statutory provision that made the Federal Sentencing Guide-

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<sup>84</sup> See generally LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005).

lines mandatory.<sup>85</sup> The result of *Booker* is that the Guidelines are merely advisory — sentencing judges can depart from them on any ground that a reviewing court deems reasonable.<sup>86</sup> The character, and untoward consequences, of the “aggressive judge” approach to judging in the open area are well-illustrated by the decision.

In setting criminal penalties, legislatures usually specify a minimum and a maximum sentence — often far apart, thus creating a very broad sentencing range — and let the judge choose in each case the actual penalty to impose on the defendant. Before the Sentencing Reform Act of 1984,<sup>87</sup> the statute that ordained the Guidelines, federal judges could pick pretty much any sentence within the statutory range to impose on the defendant. The Guidelines limited their sentencing discretion and *Booker* restored it, though not completely, because any departure from the Guidelines must be reasonable in light of sentencing factors set forth in the Act.<sup>88</sup>

The guidelines regime required that the sentence be based not only on the facts about the defendant’s conduct that the jury had found beyond a reasonable doubt, but also on facts that the judge found at the sentencing hearing by a mere preponderance of the evidence.<sup>89</sup> The defendant might have been indicted for and convicted of possessing with intent to distribute two grams of cocaine, but if the government at the sentencing hearing persuaded the judge by a preponderance of the evidence that the defendant had actually possessed with intent to distribute 200 grams, the judge was required to sentence the defendant in accordance with the guideline applicable to the larger quantity.

Critics of the mandatory guidelines regime worried about sandbagging. The government might put on a barebones case involving a tiny amount of an illegal drug, reserving its evidence of the actual amount for the sentencing hearing, at which its burden of proof would be lighter and the jury bypassed. Actually, this was not sandbagging. “Sandbagging” implies surprise, and everyone knew that this was a tactic invited by the Guidelines. And under the pre-Guidelines regime, which no Justice thought unconstitutional, the procedure had been even more lax:<sup>90</sup> the sentencing judge could impose the statutory maxi-

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<sup>85</sup> See *United States v. Booker*, 125 S. Ct. 738, 748–50 (2005) (Justice Stevens’s opinion for the Court); *id.* at 756–57 (Justice Breyer’s opinion for the Court). Stevens and Breyer each wrote a majority opinion, Stevens on the unconstitutionality of the mandatory character of the guidelines and Breyer on the constitutionality of the Guidelines as advisory rather than mandatory directives to sentencing.

<sup>86</sup> See *id.* at 764–66 (Justice Breyer’s opinion for the Court).

<sup>87</sup> Pub. L. No. 98-473, tit. 2, ch. II, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

<sup>88</sup> See *Booker*, 125 S. Ct. at 764–66 (Justice Breyer’s opinion for the Court).

<sup>89</sup> See *id.* at 748–49 (Justice Stevens’s opinion for the Court).

<sup>90</sup> See *Williams v. New York*, 337 U.S. 241 (1949).

imum sentence without any evidence at all having been presented at the sentencing hearing concerning the actual amount of the illegal drug that the defendant had possessed above the statutory minimum.

The Guidelines narrowed the sentencing variance among judges, but the narrowing itself did not make the average defendant worse off, as some have thought.<sup>91</sup> The average defendant *was* worse off — the average severity of federal sentences rose during the regime of the mandatory Guidelines<sup>92</sup> — but only because of choices made by the Sentencing Commission in picking specific guidelines, and not because the Guidelines required that sentences be based on judicial factfindings rather than, as in the old days, on judicial whim.

Why the mandatory feature of the Guidelines should have been thought to violate the Sixth Amendment, a provision designed for the protection of criminal defendants, is a puzzle. Gearing sentences to findings made on the basis of evidence gave defendants *more* procedural rights than they had before the Guidelines, when the judge could pick any point in the statutory sentencing range to be the defendant's sentence. Whatever the average sentence, a judge's discretion was greater (hence the greater variance in sentences), implying a diminution of the defendant's rights since an appeal to a judge's discretion is a plea for mercy rather than a claim of right. Invalidation of the mandatory feature of the Guidelines did not solve completely, or perhaps at all, the problem of procedural laxity in sentencing. The government can still put on a barebones case yet count on a heavy sentence if the judge is known to be unsympathetic to defendants in the particular type of case. What is more, as we are about to see, the judge must still compute the guidelines sentence, which may be high because of evidence first presented at the sentencing hearing; and though the judge is not bound to impose that sentence, imposing it is the course of least resistance because any departure must be justified to the appellate court as "reasonable." (A sentence within the guidelines range is presumed to be reasonable.<sup>93</sup>)

However the Sixth Amendment issue *should* have been resolved, the Court's resolution reflected an ingenious compromise forged by Justice Breyer under which the Guidelines, though demoted to advisory status (in other words, to being genuine "guidelines"), retain con-

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<sup>91</sup> See, e.g., David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 413 (1993) ("Uniformity . . . can come at the expense of proportionality. Imposing the same sentence on all convicted defendants, regardless of the nature of the offense and the offender, achieves perfect uniformity, but is bizarrely disproportional.").

<sup>92</sup> See U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 42-43 & fig.2.2 (2004).

<sup>93</sup> See, e.g., *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005).

siderable bite. The sentencing judge must still calculate the guidelines sentence, though he can depart. But some departures were already authorized by the Guidelines themselves,<sup>94</sup> and so all the Court did in the end was to loosen the bindings a little more.

So despite all the *Sturm und Drang* accompanying the decision (see below), *Booker* may not have greatly altered the federal sentencing scene. The note of dubiety in “may” arises from the yet unresolved question of how elaborate the sentencing process will be under the new regime. Until *Booker*, the uses that a sentencing judge could make of the statutory factors were severely circumscribed by the statute itself in order to preserve the Guidelines’ mandatory character.<sup>95</sup> Now that the Guidelines are advisory, the judge will have to determine the guidelines sentence, and having done so he will then, at least if either party asks for a different sentence, have to apply the statutory factors. Since judges will still have to make factfindings, the Court has increased the burden of sentencing, with benefits that are obscure.

And the transition to the post-*Booker* regime, whatever precisely that regime turns out to be, is looming as distinctly painful. Judgments against defendants who had been sentenced before *Booker* and had not made a Sixth Amendment challenge to the sentencing process, but had also not yet exhausted their appellate remedies, are not considered final. A defendant, and there are thousands, is entitled to be resentenced under the new sentencing regime if, but only if, his sentencing under the old regime is deemed a “plain error.”<sup>96</sup> The lower federal courts have divided over how to apply the concept of plain error to these sentences.<sup>97</sup> When the Court finally resolves the conflict, thousands of defendants may have to be resentenced. The Court could have spared the courts a considerable burden of compliance with its decision had it spelled out the application of the plain-error concept to pending cases in which the defendant had been sentenced before *Booker*. But concern with the consequences of its decisions does not figure largely in the Court’s decisions. And why should it? The consequences are felt elsewhere — in this case, in the lower federal courts.

What is difficult to perceive is any net improvement in federal criminal sentencing as a result of the *Booker* decision. This will not trouble a judge who thinks the Sixth Amendment speaks to the question of how the factual predicates of a sentence must be determined. To one like myself who does not think it speaks to that question and does not think that a decision invalidating the mandatory character of the Sentencing Guidelines will yield a net social benefit, the decision is

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<sup>94</sup> See, e.g., U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.2, 3E1.1, 4A1.3 (2004).

<sup>95</sup> See 18 U.S.C.A. § 3553(b) (West 2000 & Supp. 2005).

<sup>96</sup> See *Johnson v. United States*, 520 U.S. 461, 468–70 (1997).

<sup>97</sup> See, e.g., *United States v. Paladino*, 401 F.3d 471, 481–85 (7th Cir. 2005).

regrettable. The mandatory guidelines regime invalidated in *Booker* could not be thought inconsistent with all reasonable understandings of the Sixth Amendment; it was not revolting, either. So it passed neither Thayer's test nor Holmes's. A modest judge would have voted to reject the constitutional challenge to the Guidelines.

### III. SOME ALTERNATIVE CONCEPTIONS OF THE COURT

#### A. *The Court as Expert Administrator*

The search for an alternative to conceiving of the Court as a political organ has been a frequent theme of the Forewords; and in this and succeeding sections, I consider some of the alternatives. Henry Hart, in part because his Foreword focused on the effect of caseload on the judicial process in the Supreme Court, is usually described as an apostle of the "legal process" school of legal thought. But it would be more accurate to describe him as a Progressive reformer in a sense that associates him with such diverse characters and movements as Max Weber, Woodrow Wilson, Louis Brandeis, and the New Deal, and thus with the exaltation of expertise, and — in the American setting — the celebration of the administrative agency as the epitome of law made rational, expert, and modern, and even with the Legal Realist movement of the 1920s and 1930s.

I think Hart in his Foreword was trying to say that if the Supreme Court would behave in the hyperrational fashion of the ideal of administrative decision making, its decisions would be legitimate by virtue not of their pedigree (of being sound interpretations of past political settlements, such as the Constitution), but of the expertness of the decision makers. The Court would be a superlegislature because it was super. But it would not be political; the model would be a politically neutral civil service guided by reason rather than by public opinion. Justice Jackson's dictum<sup>98</sup> would be reversed: the Court would be final because it was infallible. And all that was holding the Court back, Hart thought, was that it wasn't allocating its time sensibly — specifically, that the Justices weren't taking enough time to discuss the cases thoroughly because they were granting review in marginal cases.<sup>99</sup> His was the Progressive dream of policy emptied of politics.

A pipe dream, actually. From a distance of almost half a century — and from the perspective, denied to Hart, of an actual appellate judge — Hart's Foreword seems either naïve to the point of almost total cluelessness, or intellectually dishonest, in arguing that what was

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<sup>98</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) ("We are not final because we are infallible, but we are infallible only because we are final.")

<sup>99</sup> See Hart, *supra* note 11, at 99–101.

preventing the Justices from fulfilling the Progressive dream was that they were using their time inefficiently. He seems to have had no sense of how judges, including Supreme Court Justices, actually used (and use) their time. Even when he wrote, it was not true that “[w]riting opinions [was] the most time-consuming of all judicial work, and the least susceptible of effective assistance from a law clerk.”<sup>100</sup> Today, most judicial opinions, including many Supreme Court opinions, are ghostwritten by law clerks. Many appellate judges have never actually written a judicial opinion. Some judges do extensive editing of their law clerks’ opinion drafts, others not, and this is the pattern in the Supreme Court as well as in the lower courts.<sup>101</sup> There were fewer law clerks per judge (or Justice) in the 1950s, when Hart was writing, but then as now many (I think as many) of the opinions were clerk-written, as Hart either did not know or pretended not to know. He may not have realized that precisely because writing judicial opinions is for most judges a chore rather than a joy, the presence of the law clerks allows Justices plenty of time to discuss the cases with each other — if they want to.

A giant if. The naïveté of Hart’s “time chart” (his tabulation of the time that the Justices devoted to their various judicial tasks, proving to his satisfaction that the Justices did not have enough time to deliberate adequately) was noted at the time by the legal realist Thurman Arnold, whose rudely accurate assessment of Hart’s Foreword — “There is no such process as [the maturing of collective thought], and there never has been; men of positive views are only hardened in those views by [judicial] conferences”<sup>102</sup> — was quickly dismissed by Profes-

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<sup>100</sup> *Id.* at 91.

<sup>101</sup> There are many rumors, but no hard evidence, concerning the percentage of judicial opinions wholly or principally written by law clerks. For the latest discussion of the issue, with many references to the earlier literature, see Stephen J. Choi & G. Mitu Gulati, *Which Judges Write Their Opinions (And Should We Care)?* (NYU Law Sch. Law & Econ. Research Paper Series, Working Paper No. 05-06, 2005), available at <http://ssrn.com/abstract=715062>.

<sup>102</sup> Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298, 1312 (1960). Arnold continues:

There is no possibility that I could pool my wisdom with Professor Hart’s so that the wisdom of both of us, “successfully pooled,” would “transcend the wisdom of” either of us. The reason is that I do not think his wisdom is real wisdom, and I am sure that he has the same opinion of mine. To lock the two of us in a room until I came to agree with the theology of Professor Hart by the process of the “maturing” of our “collective thought” would be to impose a life sentence on both of us without due process of law.

*Id.* Arnold was correct. He had the advantage over Hart of having been an appellate judge, albeit briefly. On the background of Arnold’s antipathy to Hart’s approach, see Mark Fenster, *The Birth of a “Logical System”: Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. (forthcoming Spring 2005) (manuscript at 54–68, on file with the Harvard Law School Library). Though now pretty much forgotten, Arnold was a significant figure in the legal-realist movement. See Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 BUFF. L. REV. 1053 (2003).

sor Hart's dean, Erwin Griswold.<sup>103</sup> The coarseness of Arnold's writing and the transparency of his political motivations made his diatribe easy to ignore; but his central point was correct.

Griswold's Foreword in rebuttal of Arnold is even more naïve than Hart's, but it is worth pausing on for a moment because it exemplifies an orthodoxy that Supreme Court Justices, other judges, and not a few law professors continue to proclaim. Griswold states that "[t]he volume of the work of the Court is staggering," the Justices being busy "reading long records" and "writing reflective opinions."<sup>104</sup> These things were not true when he wrote and are not true today. Justices do not read the full records of the cases they decide — much, sometimes all, of the records will be irrelevant and most of the relevant parts will have been distilled in the opinions of the lower courts. The Justices delegate much of the opinion writing. And the opinions are rarely "reflective"; they are briefs in support of the decisions.

Griswold acknowledges that the process of adjudication at the Supreme Court level is "not a merely mechanical one" (he means not algorithmic), but he describes it as "a tightly guided process. The scope of individual decision is properly narrow."<sup>105</sup> That is not true; the Justices exercise vast discretion, thrashing about in a trackless wilderness. Griswold goes on to paint the judicial process in heroic colors, very flattering to judges and a mystification to the public:

It is a process requiring great intellectual power, an open and inquiring and resourceful mind, and often courage, especially intellectual courage, and the power to rise above oneself. Even more than intellectual acumen, it requires intellectual detachment and disinterestedness, rare qualities approached only through constant awareness of their elusiveness, and constant striving to attain them.<sup>106</sup>

These attributes are desirable, but they are not *required*; they are not part of the job description. Few Justices have had "great intellectual power," nor is such power usually conjoined with "an open and inquiring" mind or "the power to rise above oneself." Justices Holmes, Brandeis, and Jackson (to speak only of the dead) are uncontroversial examples of great Justices, but would anyone think them intellectually detached and disinterested (Justice Holmes was perhaps emotionally detached) or "striving to attain" these qualities?

