

The Virtue of Judicial Statesmanship

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Some of America's most important judges have emphasized or embodied the practice of judicial statesmanship. Yet from the examples they set, it is not particularly clear what judicial statesmanship is or why it matters. In this Article, I conceptualize the elusive phenomenon of judicial statesmanship, and I defend statesmanship as a core, if underappreciated, dimension of judicial role.

I argue that judicial statesmanship defines a virtue in the role of a judge. Statesmanship charges judges with approaching cases so as to facilitate the capacity of the legal system to legitimate itself—over the long run and with respect to the nation as a whole—by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement. I derive judicial statesmanship from an understanding of the preconditions of law's public legitimation and from an understanding of the purposes of the institution of law. I demonstrate that statesmanship is a necessary, although not sufficient, component of judicial role.

I argue that judicial statesmanship is not sufficient to legitimate the legal system because there are other major purposes of law with which statesmanship can be in tension, especially those advanced by maintaining fidelity to such rule-of-law values as consistency and transparency. But I also argue that statesmanship is necessary if law is to fulfill all of its functions and to take account of the conditions of its own legitimation. The rule of law depends for its practical realization on political trust between the government and the governed. In circumstances in which trust is strained, the virtue of statesmanship is especially valuable and produces leadership.

*I illustrate the present importance of judicial statesmanship by engaging some instances of its existence or absence during the U.S. Supreme Court's October 2006 Term. I argue that Justice Kennedy's controlling opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* seems in important ways to exhibit the practice of judicial statesmanship but that his majority opinion in *Gonzales v. Carhart* will in most respects likely prove a failure of statesmanship.*

[B]ut this much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual.

—Learned Hand¹

Judge Hand was right about many things. He certainly was correct that no court can save an increasingly polarized political community that refuses to save itself. He was also right that no court need try to save a community in which “the spirit of moderation” abounds. But what about the vast middle between those extremes? What about a culture in which citizens are divided over profound questions of individual and collective identity and the spirit of moderation appears at times to be imperiled, yet it would be unduly pessimistic to conclude that the spirit of moderation is gone? In such circumstances, is it sufficient for a judge to observe that “in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish”? Or might such a judge be courting an evasion of his or her own responsibility, the responsibility to adopt “the posture of statesmanship”?²

Some of America’s most important judges have embraced the thing that Brandeis, Frankfurter, and others called judicial statesmanship. It is not easy, however, to specify what they meant by the idea. Justice Frankfurter, for example, was perhaps the foremost advocate of statesmanship on the Supreme Court, yet he tended to champion the practice in relatively vague terms. He did not clearly identify what he conceived statesmanship to entail and how its various, potentially conflicting facets fit together.³ Among other things, he emphasized the open-endedness of constitutional language;⁴ the

1. LEARNED HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155, 164 (3d ed., enlarged 1960).

2. PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* 134 (1957).

3. See, e.g., GARY J. JACOBSON, *PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT* 119 (1977) (noting the “vague[ness]” of Frankfurter’s “general comments on the subject [of judicial statesmanship]”).

4. See, e.g., Felix Frankfurter, *Twenty Years of Mr. Justice Holmes’ Constitutional Opinions*, 36 *HARV. L. REV.* 909, 911 (1923) [hereinafter Frankfurter, *Twenty Years*] (arguing that the questions confronting the Court are “not to be answered by mechanical magic distilled from the four corners of the Constitution, nor self-revealed in the Constitution ‘by taking the words and a dictionary’”); see also, e.g., FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 310 (1928) (“[T]he words of the Constitution . . . are

enormous difficulty of the problems facing the Court and the limited experience of any individual judge;⁵ the need for law to keep up with the times;⁶ the responsibility to imagine the needs of the future;⁷ the related necessity of possessing a vision of the future and of finding ways to achieve it;⁸ the perils of insisting upon absolutes;⁹ the obligation to view society as a whole;¹⁰ the importance of judicial deference to legislative judgments;¹¹ and a number of other purportedly statesmanlike qualities that judges ought to possess.¹² That

so unrestrained by their intrinsic meaning, or by their history, or by tradition, or by prior decisions, that they leave the individual Justice free, if indeed they do not compel him, to gather meaning not from reading the Constitution but from reading life.”); FELIX FRANKFURTER, *Mr. Justice Brandeis and the Constitution*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938, at 113, 117 (E.F. Prichard, Jr. & Archibald MacLeish eds., 1939) [hereinafter FRANKFURTER, *Mr. Justice Brandeis*] (“In essence, the Constitution is not a literary composition but a way of ordering society, adequate for imaginative statesmanship, if judges have imagination for statesmanship.”).

5. See, e.g., FELIX FRANKFURTER, *Justice Holmes Defines the Constitution*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938, *supra* note 4, at 61, 72 (“In view of the complexities of modern society and the restricted scope of any man’s experience, tolerance and humility in passing judgment on the worth of the experience and beliefs of others become crucial faculties in the disposition of cases.”); see also FRANKFURTER & LANDIS, *supra* note 4, at 310, 308–10 (surveying some of the “tremendous and delicate problems” that Supreme Court Justices confront in a variety of areas).

6. See, e.g., FELIX FRANKFURTER, *The Judicial Process and the Supreme Court*, in OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939–1956, at 31, 35 (Philip Elman ed., 1956) [hereinafter FRANKFURTER, *The Judicial Process*] (“Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, imperceptibly gathering strength, steadily becoming more and more exigent Law [i]s the response to these needs”).

7. See, e.g., *id.* at 39 (“To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop.”).

8. See, e.g., FELIX FRANKFURTER, *Israel’s Tenth Anniversary*, in OF LAW AND LIFE & OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956–1963, at 113, 118 (Philip B. Kurland ed., 1965) [hereinafter FRANKFURTER, *Tenth Anniversary*] (“[T]wo indispensable qualifications for high statesmanship, for high achievement, for great civilization . . . [are being] a man of vision who harnesses his science to the achievement of his vision.”).

9. See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 31 (1970) (“[Frankfurter] inveighed against the postulation of absolutes by anyone, most of all by judges. . . . [He believed in no] absolutes, therefore, . . . and prudence in the imposition of one’s principles on the society at large”).

10. See, e.g., FRANKFURTER & LANDIS, *supra* note 4, at 317 (stressing the importance of “[t]he capacity to transcend one’s own limitations, the imagination to see society as a whole”).

11. See, e.g., FELIX FRANKFURTER, *The Supreme Court of the United States*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938, *supra* note 4, at 21, 26–27 (“The Court will avoid if possible passing on constitutionality; but if the issues cannot be burked, if it must face its responsibility as the arbiter between contending political forces, it will indulge every presumption of validity on behalf of challenged powers. This is not merely the wisdom of caution, but the insight of statesmanship.”); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1932*, 47 HARV. L. REV. 245, 296 (1933) (“[T]he requisite of a statesmanlike answer is . . . patient and searching examination of the circumstances which have seemed to legislators to call for the assertion of the power under review. Upon the question of more or less . . . understanding and sympathy with legislative purposes are crucial.”).

12. See, e.g., FRANKFURTER & LANDIS, *supra* note 4, at 318 (“The accents of statesmen are the recurring motif of Supreme Court opinions To wisdom in political adjustment, talent for

descriptive litany is no doubt understandable, as it is difficult to make general statements about the subject of judicial statesmanship. Sometimes one simply seems to know statesmanship when one sees it—or when one does not see it. Yet if that is all that confidently can be said about the matter—if the very notion of judicial statesmanship eludes even rough conceptualization—then it makes scant sense to describe a judicial opinion as statesmanlike or unstatesmanlike.

In this Article, I argue that there is more that can be said about the matter. I analyze the notoriously “elusive” phenomenon of judicial statesmanship,¹³ and I defend the practice of statesmanship as a core, if underappreciated, dimension of judicial role.

Judicial statesmanship, I suggest, defines a virtue in the role of a judge. That virtue is best derived from a proper understanding of the preconditions of law’s public legitimation and the purposes of the institution of law. Statesmanship charges judges with approaching cases so as to facilitate the capacity of the legal system to legitimate itself by accomplishing two paradoxically related preconditions and purposes of law: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement. I argue that judicial statesmanship is a necessary, although not sufficient, component of judicial role in the American constitutional order.¹⁴ Statesmanship is not sufficient to legitimate the legal system because there are other important purposes of law with which statesmanship can be in tension, particularly those secured by maintaining fidelity to such rule-of-law values as consistency and transparency. But statesmanship is necessary if law is to fulfill all of its functions and to sustain its legitimacy over the long run and with respect to the nation as a whole. I conceive of law as an institution that must accomplish a diversity of purposes and that must account for the conditions of its own legitimation. It

industrial statesmanship must be joined.”); FELIX FRANKFURTER & WILBER G. KATZ, *CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE*, at vi–vii (1931) (“That the interaction between the political power of states and central government is conveyed, as it often is, through nice questions of judicial competence and procedure only adds zest to the exploration of such issues, and for their solution demands the statesman’s gift of imagination as well as the disciplined training of the lawyer.”); FELIX FRANKFURTER, *The Court and Statesmanship*, in *LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938*, *supra* note 4, at 34, 34–35 [hereinafter FRANKFURTER, *The Court and Statesmanship*] (“[T]he Court’s successful contribution to the statesmanship of the country . . . [rests] upon the self-denying ordinances of the Justices[,] . . . rigorous objectivity, . . . scrupulous alertness, . . . [avoidance of] confounding personal convictions upon ephemeral policies with enduring principles of right and wrong, . . . the utmost tolerance and detachment, . . . [and] uncommon gifts of intellectual objectivity.”).

13. See SELZNICK, *supra* note 2, at 1 (“The nature and quality of leadership, in the sense of statesmanship, is an elusive but persistent theme in the history of ideas.”).

14. I do not purport to offer a universal account of ideal judging grounded in a functional analysis of the role of courts in any political society. On the contrary, much of my argument is contingent upon certain features of the American experience with constitutionalism—for example, a written constitution with open-ended language and the power of judges authoritatively to interpret that language amidst cultural heterogeneity.

follows that the practice of judicial statesmanship is always already inside the rule of law. The judicial statesman understands legality in ways that mediate among the multiple, potentially conflicting preconditions and purposes of law.¹⁵

In Part I, I explore the political foundations of the rule of law and the preconditions for the legitimation of law. I proceed from the observation that the rule of law is “a crucial and historically rare”¹⁶ cultural achievement, one that is based upon political “trust”¹⁷ between the government and the governed. An apprehension of the trust that sustains the rule of law underlies my subsequent suggestion that when trust is strained, the virtue of judicial statesmanship is particularly important and produces leadership.

In Part II, I examine two purposes of law that help to sustain the political foundations of the rule of law. I focus on the expression of social values and the maintenance of social solidarity. I show that those purposes are potentially conflicting in particular cases yet mutually supporting along the broad range of cases. Those purposes of law will prove central to my conceptualization of the practice of judicial statesmanship.

In Part III, I analyze the phenomenon of judicial statesmanship, and I defend statesmanship as one important dimension of judicial role. My account reveals why the idea of statesmanship is so hard to pin down: the preconditions and purposes of law that statesmanship seeks to accomplish are potentially conflicting and mutually dependent at the same time, and the bounds of reasonable disagreement within which statesmanship seeks to sustain social solidarity can be intensely controversial. Regardless of the difficulties that accompany constitutive tensions and normative judgments of reasonableness, I present an account that renders the practice of judicial statesmanship a required part of the faithful discharge of a judge’s responsibilities. In developing my account, I argue that there is no necessary relation between judicial statesmanship and judicial restraint, and I anticipate several objections to my treatment of the subject.

15. In this inquiry, I focus on the relations between judges and the larger society, not on the relations among judges within a collegial court. Nor do I explore the possible connections between external and internal forms of judicial statesmanship. For a discussion, see ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 344–45 (1993) and Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-government*, 100 HARV. L. REV. 4, 74–75 (1986). Throughout this Article, I engage Kronman’s thinking on the subject of statesmanship.

16. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 642 (1990) (describing the rule of law as “a crucial and historically rare mode of restraint on power by law”).

17. See, e.g., TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 204, 204–08 (2002) (underscoring the importance to effective legal regulation of “the public’s trust in the motives of legal authorities”); Carla Hesse & Robert Post, *Introduction to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 13, 20 (Carla Hesse & Robert Post eds., 1999) (“[T]he relationship between the governed and the governors necessary to sustain the rule of law . . . consists of specific practices that reflect trust and tacit social understandings.”).

In Part IV, I illustrate the contemporary importance of judicial statesmanship by engaging some recent instances of its existence or absence. I focus on the Supreme Court's momentous interventions in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁸ and *Gonzales v. Carhart*.¹⁹ I choose those cases because the need for judicial statesmanship may be greatest in constitutional controversies implicating divisive questions of personal and collective identity, and questions of racial equality and abortion rights in America fit that description. I argue that Justice Kennedy's controlling opinion in *Parents Involved* seems in important ways to exhibit the practice of judicial statesmanship but that his majority opinion in *Gonzales v. Carhart* will in most respects likely prove a failure of statesmanship.

In the conclusion, I suggest that the potential perils of judicial statesmanship may counsel care and caution, but they do not advise abandonment of a practice that our country requires if it is to sustain the rule of law while remaining one country.

I. The Political Foundations of the Rule of Law

It has been said that the rule of law is “an *ideal* of governance” that embodies “implicit” and “nonlegal” rules of lawmaking,²⁰ “rules internal to the very idea of governing by rules.”²¹ The ideal of the rule of law requires both the government and the governed to “be ruled by the law and obey it,”²² and it thus requires that “the law . . . be capable of guiding the behaviour of its subjects.”²³ A society can realize the purposes of a law only if the law is able to guide behavior, “and the more it conforms to the principles of the rule of law the better it can do so.”²⁴ That is why fidelity to the rule of law is “an inherent value of laws,”²⁵ the “virtue of law in itself, law as law regardless of the purposes it serves,”²⁶ and why maintenance of the rule of law is appropriately viewed “as among the few virtues of law which are the special responsibility of the courts and the legal profession.”²⁷

Establishing and preserving the rule of law is no simple task. The rule of law constitutes a cultural achievement that is both “crucial and historically

18. 127 S. Ct. 2738 (2007).

19. 127 S. Ct. 1610 (2007).

20. Martin P. Golding, *Transitional Regimes and the Rule of Law*, 9 *RATIO JURIS* 387, 389 (1996).

21. *Id.* at 390.

22. JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW* 210, 213 (1979) (emphasis omitted).

23. *Id.* at 214 (emphasis omitted).

24. *Id.* at 225.

25. *Id.*

26. *Id.* at 225–26.

27. *Id.* at 226.

rare.”²⁸ Martin Krygier has powerfully captured the magnitude of the accomplishment by contrasting “societies where law can plausibly be said to *count* as a restraint on power and those where it cannot.”²⁹ The political culture that sustains the idea that *law matters* is “extraordinary: it cannot be decreed, though it can be destroyed.”³⁰

If such a political culture is extraordinary, it also tends to be taken for granted:

In societies where government is under law, this is commonly so deeply embedded an achievement that no one notices it *as* an achievement. It simply is taken as the normal way to behave.³¹

. . . .

. . . Living in a society where law counts, it is easy to imagine that that is a natural state of affairs. In fact, it is not natural and it is rare.³²

The rule of law may be so thoroughly ingrained in a political community that neither the governors nor the governed recognize its cultural contingency.

The assertion that the rule of law is culturally contingent may seem obvious once we are advised not to forget it, but the theoretical implication of that claim may not be obvious. Indeed, the implication is profound because it speaks to the ultimate question of what law is. Because the rule of law is not self-sustaining, the institution of law must have built into it ways of accounting for the conditions of its own legitimation.

Martin Golding has suggested that “[l]aw depends for its existence on a *reciprocity of expectations* between the governed and the governors, expectations that survive only when there is adherence to the rule of law.”³³ But just as compliance with the rule of law helps to sustain certain social expectations, so the rule of law itself is sustained by a particular relationship between those who make and apply the law and those whom the law purports to govern. “That relationship ultimately consists of specific practices that reflect trust and tacit social understandings.”³⁴ Maintaining the rule of law, therefore, requires all of the tools by which relationships of trust and mutual understanding are maintained.

One critical facet of the relationship of trust that sustains the rule of law is the confidence of the governed that the fidelity of their governors to what I shall call rule-of-law values—that is, to the values of consistency, stability, predictability, and transparency that were celebrated by legal-process

28. Krygier, *supra* note 16, at 642.

29. *Id.* at 640.

30. *Id.* at 646.

31. *Id.* at 643.

32. *Id.* at 644.

33. Golding, *supra* note 20, at 390.

34. Hesse & Post, *supra* note 17, at 20.

jurisprudence³⁵ and that are essential to the rule of law³⁶—does not result in law that the governed do not recognize as their own. If members of a political community experienced the law as deeply alienating over an extended period of time, they would inevitably feel a diminished sense of obligation to obey the law. They might continue to obey out of fear of punishment if punishment were reasonably likely to follow noncompliance, but less and less would those citizens continue relating to the law from what H.L.A. Hart called “the internal point of view.”³⁷ They would become less inclined to view the requirements of the law as a “*reason*” to behave in a certain way.³⁸ Alienation, in other words, undermines the “widespread assumption within [a] society that law *matters* and should matter.”³⁹ Without that tacit understanding, the rule of law will die.

Counterintuitively, therefore, while the rule of law is not primarily concerned with the content of legal rules,⁴⁰ a society cannot sustain the rule of law by pursuing rule-of-law values single-mindedly at the expense of all other ideals. Accordingly, and focusing now on the role of courts in sustaining the rule of law, one fails to apprehend the conditions for realizing the rule of law when one conceives of fidelity to rule-of-law values as exhaustively defining judicial role. One fails to register the magnitude of the cultural feat that the rule of law embodies.

In a modern, heterogeneous community, a certain kind of democratic politics provides perhaps the best political support for the rule of law. It is a politics of persuasion, coexistence, and imagination that allows citizens within it to negotiate potentially profound disagreements that may endure despite a profound sense of common identity—even though the most significant disagreements may be about the meaning of that very identity. It is a politics that pursues the normative ideal of democracy as collective self-governance. That conception of democracy engages the “question of how, in the face of manifest and indissoluble differences, we may be said to govern ourselves through collective self-determination.”⁴¹

Dialogic theorists have argued that realizing democracy in the presence of diversity requires an analytical move from substance to process.⁴² That is,

35. See *infra* notes 55–56 and accompanying text (discussing the work of several legal-process scholars).

36. See, e.g., ROBERT C. POST, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 23, 30–32 (1995) (discussing rule-of-law values); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015–16 (2005) (same).

37. H.L.A. HART, *THE CONCEPT OF LAW* 90 (2d ed. 1994).

38. *Id.*

39. Krygier, *supra* note 16, at 646.

40. Hesse & Post, *supra* note 17, at 20.

41. Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429, 433 (1998).

42. See ROBERT C. POST, *Between Democracy and Community: The Legal Constitution of Social Form*, in CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT, *supra*

democratic legitimacy must be secured independently of particular outcomes. Such independence is said to inhere in a state where “citizens identify with a system of open participation in the formation of public opinion.”⁴³ Democratic legitimacy, however, cannot be achieved wholly independently of political outcomes. When a subcommunity loses in the political process often enough on issues that matter enough, alienation eventually will set in even if there is ample opportunity to voice dissent. Accordingly, a community that means to manifest a significant measure of collective self-governance under conditions of “irreparable reasonable disagreement”⁴⁴ must supplement the communicative processes analyzed by dialogic theorists. Among other things, such a community requires an analytical move from process back to substance.

Hannah Arendt described politics as the realm of “agreement, dispute, opinion, [and] consent.”⁴⁵ She contrasted politics with all forms of truth because “[t]ruth carries within itself an element of coercion.”⁴⁶ Regarding a statement of factual truth—for example, that “[i]n August 1914 Germany invaded Belgium”—“persuasion or dissuasion is useless, for the content of the statement is not of a persuasive nature but of a coercive one.”⁴⁷ “Seen from the viewpoint of politics,” therefore, “truth has a despotic character”:

Facts are beyond agreement and consent, and all talk about them—all exchanges of opinion based on correct information—will contribute nothing to their establishment. Unwelcome opinion can be argued with, rejected, or compromised upon, but unwelcome facts possess an infuriating stubbornness that nothing can move except plain lies. The trouble is that factual truth, like all other truth, peremptorily claims to be acknowledged and precludes debate, and debate constitutes the very essence of political life. The modes of thought and communication that deal with truth, if seen from the political perspective, are necessarily domineering; they don’t take into account other people’s opinions, and taking these into account is the hallmark of all strictly political thinking.⁴⁸

note 36, at 179, 184–91 (discussing the accounts of several dialogic theorists, including Hans Kelsen, Benjamin Barber, Emile Durkheim, Claude Lefort, Jürgen Habermas, John Rawls, and Frank Michelman).

43. Post, *supra* note 41, at 436.

44. Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 421 (1998) (citing JOHN RAWLS, *POLITICAL LIBERALISM* 36 (1993)).

45. HANNAH ARENDT, *Truth and Politics*, in *BETWEEN PAST AND FUTURE* 227, 240 (enlarged ed. 1968).

46. *Id.* at 239.

47. *Id.*

48. *Id.* at 241. Daniel Patrick Moynihan put it well: “You’re entitled to your own opinions. You’re not entitled to your own facts.” ELLEN HUME, *ANNENBERG WASH. PROGRAM IN COMM’NS POLICY STUDIES OF NW. UNIV., TABLOIDS, TALK RADIO, AND THE FUTURE OF NEWS: TECHNOLOGY’S IMPACT ON JOURNALISM* (1995), http://www.ellenhume.com/articles/tabloids_printable.html.

A statement of factual truth has no tolerance for untruth.