But Griswold may have been on to something: life tenure on a fixed salary (judges do not receive raises in recognition of outstanding performance), so that there are neither carrots nor sticks, when com-

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<sup>103</sup> See Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960).

<sup>104</sup> *Id.* at 84.

<sup>105</sup> *Id.* at 92.

<sup>106</sup> *Id.* at 94.



bined with the absence of a superior authority (for remember how difficult it is to amend the Constitution to undo a judicial decision), is a temptation to irresponsibility, unless, as in the sciences, there are objective measures of performance. It is not a temptation to which all holders of tenured jobs yield, but the greater the power of the jobholder, the harder it is to resist the temptation to wield it. Not to succumb to the corrupting influence of largely unconstrained political power may indeed require extraordinary qualities, which are not only rare but also not well-correlated with the criteria for selecting Justices.

It is not surprising, given these circumstances, that the Court's performance would elicit such dyspeptic comments as the following:

The justices don't have to observe precedent, so they fudge doctrine. They don't have to describe facts accurately, so they take liberties. They don't have to restrain themselves, so they don't. And they don't have to write opinions rigorously enough to give precise guidance to the lower courts, which do not have the luxury of winging it. So they hand down opinions that sometimes leave the lower courts breathless with astonishment. . . .

The Supreme Court has a related problem with grandiosity — a tendency both to arrogate to itself decisions other actors are far better situated to make and to embellish its work with needless puffery.<sup>107</sup>

What is surprising, rather, is that the indictment is overstated. The Justices are more responsible and restrained than the quoted passage allows, even though they are not the moral and intellectual Titans that Griswold thought they had to be to do their jobs.

Like Griswold, Hart would not admit the limitedness of the average Justice, and so the mediocrity (as it seemed to him) of Supreme Court opinions cried out for an explanation. The one he offered was that the Justices were hearing too many cases and so lacked time to discuss them with each other long enough to reach the point at which the power of collective thinking would prevent them from making mistakes.

Hart is to be commended for his effort to be precise about the amount of time the Justices had in which to deliberate. But the effort miscarried because of his ignorance (and again, I do not know whether this was actual or feigned) of the working conditions of judges and, more important, the nature of judicial decision making. Apart from disregarding the delegation of opinion writing to law clerks, he seems to have thought that the typical case the Supreme Court agrees to decide is a complex puzzle that would take even very bright people a long time to solve, like designing an airplane. Most cases, certainly most constitutional cases, are not of that character. Indeterminacy, a

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<sup>107</sup> Benjamin Wittes, *Without Precedent*, ATLANTIC MONTHLY, Sept. 2005, at 39, 40.

common feature of cases that get to the top of the judicial pyramid, is not the same thing as complexity. It is the difference between politics and science.

As for those cases that *are* complex, the data that might enable them to be solved as puzzles will usually be unobtainable, or at least not obtained, and so the cases cannot be decided by methods analogous to solving puzzles or designing airplanes, either. *Roper v. Simmons*, for example, had an “obtainable but not obtained” dimension — empirical potentialities never realized. *Roper* demonstrates that the Justices are not about to become the expert administrators of Hart’s vision of adjudication.

There is a rich statistical literature on the deterrent effect of capital punishment,<sup>108</sup> which the Justices might have consulted and which provides some evidence to support the common-sense proposition that there is indeed an incremental such effect. (When was the last time a death-row prisoner declined to have his death sentence commuted?) This might have given the Justices pause, by bringing the interests of the victims of murder to mind. It is unlikely, however, that the Justices are sufficiently comfortable with statistical theory and methodology that they would want to hang their hats on such a literature. Maybe they are right to be diffident, but if so they should be consistently diffident. The Justices in the majority should not have relied on a psychological literature that they mistakenly believed showed that persons under eighteen are incapable of mature moral reflection.<sup>109</sup> One does not have to be a social scientist to know that such an inference cannot be correct. Chronological age does not coincide with mental or emotional maturity; age eighteen is not an inflection point at which teenagers suddenly acquire an adult capacity for moral behavior. The studies on which the Court relied acknowledge that their findings that sixteen- or seventeen-year-olds are less likely to make mature judgments than eighteen-year-olds are statistical rather than individual<sup>110</sup> and do not support a categorical exclusion of sixteen- and

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<sup>108</sup> See, e.g., Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 364–65 (2003); Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 305 (2004). But see Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 363 (1999); Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 251, 274–77 (James R. Acker et al. eds., 2d ed. 2003).

<sup>109</sup> See *Roper v. Simmons*, 125 S. Ct. 1183, 1195–97 (2005).

<sup>110</sup> See Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992) (“[I]t is not being suggested here that all adolescents are reckless, only that adolescents as a group engage in a disproportionate amount of reckless behavior.”). Arnett makes no distinction between persons under and over eighteen; in fact, he defines

seventeen-year-olds from the ranks of the mature. At most, the studies demonstrate a need for careful inquiry into the maturity of a young person charged with capital murder. The Court thought juries incapable of such an inquiry — but if so, they are incapable of ever deciding when a murderer is “bad” enough to be executed. So maybe total abolition of the death penalty is next on the Court’s agenda.

The principal study cited by the Court acknowledges that “the definitive developmental research has not yet been conducted, [and] until we have better and more conclusive data, it would be prudent to err on the side of caution.”<sup>111</sup> Caution might well be thought to argue not, as the authors of the quoted study believe, for outlawing the death penalty for sixteen- and seventeen-year-olds but rather for leaving the judgment to the states, though for those Justices who find capital punishment a disturbing practice, caution may mean forbidding it whenever there is the slightest doubt about its propriety. But unless they are *really* naïve about social science, these studies could not have figured in the decision, as distinct from the advocacy of the decision in the Court’s opinion. The Court could have taken into account the social-scientific evidence on the deterrent effect of capital punishment *and* the social-scientific evidence on the deterrability of youthful murderers, or it could have ignored both bodies of evidence on the ground that the evidence is inconclusive or that judges are incompetent to evaluate it. What they could not responsibly do — if they were indeed

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adolescence “as extending from puberty to the early 20’s.” *Id.* at 340. And Arnett does not directly discuss murder or other serious crimes. A study cited not by the Court but by Laurence Steinberg and Elizabeth S. Scott in *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003), discusses “teens” in passing, but, like Arnett, does not classify them by age. See Baruch Fischhoff, *Risk Taking: A Developmental Perspective*, in RISK-TAKING BEHAVIOR 133, 142, 148 (J. Frank Yates ed., 1992).

<sup>111</sup> Steinberg & Scott, *supra* note 110, at 1017; see also *id.* at 1012 (“In our view, it is an open and unstudied question whether, under real-world conditions, the decision making of mid-adolescents is truly comparable with that of adults.”); *id.* at 1013 (“At this point, the connection between neurobiological and psychological evidence of age differences in decision-making capacity is indirect and suggestive.”); *id.* at 1014 (“Recent evidence on age differences in the processing of emotionally arousing information supports the hypothesis that adolescents may tend to respond to threats more viscerally and emotionally than adults, but far more research on this topic is needed.” (citation omitted)). The Steinberg-Scott study, coauthored by law professor Elizabeth Scott, is an advocacy article. Its last sentence is: “The United States should join the majority of countries around the world in prohibiting the execution of individuals for crimes committed under the age of 18.” *Id.* at 1017. The only “study” cited by the Court other than the Arnett and Steinberg-Scott articles is not a study at all, but an old, speculative book by Erik H. Erikson. See *Roper*, 125 S. Ct. at 1195 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968)). Unsurprisingly, the Court did not cite a study that concludes that adolescents “may be just as competent as adults at a number of aspects of decision making about risky behavior.” Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 36 (1992). For other cautionary notes, see Fischhoff, *supra* note 110, at 148, 152, 157.

acting as neutral experts — was ignore both the evidence that contradicted their desired result and the limitations of the body of evidence that appeared to support that result.

The picture of Supreme Court Justices poring over esoteric scholarly articles to come to a decision is in any event an unrealistic one. The “expert administrator” model of Supreme Court adjudication misconceives how judges reach decisions. Experienced appellate judges, as Hart should have known, read the briefs in a case, discuss the case with their law clerks, listen to oral argument, perhaps dip into the record here and there, maybe do some secondary reading, *briefly* discuss the case at conference with the other judges, and — from the information and insights gleaned from these sources, filtered through preconceptions based on experience, temperament, and other personal factors — make up their minds. It is not a protracted process unless the judge has difficulty making up his mind, which is a psychological trait rather than an index of conscientiousness. And this makes it unlikely that the Justices would do a better job if they decided fewer cases and thus had more time to spend on each one.

I need not rely entirely on conjecture. We have the results of a natural experiment. The Justices now do decide fewer cases and thus have more time to spend discussing each one — should they desire to. Although the number of paid petitions for certiorari has doubled since 1958<sup>112</sup> (the unpaid — *in forma pauperis* — petitions are mostly frivolous and easily disposed of), the number of law clerks has also doubled over this period and the ingenious “pool” system of processing petitions for certiorari has been adopted, which enables the Justices to delegate most of the screening function to the clerks. Most important, the Court has been deciding fewer and fewer cases and it is now, as we know, issuing opinions in only about 80 cases a year, compared to 129 in 1958.<sup>113</sup>

Figure 2, which graphs the annual number of full opinions issued by the Supreme Court, traces the decline in decisions.<sup>114</sup> Not that number of decisions is the sole measure of a court’s workload. The cases could be getting tougher, and this might be reflected in longer opinions or in more separate opinions. But contrary to a widespread impression (there are many erroneous impressions about courts), the decline in the number of decisions by the Supreme Court has not been

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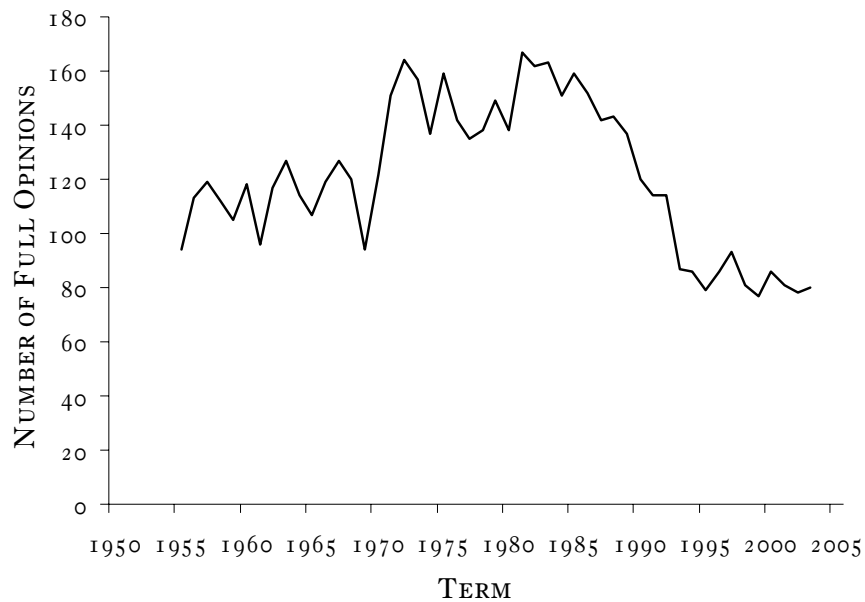
<sup>112</sup> In 1958 there were 886 such petitions, as compared to 1727 in 2004. See *The Supreme Court, 1958 Term—The Statistics*, 73 HARV. L. REV. 128, 129 tbl.I (1959); *2004 Term Statistics*, *supra* note 28, at 426 tbl.II(B).

<sup>113</sup> See *1958 Term Statistics*, *supra* note 112, at 129 tbl.I.

<sup>114</sup> See generally Philip Allen Lacovara, *The Incredible Shrinking Court: If Their Productivity Were Measured by Private Sector Standards, the Supremes Might Receive Pink Slips*, AM. LAW., Dec. 2003, at 53, 54.

offset by an increase in separate (i.e., dissenting and concurring) opinions. (This is shown in Figure 3, which graphs the percentage of all opinions that are majority opinions, and in Figure 4, which graphs the number of separate opinions.) The total number of opinions, not just of decisions, has declined (Figure 5). Nor have these declines been offset (since the early 1970s) by a significant increase in opinion length (Figure 6). And so the total word output of the Justices has declined along with the number of opinions (Figure 7).

FIGURE 2. NUMBER OF FULL OPINIONS  
OF THE SUPREME COURT, BY TERM<sup>115</sup>



<sup>115</sup> Unless otherwise indicated, the data for this Figure and succeeding Figures are drawn from the tables entitled “Actions of Individual Justices” in the *Harvard Law Review* November issues for 1955 through 2003. See, e.g., *The Supreme Court, 1998 Term—The Statistics*, 113 HARV. L. REV. 400, 400 tbl.I (1999).

FIGURE 3. MAJORITY OPINIONS AS A PERCENTAGE OF ALL OPINIONS, BY TERM

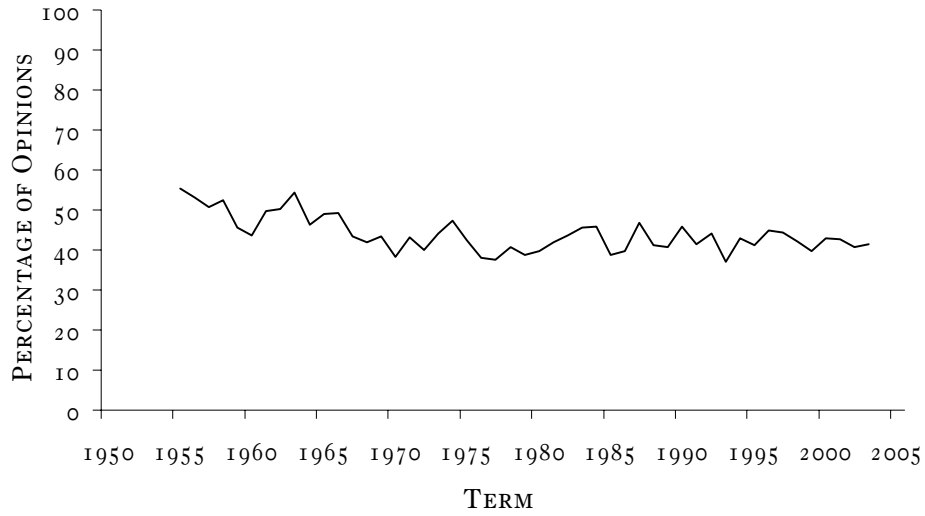


FIGURE 4. NUMBER OF SEPARATE SUPREME COURT OPINIONS, BY TERM

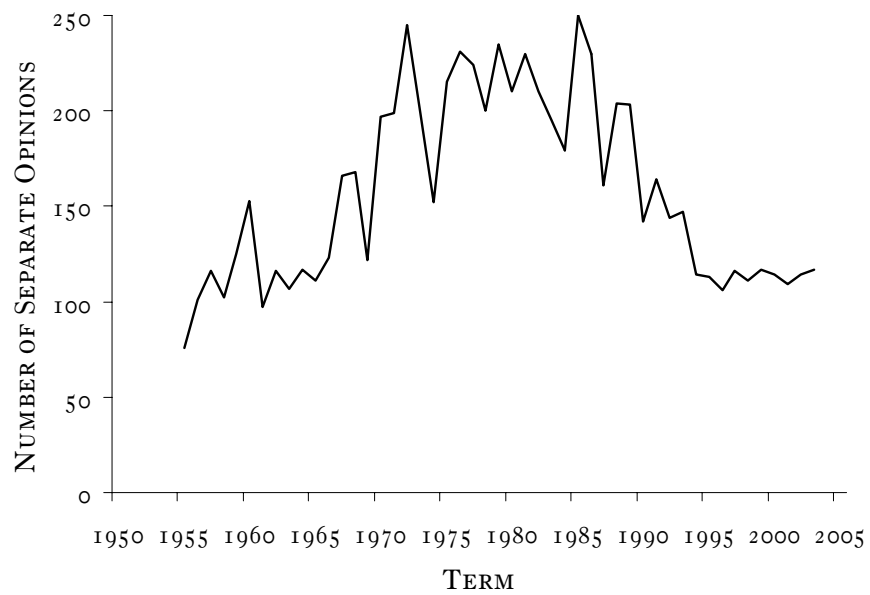


FIGURE 5. TOTAL NUMBER OF SUPREME COURT OPINIONS, BY TERM

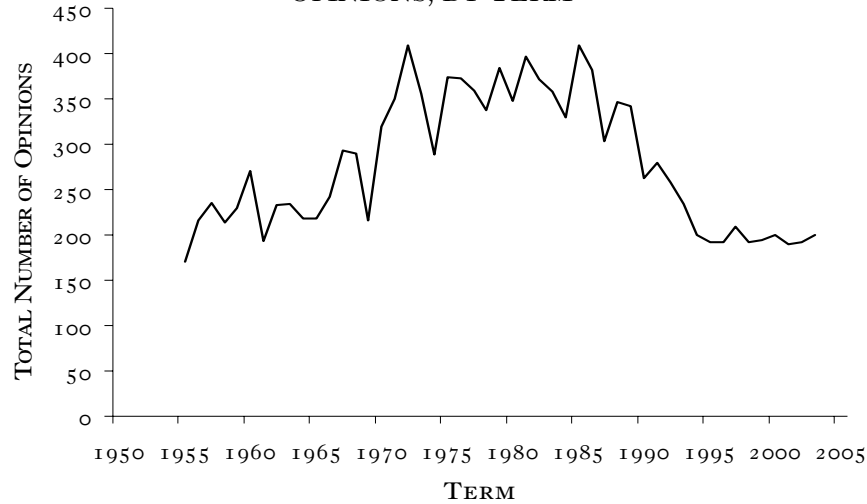
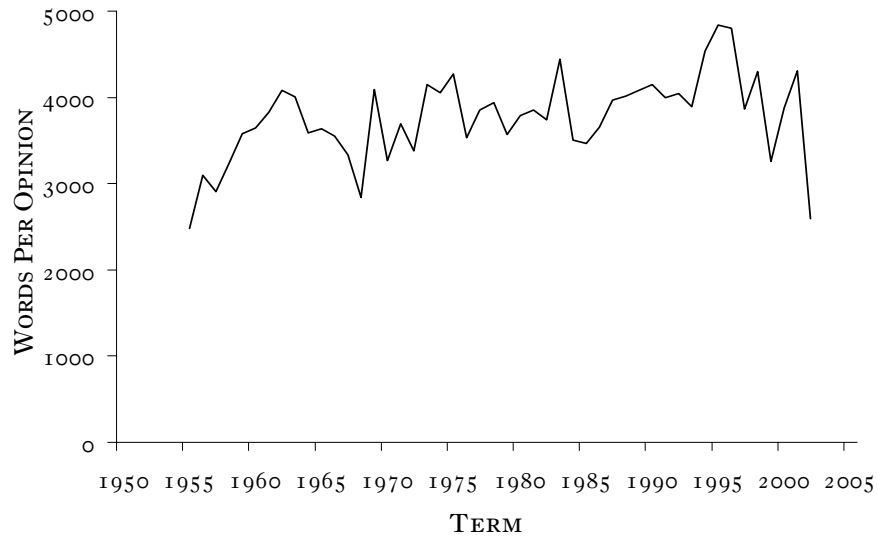
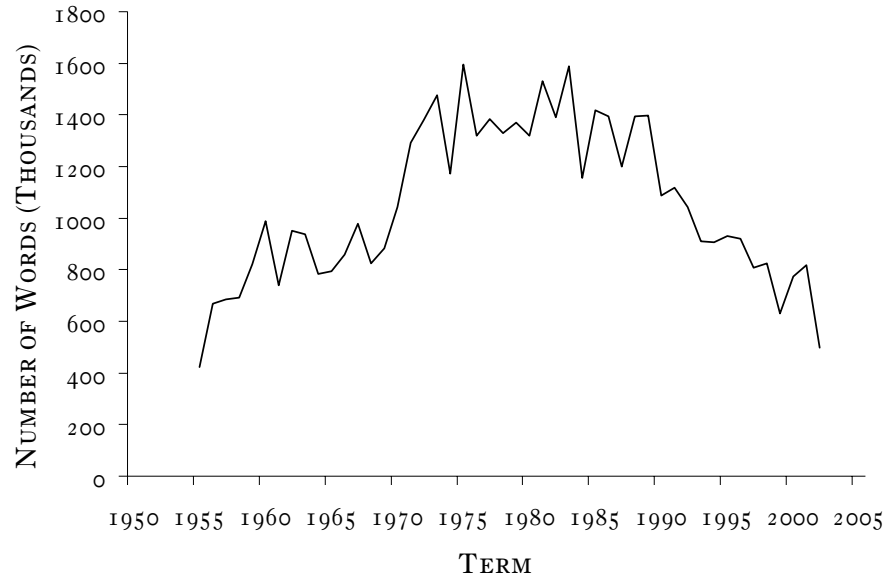


FIGURE 6. AVERAGE LENGTH OF SUPREME COURT OPINIONS, BY TERM<sup>116</sup>



<sup>116</sup> For figures 6 and 7, I assumed an average of 362 words per page in the U.S. Reports from 1955 to 2002. This average is based on data gathered from a random sample of cases from 1955 to 2002 (selecting three cases each from Terms at five-year intervals). To calculate the total number of words per Term, I multiplied the number of pages in each U.S. Report (excluding orders) by the 362 words-per-page average. Dividing the total number of words per Term by the number of opinions in each Term yielded the average number of words per opinion for each Term.

FIGURE 7. TOTAL WORD OUTPUT OF THE SUPREME COURT, BY TERM



*Why* the Supreme Court's caseload has declined is a mystery. The Court's mandatory jurisdiction has, it is true, been greatly curtailed by Congress; the Court used to hear appeals that it would not have heard had they been petitions for certiorari — which is why that jurisdiction was curtailed. Yet apparently this has not been a major factor in the caseload decline,<sup>117</sup> because prior to Congress's action the Court had "taken it upon itself to rewrite the statute and to treat most appeals as the equivalent of petitions for certiorari, subject only to discretionary review."<sup>118</sup> Anyway, the Court might have taken up any slack created by the curtailment of its mandatory jurisdiction by accepting more cases for review, important cases for which it had not had time when it was burdened by the mandatory jurisdiction.

It did not do so. One reason may be that the lower courts — perhaps because of the Court's penchant for laying down rules and standards explicitly designed to guide the lower courts, or perhaps because of a growing professionalism in those courts as a result of more numerous and experienced clerks, the rise of computerized research, and more careful screening of candidates for lower-court judgeships — stray less frequently from the Court's directives. And here we may

<sup>117</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751–58 (2001); Hellman, *supra* note 14, 410–12.

<sup>118</sup> Erwin N. Griswold, *Rationing Justice — The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 346 (1975).



find the silver lining in the increased senatorial scrutiny that candidates for appointment to the federal Courts of Appeals have been receiving ever since it became clear in the early 1980s that President Reagan was using these appointments to try to change the ideological profile of the courts. The scrutiny is largely political in motivation and character, and as a result tends to exclude candidates who are in either tail of the political distribution. So the Courts of Appeals are more centrist than they used to be, and the more centrist they are, the fewer intercircuit conflicts they produce for the Supreme Court to resolve and the fewer wild departures for the Court to rein in.

Another cause of the decline in the number of decisions by the Supreme Court may be changes in its membership.<sup>119</sup> The Court's discretionary jurisdiction is just that — discretionary. There are no rules. One therefore expects an individual Justice's exercise of jurisdiction to be individual or, less politely, idiosyncratic. Notice that the drop in the number of decisions in the early 1990s (Figure 2) coincides with a change in the Court's membership and that the subsequent leveling off coincides with the period of unchanged membership that lasted until the death of Chief Justice Rehnquist in 2005. One potential reason for this trajectory is the background of the recent Justices, almost all of whom have been veterans of the lower federal courts and are therefore presumably more attuned to the harm that is caused by the Court's mistakes than Justices of different backgrounds would be; the current Justices had to live with those mistakes when they were lower court judges. The Court's mistakes are a great deal more harmful than those of the lower courts because of the greater scope and finality of Supreme Court decisions. One way for the Court to minimize its mistakes is to be extremely cautious in the selection of cases to accept for review, and so, although the decline in the number of cases the Court decides is sometimes deplored,<sup>120</sup> it may actually be a good thing.

But whatever the explanation or explanations, the decline provides a test of Hart's workload hypothesis — and does not support it. No one knows whether the Justices' lighter workload, compared for example to their much heavier workload in the 1980s, has led to better decisions. The decisions *may* be better, either because of an increase in the average quality of the Justices or the increase in the number and quality of law clerks — the opinions are on average more polished, more “professional” in appearance, than in days of yore — but not because the Justices have been conferring more. By all reports, they

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<sup>119</sup> See Cordray & Cordray, *supra* note 117, at 776–90; see also Hellman, *supra* note 14, at 429–31.

<sup>120</sup> See, e.g., Lacovara, *supra* note 114, at 53 (“[T]his is a shockingly low performance record. . . . [T]axpayers, lawyers, and litigants may fairly ask: ‘What are the justices doing with all the resources given to them?’”).

have been conferring less because Chief Justice Rehnquist ran a crisper conference than his predecessor, Warren Burger. And we know that the lighter workload has not led to fewer separate opinions (Figure 4), as one might expect to result from the Justices' having more time to iron out their differences. There are diminishing returns from effort, and probably even in Hart's time the point had been reached at which further judicial effort per case would have yielded few benefits.

A Hart sympathizer might reply that all he meant was that if the Justices deliberated more they would produce better opinions, not that they would deliberate more if they had the time. But that is not the thrust of his Foreword. The thrust is that if only the Justices would stop granting certiorari in trivial cases, such as Federal Employers' Liability Act cases in which the only question was whether the plaintiff's evidence of the defendant's negligence was strong enough to go to a jury, the Justices would deliberate more. What was wanting, he seems to have thought, was not the will but the time.

That was wrong; but Hart's more interesting error was to think that dramatic improvements in the quality of judicial decision making would ensue if only the Justices talked out their differences at greater length. Hart was confused not only about the character of constitutional disputes, but also about the very nature of reasoning. This is apparent in the famous purple passage in his Foreword in which he said:

[T]he Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law . . .<sup>121</sup>

In everyday usage, the "voice of reason" means a reasonable response to a situation — calm, impartial, and practical, but unconnected with "principles." Drawing from a more technical vocabulary, we might speak of problem solving — that is, of reasoning from common premises — as "instrumental reason." Hart seems to have thought that "reason" in either of these senses (which he may not have distinguished in his own mind) would bring about convergence on constitutional doctrine if only the Justices would take the time to argue out their differences.

Hart's is a seminar model of the appellate process that comes naturally to academics. It is no accident that his claim that the Justices were not spending enough time in discussion echoed similar complaints by Justice Frankfurter and before him by Justice Brandeis.<sup>122</sup>

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<sup>121</sup> Hart, *supra* note 11, at 99.

<sup>122</sup> See Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946–O.T. 1961*, 1980 SUP. CT. REV. 143.

All three were brilliant, articulate intellectuals; two were distinguished professors. It is a source of frustration to brilliant people to be unable to persuade their intellectual inferiors, and a natural reaction is to seek more time to persuade, knowing they can out-argue their duller colleagues. What they may not realize is that reasoned argument is ineffectual when the arguers do not share common premises and — what turns out to be related — that people do not surrender their deep-seated beliefs merely because they cannot match wits with the scoffers. (And thus, as I said, Robert Bork's brilliance did not disarm his opponents.) In such situations the principal effect of arguing is, as Thurman Arnold noted and a subsequent psychological literature confirms,<sup>123</sup> to drive the antagonists further apart — or at least to cause them to dig in their heels and clutch their beliefs closer to their chests.