By contrast, the kind of democratic politics I describe is a realm of reasonable, potentially irreconcilable disagreement. It is a realm in which citizens must tolerate those who disagree with their views and reject their values. But citizens must do more. They must also seek to persuade their fellow citizens, and they must accommodate opposing views and values, at least to some extent within a broad range of reasonableness. They must register, acknowledge, and even at times validate the concerns of other citizens in seeking to craft resolutions that do not threaten to alienate fellow citizens from the political community.⁴⁹ “The business of politics is not with theory and ideology but with accommodation.”⁵⁰

The kind of democratic politics that I have sketched above helps to sustain the political foundations of the rule of law. It helps to maintain the preconditions of law’s public legitimation by tempering normal and necessary efforts to shape social values in particular ways with the inclusive expression of social values and attempts to maintain social solidarity.

II. Some Purposes of Law

Expressing social values and sustaining social solidarity are not only preconditions for successful law. They are also fundamental purposes of the

49. One positive premise of the conception of democratic politics discussed in the text is that it is not entirely unrealistic—that in at least some democratic societies, people do what I describe in living with and exercising power together. I suggest, without purporting to demonstrate, that it captures much of the American experience with collective self-governance. Other commentators have expressed similar normative conceptions of democratic politics. See POST, *supra* note 36, at 184–91; David Bromwich, *Lincoln and Whitman as Representative Americans*, in DEMOCRATIC VISTAS: REFLECTIONS ON THE LIFE OF AMERICAN DEMOCRACY 36, 48, 36–52 (Jedediah Purdy ed., 2004) (“When Lincoln [places himself in the position of the Southern people], he is engaged in a disagreeable and necessary act of sympathy. He is seeking to conciliate, and he is also telling the truth as he sees it.”); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379–87 (2007); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323, 1343 (2006) (“Because citizens must enlist the voice and accommodate the views of others if they are to persuade officials charged with enforcing the Constitution, the quest to secure constitutional recognition may promote forms of community identification, and not merely exacerbate group division.”).

Anthony Amsterdam and Jerome Bruner offer a nice account of one community’s success in maintaining the sort of democratic ethos that sustains community despite irreconcilable disagreements on first principles. They describe the experience of Reggio Emilia, a city in northern Italy where devout Communists and devout Catholics have been living and governing together for more than a century. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 242–43 (2000) (“There is abundant dialogue. The Left majority in Reggio is not the voice of an angry and dispossessed proletariat, nor is the Right an expression of single-minded Catholic militancy. Both sides are quite aware that they must occupy the same space, and have been long aware of it.”).

50. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 19 (1975); see also *id.* (“‘All government, indeed every human benefit and enjoyment,’ Burke said in 1775 urging conciliation with America, ‘every virtue, and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others; and we choose rather to be happy citizens, than subtle disputants.’”).

institution of law.⁵¹ The legal order exists to serve purposes for society at large, and those purposes are multiple. The two upon which I focus relate to each another in a complex fashion.⁵²

A. *Expressing Social Values*

A primary purpose of law, one associated with the professional norm of offering reasons in support of a judgment, is to provide “a justification *in principle* for official coercion.”⁵³ Requiring judges to articulate reasons for their decisions disciplines them to the virtue of consistency—to deciding future cases according to previously articulated reasons. Judicial reason giving also serves an important settlement function⁵⁴ and provides lower courts and the public with reliable guidance about the future path of the law:

Only opinions which are grounded in reason and not on mere fiat or precedent can do the job which the Supreme Court of the United States has to do. Only opinions of this kind can be worked with by other men who have to take a judgment rendered on one set of facts and decide how it should be applied to a cognate but still different set of facts.⁵⁵

The celebration of reason and principle in legal-process jurisprudence, nowhere developed more influentially than in the writings of Henry M. Hart,

51. There is of course a distinction between the preconditions of something and the purposes of something. In this inquiry, however, I argue that expressing social values and sustaining social solidarity are *both* preconditions for effective law and fundamental purposes of law. On my account, courts are charged with expressing social values and sustaining social solidarity for two logically distinct reasons: (1) doing so is necessary in order to legitimate the legal system, thereby establishing a precondition for the capacity of law to achieve its various purposes; and (2) doing so is necessary if the legal system is to accomplish all of its purposes, thereby legitimating itself over the long run. The first reason understands legitimacy as an independent value (so that, as I argue in Part III, an attribute of judicial statesmanship is to ensure legitimation). The second reason conceives of legitimacy as parasitic on the realization of other values (so that an attribute of judicial statesmanship is the achievement of certain purposes of law). The argument in this Part is important because, among other things, it reduces the likelihood that courts will confront acute trade-offs between securing their own legitimacy and accomplishing the purposes of the legal system. See *infra* subpart III(D).

52. I focus on those purposes of law that are essential to my conceptualization of the phenomenon of judicial statesmanship in Part III. There are obviously several purposes of law that I do not discuss. Nor do I distinguish the various functions of law *qua* law from the various goods that can be obtained through law.

53. RONALD DWORKIN, *LAW'S EMPIRE* 110 (1986); see also *id.* at 93 (“Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”).

54. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (“[A]n important—perhaps *the* important—function of law is its ability to settle authoritatively what is to be done. That function is performed by all law; but because the Constitution governs all other law, it is especially important for the matters *it* covers to be settled.”).

55. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959).

Herbert Wechsler, and Albert M. Sacks,⁵⁶ is thus closely tied to achieving the values of consistency, stability, predictability, and transparency that, as noted in Part I, are essential to the rule of law.

There are other weighty social values, however, and they may conflict at times with such rule-of-law values as consistency.⁵⁷ In cases of value conflict, it may be misguided to assume that judicial decision making fulfills its functions merely by remaining faithful to rule-of-law values. For example, the Supreme Court's adherence to *Lochner*⁵⁸ Era precedents of substantive due process may have been consistent with rule-of-law values, and in reaffirming *Lochner*-type norms of substantive due process, the Court maintained fidelity to various professional norms, including norms of reason giving.⁵⁹ But such fidelity did not secure the legitimacy of the Court during the constitutional crisis of the New Deal.⁶⁰ In fact, the Court's fidelity to rule-of-law values likely undermined the Court's legitimacy.⁶¹

56. See, e.g., *id.* (“[T]he Court is predestined . . . to be a voice of reason, charged with the creative function of . . . developing impersonal and durable principles of law.”); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (“[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”); *id.* at 19 (“A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”). See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

57. See, e.g., RAZ, *supra* note 22, at 228 (“Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values.”); *id.* at 229 (noting that “the rule of law is meant to enable the law to promote social good” and cautioning that “[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty”); Krygier, *supra* note 16, at 645 (“There is also room for argument that the rule of law is not all we should want and for recognition that, in case of conflict of values, we need not assume that only maintenance of the rule of law matters, or that any chink in what are fancied to be its formalistic preconditions spells its doom.” (footnote omitted)).

58. *Lochner v. New York*, 198 U.S. 45 (1905).

59. See, e.g., *id.* at 52–65 (providing an extensive explanation of the reasoning behind the majority's decision).

60. To be sure, the *Lochner* Court was criticized for arbitrariness and inconsistency, but those criticisms were not primarily responsible for the crisis of legitimacy that the Court eventually faced. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 45 (1962) (“Serving this value [of *laissez faire*] in the most uncompromising fashion, at a time when it was well past its heyday, five Justices, in a series of spectacular cases in the 1920's and 1930's, went to unprecedented lengths to thwart the majority will. The consequence was very nearly the end of the story.”).

61. Barry Friedman has put the point nicely:

The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.

There is, of course, nothing *sui generis* about the *Lochner* period. For example, the claim to legitimacy of *Brown v. Board of Education*⁶² is today unimpeachable, and any legal arguments to the contrary seem tellingly beside the point. The ultimate ground of *Brown*—whether it sounds primarily in antidisubordination values or in anticlassification discourse⁶³—remains hotly contested, but each side of the cultural divide on race and the Constitution lays claim to *Brown*'s repudiation of state-mandated racial segregation in public education.⁶⁴ It appears of little or no consequence anymore whether the holding in *Brown* enjoys adequate legal support in the text of the Equal Protection Clause, the original meaning(s) of the text, the constitutional structure, or pre-*Brown* precedent.⁶⁵ Any court that suggested a return to the regime of *Plessy v. Ferguson*⁶⁶ would face an insurmountable crisis of legitimacy.

Because the legitimation of a court, like the legitimation of any government institution, “is constituted by its collective acceptance,”⁶⁷ and

Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001).

62. 347 U.S. 483 (1954).

63. See generally, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antidisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (challenging the common assumption that the anticlassification principle triumphed over the antidisubordination principle during the Second Reconstruction); Reva B. Siegel, *Equality Talk: Antidisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) (identifying the competing principles of antidisubordination and anticlassification and analyzing their relations to each other and to *Brown*).

64. Compare *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767–68 (2007) (plurality opinion) (reading *Brown* and its progeny as requiring vigorous judicial scrutiny of all racial classifications), and *id.* at 2782, 2782–88 (Thomas, J., concurring) (emphasizing the “color-blind Constitution” in rejecting any consideration of race in allocating educational opportunities, absent *de jure* segregation), with *id.* at 2797, 2797–800 (Stevens, J., dissenting) (noting a “cruel irony” in the way the plurality “re[wrote] the history” of *Brown* and rejecting the application of strict scrutiny to racial classifications that promote practices of inclusion), and *id.* at 2800 (Breyer, J., dissenting) (reading *Brown* as promising racially integrated schools and viewing the plans at issue as important efforts to fulfill that promise).

65. I am aware that some modern commentators have been concerned with establishing the legality of *Brown* from an originalist perspective. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). But such efforts may support the claims in the text. The assumption animating much such work may be that there *has* to be a way to justify *Brown* even from an originalist point of view precisely because contemporary social values so strongly support the decision. I imagine few commentators would suggest that *Brown* should be overruled if an adequate legal case for it cannot be made from their interpretive perspective. On the contrary, in cases of conflict, it is the interpretive perspective—not *Brown*—that must bend, break, or fall temporarily silent. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 77 (1990) (“*Brown* has become the high ground of constitutional theory. Theorists of all persuasions seek to capture it, because any theory that seeks acceptance must, as a matter of psychological fact, if not of logical necessity, account for the result in *Brown*.”).

66. 163 U.S. 537 (1896), overruled by *Brown*, 347 U.S. 489.

67. JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 117 (1995). As Searle observes, “institutions survive on acceptance.” *Id.* at 118; see also Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 309 (1968) (“[W]hether a designated

because collective acceptance turns in significant part on whether a government institution is accomplishing its purposes, the *Lochner* and *Brown* experiences suggest that there are other purposes of law beside the justification of official coercion and the provision of authoritative guidance. Another principal function of law is to declare official government approval of “[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious.”⁶⁸ That purpose of law consists of the expression of fundamental social values. Those who embrace that purpose apprehend, “as the great men of law have always insisted, that law must be sensitive to life.”⁶⁹ The *Lochner* period culminated in what was widely perceived to be a crisis because the values that the Court insisted on continuing to express had come to sit in acute tension with the political consensus in the nation, and the Court was refusing to get out of the way.⁷⁰ The *Brown* Court, by contrast, ultimately won its bet with constitutional destiny by succeeding in shaping constitutional values as it expressed them.⁷¹

requirement is to be regarded as obligatory will depend in part on whether those who have made that designation are regarded by those to whom the requirement is addressed (the target audience) as endowed with the requisite competence or authority for that role.”); Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 604 (1963) (“Political institutions survive and prosper to the extent that they satisfy widely held expectations about them.”); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 307 (2003) (“Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.”).

68. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881). Archibald MacLeish observed that “[t]o most great lawyers the law sooner or later becomes a substantive, a noun. To Mr. Justice Holmes it was always a verb having a predicate to follow.” Archibald MacLeish, *Foreword to LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938*, *supra* note 4, at xviii.

69. FRANKFURTER, *Mr. Justice Brandeis*, *supra* note 4, at 116. Frankfurter wrote that Brandeis so insisted “[a]t a time when our constitutional law was becoming dangerously unresponsive to drastic social changes, when sterile clichés instead of facts were deciding cases.” *Id.*

70. Theodore Roosevelt stressed the disconnect in the middle of the *Lochner* Era:

[Courts] have thus strained to the utmost (and, indeed, in my judgment, violated) the Constitution in order to sustain a do-nothing philosophy which has everywhere completely broken down when applied to the actual conditions of modern life. These good judges, these upright and well-meaning men, who champion an outworn philosophy, do not realize that the changed conditions mean changed needs, and that the tremendous social problem of to-day cannot be solved by methods adequate to meet the infinitely simpler problems offered by industrial and social life a century ago.

Theodore Roosevelt, *Judges and Progress*, 100 OUTLOOK 40, 44 (1912); *see also* Editorial, *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924, at 110, 113 (“No student of American constitutional law can have the slightest doubt that Mr. Roosevelt’s vigorous challenge of judicial abuses was mainly responsible for a temporary period of liberalism which followed in the interpretation of the due process clauses, however much abhorrent the remedy of judicial recall appeared to both bar and bench.”).

71. It is worth remembering that the Court could have lost that bet because the culture was deeply divided. *See, e.g.*, POST, *supra* note 36, at 43 (“*Brown* represented a courageous gamble. The Court’s embrace of the value of racial equality could have been a misreading of the national ethos; indeed the Court’s gamble was intensely controversial and came close to failing precisely because that ethos was in fact so divided.”). It is also worth noting that the reasons for the country’s ultimate acceptance of *Brown* are controversial. *See generally* Michael J. Klarman, *Brown, Racial*

The function of law that concerns itself with the expression of social values, therefore, actually encompasses two functions that relate paradoxically. Law is shaped by social values at the same time that law itself shapes social values.⁷² “In this respect law must resemble literature a little. It will imitate life—or life will imitate it.”⁷³ That relationship between law and social values can exist both at a given point in time and over time.⁷⁴

B. Sustaining Social Solidarity

Another basic purpose of law, particularly in a culturally heterogeneous society such as our own,⁷⁵ is “to maintain social cohesion as circumstances change.”⁷⁶ That purpose of law has been characterized as reflecting concern with “the fate of ‘a common fate’, that is, in the durability of social relationships across time.”⁷⁷ That purpose has also been described as “promoting social stability and . . . achieving a form of mutual respect.”⁷⁸ Some measure of social solidarity—of “political fraternity”—in the face of intense normative disagreement seems constitutive of the very existence of the community for whose benefit the legal order exists.⁷⁹ Regarding the role of the Supreme

Change, and the Civil Rights Movement, 80 VA. L. REV. 7 (1994) (arguing that the chain of causation tying *Brown* to transformative racial change is very different from what has commonly been supposed); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994) (questioning conventional accounts of *Brown*'s importance and providing an alternative thesis stressing *Brown*'s indirect contribution to racial change).

72. Indeed, in circumstances of cultural conflict, the act of expressing social values necessarily entails an effort to shape social values because the authoritative expresser of values must elect to enforce one set of values to a greater extent than another. See, e.g., Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 492 (2003) (“When law is invoked to enforce ‘cultural values,’ therefore, it is often being used to advance one or another side of an ongoing cultural disagreement.”).

73. AMSTERDAM & BRUNER, *supra* note 49, at 3.

74. The term “paradoxical” denotes a synchronic relation. It describes the structural relationship between timeless ideas. “Dialectical,” by contrast, is a term of temporal extension. It describes a relationship that moves in time. It is a dynamic, diachronic notion. A given relation can be both paradoxical and dialectical at the same time. Examples include the structural relations identified in this inquiry: the relation between law and social values, and the relation between expressing social values and maintaining social cohesion. For an exploration of the paradoxical and dialectical relation between law and culture, see generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

75. Cf. generally RAWLS, *supra* note 44 (emphasizing the reasonable yet irreconcilable disagreements about basic questions of religion, morality, and philosophy that characterize modern, heterogeneous democracies).

76. Alec Stone Sweet, *Judicialization and the Construction of Governance*, in ON LAW, POLITICS, & JUDICIALIZATION 55, 57 (Martin Shapiro & Alec Stone Sweet eds., 2002).

77. *Id.*

78. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 50 (1999).

79. See KRONMAN, *supra* note 15, at 93 (“The condition of political fraternity is one in which the members of a community are joined by bonds of sympathy despite the differences of opinion that set them apart on questions concerning the ends, and hence the identity, of their community.”). According to Kronman, “political fraternity” is what gives communities “their unity and preserves

Court in particular, “it is a function of the Court—in the sphere of its competence—to maintain continuity in the midst of change.”⁸⁰

Of course, near-collective assent to significant legal interpretations is often lacking at a particular time. But if courts are to “organiz[e] political change so as to facilitate the survival of societies,”⁸¹ then they must attend to “the problem of stability.”⁸² This means, among other things, that courts must “anticipate[] the disputants’—or a community’s—reactions to [their] behaviour.”⁸³ This further means that the values authoritatively expressed by governmental actors, including courts, must (over the long haul and to some extent) be those that different segments of a normatively heterogeneous nation can recognize as their own.⁸⁴ In certain deeply divisive cases—certain cases that Anthony Kronman has called “identity-defining” conflicts⁸⁵—it may be appropriate for courts to “fashion settlements that avoid the declaration of a clear winner or loser,” settlements that allow “each disputant [to] achiev[e] a partial victory.”⁸⁶ In other identity-defining controversies, as when a government seeks to dismantle an apartheid social order, it may be appropriate for courts to take decisive action, sacrificing social stability over the short run in order to advance social solidarity and other important values over the long run. How courts ought to respond to situations so as to sustain social solidarity is not a theoretical question; the answer in a given case necessarily turns on the specific values at stake, the context, and the exercise of the faculty of judgment.

Maintaining a significant measure of social solidarity over the long term does not require courts to credit all values regardless of their content. The task of maintaining solidarity amidst heterogeneity is properly performed within the universe of *reasonable*, even if irreconcilable, disagreements that

them from disintegration. A community without political fraternity is no longer a community at all.” *Id.* at 92.

80. BICKEL, *supra* note 60, at 108–09.

81. Sweet, *supra* note 76, at 72.

82. RAWLS, *supra* note 44, at vi.

83. Sweet, *supra* note 76, at 63.

84. Of course, much more than well-functioning courts are needed to sustain social solidarity amidst normative dissensus. For example, the people themselves have a vital role to play. See Siegel, *supra* note 49, at 1343 (“[P]opular participation in constitutional deliberation, and the role expectations that sustain it, underwrite the legitimacy of government and the solidarity of a normatively heterogeneous community.”).

85. See KRONMAN, *supra* note 15, at 88–89 (“In the political sphere, as in the personal, there are some choices that have what I call identity-defining consequences. To varying degrees, such choices define the community that makes them in the same way that some personal choices define the individual who does.”); see *id.* at 90 (“[T]hose controversies that happen at any moment to be the most lively and important ones in a community—those with the largest implications for its direction and destiny—often present conflicts among values that reflect incomparable visions of what is most worthy in the community’s current practices or future possibilities . . .”).

86. Sweet, *supra* note 76, at 63. To be clear, Sweet himself did not limit his focus to the most divisive cases.

may exist in a community.⁸⁷ For example, the values that long supported social subordination based on race or gender in this country are properly regarded by courts as unreasonable and inadmissible. Moreover, validating extreme views, even to only a modest extent, might undermine social solidarity rather than sustain it and would in any event prove impossible to reconcile with the function of law faithfully to express prevailing social values. Of course, what qualifies as “reasonable” disagreement, as opposed to “unreasonable” or “the most extreme,” can be controversial when one moves from, say, apartheid to affirmative action. Drawing the necessary lines, particularly when the values in question are determined to be unreasonable but not extreme as measured by the number of present adherents, requires normative judgments that may themselves be based in contestable social values.

C. *Social Values, Social Solidarity, and the Constitution*

The Constitution functions in part to realize the twin purposes of law discussed above: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.⁸⁸ The authority of the Constitution flows not only from its status as law but also from its status as the embodiment of our “fundamental nature as a people,” our national “ethos.”⁸⁹ The Constitution has always swung pendulum-like between a document dominated by legal professionals⁹⁰ and a popular text that enacts and embodies the American identity.

Constitutional law inherits that instability. Examples include whether race-conscious assignments of students to public schools are narrowly tailored to advance a compelling state interest⁹¹ and whether a government regulation imposes an “undue burden” on a woman’s constitutional right to abortion.⁹² Justice Kennedy recently observed in *Gonzales v. Carhart* that

87. See generally RAWLS, *supra* note 44, at 235–40 (imposing a similar reasonableness constraint).

88. One might suggest that the two purposes of law upon which I focus also constitute purposes of politics. That is no doubt true, which helps to explain why the boundary partially separating law from politics can be deeply ambiguous. See generally, e.g., Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007).

89. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987).

90. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (1997) (“[The] interpretation of the Constitution . . . is . . . essentially lawyers’ work—requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth.”).

91. See, for example, *infra* subpart IV(A) for a discussion of *Parents Involved in Community Schools v. Seattle School District No. 1*.

92. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (joint plurality opinion of O’Connor, Kennedy, and Souter, JJ.) (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

*Planned Parenthood of Southeastern Pennsylvania v. Casey*⁹³ “struck a balance.”⁹⁴ That balance was fashioned out of respect for the conflicting normative commitments of each side of the abortion controversy.⁹⁵ Whenever a court “‘balances’ or ‘weighs’ incommensurate and potentially incompatible values,” it relies “upon contextual interpretations that are deeply influenced by implicit and inarticulate considerations characteristic of social values.”⁹⁶

Judicial opinions that invoke the authority of the Constitution as ethos are pervasive. Justice Holmes, for example, sought to understand “our whole experience” as a nation in construing the Constitution on behalf of the Court:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁹⁷

Holmes insisted that “the provisions of the Constitution are not mathematical formulas having their essence in their form.”⁹⁸ Rather, “they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.”⁹⁹ In those statements, the Supreme Court endorsed the constitutional authority of American collective identity. So did Chief Justice Marshall when he relied upon “the whole American fabric”¹⁰⁰ and when he asserted that “[t]his provision is made in a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.”¹⁰¹

Those examples, as well as many others,¹⁰² suggest that constitutional law has been legitimated throughout history in significant part by the Court’s

93. 505 U.S. 833 (1992).

94. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1627 (2007).

95. I argue in subpart IV(B) that *Gonzales v. Carhart* was a very different decision in that regard.

96. Post & Siegel, *supra* note 88, at 1502 (citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987)).

97. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

98. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

99. *Id.*

100. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

101. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

102. For additional examples, see Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. (forthcoming 2008).

continual renegotiation and ultimate expression of popular commitments.¹⁰³ There remains much insight in Karl Llewellyn's assertion that "[w]hatever the Court has *said*, it has shaped the living Constitution to the needs of the day as it felt them."¹⁰⁴ Our constitutional law has always been "historically conditioned and politically shaped."¹⁰⁵

D. *The Relation Between Social Values and Social Solidarity*

Those twin purposes of law—expressing social values on the one hand and maintaining social solidarity on the other—relate paradoxically. In a particular case, the purpose of expressing values can sit in acute tension with the purpose of sustaining community. Most values are not held by an entire community, so the more a court expresses certain values and attempts to move a society in the direction of their further realization, the more alienating the law can become to members of the subcommunity who do not share those values. At the same time, Alexander Bickel seems correct in saying that "unless [government] is responsible it cannot in fact be stable."¹⁰⁶ Social solidarity will prove difficult to sustain over the long run when the law does not perform any expressing function, for then the values authoritatively expressed by government officials will not be ones to which the members of a society can collectively attach. Accordingly, law's expression of social values can conflict with law's efforts to maintain community, even as the latter function relies upon the former function for its realization.

One can investigate the relation between those purposes of law from the opposite direction and discover the same sort of relationship. Efforts to maintain social cohesion can undermine efforts to express certain social values authoritatively, for attention to the former purpose may limit the universe of options within which the latter purpose may be pursued. Yet it would be

103. See, e.g., H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* 6 (2002) ("However counterintuitive it may seem, the integrity and coherence of constitutional law are to be found in, not apart from, controversy."); Siegel, *supra* note 63, at 1547 ("[A] history of debates over *Brown* . . . suggests how the contours of constitutional principle emerge from the crucible of constitutional politics.").

104. K.N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 40 (1934); see also *id.* ("Theory that can face fact . . . is what we need.").

105. POWELL, *supra* note 103, at 6.

106. BICKEL, *supra* note 60, at 29. In *The Morality of Consent*, Bickel added the following, relying on Burke:

And power should seek to rest on consent so that its distribution and its exercise may be stable—stability being a prime value, both as an end and as a means[]; as an end, because though truth may be preferable to peace, "as we have scarcely ever the same certainty in the one that we have in the other, I would, unless the truth were evident indeed, hold fast to peace"; and as a means, because stability is a source as well as a fruit of consent, making the beneficent exercise of power possible though by no means certain.

BICKEL, *supra* note 50, at 15 (quoting Edmund Burke, Speech on the Acts of Uniformity (1772), reprinted in EDMUND BURKE: *SELECTED WRITINGS AND SPEECHES* 365, 368 (Peter J. Stanlis ed., 2006)).

difficult for a court to express social values effectively over the long run in the absence of a significant measure of social cohesion. The very idea of expressing fundamental social values presupposes the existence of a community whose values may be expressed. Moreover, a court likely cannot succeed in shaping social values without some basis in shared commitments from which to proceed and persuade. Viewed from the vantage point of either purpose of law, therefore, the relation between them is paradoxical, so that success in realizing one requires close attention to the status of the other.¹⁰⁷

III. Conceptualizing Judicial Statesmanship

Judicial statesmanship means that judges must seek not only the “right answer” to legal questions as a matter of professional reason but also an answer that sustains the social legitimacy of law. Specifically, I suggest that judicial statesmanship charges judges with approaching cases so as to facilitate the ability of the legal order to legitimate itself over the long term by accomplishing the two preconditions and purposes of law discussed above: expressing social values as social circumstances change and sustaining social solidarity amidst reasonable, irreconcilable disagreement.¹⁰⁸ In pursuing them, judicial statesmanship helps to ensure the practical realization of the rule of law.¹⁰⁹

107. Cf. Ben W. Heineman, Jr., *Law and Leadership*, 56 J. LEGAL EDUC. 596, 599–600 (2006) (“We are seeking lawyers who, in addition to exposing value tensions, *can find a fair balance, in the ultimate course taken, between legitimate competing values*. . . . [D]ecisions are better informed with a sure grasp of legitimate values in tension and more durable with a fair balance of those values.”).

108. Statesmanship is concerned primarily with the long view—that is, with succeeding over the long run rather than achieving a quick but pyrrhic victory:

The perennial existence of bodies corporate and their fortunes, are things particularly suited to a man who has long views; who meditates designs that require time in fashioning; and which propose duration when they are accomplished. He is not deserving of high rank, or even to be mentioned in the order of great statesmen, who, having obtained the command and direction of such a power as existed in the wealth, the discipline, and the habits of such corporations, . . . cannot find any way of converting it to the great and lasting benefit of his country.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 329 (J.C.D. Clark ed., Stanford Univ. Press 2001) (1792); cf. Pitkin, *supra* note 89, at 168–69 (“To constitute, one must not merely become active at some moment but must establish something that lasts, which, in human affairs, inevitably means something that will enlist and be carried forward by others. Unless we succeed in creating—together with others—something lasting, inclusive, principled, and fundamental, we have not succeeded in *constituting* anything.”).

109. Kronman distinguishes “the concern for doctrinal coherence” and the concern “for the responsiveness of doctrine to social and economic circumstances” from the practice of judicial statesmanship, which entails “a concern for the bonds of fellowship that legal conflict strains but that must be preserved to avoid other, more destructive conflicts.” KRONMAN, *supra* note 15, at 118; *see also id.* at 343 (“One of the responsibilities of courts is to preserve the political order when it is threatened by conflicts between passionately held and profoundly divergent points of view.”). By contrast, I conceive of judicial statesmanship as attending to all three concerns—specifically, by tempering the judicial focus on the first with sensitivity to the second and third.

In this Part, I defend my account of judicial statesmanship by showing that it conceptually clarifies, integrates, and refines many of the reflections on the nature and importance of judicial statesmanship offered by the likes of de Tocqueville, Holmes, Brandeis, Frankfurter, and others.¹¹⁰ At the same time, my account cautions against embracing the suggestion that judicial statesmanship presumptively demands judicial restraint or strategies of conflict avoidance.

A. *Judicial Statesmanship and Social Values*

Judicial statesmanship advises judges to recognize that a major purpose of law—and thus a ground of judicial legitimacy¹¹¹—is the expression of public ideals. Alexis de Tocqueville, for example, wrote that the “power” of Justices of the Supreme Court:

is immense, but it is power springing from opinion. [Justices] are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.

The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.¹¹²

110. The work of several prominent commentators suggests that statesmanship has a rich history in the law and politics of our nation. *See, e.g.*, KRONMAN, *supra* note 15, at 11–17 (describing the American ideal of the lawyer–statesman in the nineteenth century and beyond); Bromwich, *supra* note 49, at 46–52 (describing Abraham Lincoln as a statesman of great character who used political persuasion to advance his understanding of American ideals); *cf.* Heineman, *supra* note 107, at 601–02 (offering examples of American statesmen, including judges). For historical background on the ideal of statesmanship in American law and life, see generally PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999); ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984); ROBERT A. FERGUSON, *READING THE EARLY REPUBLIC 163–66* (2004); Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 J. LEGAL EDUC. 339 (1992); and Robert W. Gordon, *Lawyers as the “American Aristocracy”: A Nineteenth-Century Ideal that May Still Be Relevant*, 20 STAN. LAW. 2 (1985). Accordingly, our country is not in the same position regarding statesmanship as Alisdair MacIntyre has argued we are in regarding morality or virtue—namely, repeating nostrums torn from the contexts that would have been needed to make those nostrums live and vibrant. *See* ALISDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 1–2 (1981). Statesmanship remains a living (if controversial) tradition, not a set of disconnected nostrums that are properly viewed with cynicism.

111. *See supra* notes 51, 67 and accompanying text (discussing grounds of judicial legitimation and the relation of legitimation to accomplishing the purposes of the institution of law).

112. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 150–51 (J.P. Mayer ed., George Lawrence trans., Doubleday & Co. Anchor Books ed. 1969) (1835); *see also* Editorial, *Can the Supreme Court Guarantee Toleration?*, NEW REPUBLIC, June 17, 1925, at 85, 87 (“To a large extent

In that stunning passage, de Tocqueville instructed that judges who understand “the spirit of the age” are better able to craft constitutional law that legitimates itself through skillful expression of the social values of the time. They are in a better position to register and express those values. Woodrow Wilson agreed that “the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”¹¹³

Judicial statesmanship, however, requires more of judges than apprehension of “the spirit of the age” at a given moment in time. Because social values are continuously evolving and social conditions are always changing—“repose,” after all, “is not the destiny of man”¹¹⁴—statesmanship encourages judges to approach cases so as to enable the legal system to maintain pace with those changes, to “bring the public administration of justice into touch with changed moral, social or political conditions.”¹¹⁵ Statesmanship, in other words, would have judges exercise the power of judicial review not only “with insight into social values” but also “with suppleness of adaptation to changing social needs.”¹¹⁶ Frankfurter thus endorsed “Lord Haldane’s comments on the personnel of the Judicial Committee of the Privy Council,” which “reflect the same considerations which have largely determined selection for the Supreme Court.”¹¹⁷ Haldane counseled:

training calculated to give what is called the statesmanlike outlook to the judge—that is to say, the outlook which makes him remember that with a growing Constitution things are always changing and developing, and that you cannot be sure that what was right ten years ago will be right to-day.¹¹⁸

the Supreme Court, under the guise of constitutional interpretation of words whose contents are derived from the disposition of the Justices, is the reflector of that impalpable but controlling thing, the general drift of public opinion.”)

113. WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 69 (1908).

114. OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 181 (1920).

115. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 *AM. LAW.* 445, 445 (1906).

116. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 94 (1921).

117. FRANKFURTER & LANDIS, *supra* note 4, at 317.

118. Viscount Haldane, *The Work for the Empire of the Judicial Committee of the Privy Council*, 1 *CAMBRIDGE L.J.* 143, 148 (1922). In a letter congratulating George Sutherland on his appointment to the Court, Chief Justice Taft stressed the role of judicial statesmanship in adapting the Constitution to changing circumstances:

I do not minimize at all the importance of having Judges of learning in the law on the Supreme Bench, but the functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a sense of proportion derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State. A Supreme Judge must needs keep abreast of the actual situation in the country so as to understand all the

Holmes, in an oft-quoted passage, captured the reality of ceaseless social change to which the law must be responsive:

The life of the law has not been logic: it has been experience. The seed of every new growth within its sphere has been a felt necessity. The form of continuity has been kept up by reasonings purporting to reduce every thing to a logical sequence; but that form is nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views. No one will ever have a truly philosophic mastery over the law who does not habitually consider the forces outside of it which have made it what it is. More than that, he must remember that as it embodies the story of a nation's development through many centuries, the law finds its philosophy not in self-consistency, which it must always fail in so long as it continues to grow, but in history and the nature of human needs.¹¹⁹

Justice Scalia's recent counter that "the soul of the law . . . is logic and reason"¹²⁰ seems calculated to war with Holmes's implicit defense of part of the practice of judicial statesmanship. To turn Scalia's language against his cause, statesmanship insists that "the soul of the law" not be deployed to snuff out its life.

Maintaining proper pace with changes in society requires judges to balance fidelity to rule-of-law values, which confers legal legitimacy on courts, with fidelity to social values, which confers social legitimacy.¹²¹

phases of important issues which arise, with a view to the proper application of the Constitution, which is a political instrument in a way, to new conditions.

Letter from William Howard Taft to George Sutherland (Sept. 10, 1922), *microformed on* William H. Taft Papers, Reel 245 (Library of Cong., 1969).

119. Oliver Wendell Holmes, Jr., *Book Notices*, 14 AM. L. REV. 233, 234 (1880). For a cogent history of the rise of legal realism and its repudiation of the idea of an unchanging law discernible through abstract logic and reason, see EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 74–94 (1973).

120. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2582 (2007) (Scalia, J., concurring in the judgment).

121. Professor Fallon distinguishes between "legal" and "sociological" legitimacy. See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005) ("When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . insofar as it is otherwise acquiesced in."); see also Friedman, *supra* note 61, at 1387 ("[T]he work of constitutional judges must have both 'legal' and 'social' legitimacy. Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered." (footnote omitted)); cf. Harry M. Clor, *Judicial Statesmanship and Constitutional Interpretation*, 26 S. TEX. L.J. 397, 398 (1985) ("American thinking about the nature and function of courts of law has always been characterized by a kind of duality.").

Elsewhere Robert Post and I have attempted to theorize that dialectical tension.¹²² For present purposes, it suffices to note that an evolving society must look forward in addition to looking back, and courts that continuously prevent the society from doing so eventually will lose their legitimacy.¹²³ Accordingly, judicial statesmanship recognizes that judges must do more than maintain fidelity to the value of logical consistency. They also owe fidelity to the evolving ideals of the society they serve.¹²⁴ As Frankfurter put it, “Law presupposes sociological wisdom as well as logical unfolding.”¹²⁵

Judicial statesmanship, however, demands more than the processing and expression of extant social values. The judge must shape and refine as he expresses; he must be “a man of vision who harnesse[s] his science to the achievement of his vision.”¹²⁶ Judges, in short, are charged with authoritatively expressing certain values and not others, with putting the power and prestige of the law behind the ones they embrace in an effort to “sort[] out the enduring values of a society.”¹²⁷ That is plainly what the *Brown* Court did¹²⁸ and what courts have done time and again in many areas of constitutional law.

But this is hardly to suggest that “anything goes” in the realm of judicial statesmanship. Judges are not free to endorse whatever set of values they wish. Quite the contrary, the Court “labors under the obligation to

122. See Post & Siegel, *supra* note 88, at 1497–500, 1503 (identifying weak and strong dilemmas that may arise when courts must choose between norms of professional practice and the logic of popular values).

123. See, e.g., *supra* notes 58–61 and accompanying text (discussing the New Deal crisis and the *Lochner* Era).

124. In some contexts, law’s incorporation of social values may prove highly effective at achieving rule-of-law values like consistency. People who do not possess the expertise of legal professionals may be able to discern whether judges are accurately and consistently applying social values. See Post & Siegel, *supra* note 88, at 1499–500.

125. FRANKFURTER, *The Judicial Process*, *supra* note 6, at 35; see also Frankfurter, *Twenty Years*, *supra* note 4, at 931 (“The eternal struggle in the law between constancy and change is largely a struggle between the forces of history and the forces of reason, between past reason and present needs.”).

126. FRANKFURTER, *Tenth Anniversary*, *supra* note 8, at 118; cf. SELZNICK, *supra* note 2, at 135–36 (“Leadership goes beyond efficiency (1) when it sets the basic mission of the organization and (2) when it creates a social organism capable of fulfilling that mission.”).

127. BICKEL, *supra* note 60, at 26; see also *id.* at 239 (“[T]he Court . . . is at once shaper and prophet of the opinion that will prevail and endure.”); KRONMAN, *supra* note 15, at 15 (“[O]ne important part of what [the lawyer-statesman] does is to offer advice about ends. An essential aspect of his work, as he and others see it, is to help those on whose behalf he is deliberating come to a better understanding of their own ambitions, interests, and ideals and to guide their choice among alternative goals.”). Kronman conceives of “the core of statesmanship” in the judicial arena no differently than he views it in other arenas. See *id.* at 340–41 (“[The] aspect of the judge’s job that constitutes the core of statesmanship in all its different guises, including the judicial one[is] his obligation to preserve the bonds of political fraternity, to strengthen the willingness of opposing groups to continue as members of a common enterprise even when there is no shared standard to resolve their disputes.”).

128. See *supra* notes 62–66, 71 and accompanying text (discussing *Brown*).

succeed.”¹²⁹ And as *Brown* underscores, success may be far from certain. Success requires regular attempts at education and persuasion,¹³⁰ not declarations of consensus by judicial fiat or routine resort to coercion.¹³¹ Moreover, as I develop in the next subpart, success may at times require moderation and a vantage point that encompasses the reasonable commitments of different parts of a divided nation.

Success also requires a sensitive understanding of the traditions and character of the country:

Except insofar as we *do*, what we think we *have* is powerless and will soon disappear. Except insofar as, in doing, we respect what we *are*—both our actuality and the genuine potential within us—our doing will be a disaster. Neglect any one of these dimensions, and you will get the idea of our United States Constitution very wrong.¹³²

Because the Constitution functions in part as the repository of our “fundamental nature as a people”¹³³—because it gives voice to the deepest values of the nation—“there is a sense, after all, in which our constitution is sacred and demands our respectful acknowledgement.”¹³⁴ Judges ignore at their peril the limits imposed by a shared past.¹³⁵

129. BICKEL, *supra* note 60, at 239 (“The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.”).

130. *See, e.g., id.* at 26 (“Their insulation and the marvelous mystery of time give courts the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry. . . . Hence it is that the courts, although they may somewhat dampen the people’s and the legislatures’ efforts to educate themselves, are also a great and highly effective educational institution.”); BICKEL, *supra* note 9, at 91 (“Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”); KRONMAN, *supra* note 15, at 101 (“[A] statesman must accept the fact that he is only one among many and persuade others to adopt his point of view. He cannot force his convictions on them but must win their support by making arguments they will accept.”); *cf.* SELZNICK, *supra* note 2, at 150 (“It has been well said that the effective leader must know the meaning and master the techniques of the educator.”); Heineman, *supra* note 107, at 600 (“[M]uch of leadership today is not command and control of the troops but persuasion, motivation, and empowerment of teams around a shared vision.”).

131. *See, e.g., BICKEL, supra* note 60, at 28 (“[T]he Court has ways of persuading before it attempts to coerce, and . . . over time, sustained opinion running counter to the Court’s constitutional law can achieve its nullification . . .”).

132. Pitkin, *supra* note 89, at 169; *cf.* SELZNICK, *supra* note 2, at 26 (“[T]he purposes we have or can have depend on what we are or what we can be. In statesmanship no less than in the search for personal wisdom, the Socratic dictum—know thyself—provides the ultimate guide.”); *id.* at 27 (“This is not to say that the leader is free to do as he wishes, to mold the organization according to his heart’s desire, restrained only by the quality of his imagination and the strength of his will. Self-knowledge means knowledge of limits as well as of potentialities.”).

133. Pitkin, *supra* note 89, at 167.

134. *Id.* at 169.

135. In criticizing the excesses of the French Revolution, Edmund Burke powerfully articulated the balance between conservation and creation that the practice of statesmanship requires:

I cannot conceive how any man can have brought himself to that pitch of presumption, to consider his country as nothing but *carte blanche*, upon which he may scribble whatever he pleases. A man full of warm speculative benevolence may wish his

The foregoing points about the practice of judicial statesmanship echo Philip Selznick's path-marking work on leadership in administration.¹³⁶ Just as the "[t]he executive becomes a statesman as he makes the transition from administrative management to institutional leadership,"¹³⁷ and just as the statesman at the helm of an organization seeks "[t]o infuse with value beyond the technical requirements of the task at hand,"¹³⁸ so too the statesmanlike judge supplements her commitment to technical legal reason with an exquisite sensitivity to the values of the community she is in part responsible for governing.

B. *Judicial Statesmanship and Social Solidarity*

Judicial statesmanship charges judges with accomplishing another, related purpose of law. "[M]aintain[ing] social cohesion as circumstances change"¹³⁹ can be a formidable challenge, particularly when the society is culturally heterogeneous and encompasses divisions on matters of personal and collective identity. Examples in contemporary America include government regulation of abortion, the use of race in educational settings, government funding of religion or symbolic endorsement of religion, capital punishment, gay rights, and physician-assisted suicide. Each of those issues is the site of cultural conflict¹⁴⁰ over incommensurable values.¹⁴¹

Like the rest of us, judges possess life experiences and ideological commitments that ineluctably inform their legal interpretations. Unlike

society otherwise constituted than he finds it; but a good patriot, and a true politician, always considers how he shall make the most of the existing materials of his country. A disposition to preserve, and an ability to improve, taken together, would be my standard of a statesman.

BURKE, *supra* note 108, at 328.

136. See generally SELZNICK, *supra* note 2. For a thoughtful interpretation, see generally Hugh Heclo, *The Statesman: Revisiting Leadership in Administration*, in LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 295 (Robert A. Kagan et al. eds., 2002).

137. SELZNICK, *supra* note 2, at 4 (emphasis omitted).

138. *Id.* at 17 (emphasis omitted).

139. Sweet, *supra* note 76, at 57.

140. There is substantial disagreement regarding the actual degree of cultural conflict in America today; compare, for instance, JOHN KENNETH WHITE, *THE VALUES DIVIDE: AMERICAN POLITICS AND CULTURE IN TRANSITION* (2003), with MORRIS P. FIORINA WITH SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* (2005). Fiorina finds significant polarization among political elites but not much polarization among most Americans. See, e.g., *id.* at 28 ("[T]he thin stratum of elected officials, political professionals, and party and issue activists who talk to the media are indeed more distinct, more ideological, and more polarized than those of a generation ago."); *id.* at 77 ("There is little indication that voters are polarized now or that they are becoming more polarized . . ."); *id.* at 78 ("For as long as we have had data political scientists have known that political elites are more polarized than the mass of ordinary Americans."). Even if Fiorina is right that America as a whole is not as polarized as it may at times appear, serious polarization among those Americans who are most active in the public life of the nation raises concerns about maintaining social solidarity that animate part of the practice of judicial statesmanship.