When premises for decision are shared, instrumental reason can generate conclusions that will convince all participants and observers; and collective deliberation may be extremely valuable in deriving conclusions from common premises. The process is kept honest by empirical verification: the airplane of novel design either flies or it does not. But in most constitutional disputes, consistent with my emphasis on their political character, the disputants are not arguing from common premises. One disputant thinks the public safety more important than the rights of people accused of crime; the other thinks the opposite. One views the actions of the police through the lens of a potential victim of crime, the other through the lens of a person wrongfully accused of crime. One worries about subtle forms of sexual harassment; the other (invariably male) worries about being falsely accused of harassment. One considers affirmative action naked discrimination; the other considers it social justice and political necessity. One considers the banishment of religion from public life a sacrilege and a moral disgrace; the other fears that religion will penetrate and subvert government, turning the United States into a theocracy unless the government has no truck whatsoever with religion; a third fears that entangling religion with government hurts religion. One views abortion from the standpoint of the hapless fetus, the other from the standpoint of a woman forbidden to terminate an unwanted pregnancy. One values the states as laboratories for social experimentation; the other regards state government as provincial and local governments as little better than village tyrannies. One holds James Bradley Thayer's view of judicial review; the other holds Justice Brennan's. The Justices either overlook the social-scientific studies that might narrow some of these gaps or, as we saw in *Roper*, use them tendentiously.

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<sup>123</sup> See, e.g., Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. PERSONALITY & SOC. PSYCHOL. 1141 (1986).

The attitude of Supreme Court Justices toward deliberation is illustrated by Chief Justice Rehnquist's decision, when he first fell seriously ill in the fall of 2004, to participate for a time only in the decision of cases in which his would be the deciding vote. This bespeaks a voting model, not a deliberative model, of Supreme Court adjudication. In a deliberative model, the participation of all members of the Court in every case is important not only because the Justices are assumed in that model to be open to persuasion, but also because each member may be able to contribute to making the opinion (even if it is unanimous) the best that it can be. In a voting model, participation is unimportant if one's vote is not going to be decisive.

Rehnquist, it should be noted, was acting in character. For he had written illuminatingly about the nature of the deliberative process in the Supreme Court — so different from what Hart had imagined (or perhaps pretended to imagine) it to be:

When I first went on the Court, I was both surprised and disappointed at how little interplay there was between the various justices during the process of conferring on a case. Each would state his views, and a junior justice could express agreement or disagreement with views expressed by a justice senior to him earlier in the discussion, but the converse did not apply; a junior justice's views were seldom commented upon, because votes had been already cast up the line. Probably most junior justices before me must have felt as I did, that they had some very significant contributions to make, and were disappointed that they hardly ever seemed to influence anyone because people didn't change their votes in response to their, the junior justices', contrary views. I felt then it would be desirable to have more of a round-table discussion of the matter after each of us had expressed our ideas. Having now sat in conferences for nearly three decades, and having risen from ninth to first in seniority, I realize — with newfound clarity — that my idea as a junior justice, while fine in the abstract, probably would not have contributed much in practice, and at any rate was doomed by the seniority system to which the senior justices naturally adhere.<sup>124</sup>

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... If there were a real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the Court, that would be a strong argument for having that sort of discussion even with its attendant consumption of time. But my years on the Court have convinced me that the true purpose of the conference discussion of argued cases is not to persuade one's colleagues through impassioned advocacy to alter their views, but instead, by hearing each justice express his own views, to determine therefrom the view of the majority of the Court. This is not to say that minds are never changed in conference; they certainly are. But it is very much the exception and not the rule, and

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<sup>124</sup> WILLIAM H. REHNQUIST, *THE SUPREME COURT* 254–55 (2001).

if one gives some thought to the matter, this should come as no surprise.<sup>125</sup>

*B. Institutionally Constrained Justices*

For all the deficiencies of his Foreword, Henry Hart was right that the Justices' institutional "surround" might constrain (rather than, as I have been emphasizing, unconstrain) their judicial performance. Even if the Supreme Court is really just a legislature when it comes to ninety-nine percent of the constitutional cases it decides, the method of selecting Justices, the terms and conditions of their employment, the resulting qualities and attitudes of the Justices, and the methods they use in "legislating" differ from the corresponding conditions and methods of legislators and other nonjudicial officials. The differences may be so great that the product, even if legislative in a sense, so differs from the characteristic product of the official legislatures — is so much more constrained, disciplined, impersonal, reasoned, nonpartisan — as to be "lawlike" in the same sense that the common law, although also legislative rather than interpretive, is lawlike rather than, as I earlier described constitutional law, "lawless." It would be another example of how institutional structure might substitute for clear constitutional text as a means of domesticating the Court's discretionary power. Maybe when all the characteristics of the Court as an institution are considered — especially the fact that the Justices try to justify their decisions in reasoned opinions, which, even when they are advocacy products largely drafted by law clerks wet behind the ears, reflect a degree of deliberation and a commitment to minimal coherence that are not expected of legislative bodies — we will conclude that the Justices' discretion is really rather narrowly penned. Maybe Hart's only mistake was to focus too narrowly on the effect of caseload on the Justices' deliberative capacity.

A major difference between Justices and (other) legislators, a difference stemming from their different tenure rules, is that Justices are less partisan than elected officials — that is, less emotionally and intellectually tied to a particular political party. Democratic and Republican Justices are much less Democratic and Republican than their counterparts in elected officialdom, often to the chagrin of the appointing Presidents. Appointment to life-tenured positions liberates federal judges at all levels from partisan commitments. Their ingratitude to the Presidents who appointed them is legendary, but from a social standpoint redemptive.

Nonpartisanship, unlike ideological neutrality, is an attainable ideal; indeed, it is the nearly automatic consequence of the Justices'

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<sup>125</sup> *Id.* at 258.

not having to stand for election or kowtow to politicians. It may be only a halting first step toward objectivity, but it is the cornerstone of a realistic conception of the “rule of law” — a concept, a practice, of enormous social value. In its most extravagant formulations, the sort one encounters in “Law Day” celebrations, the rule of law signifies government by legal rules rather than by individuals wielding discretionary power. The judges are just the medium through which law speaks — they are the oracles of the law, in Blackstone’s phrase. But if you trace the idea of the rule of law back to its origin in Aristotle’s concept of corrective justice, what you find is a modest but invaluable — and in favorable conditions realistic — expectation that in deciding a case the judge will set to one side the personal characteristics of the litigants. Justice is blindfolded in this way in order to prevent judges from being swayed by the politics, personalities, connections, etc., of the litigants — for law administered by judges swayed in those ways does not provide an adequate framework for an orderly and prosperous society.<sup>126</sup>

In a legal system as inherently undisciplined as ours, with its legally enforceable eighteenth-century Constitution, its layering of federal on top of state law, its effectively tricameral federal legislature (tricameral because of the President’s veto power), its weak political parties, and its lack of career judiciaries — a legal system embedded, moreover, in a society as individualistic as ours (Justices no more than other Americans can be expected to be content to be wallflowers) — a more ambitious conception of the rule of law would be quixotic. For we must not confuse “nonpartisan” with “nonpolitical.” One can be the former without being the latter — or even be the latter without being the former, for there are people whose identification with a political party is unrelated to a political preference, being a matter of family tradition or personal friendships rather than of political conviction.

“Nonpartisan politician” is thus not an oxymoron. With political parties in a two-party system being coalitions and as a result lacking intellectual coherence, Supreme Court Justices are in a position to forge for themselves a coherent, party-independent political identity. They still are political, but they are more detached and thoughtful than the “official” politicians. But if so, then maybe — this is the implicit view of many constitutional scholars, and of some Justices as well — Justices are better legislators than the members of Congress and of the state legislatures and would be better still if the institutional setting could be made more conducive to deliberation. (There is an

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<sup>126</sup> For this interpretation of corrective justice, see RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 284–85 (2003). For Aristotle’s formulation, see ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, ch. 4.

echo of Hart.) However, this position is difficult to defend convincingly because of the many differences between judges and conventional legislators that cut against the thesis of judicial superiority. The Justices are not as representative of the public as elected officials are, they lack easy access to much of the information that those officials obtain routinely in the course of their work, and as lawyers they have professional biases and prejudices that can distort their legislative judgments. Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring exaggerated opinions of their ability and character. They are privileged, sheltered, and, most of them, quite wealthy. They do not rub shoulders with *hoi polloi*. In a democratic society, and one moreover of considerable complexity, it is difficult to justify giving a committee of lawyer-aristocrats the power not just to find or apply the law and make up enough law to fill in the many gaps in the law that is given to them, but also to create law — to create it, moreover, in a form — constitutional “interpretation” — that makes mistakes exceedingly difficult to correct because of the difficulty of amending the Constitution, even when those mistakes are usurpative in the sense of stemming from assertions of a governing power that has not been given to the Court but rather has been taken by it. It is difficult to see what institutional improvements should make us comfortable with allowing the Supreme Court to seize and exercise such power.

A great weakness of the Court as a legislative body is that it does not have its hands on enough of the levers of power to effectuate its grand designs.<sup>127</sup> (This could of course be thought its saving grace — that the Court is mischievous rather than prepotent.) The Court was able to eliminate the stigma of officially segregated schools, but it was unable to eliminate the segregation itself. It could create new procedural rights for criminal defendants — a major project of the Court in the 1960s — but legislatures could and did offset the effect by increasing the severity of criminal sentences. Maybe fewer innocent people were convicted, but those who were served longer sentences,<sup>128</sup> so the total misery of the wrongfully convicted was probably not lessened. The Court altered the structure of state legislatures by requiring that seats in both the lower and the upper houses of every state legislature

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<sup>127</sup> On the limited consequence of the Supreme Court’s constitutional decisions generally, see ROSENBERG, *supra* note 10, and sources cited *supra* note 9.

<sup>128</sup> In the 1960s, the average criminal sentence in federal district courts was 34.4 months; the average rose to 40.4 months in the 1970s and to 59.6 months for the period between 1994 and 2003. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 2003, at tbl.5.23, <http://www.albany.edu/sourcebook> (last visited Oct. 9, 2005).

be apportioned by population,<sup>129</sup> but there appears to have been no effect on the actual content of legislation.<sup>130</sup> The Court created a right to abortion, but in states where abortion is unpopular a variety of legal and extralegal pressures continue, thirty years later, to deny many women access to abortion;<sup>131</sup> as a result, the Court's actual impact on the abortion rate, while doubtless positive,<sup>132</sup> may be much less than either the fans or the foes of *Roe v. Wade*<sup>133</sup> believe. Congress's response to *Booker* is likely to be, as I remarked earlier, a spate of increased mandatory minimum sentencing laws of unquestioned constitutionality.

So the case for the Court as a "good" superlegislature — so good as to be qualitatively distinct from the official legislatures, and, besides, as "lawlike" as a common law court — fails, together with the related idea of the Court as the perfection of the administrative process, of Weberian bureaucratic rationality. But this does not make the question of what I am calling the institutional surround — the question that Hart raised in his Foreword and that Justice Frankfurter and James Landis had discussed years earlier in articles that presaged the Forewords<sup>134</sup> — less interesting. As I said earlier, the Court now produces more polished opinions, but is this a sign that the Court is a less "lawless" institution, or is it just better packaging? And better packag-

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<sup>129</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

<sup>130</sup> See Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433, 434 (2004) ("Surprisingly, a broad shift in public policy in the states cannot be traced to reapportionment . . ."); see also William H. Riker, *Democracy and Representation: A Reconciliation of Ball v. James and Reynolds v. Sims*, 1 SUP. CT. ECON. REV. 39, 41–55 (1982).

<sup>131</sup> For examples of legislation that restricts access to abortion, see Julia Lichtman, Note, *Restrictive State Abortion Laws: Today's Most Powerful Conscience Clause*, 10 GEO. J. ON POVERTY L. & POL'Y 345, 348–51 (2003); and Jennifer Templeton Schirmer, Note, *Physician Assistant as Abortion Provider: Lessons from Vermont, New York, and Montana*, 49 HASTINGS L.J. 253, 264 (1997). A study in 2000 found that 94% of counties in the Midwest and 91% in the South had no abortion provider and that 34% of all women live in counties that do not have one. See Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH, Jan.–Feb. 2003, at 6, 10 tbl.3. The authors attribute this dearth in part to regulatory restrictions and in part to extralegal harassment. See *id.* at 13–14.

<sup>132</sup> The evidence is indirect. John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379, 386–89 (2001), presents statistical evidence that legalization of abortion lowered crime rates by reducing the population of unwanted children, who when they grow up are likely to have an above-average incidence of criminal conduct. This finding implies that legalization did in fact increase the number of abortions.

<sup>133</sup> 410 U.S. 113 (1973).

<sup>134</sup> Felix Frankfurter & James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System* (pt. I), 38 HARV. L. REV. 1005 (1925); Frankfurter, *id.* (pts. II–V), 39 HARV. L. REV. 35, 325, 587, 1046 (1926); Frankfurter & Landis, *id.* (pts. VI–VIII), 40 HARV. L. REV. 431, 834, 1110 (1927).



ing could be dangerous — could enable the Justices to get away with being more aggressive than if they didn't hide the ball as skillfully.

One would like to think that more than a higher sheen has resulted from the dramatic increase in the quantity and quality of inputs into Supreme Court decisions (more and better clerks, etc.). From a private-sector standpoint, at least, it would be remarkable if increasing the quality-adjusted inputs into a production process was associated with a decline in quality-adjusted output. If the Court's output has not increased, this confirms the fear of "small government" conservatives that giving government more resources produces no social benefits, just waste. However that may be, we have seen that the unwillingness of the modern Court to hear more than a handful of cases may be prudent, though it has limited the Court's ability to control the development of federal law. It has had another effect, which casts an oblique light on the Court's constitutional decisions. With many areas of federal law becoming ever more complicated, the number of non-constitutional cases that the Court decides has become too small to enable the Justices to become or remain experts in these bodies of law. There may be a tipping phenomenon in the offing: the more constitutional cases the Justices decide relative to tax, pension, antitrust, securities, immigration, patent, copyright, communications, and other federal statutory cases, the more constitutional cases they will want to hear, because they will be increasingly comfortable with the former and increasingly uncomfortable with the latter. And the Justices decide what they will hear.