141. For a nice discussion of the problem of incommensurability, see KRONMAN, *supra* note 15, at 104, 161, 341–42, 375–76.

many of us, however, judges who practice statesmanship attempt to step outside their own experiences and commitments by approaching cases with a genuine regard for the reasonable concerns of both sides.¹⁴² They entertain those concerns with a combination of what Kronman has called sympathy and detachment.¹⁴³ Statesmanlike judges endeavor to speak for the whole rather than the part; they cultivate “[t]he capacity to transcend [their] own limitations, the imagination to see society as a whole.”¹⁴⁴ Such judges deliberate in a way that allows them to experience conflict from the incompatible perspectives of each side without necessarily adopting either perspective as their own.¹⁴⁵

Practicing statesmanship does not require judges continuously to give each pole of controversy “half a loaf.” Other purposes of law make their demands, including those advanced by fidelity to rule-of-law values and the integrity of professional legal reason. The idea of *judicial* statesmanship entails certain limits that the practice of statesmanship in other settings may not. Moreover, the “nomos” that constitutional law embodies¹⁴⁶ need not be

142. See, e.g., Frankfurter, *Twenty Years*, *supra* note 4, at 917 (“Once recognize [sic] the true nature of the judicial process in these constitutional cases, and the determining factors in the qualifications of a Justice become his background, the range of his experience, and *his ability to transcend his experience*.” (emphasis added)).

143. See KRONMAN, *supra* note 15, at 66–87, 114. He writes:

Political deliberation too requires an ability to combine the opposing attitudes of sympathy and detachment, the ability to place oneself imaginatively in the position of others and to entertain their concerns in the same affirmative spirit they do, while remaining uncommitted to the values and beliefs that give these concerns their force. Only the person who has surveyed, with sympathetic detachment, the conflicting interpretations that different members of his community offer of its goals is in a position to say whether his own preliminary views should be revised and to make an informed choice among the alternatives before him.

Id. at 97–98.

144. FRANKFURTER & LANDIS, *supra* note 4, at 317; cf. SELZNICK, *supra* note 2, at 9 (“[W]ithin every association there is the same basic constitutional problem, the same need for an accommodative balance between fragmentary group interests and the aims of the whole, as exists in any polity.”); *id.* at 141 (“There is a need to see the enterprise as a whole and to see how it is transformed as new ways of dealing with a changing environment evolve.”). According to Kronman, the lawyer–statesman ideal in the nineteenth century viewed the statesman as “a devoted citizen,” one who “cares about the public good and is prepared to sacrifice his own well-being for it.” KRONMAN, *supra* note 15, at 14; see also *id.* at 35 (describing the lawyer–statesman as “a public-spirited participant in those deliberative debates concerning the meaning of the common good”).

145. Kronman understands statesmanship as a trait of character that some people possess to a greater extent than others and that is acquired only by developing sound judgment. See KRONMAN, *supra* note 15, at 2–3, 15–16, 21, 24, 26, 35, 76, 161, 363. Selznick, by contrast, conceives of statesmanship “as a specialized form of activity, a kind of work or function.” SELZNICK, *supra* note 2, at 22. Those scholars thus identify differently how the virtue of statesmanship acquires its content—from the character of individuals or from the role they perform in a social system. They agree, however, that statesmanship is a virtue of action. The account of judicial statesmanship that I develop in this inquiry incorporates both understandings as relevant to judicial role.

146. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“We inhabit a *nomos*—a normative universe.”). As Cover explains, “nomos” is so important because it expresses “identity.” *Id.* at 28.

that of the political median in the country in order for constitutional law to legitimate itself over the long run, particularly when expressing social values constitutes another, potentially conflicting purpose of law that statesmanship seeks to accomplish. Depending on the circumstances and the values at stake, the judicial statesman may need to take decisive action. Likely instances include the Court's efforts to end the constitutional crisis of 1937 and its later efforts finally to begin dismantling an apartheid social order.¹⁴⁷ *Brown v. Board of Education* proved terribly divisive and disruptive of social cohesion over the short and medium run because the Court intervened decisively on behalf of one side of an intense social conflict.¹⁴⁸ Almost no one today, however, would suggest that the Court should have exhibited greater statesmanlike sensitivity to inclusiveness and social stability by continuing to proceed from within the paradigm of *Plessy v. Ferguson*. Statesmanship most required the Court to attempt to shape social values in a decidedly different direction.¹⁴⁹

At other times, however, statesmanlike judges appreciate that maintaining some measure of community over the long run—engaged dissent

147. See *supra* subpart II(A).

148. Notably, however, the Court did not morally condemn states that practiced racial segregation in public education. It focused instead on the harm that segregation imposed on black children. Compare *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate [black schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”), with, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424 (1960) (“[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.”). In several ways, *Brown* exhibited a significant measure of moderation. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 745, 536–750 (2d ed. 2004) (discussing the *Brown* Court’s decisions to list the Kansas case first so as not to portray racial segregation as exclusively a Southern practice; to reset the cases for oral argument twice so as to build unanimity among the Justices and allow time to pass between the holding of unconstitutionality and the imposition of a remedy; to limit the focus to public education; and to build flexibility into the decree by requiring desegregation “with all deliberate speed” (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955))). The Court subsequently postponed deciding the constitutionality of antimiscegenation laws. See *infra* note 183 (discussing the Court’s controversial handling of that issue). Scholars today debate whether such moderation was statesmanlike in its concern about public legitimacy or was instead “unnecessary and probably counterproductive.” Jack M. Balkin, *Brown v. Board of Education—A Critical Introduction*, in *WHAT “BROWN V. BOARD OF EDUCATION” SHOULD HAVE SAID* 3, 41 (2001).

149. Some of the most difficult conceptual terrain for an account of judicial statesmanship to navigate is the work that the idea of “reasonableness” should do. There are times when only history can decide whether a judge who rejected a deeply held but unreasonable societal commitment was proceeding in a statesmanlike manner because the commitment was unreasonable or was acting in an unstatesmanlike fashion because the commitment was deeply held. Although the hindsight problem is real and potentially substantial in particular settings, it does not follow that the practice of judicial statesmanship is abjectly dependent on the future. Part IV, for example, offers an evaluation in the present of the likelihood that two recent judicial opinions will prove statesmanlike over the long run.

if not near-universal assent¹⁵⁰—requires what Learned Hand winningly called “the spirit of moderation.”¹⁵¹ That spirit entails, among other things, a sincere effort by judges to reach out to both sides in a “culture war”¹⁵² and to fashion a form of constitutional law that, at least to some extent, symbolically and actually reflects the values of each side.¹⁵³

Understanding that the Constitution “is made for people of fundamentally differing views,”¹⁵⁴ practitioners of judicial statesmanship do not regularly put all the legal and cultural weight of the Court behind one party to the fight, and they do not gratuitously dismiss or belittle the concerns of one side.¹⁵⁵ Their challenge, Frankfurter wrote, “is to arrive at an accommodation of the contending claims,” a task that, “for any conscientious judge, is the agony of his duty.”¹⁵⁶ Alexander Bickel agreed with his mentor, writing that “[t]he Court’s first obligation” is “to invent compromises and accommodations before declaring firm and unambiguous principles.”¹⁵⁷

Just as attempts to express evolving social ideals can implicate tensions with rule-of-law values, so too can attempts to fashion law that sustains

150. See, e.g., Siegel, *supra* note 63, at 1546 (“For a norm that can elicit the fealty of a divided nation forges community in dissensus, enabling the debates through which the meaning of a nation’s constitutional commitments evolves in history.”).

151. HAND, *supra* note 1, at 164. Elsewhere Judge Hand movingly proclaimed that “[t]he spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias.” LEARNED HAND, *The Spirit of Liberty, in THE SPIRIT OF LIBERTY*, *supra* note 1, at 189, 190. Burke also emphasized moderation in describing the practice of statesmanship. See BURKE, *supra* note 108, at 187 (“These opposed and conflicting interests . . . render deliberation a matter not of choice, but of necessity; they make all change a subject of *compromise*; which naturally begets moderation . . .”); *id.* at 341 (“We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men.”).

152. Justice Scalia has explicitly invoked that martial imagery. See *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“It is clear . . . that the Court has taken sides in the culture war . . .”); *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) (“I think it no business of the courts . . . to take sides in this culture war.”).

153. See, e.g., Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 922 (1983) (admiring Justice Powell’s controlling opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) because, among other things, it “both symbolically and actually recognized the legitimacy of deeply held moral claims on both sides”); Post, *supra* note 74, at 76 (observing that in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court “intervene[d] into a fierce controversy within constitutional culture about the legitimacy of affirmative action in a way that recognize[d] and legitimate[d] concerns on both sides of the dispute”).

154. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

155. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995) (Souter, J.) (“[Respondent] understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.”); *id.* at 571 (“The Massachusetts public accommodations law under which respondents brought suit has a venerable history.”); *id.* at 581 (“Our holding today [rejecting respondent’s position] rests not on any particular view about the Council’s message but on the Nation’s commitment to protect freedom of speech.”).

156. FRANKFURTER, *The Judicial Process*, *supra* note 6, at 43.

157. BICKEL, *supra* note 50, at 26.

community. In *Regents of the University of California v. Bakke*,¹⁵⁸ for example, Justice Powell sought to achieve the value of reducing social tension over affirmative action in higher education (while allowing the practice to continue) in part by asserting that affirmative-action programs awarding every applicant “individualized consideration” did not employ facial racial distinctions,¹⁵⁹ a suggestion that was plainly false.¹⁶⁰ Twenty-five years later, Justice O’Connor approached the same dilemma differently. Like Powell, she seemed to want to allow universities to engage in affirmative action. Unlike Powell, however, she was prepared to concede that such programs were based in part upon race. She instead sought to protect the programs by applying strict scrutiny in a manner that was sufficiently deferential as to be inconsistent with the generally accepted meaning of the test.¹⁶¹

It need not be the case, however, that the practice of judicial statesmanship requires courts to achieve desired social consequences only through reasoning that is inconsistent with the requirements of professional reason. For example, Justices Powell and O’Connor appeared concerned about how differently designed affirmative-action programs would differentially affect racial balkanization in America, even if the net operative results of the programs were the same.¹⁶² That concern may explain why Powell preferred the use of race as a “plus” factor to the use of racial quotas and why O’Connor favored the use of Powell’s opaque “plus” to an explicit award of twenty points on the basis of race.¹⁶³ Nothing about an antibalkanization principle would contradict legal reason, however, and those Justices might have considered articulating such a principle candidly and distinguishing permissible means of race-conscious state action from impermissible means

158. 438 U.S. 265 (1978).

159. *Id.* at 318 n.52. Justice Powell wrote:

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated—but no less effective—means of according racial preference than the [petitioner’s set-aside] program. A facial intent to discriminate, however, is evident in petitioner’s preference program and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.

Id. at 318 (opinion of Powell, J.).