Furthermore, the more that constitutional law dominates the Court's docket, the more that appointments to the Court focus on the candidate's likely position in constitutional cases rather than on competence in business law and other statutory fields. Of the current Justices, only one, Justice Breyer, has displayed any real feel for such fields,<sup>135</sup> though Chief Justice Roberts is likely to make a second.

Yet the Justices would be reluctant to relinquish their nonconstitutional jurisdiction (a jurisdiction mainly statutory — the Court decides few common law cases, though there often are common law pockets in statutes) to a nonconstitutional supreme court. Nonconstitutional cases provide protective coloration. Not because there aren't plenty of indeterminate statutory cases, especially in the sample that reaches the Supreme Court, but because no one doubts that a court is "doing law" when it is deciding statutory cases. Since the style of the Court's constitutional opinions is similar to that of its statutory opinions, the impression is created that even when deciding constitutional cases the Justices are doing law, and hence that the Supreme Court really is just

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<sup>135</sup> See Stuart Taylor Jr., *Remote Control*, ATLANTIC MONTHLY, Sept. 2005, at 37, 38.

another court, doing what normal courts do. Thus, paradoxically, the Court's aggressiveness in constitutional decision making retards the emergence of the dual system found in so many other countries, in which there is a supreme court for nonconstitutional cases and a supreme court limited to constitutional cases.<sup>136</sup> If you have a court that decides just constitutional cases, and if the constitution is as open-ended as ours is, you can hardly fool the public into thinking that the court is not making political judgments. Not that foreign constitutional courts are unaggressive; but, as we shall see, it is aggression with a soft bite.

Still on the subject of the Supreme Court's institutional, as distinct from substantive, characteristics, it is fascinating to speculate on the possible consequences of the increased length of service of the average Supreme Court Justice,<sup>137</sup> a product of increased longevity and what seems the increasing desire of presidents to project their influence as far beyond the end of their term of office as possible by appointing young Justices.<sup>138</sup> One consequence is to make the Court more predictable because there is less turnover (this may be a factor in the Court's reduced workload — the lower courts have a better idea of how the Court would be likely to react to a given decision), and of course more experienced; another, however, is to make it more oligarchic. The less frequently Supreme Court Justices turn over, the less representative is the Court as an institution — and also the greater are the stakes in each appointment, and hence the more bitter and protracted the confirmation battles are likely to be.

We can gain additional insight into the tenure issue from the growing literature on constitutional courts in other countries — a literature that is growing in part because the number and activity of such courts are growing, a development that helps to explain the growing propensity of our Supreme Court Justices to cite foreign decisions (see section III.D). John Ferejohn and Pasquale Pasquino argue that the limited, nonrenewable terms (usually ten or twelve years) of the judges of these constitutional courts are one of the reasons that such courts are less

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<sup>136</sup> Constitutional courts are the norm in Europe. See Victor Ferreres Comella, *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, 82 TEX. L. REV. 1705, 1705 & n.2 (2003) (seventeen of the twenty-five countries in the European Union have constitutional courts); Herman Schwartz, *Eastern Europe's Constitutional Courts*, J. DEMOCRACY, Oct. 1998, at 100 (constitutional courts in Eastern Europe). They are found in other parts of the world as well. See, e.g., Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 108 & n.424 (2003). But I have not been able to find any systematic evidence concerning their performance.

<sup>137</sup> See generally Steven G. Calabresi & James Lindgren, *Supreme Gerontocracy*, WALL ST. J., Apr. 8, 2005, at A12.

<sup>138</sup> There may be a fallacy in such a policy. The younger the judge, the less fixed his views — and the more time he has in which to change them.

controversial than our Supreme Court, despite lacking the protective coloration that our Court has obtained from having a nonconstitutional jurisdiction as well as its constitutional one.<sup>139</sup> Shorter terms mean that judicial appointments are less consequential and therefore attract less attention.<sup>140</sup> More important, these courts operate without oral arguments, signed opinions, or published dissents, and as a result there is much less opportunity for the judges to play to the gallery, as our Justices do.<sup>141</sup> Our gallery, however, is the court of public opinion, and its participation in constitutional controversies injects a democratic element into constitutional adjudication.

### C. *The Court as Moral Vanguard*

At the opposite extreme from Hart's technocratic conception of the Supreme Court, and his consequent fascination with the conditions under which the Justices work (a fascination I share without sharing Hart's optimism that a change in the Court's working conditions would significantly improve the Court's performance), is the idea of the Court as a moral vanguard. The examination of this idea might not seem to belong in a discussion of *alternatives* to the conception of the Court as a political court; the idea might seem the very quintessence of a political approach. But the proponents do not conceive of it in that way. Believers in natural law as the source or limit of positive law do not think that they are politicizing law. No more did Alexander Bickel, in his influential Foreword, published just two years after Hart's, in which Bickel cast the Court in the role of a secular Moses that would lead the American people out of their moral wilderness.<sup>142</sup>

Like Hart, Bickel was much taken with "principles." "Principles" in the sense in which both of them, following Herbert Wechsler,<sup>143</sup> used the term echoes the Aristotelian origins of the idea of the rule of law and some of its modern derivatives, such as the notion of equal protection of the laws and the related notion that legislation should be general and prospective. For one way to try to prevent judges from picking and choosing among litigants on inappropriate grounds is to require that legal rules be general in their application rather than pinpointed on unpopular individuals or groups. This does not tell us what the *content* of the rules should be. Reading Bickel's Foreword,

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<sup>139</sup> See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 TEX. L. REV. 1671, 1702 (2004).

<sup>140</sup> See *id.*

<sup>141</sup> See *id.* at 1692–1700.

<sup>142</sup> See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77 (1961).

<sup>143</sup> Wechsler, *supra* note 41, at 15–20. Wechsler's article appears in the same issue of the *Harvard Law Review* as Hart's Foreword.

one realizes that he had definite ideas about where the public policy of the United States should be moving and that these ideas were his “principles.”

They were political ideas. And he realized that the Supreme Court had to move carefully in imposing political ideas on the nation because other institutions would fight back. Guido Calabresi’s Foreword,<sup>144</sup> and other writing both judicial and academic that Calabresi has done since, are in the spirit of Bickel’s work, as Calabresi acknowledges.<sup>145</sup> For Bickel and Calabresi, the Supreme Court is not (quite) political (it is “principled”), but it is in a tense political competition with the elective institutions.

There is an air of condescension in Bickel’s Foreword: the Court has an “educational function,” which it performs by “engag[ing] in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise.”<sup>146</sup> It is apparent in this account who is Socrates and who are Socrates’s stooges; who is the law professor and who are the law students. As in Hart’s Foreword, there are many admiring references to Justice Frankfurter, the only professor on the Supreme Court at the time.

The sense of substantive direction, what we might call the teleological mode, is missing from the school of Hart — Hart the Progressive, the technocrat (it is never very clear what substantive principles he embraces). Bickel’s project, though clothed in reference to principles, is transparently political. He wants to make the United States more civilized by his lights but realizes that the Court, given the limitations on its powers, can succeed in such an aim only if it is politically adroit. This requires avoiding giving “bad” legislation that the Court does not yet dare to condemn the imprimatur of constitutionality (the Court should exercise its discretionary power to refuse to hear the case), which the ignorant laity would treat as an endorsement, and instead engaging legislatures in a coercive “dialogue.”<sup>147</sup> (So here is an echo of Hart’s faith in deliberation, but a weak one, because of the one-sidedness of Bickelian dialogue.) Bad state legislation should if possible be invalidated, but on narrow grounds that give the states the illusion that if they did a better job of articulating the concerns underlying the legislation, or at least expressed their desire for the legislation

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<sup>144</sup> Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–08 (1991).

<sup>145</sup> See, e.g., *Quill v. Vacco*, 80 F.3d 716, 738–43 (2d Cir. 1996) (Calabresi, J., concurring in the result), *rev’d*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring).

<sup>146</sup> Bickel, *supra* note 142, at 50; see also *id.* at 64.

<sup>147</sup> See *id.* at 47–58.

more forcefully, it might survive.<sup>148</sup> But it would be a Bickelian Court's hope that the legislators would have their eyes opened by the Court's tutorial or that reenactment would founder on the inertial difficulty of enacting legislation.

Bickel discusses at length the Connecticut birth-control statute later invalidated in the *Griswold* decision.<sup>149</sup> He is mindful that nothing in the Constitution or in the Court's decisions seemed to bear on such a statute, family and sex law having long been thought prerogatives of the states. But he does not want the Court to affirm the constitutionality of — and thus give a boost to — such a bad statute and so he recommends that the Court invalidate it on the narrow ground that because it is not enforced it should be deemed abandoned.<sup>150</sup> Such a ruling would allow the state to reenact it. But because it is much more difficult to pass a statute than just to leave it unenforced on the books, probably the statute would not be reenacted and so Bickel's goal would be achieved without a confrontation with the state over the power to regulate contraception.

The “moral vanguard” school exemplified by Bickel (who actually refers approvingly to “the Court's function of defining the moral goals of government”<sup>151</sup>), although it uses all the tricks of the lawyerly trade to work its will, implicitly conceives of the Supreme Court as a free-wheeling legislative body, only a more enlightened one than the government bodies formally classified as legislatures — in fact, a legislature that has a bully pulpit from which, not being tongue-tied by partisan commitments, it can preach in clarion terms to the people. Being more enlightened, however, it has to bring the elected officials and public opinion along with it by subtle maneuvers:

[T]he resources of rhetoric and the techniques of avoidance enable the Court to exert immense influence. It can explain the principle that is in play and praise it; it can guard its integrity. The Court can require the countervailing necessity to be affirmed by a responsible political decision, squarely faced and made with awareness of the principle on which it impinges. The Court can even, possibly, . . . require a second decision.<sup>152</sup>

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<sup>148</sup> See *id.* at 58–64.

<sup>149</sup> See *id.*

<sup>150</sup> Noting the state's tepid enforcement of the birth control statute, Bickel suggests:

A device to turn the thrust of forces favoring and opposing the present objectives of the statute toward the legislature, where the power of at least initial decision properly belongs in our system, was available to the Court, and it is implicit in the prevailing opinion [in *Poe v. Ullman*, 367 U.S. 497 (1961)]. It is the concept of desuetude.

Bickel, *supra* note 142, at 61. But in *Griswold* the Court invalidated the Connecticut statute not on grounds of desuetude, but as an infringement of a constitutional right of privacy (an Aesopian term meaning sexual freedom). See 381 U.S. 479, 485–86 (1965). Actually the statute *was* enforced, though only against birth control clinics. POSNER, *supra* note 81, at 325–26.

<sup>151</sup> Bickel, *supra* note 142, at 79.

<sup>152</sup> *Id.* at 77.

The Court is a teacher in a class of slow learners consisting of the people and their elected representatives.

This approach could have led Bickel down some curious paths. He could have argued that the Supreme Court should not have decided *Brown* as it did, that it should have remanded the case to enable the Topeka school district to attempt to prove the physical and psychological equality of its segregated public schools rather than terminating the Court's "Socratic dialogue" over racial equality when it did.

We should mark the family resemblance between Bickel's moral vanguardism, despite its cloak of principles, and the active side of Holmes's "can't help" or "puke" test. Both are delaying games in the sense that if public opinion is very strongly in favor of some policy that the Justices cannot stomach, eventually they will have to give way; the moral vanguard has to stop its march if there is no one following it. But there is an important difference between the two approaches. Bickel thought that the Justices could educate the masses to fall in line with the Justices' superior insights. Holmes harbored no such hopes, which he would have described as illusions, because he was skeptical about the force of moral reasoning.

#### D. *The Cosmopolitan Court*

The leading moral vanguardist on the Supreme Court is Justice Kennedy, but he makes the mistake, which Bickel would not have made, of tipping his hand. He is a kind of judicial Ronald Dworkin, who also will have no truck with disguises: the slogan of both could be — borrowing from the Army's former recruiting slogan "Be All You Can Be" — "Make the Constitution All It Can Be." A newer Army slogan, "An Army of One," could describe Justice Kennedy's Court, given his significance as one of two swing Justices, the other of whom recently announced her retirement.

Justice Kennedy's opinions in *Lawrence v. Texas*<sup>153</sup> (the homosexual sodomy case) and *Roper v. Simmons* make only limited efforts to ground decision in conventional legal materials. They could not do more, operating with nondirective constitutional provisions and in the teeth of adverse precedent. They are startlingly frank appeals to moral principles that a great many Americans either disagree with or think inapplicable to gay rights and juvenile murderers. The most egregious departure from conventionality is the reliance on foreign decisions in the *Roper* case. The legitimacy of such reliance can be debated;<sup>154</sup> the imprudence of it is shown by the surprising antipathy

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<sup>153</sup> 123 S. Ct. 2472 (2003).

<sup>154</sup> For a thorough canvass of the issue, see David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). For penetrating critiques, see Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); James Allan & Grant Huscroft,

that it has provoked<sup>155</sup> — surprising because the citations in judicial opinions rarely receive attention in the lay press.

But I do not think the citation of these foreign decisions is an accident, or that it is unrelated to moral vanguardism. It marks Justice Kennedy (like Professor Dworkin) as a natural lawyer. The basic idea of natural law is that there are universal principles of law that inform — and constrain — positive law. If they are indeed universal, they should be visible in foreign legal systems and so it is “natural” to look to the decisions of foreign courts for evidence of universality.

This means, however, that these foreign decisions are being used as authorities,<sup>156</sup> and there are a number of objections to using them as such, as they were used in *Lawrence* and *Roper*, rather than merely for the information they may contain or because a treaty or a choice-of-law provision in a contract has made foreign law the rule of decision in a particular case. That is, the objections are to counting foreign judicial noses in an effort to determine the existence of a global consensus on an issue. The search for such a consensus is an effort to ground controversial Supreme Court judgments in something more objective than the Justices’ political preferences and thus to make the Court’s political decisions seem less political. Natural law is, in principle, suprapolitical. The problem is that there is pervasive disagreement on its actual content, on how to ascertain it, and on how to resolve disagreements over it. Maybe the answer lies in searching out a global judicial consensus.

One objection to the search is the promiscuous opportunities that relying on foreign decisions opens up. Consider by way of analogy that many American courts do not permit unpublished opinions to be cited to them as precedents because those opinions do not receive as much or as careful attention from the judges as the decisions they publish. Allowing them to be cited as precedents would increase the amount of research that lawyers and judges would have to do but would not create a commensurate benefit in the form of better or clearer law. Yet the judicial systems of the United States are relatively

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*Constitutional Rights Coming Home To Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. (forthcoming Mar. 2006); and Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345 (2005).

<sup>155</sup> See, e.g., Dennis Byrne, *Trampling All Over State Legislatures*, CHI. TRIB., Mar. 7, 2005, at 15; Ed Feulner, *Courting Trouble*, WASH. TIMES, Mar. 16, 2005, at A18; Jonathan Gurwitz, Op-Ed., *If It Pleases the Court, Law by Consensus*, SAN ANTONIO EXPRESS-NEWS, Mar. 13, 2005, at 3H.

<sup>156</sup> Justice O’Connor, in her March 15, 2002, Keynote Address before the Ninety-Sixth Annual Meeting of the American Society of International Law, said that “conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts.” Her address is reprinted in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002).

uniform and their product readily accessible, while the judicial systems of the world are immensely varied and most of their decisions inaccessible as a practical matter to our mostly monolingual judges and law clerks. If foreign decisions are freely citable, any judge wanting a supporting citation has only to troll deeply enough in the world's *corpora juris* to find it. Justice Scalia could turn from denouncing the citation of foreign decisions by his colleagues to casting his own net wide enough to haul in precedents supporting his views on homosexuality, abortion, capital punishment, and the role of religion in public life — for such precedents are abundant in the world's courts.

Another objection to our nascent judicial cosmopolitanism is that foreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices, like other American judges and lawyers, are largely ignorant. To know how much weight to give a decision of the German Constitutional Court in an abortion case, one would want to know such things as how the judges of that court are appointed, how they conceive of their role, and, most important and most elusive, how German attitudes toward abortion have been shaped by peculiarities of German history, notably the abortion jurisprudence of the Weimar Republic, thought to have set the stage for Nazi Germany's program of involuntary euthanasia.<sup>157</sup> Similarly, the European rejection of the death penalty probably is related to its past overuse by European nations and also to the less democratic cast of European politics, as a result of which elite opinion is more likely to override public opinion than it is in the United States. Public opinion in the United Kingdom, as in the United States, strongly favors the death penalty,<sup>158</sup> despite which Parliament repealed it and cannot be persuaded to reconsider.

To cite foreign decisions as precedents is indeed to flirt with the idea of universal natural law, or, what amounts to almost the same thing, to suppose fantastically that the world's judges constitute a single, elite community of wisdom and conscience. That is the position the Justices are gesturing toward when they try to justify their citation

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<sup>157</sup> Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109 (2001), discusses the German Constitutional Court's "repeated emphasis," in cases involving abortion, "on the negative example set by Nazi-Germany." *Id.* at 115–16.

<sup>158</sup> A recent Gallup poll reported that 55% of Britons and 64% of Americans support the death penalty. DENNIS WELCH, GALLUP POLL NEWS SERV., SUPPORT FOR THE DEATH PENALTY: U.S., BRITAIN, CANADA (Mar. 16, 2004). Other polls report similar numbers. An informal poll on a British website reported 69% support for reinstating the death penalty in Britain, *see* 2004 Capital Punishment Survey Results, <http://www.richard.clark32.btinternet.co.uk/results.html> (last visited Oct. 9, 2005), and the Death Penalty Information Center reported that 66% of Americans support the death penalty, *see* Facts About the Death Penalty (2005), *available at* <http://www.deathpenaltyinfo.org/FactSheet.pdf>.



of foreign decisions as authorities by invoking a “decent respect to the opinions of mankind,”<sup>159</sup> a phrase in the Declaration of Independence that they have taken out of context and by doing so inverted its meaning.<sup>160</sup> It is the position urged outright in a recent book by a Canadian law professor, David Beatty.<sup>161</sup>

The pitfalls of the position are unwittingly revealed by Professor Beatty’s approving reference to a decision by the Japanese Supreme Court permitting a city government to support a Shinto groundbreaking ceremony for a gymnasium.<sup>162</sup> Beatty remarks that “most people, including those on the city council who voted for the expenditure [by the city, to finance the ceremony], regarded it primarily as a secular ritual dedicated to the safe construction of the gymnasium that lacked a religious meaning of any significance.”<sup>163</sup> And indeed the court dismissed the religious significance of the ceremony in much the same way that an American court would be inclined to dismiss the religious significance of the intonation of “God save the United States and this honorable court” that opens the sessions of my court. Still, it would be remarkable in the American context to authorize public expenditures for religious ceremonies. The groundbreaking ceremony was sponsored by the city’s mayor, subsidized out of city funds, and presided over by four Shinto priests. It lasted forty minutes and involved the use of a Shinto altar and other sacred Shinto objects and the performance of Shinto purification rituals in which the audience participated. Shinto had been the state religion of Japan until the United States occupied the country at the end of World War II and had been intolerant

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<sup>159</sup> See, e.g., *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari).

<sup>160</sup> As one commentator has noted:

The Declaration actually says that “a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.” In other words, America should give reasons for its actions. The Declaration is a public-relations document designed to explain and justify the colonists’ actions. This is the opposite of the spin put on it by internationalist lawyers, who say it shows that we “learn from others.” Rather, the Declaration seeks to teach other nations.

... In 1776, there was no basis in international law for throwing off the rule of a sovereign monarch. Doing so contradicted the dominant opinion of nations, which were themselves monarchies. Had the colonists taken the court’s approach [in *Roper v. Simmons*], they would have said, “Well, everyone else is doing taxation without representation, there must be something to it.”

Eugene Kontorovich, Op-Ed., *The Opinion of Mankind*, N.Y. SUN, July 1, 2005, at 9 (quoting THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)), LEXIS, News Library, Nysun File; see also Eugene Kontorovich, *Disrespecting the “Opinions of Mankind”*: *International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005).

<sup>161</sup> DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

<sup>162</sup> See *Kakunaga v. Sekiguchi*, 31 MINSHŪ 533 (Sup. Ct., July 13, 1977), translated in LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990*, at 478–91 (1996).

<sup>163</sup> BEATTY, *supra* note 161, at 68.

of other religions. Despite this history and the unabashedly religious character of the groundbreaking ceremony, the court ruled that because “the average Japanese has little interest in and consciousness of religion” — with many Japanese believing incongruously in both Shinto and Buddhism, as a consequence of which “[t]heir religious consciousness is somewhat jumbled”<sup>164</sup> — and because Shinto is not a proselytizing religion, “it is unlikely that a Shinto groundbreaking, even when performed by a Shinto priest, would raise the religious consciousness of those attending or of people in general or lead in any way to the encouragement or promotion of Shinto.”<sup>165</sup>

Manifestly the decision depended on details of Japanese culture rather than on “universal” principles that an American court might be thought entitled to draw on. And, needless to say, the U.S. Supreme Court Justices who joined *Roper v. Simmons* and take a hard line against public recognition of religion do not bother to acknowledge decisions of the Japanese Supreme Court. The citation of foreign decisions is opportunistic; in fact, it is a “rhetorical” move in the pejorative sense of the word. Our Justices cite foreign decisions for the same reason that they prefer to quote from a previous decision rather than state a position anew: they are timid about speaking in their own voices lest the mask slip and legal justice be revealed as personal or political justice. Citing foreign decisions is best understood as an effort to mystify the adjudicative process and disguise the political decisions that are the core of the Supreme Court’s constitutional output.

The effort is likely to backfire because of the undemocratic character of relying (or pretending to rely) on foreign decisions to shape American constitutional law. It is no answer that our courts, especially the federal courts (since federal judges are appointed rather than elected), are “undemocratic” institutions, so why should we balk at their citing foreign decisions merely because they are outside the framework of our democratic system? It is imprecise to describe our federal courts as “undemocratic.” Federal judges are appointed and confirmed by elected officials, the President and the members of the Senate respectively, and as a result have at least an attenuated democratic legitimacy; many able lawyers cannot be appointed to judgeships because the people’s elected representatives consider them to be outside the “mainstream.” Judges in foreign countries do not have the slightest democratic legitimacy in a U.S. context. The votes of foreign electorates, the judicial confirmation procedures (if any) in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight

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<sup>164</sup> Imagine an American court making fun of Americans’ religious beliefs!

<sup>165</sup> BEER & ITOH, *supra* note 162, at 483.

with U.S. courts is like subjecting legislation enacted by Congress to review by the United Nations General Assembly. The Supreme Court would not only be making a juridical error, but also acting imprudently, if it asked the American people (as one Justice did in an opinion<sup>166</sup>) to accept that decisions by the Supreme Court of Zimbabwe, one of the world's most disordered nations, should influence decisions by our Supreme Court.

A neglected factor in this debate concerns the ease of nullifying by constitutional amendment any principles created by a foreign constitutional court. The decision of a constitutional court can usually be overruled by a legislative supermajority.<sup>167</sup> Rarely is there anything that corresponds to the biggest hurdle to overruling a constitutional decision of our Supreme Court — the requirement that three-fourths of the states must, after a two-thirds vote in both houses of Congress, ratify a federal constitutional amendment for it to take effect. The easier it is to overrule a constitutional decision by amending the constitution, the less cautious, the less respectful of public opinion and strong disagreement, a constitutional court can afford to be. Just as dogs bark more ferociously when they are behind a fence, judges indulge their personal views more blatantly when they know they don't have the last word. (Think of the uncomfortable position in which Justices Black and Douglas would have found themselves had their dissenting position that obscenity is fully protected by the First Amendment commanded the assent of a majority of the Justices. They would have been flirting with impeachment.) The Bickelian "moral vanguard" role becomes more genuinely Socratic in a good sense when a court has to persuade, and not merely declare. Our Justices are fooled if they think that the audaciously progressive opinions expressed by foreign constitutional judges would be the same if those judges had the power of our Justices.

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<sup>166</sup> See *Knight v. Florida*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari) ("The Supreme Court of Zimbabwe, after surveying holdings of many foreign courts, concluded that delays of five and six years [between imposition and execution of death sentences] were 'inordinate' and constituted 'torture or . . . inhuman or degrading punishment or other such treatment.'" (omission in original) (quoting Catholic Comm'n for Justice & Peace in *Zimb. v. Attorney-Gen.*, 1993 (1) *Zimb. L. Rep.* 242(S), 252, 282) (internal quotation marks omitted)).

<sup>167</sup> Of the forty-seven countries that have a separate constitutional court and for which the requisite data were found, 79% allow a two-thirds vote by the legislature to overrule a decision. See Memorandum from Richard Posner to the Harvard Law Review (Oct. 4, 2005) (on file with the Harvard Law School Library). This figure was calculated mainly from information contained in *VENICE COMM'N, DECISIONS OF CONSTITUTIONAL COURTS AND EQUIVALENT BODIES AND THEIR EXECUTION* (Mar. 9–10, 2001), [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)009-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)009-e.asp). Other countries were added to the list by consulting constitutional texts from websites such as the University of Richmond's Constitution Finder at <http://confinder.richmond.edu>.

Strip *Roper v. Simmons* of its fig leaves — the psychological literature that it misused, the global consensus to which it pointed, the national consensus that it concocted by treating states that have no capital punishment as having decided that juveniles have a special claim not to be executed (the equivalent of saying that these states had decided that octogenarians deserve a special immunity from capital punishment) — and you reveal a naked political judgment.

#### IV. A PRAGMATIC COURT?

Some readers may be thinking that since I am an advocate of a pragmatic approach to law,<sup>168</sup> I must be trying to knock down the rivals of that approach so that it alone will be left standing. But I have not discussed all the rivals (the list is endless), and I do not pretend that the pragmatic approach, which, at least in my version, asks judges to focus on the practical consequences of their decisions,<sup>169</sup> is demonstrably correct as applied to constitutional law. It has certain advantages, but whether they outweigh the concerns that are expressed about it — that it is vague, that it lacks a moral compass, that it asks too much (or too little) of judges, that it is not “law,” that it ignores soft values such as “justice” in its manifold meanings — depends ultimately on the observer’s temperament, prejudices, etc. The pragmatic approach is correct for me, in this era of our constitutional history, and for people who think and feel approximately as I do. But that is as far as I will go to defend the approach. I do not suggest that a pragmatic court is not a political court, but present it rather as a tolerable form of political court — in part because it is likely to take the “modest” approach to political judging that I discussed in section II.B.

Three years ago, in *Zelman v. Simmons-Harris*,<sup>170</sup> the Supreme Court upheld the constitutionality of a voucher system whereby public monies are funneled to private schools,<sup>171</sup> most of which are Catholic parochial schools.<sup>172</sup> To my way of thinking, it was a model pragmatic decision, supported by the fact that there is a great deal of dissatisfaction with public education in this country, that a voucher system would encourage competition in public education and competition would improve education — either directly by driving the worst school administrations from the market or indirectly by stimulating new approaches to education (or both) — and that we would never learn whether a voucher system works if it were declared unconstitutional.

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<sup>168</sup> See, e.g., POSNER, *supra* note 126, at 57–96.

<sup>169</sup> See *id.* at 59–60.

<sup>170</sup> 536 U.S. 639 (2002).

<sup>171</sup> See *id.* at 662–63.

<sup>172</sup> *Id.* at 681 (Thomas, J., concurring).

The last consideration is the decisive one for me, and it is why I am unimpressed by the fear, expressed by opponents of voucher systems, that such systems amount to a massive subsidy to the Catholic Church. Not that I would favor such a subsidy. But should that turn out to be the effect of voucher systems (as is unlikely, since if widely adopted they will stimulate the creation of new secular private schools by providing parents with the wherewithal to bypass public schools in favor of secular as well as religious private schools), there will be time enough to invalidate them; that is the purpose of treating voucher systems as experiments. As Michael Dorf pointed out in his Foreword, Supreme Court Justices are unlikely to develop a taste for social science, and therefore actual social experiments are necessary to generate the data needed for intelligent constitutional rulemaking.<sup>173</sup> Granted, decisions generate reliance and even create interest groups that will defend the decisions; for example, busing as a remedy for school segregation attracted the enthusiastic support of the bus industry. So if vouchers spread like wildfire, the Court might have difficulty putting out the flames. But there is no evidence either that they are spreading rapidly or, as the dissenters feared, that they are fomenting religious strife.

The case illustrates why I sense convergence between the pragmatic approach to constitutional adjudication and judicial modesty. The pragmatist wants to base decisions on consequences — and it is very difficult to determine the consequences of a challenged policy if you squelch it at the outset. The Holmes-Brandeis idea of the states as laboratories for social experimentation is both quintessentially pragmatic (the term that John Dewey, the great pragmatic philosopher, preferred for his philosophy was “experimentalism”<sup>174</sup>) and a fundamental principle of judicial modesty.

But if someone wants to challenge my arguments for the voucher decision — whether on the formalist ground that even indirect financial assistance to parochial schools is an “establishment” of religion according to the best understanding of the Court’s previous decisions, or that the last thing this country needs is more religion (a pragmatic ground, though one that would strain even my broad conception of judicial legitimacy, as no judge would dare to utter it), or that a voucher system will fatally weaken public education and by doing so undermine a variety of civic values (another and less dubious pragmatic ground, because it is something a judge might acknowledge in an opin-

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<sup>173</sup> See Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60–69 (1998).

<sup>174</sup> See, e.g., JOHN DEWEY, “From Absolutism to Experimentalism”: *The Democratic Public and the War Question*, in THE POLITICAL WRITINGS 173 (Debra Morris & Ian Shapiro eds., 1993).

ion) — I have no devastating riposte. Although at least one of the counterarguments has a factual component — the impact of voucher systems on public schools is an empirical issue — there was no way in which the Court could have resolved such a factual dispute.

Now consider, by way of an injuriously unpragmatic decision, the gamey example of *Clinton v. Jones*,<sup>175</sup> the case in which the Supreme Court refused to grant President Clinton immunity from Paula Jones's suit for sexual harassment until his term of office ended.<sup>176</sup> The pragmatic case for the immunity — for what would have amounted to a two-year delay in her doomed lawsuit — seems to me compelling, since it should have been obvious to the Justices that forcing the President to submit to a deposition in a case about his sexual escapades would be political dynamite that would explode and interfere with his ability to perform his duties. Which is indeed what happened. But I cannot say the Court was “wrong” to find no basis in Article II of the Constitution for immunizing the President from suits during his term of office based on acts he committed before he took office. It is, after all, a basic principle of republican government that officials are not above the law; how far to go in compromising that principle in recognition of political reality is a matter of judgment, not of analysis. Not wrong; yet a Court consisting of politically savvy Justices would probably have decided the case the other way, and that would not have been “wrong” either.

*Zelman* (the voucher case) was a good pragmatic decision because it allowed a social experiment, *Jones* a bad one because it disregarded the bad consequences likely to ensue from its decision. In between is last Term's decision in *Kelo v. City of New London*, which upheld the condemnation of private property for use in an urban development project as a “public use,” and thus within the state's eminent domain power, even though the condemned land was to be transferred to the private developers of the project.<sup>177</sup> The only reason the Court gave for thinking that the project might benefit the public, as distinct from the private developers and (new) owners, was that “the area [of the redevelopment project, a waterfront area in downtown New London, Connecticut] was sufficiently distressed to justify a program of economic rejuvenation.”<sup>178</sup> This question-begging justification (“distress”) opened the way to the parade of horrors in Justice O'Connor's dissent,<sup>179</sup> in which we read that “[t]he specter of condemnation hangs

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<sup>175</sup> 520 U.S. 681 (1997).

<sup>176</sup> See *id.* at 684.

<sup>177</sup> See 125 S. Ct. 2655, 2668–69 (2005).

<sup>178</sup> *Id.* at 2665.

<sup>179</sup> See *id.* at 2671–77 (O'Connor, J., dissenting).

over all property.”<sup>180</sup> If “economic rejuvenation” is a public use, what is to prevent a city from condemning the homes of lower-middle-class families and giving them free of charge to multimillionaires, provided it could show that the new owners would be likely to pay enough for various local goods and services, and in property and other local taxes, to offset the expense of compensating the owners of the condemned properties at market value?

The majority and dissenting opinions spar over the original meaning of “public use” and over the correct interpretation of the previous cases in which condemnation of property for the purpose of transferring it to a private entity had been challenged (and in this back-and-forth the majority has the better of the argument). But they do not consider the questions that would most interest a pragmatic judge: What is the reason for eminent domain? Does the New London development plan comport with that reason? And what have been the economic and social consequences of such development projects?

At first glance, the power of eminent domain seems a completely arbitrary method of taxation. When the power is exercised, the condemnor is required to pay only the market value of the condemned property. Ordinarily an owner’s subjective valuation will exceed market value because the property fits his needs or tastes particularly well or because relocation would be costly; otherwise he would probably have sold it. A private purchaser who wanted the property would have to pay a price sufficiently higher than the market value to compensate the owner for the loss of these idiosyncratic, property-specific values. Awareness of such values explains why courts are more likely to deem inadequate a damages remedy for breach of contract, and thus to order specific performance, when the contract is for the sale of land than when it is for the sale of some other type of property. The eminent domain power allows the government to obtain property by paying just its market value and by doing so to extinguish the idiosyncratic values; in effect, they are taxed away to help pay for the acquisition. If the market value of a condemned property is \$100,000 and its total value (including idiosyncratic value) is \$125,000, condemnation enables the government to pay for the property with \$100,000 out of its own coffers and \$25,000 out of the owner’s pocket.

The only justification for this almost random form of taxation is the existence of holdout problems, problems best illustrated — paradoxically — when the power of eminent domain is employed on behalf not of government but of private firms, such as railroads and pipeline

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<sup>180</sup> *Id.* at 2676. Note the echo — could it be deliberate? — of the opening sentence of the *Communist Manifesto*: “A spectre is haunting Europe, the spectre of communism.” KARL MARX & FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* 1 (Monthly Rev. Press 1998) (1848).

companies, that provide services over rights of way. A railroad's ability to operate between two points depends on its acquiring an easement from every one of the intervening landowners; knowing this, each landowner will have an incentive to hold out for a very high price. Eminent domain in these situations is an antimonopoly device.<sup>181</sup>

Holdout problems are not limited to right-of-way situations. They can arise whenever someone wants to assemble a large tract of land that is divided into many individually owned parcels. So one might want to ask whether that was the situation in New London; if not, it would be a good case for placing a limit on the concept of public use. It is hard to tell from the opinions. The City wanted to redevelop a ninety-acre tract adjoining a site on which Pfizer (the world's largest pharmaceutical manufacturer) had decided to build a large research facility.<sup>182</sup> The plaintiffs owned fifteen lots in parts of the tract that were to be either developed for office space, in the hope that Pfizer's proximity would attract other businesses, or used for parking, for retail stores catering to visitors, for facilities ancillary to a nearby marina, or for some combination of these uses.<sup>183</sup> Conceivably, leaving the plaintiffs' fifteen homes in place, scattered throughout these areas and thus creating what the City's brief colorfully called the "spotted leopard" problem,<sup>184</sup> would make it difficult to develop the areas for their intended uses; imagine a parking lot dotted with houses. If so, the plaintiffs did have holdout power that might have justified the use of eminent domain to obtain their property. This is only a possibility, because the holdout issue is mentioned only in passing by the Court.<sup>185</sup> The opinions do not even indicate the size of either the plaintiffs' lots or the two parcels (out of the seven that constituted the ninety-acre tract that was condemned) that contain those lots, although from the briefs one learns that one of the parcels is only 2.4 acres in size and the plaintiffs' lots occupy 0.76 acres in it.<sup>186</sup> That is almost one-third of the total area and might indeed present a holdout problem. However, as I note shortly, and as the Court briefly acknowledged,<sup>187</sup> it is uncertain whether private developers actually need the aid of the eminent domain power to solve holdout problems.

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<sup>181</sup> On the simple economics of eminent domain, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 55-60 (6th ed. 2003); and STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 123-36 (2004).

<sup>182</sup> See *Kelo*, 125 S. Ct. at 2659-60.

<sup>183</sup> See *id.*

<sup>184</sup> See Brief of the Respondents at 48, *Kelo* (No. 04-108), 2005 WL 429976.

<sup>185</sup> See *Kelo*, 125 S. Ct. at 2668 n.24.

<sup>186</sup> Brief of the Respondents, *supra* note 184, at 46-47.

<sup>187</sup> See *Kelo*, 125 S. Ct. at 2668 n.24.



The majority opinion does not acknowledge that whether a change in land use is a good thing is not the same question as whether eminent domain is a proper method of bringing about the change. If a property is worth more in a different use and there is no holdout obstacle to transacting with the existing owner, the market will take care of shifting the property to its more valuable use; there is no need for the government to assist.

The Court's cursory treatment of the holdout issue is surprising because some of the briefs discussed the issue at length, particularly an amicus curiae brief filed by the Cato Institute in support of the plaintiffs.<sup>188</sup> The issue was even touched on at the oral argument.<sup>189</sup> The minimal attention given to the issue supports Justice O'Connor's concern that the decision signifies the abandonment of any limitation on "public use" except that the condemning authority be acting in good faith. Justice Kennedy, who cast the decisive fifth vote, wrote a concurring opinion suggesting a somewhat more demanding standard,<sup>190</sup> but he also joined — and by joining made it — the majority opinion. Here I digress for a moment to note that casting the essential fifth vote for the "majority" opinion while also writing a separate opinion qualifying the Court's opinion is bad practice because it leaves the reader uncertain whether the majority opinion or the concurring opinion should be regarded as the best predictor of how the Court would decide a similar case in the future.<sup>191</sup> Justice Kennedy's action is a further example of the Court's tendency (which I remarked in connection with the *Booker* decision) to disregard the consequences of its decisions for the lower courts that have to apply them. If Kennedy had reservations concerning the majority opinion that he was not willing to swallow, he should have concurred in the judgment only; then the lower court judges and future litigants would know where they stood.

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<sup>188</sup> See Brief of the Cato Institute as Amicus Curiae in Support of Petitioners at 11–30, *Kelo* (No. 04-108), 2004 WL 2802972.

<sup>189</sup> Transcript of Oral Argument at 39–40, *Kelo* (No. 04-108), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/04-108.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-108.pdf).

<sup>190</sup> See *Kelo*, 125 S. Ct. at 2669–71 (Kennedy, J., concurring).

<sup>191</sup> A notorious example is *Branzburg v. Hayes*, 408 U.S. 665 (1972), which rejected the existence of a reporter's constitutional privilege to conceal his sources. See *id.* at 667. Justice Powell, who cast the deciding vote in the 5–4 decision, stated in a concurring opinion that a reporter's "asserted claim of privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710 (Powell, J., concurring). Because the four dissenting Justices would have recognized a more substantial privilege and thus preferred Powell's opinion to that of the Court — one dissent said that "Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future," *id.* at 725 (Stewart, J., dissenting) — some courts thought Powell's opinion should be taken as controlling, even though Justice White's opinion garnered a five-Justice majority. The issue is discussed in *McKevitt v. Pallasch*, 339 F.3d 530, 531–33 (7th Cir. 2003).

Justice O'Connor's dissent would have been stronger had she adopted the arguments in the Cato brief, and her parade of horrors would have been more convincing had she given some examples of actual, as distinct from imagined, abuses of the eminent domain power as exercised in modern urban redevelopment projects. She gave none, but merely — in typical lawyer's fashion — cited a few cases, a brief, and a single study<sup>192</sup> that she made no attempt to evaluate despite its being an advocacy document of questionable objectivity.<sup>193</sup> If this meager documentation signifies that abuse of the eminent domain power actually is infrequent — an inference supported by the sparseness of the references to eminent domain in scholarship on urban redevelopment<sup>194</sup> — then it is hard for a pragmatist to become indignant about municipalities being allowed to continue using the power. Placing limits on the power can be reserved for a case in which it is plain that the power was abused.

Another point that Justice O'Connor failed to make is that private developers who want to assemble a large contiguous parcel of land seem generally able to do so by employing "straw man" purchasers.<sup>195</sup> That it is difficult for government to operate with the requisite secrecy is a bad argument for allowing government to use eminent domain on behalf of private developers; it should let the developers fend for themselves.<sup>196</sup>

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<sup>192</sup> See *Kelo*, 125 S. Ct. at 2676 (O'Connor, J., dissenting). The study, undertaken on behalf of private developers, is a detailed examination of a large number of recent eminent domain proceedings. See DANA BERLINER, PUBLIC POWER, PRIVATE GAIN: A FIVE-YEAR, STATE-BY-STATE REPORT EXAMINING THE ABUSE OF EMINENT DOMAIN (2003), available at [http://www.castlecoalition.org/report/pdf/ED\\_report.pdf](http://www.castlecoalition.org/report/pdf/ED_report.pdf). In many of the cases discussed, the courts rebuffed the attempt to use eminent domain; in others, while the use of eminent domain appears questionable, the report's presentation is one-sided and it is difficult to make a judgment on the reasonableness of the use of the power. The report does not discuss holdout problems.

<sup>193</sup> The study was published by the Institute for Justice, a conservative public interest firm that, according to its website, "litigates to secure economic liberty, school choice, private property rights, freedom of speech and other vital individual liberties and to restore constitutional limits on the power of government." Institute for Justice, Institute Profile: Who We Are, <http://www.ij.org/profile/index.html> (last visited Oct. 9, 2005).

<sup>194</sup> Note, for example, the sparse index references to eminent domain in REVITALIZING URBAN NEIGHBORHOODS 276 (W. Dennis Keating et al. eds., 1996), and the absence of such references in CHARLES C. EUCHNER & STEPHEN J. MCGOVERN, URBAN POLICY RECONSIDERED: DIALOGUES ON THE PROBLEMS AND PROSPECTS OF AMERICAN CITIES 343 (2003). Even literature hostile to urban development projects refers infrequently to eminent domain, focusing instead on issues such as regulatory takings. See, e.g., JAMES V. DELONG, PROPERTY MATTERS: HOW PROPERTY RIGHTS ARE UNDER ASSAULT — AND WHY YOU SHOULD CARE 289, 378 (1997).

<sup>195</sup> See Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence* 15–18 (John M. Olin Ctr. for Law, Econ., and Bus., Harvard Law Sch., Discussion Paper No. 5, 2005).

<sup>196</sup> See *id.*

In a separate dissenting opinion, Justice Thomas recited the negative impact of urban renewal on minorities. But his most recent example — the displacement of residents of the Poletown neighborhood in Detroit to make way for a General Motors plant<sup>197</sup> — was a quarter of a century old. That is not a surprise; the traditional form of urban renewal, which focused primarily on run-down downtown business districts with significant minority populations and relied heavily on eminent domain, was abandoned in the 1970s.<sup>198</sup> Justice Thomas did not mention this history or indicate the contemporary relevance of his concern.

Maybe what really motivated the Court's majority was an understandable reluctance to become involved in the details of urban redevelopment plans. A flat rule against takings in which the land ends up in the hands of private companies would be unsound and was not urged by the dissenters. An amicus curiae brief on behalf of the American Farm Bureau Federation, reinforcing the study on which Justice O'Connor relied, gave a number of examples of what appear to be foolish, wasteful, and exploitive redevelopment plans.<sup>199</sup> It is unclear how representative the examples are, yet it would not be surprising to discover that redevelopment plans are for the most part unholy collusions between the real estate industry and local politicians. But if so, there is little the Supreme Court can do. For the more limitations the Court places on the private development of condemned land, the more active the government itself would become in development. Had the City of New London built office space, parking lots, etc., on land that it had condemned, a challenge based on the "public use" limitation would have been unlikely to succeed — unless the Court confined "public use" to holdout situations and was prepared to try to determine, case by case, whether a genuine holdout situation existed. But this is a thicket the Court is not minded to enter, just as in *Eldred v. Ashcroft*,<sup>200</sup> which upheld the constitutionality of the Sonny Bono Copyright Term Extension Act.<sup>201</sup> Eldred made a powerful argument that extending the term for existing copyrights from life plus fifty years to life plus seventy years, as the Act did, was inconsistent with the purpose of the Constitution's empowering Congress to authorize copyrights only for "limited Times."<sup>202</sup> But the Court rejected the argument, in part at least, I conjecture, because it did not want to embark

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<sup>197</sup> See *Kelo*, 125 S. Ct. at 2687 (Thomas, J., dissenting).

<sup>198</sup> See EUCHNER & MCGOVERN, *supra* note 194, at 98–108.

<sup>199</sup> See Brief Amici Curiae of the Am. Farm Bureau Fed'n et al. in Support of Petitioners at 16–24, *Kelo* (No. 04-108), 2005 WL 2787138.

<sup>200</sup> 537 U.S. 186 (2003).

<sup>201</sup> *Id.* at 194 (upholding 17 U.S.C. §§ 302, 304 (2000 & Supp. II 2002)).

<sup>202</sup> See *id.* at 193 (quoting U.S. CONST. art. I, § 8, cl. 8).

on the project of determining what should be the maximum term for copyright property protection. That would be a morass.

Still another complication unremarked by the Court in *Kelo* is that tightening up the public use requirement, and thus curtailing the government's power to use eminent domain, would increase the expense to the government of acquiring property. And that higher expense, except insofar as it deterred acquisition, would beget higher taxes, which might have as arbitrary an incidence as the taxation of idiosyncratic land values that is brought about by the exercise of the eminent domain power. Along with the possibility that narrowing the concept of public use would induce the government to develop property itself, the unpredictable tax effects of curtailing the eminent domain power illustrate the earlier-remarked difficulty that the Supreme Court has in bringing about durable social change when it does not control the full array of public policy instruments. The Court cannot regulate the taxing power or prevent the government from engaging in real estate development.

Paradoxically, the strong adverse public and legislative reactions to the *Kelo* decision<sup>203</sup> are evidence of its pragmatic soundness. When the Court declines to invalidate an unpopular government power, it tosses the issue back into the democratic arena. The opponents of a broad interpretation of "public use" now know that the Court will not give them the victory they seek. They will have to roll up their sleeves and fight the battle in Congress and state legislatures — where they may well succeed. Property owners and the advocates of property rights are not some helpless, marginalized minority. They have plenty of political muscle, which they are free to use, since there is no constitutional impediment to the government's declining to exercise the full range of powers that the Constitution, as interpreted by the Supreme Court, allows it.

So the result in *Kelo* may be pragmatically defensible, but the Court articulated no pragmatic defense. This is typical, and is the obverse of the meretricious practice of citing foreign decisions as authorities. Pragmatic reasons do not sound very lawlike, whereas citing decisions of a judicial body — any judicial body — sounds quintessentially lawlike in a system, which is the U.S. system, of case law. Moreover, to go beyond the simplest type of pragmatic reason — such as let's keep out of this briar patch — would require the Court to develop a far greater taste for empirical inquiry than it has ever demonstrated. Like most judges, Supreme Court Justices prefer in their opinions to

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<sup>203</sup> See Timothy Egan, *Ruling Sets Off Tug of War over Private Property*, N.Y. TIMES, July 30, 2005, at A1; Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1; Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCI. MONITOR, July 6, 2005, at 1.

remain on the semantic surface of issues, arguing over the meaning of malleable terms such as “public use” or “cruel and unusual punishments” rather than over the consequences of adopting one meaning over another. Trying to decide what a term means by staring at it is a form of navel gazing. The Court’s reluctance to grapple with empirical issues, understandable though it is, is an argument for judicial modesty in countermanding the decisions of government bodies that are closer to social reality than the lofty Justices are.

Justice Breyer is generally regarded as the most pragmatic member of the current Supreme Court. Yet he dissented in *Zelman*,<sup>204</sup> joined *Clinton v. Jones* (though with an uneasy concurrence, sensing trouble ahead),<sup>205</sup> is an enthusiastic citer of foreign decisions (but at least he is fluent in French), and joined Justice Stevens’s majority opinion in *Kelo* without writing separately to explore the actual interests at stake. But he redeemed himself in my eyes by his vote and separate opinion in *Van Orden v. Perry*,<sup>206</sup> one of the two Ten Commandments decisions that the Court handed down on the last day of the 2004 Term. In the other one, *McCreary County v. ACLU of Kentucky*,<sup>207</sup> a five-Justice majority including Breyer invalidated the display of the Ten Commandments in a county court.<sup>208</sup> He switched sides in *Van Orden*, thus creating a five-Justice majority to permit a monument inscribed with the Ten Commandments to remain on display on the grounds of the Texas State Capitol. The majority was for the result only, because Justice Breyer did not join Chief Justice Rehnquist’s opinion. There are passages in the Chief Justice’s opinion that I imagine struck rather the wrong note for Breyer, notably the statement that “[r]ecognition of the role of God in our Nation’s heritage has also been reflected in our decisions.”<sup>209</sup> Whether God has actually played a role in the nation’s history is a theological question, the answer to which depends first on whether there is a God and, if so, whether He intervenes in the life of nations. It is odd for the Supreme Court to offer answers to these questions. But perhaps all that the Chief Justice meant by “God” was invocations of God and all that he meant by “heritage” was the national culture.

The Chief Justice was on solid ground in enumerating some of the countless invocations of the Deity in American public life, including many approving references to the Ten Commandments. He inferred that “[t]he inclusion of the Ten Commandments monument” in a var-

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<sup>204</sup> See 536 U.S. 639, 717 (2002) (Breyer, J., dissenting).

<sup>205</sup> See 520 U.S. 681, 710 (1997) (Breyer, J., concurring in the judgment).

<sup>206</sup> 125 S. Ct. 2854 (2005).

<sup>207</sup> 125 S. Ct. 2722 (2005).

<sup>208</sup> See *id.* at 2745.

<sup>209</sup> *Van Orden*, 125 S. Ct. at 2861 (plurality opinion).

ied, one might even say (though with no disrespect intended) motley, assemblage of monuments on the Texas State Capitol grounds — dedicated to everything from “Heroes of the Alamo” (of course) to Texas cowboys, Texas schoolchildren, volunteer firemen, and Confederate soldiers<sup>210</sup> — “has a dual significance, partaking of both religion and government.”<sup>211</sup>

The implication was that a secular purpose can redeem a religious display even if the secular purpose is not paramount, and Justice Breyer was unwilling to go that far. Instead he investigated the history of the Ten Commandments monument. He discovered that it had been donated to Texas by the Fraternal Order of Eagles, a primarily secular organization that “sought to highlight the Commandments’ role in shaping civic morality as part of that organization’s efforts to combat juvenile delinquency.”<sup>212</sup> From this and other facts, including that it had taken forty years for anyone to complain about the state’s sponsoring a religious display, Justice Breyer concluded that the predominant purpose of the monument was to convey a secular message about the historical ideals of Texans.<sup>213</sup>

The reference to the many years without a lawsuit seems at first encounter off-key — it fairly invites the ACLU to sue the minute it learns of any new display of the Ten Commandments on public property. But as Breyer explained, the dearth of complaints “helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive,” whereas “to reach a contrary conclusion . . . might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”<sup>214</sup> In other words, if, as the Justices who dissented in *Van Orden* appear to believe, the Constitution forbids any and all “governmental displays of sacred religious texts,”<sup>215</sup> a decision so holding would trigger an ACLU-led campaign to purge the entire public space of the United States of displays of the Ten Commandments, ubiquitous as they are. It is hard to imagine not only a more divisive, but also a more doctrinaire and even absurd project, faintly echoing as it would the campaigns of Republican Spain and the Soviet Union in the 1930s against the churches of those countries, not to mention the destruction of religious images by the Iconoclasts of eighth-century Byzantium.

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<sup>210</sup> *Id.* at 2858 n.1.

<sup>211</sup> *Id.* at 2864.

<sup>212</sup> *Id.* at 2870 (Breyer, J., concurring in the judgment).

<sup>213</sup> *See id.*

<sup>214</sup> *Id.* at 2871.

<sup>215</sup> *Id.* at 2890 (Stevens, J., dissenting).

What the *Van Orden* dissenters missed is the dual religious-secular character of the Ten Commandments, which resembles the dual religious-secular character of Christmas and renders the invocation of the Ten Commandments innocuous in most settings — though perhaps not, as the Chief Justice’s opinion in *Van Orden* seems to suggest, in all. Christmas is a religious holiday for believing Christians, but it is also a national holiday, and also a secular holiday for children, for all shoppers and retailers, and for most atheists (they are shoppers, and some of them are even children). So salient is the secular dimension that it requires rather a special effort to remind people of the religious significance of Christmas. The Ten Commandments are similarly multifaceted. They are a set of religious commands for believing Christians and Jews, a set of moral imperatives (thou shalt not kill, thou shalt not bear false witness, etc.) as binding on the nonbeliever as on the believer, a literary rendition of moral duties, a Hollywood spectacular,<sup>216</sup> a milestone of Western intellectual history, and to the cynical, a set of clichés and anachronisms (such as do not covet thy neighbor’s cattle) and pathetic overstatements of duties. Most of the Commandments are not explicitly religious, and those that are get the least attention — who has been worrying lately about graven images, or even about taking the Lord’s name in vain? The spirit of Justice Souter’s dissent in *Van Orden* puts one in mind of the Bowdlerizers and the (literal) fig leafers, for it seems that he would permit the display of the Ten Commandments on public property only if they were secularized by having Moses in the company of secular figures such as Plato, Beethoven, or Equity — preferably with the text of the Commandments, like the private parts of a fig-leafed statue, invisible.<sup>217</sup>

Ask someone to name one of the Ten Commandments and he will almost certainly reply: “Thou shalt not kill.” Considering the murder rate in the United States, one might have thought that effacing that Commandment from every public building in America would not be the most sensible exercise of the wide-ranging political power that has been entrusted to the Supreme Court in the guise of deciding cases.

The obvious criticism to make of Justice Breyer’s concurrence is that it does not enunciate a rule that would enable the lower courts and the pro- and anti-Ten Commandments forces to determine easily how far the government can go in the display of the Commandments

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<sup>216</sup> Earnings from the Cecil B. DeMille movie *The Ten Commandments* helped to finance the Eagles’s project, which DeMille personally encouraged, of placing Ten Commandments monuments throughout the United States. See *Supreme Court Issues Rulings on Ten Commandments Cases*, TEN COMMANDMENTS NEWS, June 15, 2005, [http://10commandments.biz/biz/newsletter/2005/june/supreme\\_court\\_ten\\_commandments.php](http://10commandments.biz/biz/newsletter/2005/june/supreme_court_ten_commandments.php). When it comes to Establishment Clause issues, the taint of commerce is the saving grace for religion.

<sup>217</sup> See 125 S. Ct. at 2894 & n.4 (Souter, J., dissenting).

on public property. But that is not a good criticism once the political character of constitutional adjudication is acknowledged. Compromise is the essence of democratic politics and hence a sensible approach to dealing with indeterminate legal questions charged with political passion — this is Bickelian prudence minus Bickelian teleology. To describe the display of the Ten Commandments as an “establishment” of religion is far-fetched from the standpoint of the text or original meaning of the Establishment Clause; on its face and in light of its history, the clause is simply a prohibition against Congress’s creating an established church, like the Church of England. To get from there to forbidding the State of Texas to display the Ten Commandments on its capitol grounds in company with the Heroes of the Alamo, or even the State of Kentucky to display them in a courthouse, requires a complicated chain of reasoning with too many arbitrary links to convince doubters. In these circumstances, to give a complete victory to the secular side of the debate (or for that matter to the religious side) could be thought at once arrogant, disrespectful, and needlessly inflammatory. These are considerations to give a pragmatic constitutional court pause.

By now it should be clear why I associate judicial pragmatism with judicial modesty. In all the cases that I have discussed in this Part — *Zelman*, *Kelo*, *Van Orden*, *Eldred*, *Clinton v. Jones* (with the possible exception of *McCreary*, on which I have no settled view) — my brand of pragmatism suggests that the Court should have stayed its hand and allowed the challenged government officials to have their way. Likewise in *Roper* and *Booker*. If the Supreme Court is inescapably a political court when it is deciding constitutional cases, let it at least be restrained in the exercise of its power, recognizing the subjective character, the insecure foundations, of its constitutional jurisprudence.

. . . *O, it is excellent*  
*To have a giant's strength, but it is tyrannous*  
*To use it like a giant.*<sup>218</sup>

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<sup>218</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 2, ll. 107–09.