160. For a discussion, see Post & Siegel, *supra* note 88, at 1491–92.

161. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring to the “educational judgment” of the University of Michigan Law School in holding that attaining a diverse student body is a compelling state interest under strict scrutiny). For a discussion of Justice O’Connor’s use of strict scrutiny in *Grutter*, see Post, *supra* note 74, at 57–58, 57 & n.257.

162. To balkanize is “to break up (as a region or group) into smaller and often hostile units.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 87 (11th ed. 2006). For an extended development of the argument in the text, see generally Post & Siegel, *supra* note 88, and Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

163. See generally Siegel, *supra* note 162, at 799, 794–800 (arguing that the balkanizing effects of using racial classifications in university admissions might increase “if such use were more apparent than necessary to accomplish the objective at hand”).

on that basis.¹⁶⁴ As I show in subpart IV(A), Justice Kennedy did essentially that in his controlling opinion in the student-assignment cases recently decided by the Court.

To reiterate, however, judges who are attuned to considerations of statesmanship comprehend that they are responsible to more than rule-of-law values. For example, exclusive fidelity to Wechsler's notion of a "neutral principle[]"¹⁶⁵ might render it difficult at critical times to fashion constitutional law that can sustain the allegiance of a divided nation. Wechsler was therefore incorrect to suggest that the only alternative to "entirely principled" decisions was for a court to act "as a naked power organ,"¹⁶⁶ one that "would become the partisan of a particular set of ethical or economical opinions."¹⁶⁷ On the contrary, defining professional norms in the relentlessly rigorous way that Wechsler espoused might force courts to choose sides in divisive conflicts to a greater extent than a concern to sustain social solidarity over the long run would counsel.

Justice Scalia recently illustrated that point in an Establishment Clause standing case. There he chided the plurality composed of Chief Justice Roberts, Justice Kennedy, and Justice Alito, insisting that "[i]f this Court is to decide cases by rule of law rather than show of hands, we must surrender to logic and choose sides."¹⁶⁸ Choosing sides, however, can be a heavy price to pay in the most divisive cases, which is why unyielding fidelity to legal logic is fortunately not the only proper basis for deciding them. Judges must accomplish multiple purposes of law, and the rule of law itself demands that judges attend to the conditions of law's own legitimation. When trust in law is strained, as it can be in deeply divisive disputes over constitutional identity, the virtue of judicial statesmanship is especially valuable and produces leadership.

C. *Judicial Statesmanship, Legal Principle, and Judicial Restraint*

As the foregoing discussion emphasizes, it may be no easy task in particular cases for judges appropriately to balance fidelity to those preconditions and purposes of law that judicial statesmanship seeks to

164. See Post & Siegel, *supra* note 88, at 1503–04 (developing the antibalkanization rationale). A key question is the extent to which candidly declaring such a principle in *Bakke* or *Grutter* and *Gratz* would have undermined the intended effect of the Court's speech, which was to reduce social tension over affirmative action in higher education while allowing such admissions programs to continue. For a discussion, see *id.* at 1504–07.

165. Wechsler, *supra* note 56, at 17.

166. *Id.* at 19.

167. *Id.* (quoting *Otis v. Parker*, 187 U.S. 606, 609 (1903)).

168. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2573 (2007) (Scalia, J., concurring in the judgment). I do not mean to imply approval of the particular distinction drawn by the plurality in *Hein*—that is, the distinction between specific and general congressional appropriations for purposes of taxpayer standing under *Flast v. Cohen*, 392 U.S. 83 (1968). I intend my point to be general in the same way that Justice Scalia intended his point to be general.

accomplish with fidelity to other purposes of law.¹⁶⁹ Likewise, it seems impossible to specify as a theoretical matter how judges ought to set that balance. Beyond advising them not to sacrifice completely one set of concerns to the other as a matter of course, it seems appropriate to endorse the exercise of tact, judgment, prudence, discretion, and sensitivity to considerations of timing.¹⁷⁰ The relevance of such ideas and others like them indicates the presence of a problem that is incapable of theoretical resolution.

On the one hand, it should be clear that there is more to judging than judicial statesmanship. That is because there are other preconditions and purposes of law beyond those that statesmanship seeks to accomplish. The values associated with the semiautonomous integrity of professional legal reason can make potentially competing demands in a given case. As discussed in subpart III(B), Justices Powell and O'Connor may have viewed the problem of affirmative action in higher education as implicating just that sort of conflict.¹⁷¹ Judges should not take lightly the demands of legal principle. Anything taken to an extreme, including statesmanship, can corrupt.¹⁷²

169. See *supra* subpart II(A) (discussing other purposes of law).

170. On the importance of timing, see FELIX FRANKFURTER, *Franklin D. Roosevelt*, in *OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939–1956*, *supra* note 6, at 362, 362 (“Not least of the arts of statesmanship is that of correct timing, of knowing what to say and when.”). Only the statesman, Plato wrote, “know[s] when to embark on and initiate courses of action which are particularly important to a state.” PLATO, *STATESMAN* 76 (Julia Annas & Robin Waterfield eds., Robin Waterfield trans., Cambridge University Press 1995) (*circa* 350 B.C.); see also BICKEL, *supra* note 50, at 15–16 (“The eastern politicians never do anything without the opinion of the astrologers on the *fortunate moment*. . . . Statesmen of a more judicious prescience look for the fortunate moment too; but they seek it, not in the conjunctions and oppositions of the planets, but in the conjunctions and oppositions of men and things. These form their almanac.” (quoting EDMUND BURKE, A LETTER FROM MR. BURKE TO A MEMBER OF THE NATIONAL ASSEMBLY; IN ANSWER TO SOME OBJECTIONS TO HIS BOOK ON FRENCH AFFAIRS 58 (Paris, Pall-Mall 1791))).

171. Cf. Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396 (1987) (“Indeed, at times, I think he may have been willing to sacrifice a little consistency in legal theory in order to reach for justice in a particular case.”). O'Connor could just have readily been describing her own approach to judging.

172. Holmes thus “timidly suggest[ed]” to Frankfurter to exercise:

caution in the use of the word statesmanship with regard to judges. Of course, it is true that considerations of the same class come before their minds that have to be or ought to be the motives of legislators, but the word suggests a more political way of thinking than is desirable and also has become slightly *banal*. I didn't think the late Chief Justice [Edward D. White] shone most when he was political. A statesman would consider whether it was wise to bring to the mind of Congress what it might do in this or that direction—but it seems to me wrong to modify or delay a decision upon such grounds. When economic views affect judicial action I should prefer to give such action a different name from that which I should apply to the course of Wilson or Lodge.

Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (Sept. 9, 1923), in HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 159, 160 (Robert M. Mennel & Christine L. Compston eds., 1996). Bickel described Holmes's advice to Frankfurter “merely as a hedge against what might come after, as a prudent qualification.” BICKEL, *supra* note 9, at 21.

On the other hand, the institution of law itself requires judicial attention to other purposes of law and to the political conditions for sustaining respect for legality:

No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden. But it is not true in our society that we are generally governed wholly by principle in some matters and indulge a rule of expediency exclusively in others. There is no such neat dividing line. . . . Most often, . . . and as often as not in matters of the widest and deepest concern, such as the racial problem, both requirements exist most imperatively side by side: guiding principle and expedient compromise. The role of principle, when it cannot be the immutable governing rule, is to affect the tendency of policies of expediency. And it is a potent role.¹⁷³

Bickel was brushing up against important truths in insisting that “[o]ur democratic system of government exists in this Lincolnian tension between principle and expediency, and within it judicial review must play its role.”¹⁷⁴ Bickel’s whole understanding of law as an institution contrasts sharply with the partial understanding sometimes expressed by Justice Scalia¹⁷⁵ or forcefully stated by Gerald Gunther. Gunther insisted that “the 100% insistence on principle, 20% of the time”¹⁷⁶ will not do, for “if devotion to principled adjudication is to be taken seriously, tolerance must have its bounds, doctrinal integrity must be more than a sometime goal.”¹⁷⁷ Judges must negotiate the various purposes of law that the legal system exists to vindicate. The judicial statesman also functions inside the law because the grounds of the legitimation of law are properly regarded as part of the law.

In light of the context specificity on which the practice of judicial statesmanship necessarily turns, it seems inappropriate to endorse as a general matter Frankfurter’s devotion to judicial restraint—that is, judicial deference to legislatures.¹⁷⁸ It seems equally inappropriate to award pride of place to the techniques of conflict avoidance championed by the early Bickel¹⁷⁹ or, more recently, by Cass Sunstein.¹⁸⁰ So much turns on the

173. BICKEL, *supra* note 60, at 64; cf. SELZNICK, *supra* note 2, at 1 (“In our time, there is no abatement of the need to continue the great discussion [about statesmanship], to learn how to reconcile idealism with expediency . . .”).

174. BICKEL, *supra* note 60, at 68.

175. *But see infra* notes 195–97 and accompanying text (discussing Scalia’s apprehension of the need at times for judges to deviate from his own conception of legal principle).

176. Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964).

177. *Id.* at 25.

178. *See supra* note 11 and accompanying text.

179. *See generally* BICKEL, *supra* note 60 (urging use of the “passive virtues,” such as standing doctrine, in order to protect legal principles from being distorted by the need to maintain public legitimacy).

particular situation, and the proper relation among the various alternatives “is itself a matter for the judgment of statesmen.”¹⁸¹

Sometimes restraint will be appropriate, as when legislatures are expressing social ideals in ways that do not conflict with fundamental constitutional values. Restraint may also be appropriate when the social problem at hand is difficult to address effectively and the consequences of judicial intervention are highly uncertain.¹⁸² At other times, conflict avoidance, at least for the time being, may be the path of statesmanship, as when the country is bitterly divided and legal intervention at that moment might increase balkanization and thwart vindication of the very values that would justify the intervention.¹⁸³ But at still other times, judges can best accomplish the preconditions and purposes of law for which judicial statesmanship is responsible by intervening in the right sort of way: by acknowledging conflict, not avoiding it. The situation may require decisive action in the wake of such acknowledgment, or it may require efforts to ameliorate conflict—or at least to keep it to a manageable level—through crafting law that to some extent reflects the values of each side.¹⁸⁴

D. Some Objections

I offer the foregoing as a sketch, a rough conceptual account of the thing Brandeis,¹⁸⁵ Frankfurter,¹⁸⁶ and others have called judicial statesmanship.

180. See generally SUNSTEIN, *supra* note 78 (advocating use of judicial minimalism in order, among other things, to sustain solidarity and to make judicial errors less frequent and less damaging).

181. BICKEL, *supra* note 9, at 34.

182. See, for example, the analysis *infra* subpart IV(A) of Justice Kennedy’s opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*.

183. An example, albeit a very controversial one, may be *Naim v. Naim*, 350 U.S. 985 (1956), which dismissed a challenge to Virginia’s antimiscegenation statute despite its incompatibility with the equal-protection principles articulated in *Brown*. See Siegel, *supra* note 36, at 2017 (“Principle lost the battle . . . but at least principle put itself in a position not to lose the war.”). When the legitimacy of *Brown* was more secure, the Court unanimously invalidated the law as a violation of equal protection and due process. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

184. For further discussion, see *infra* subpart IV(B), contrasting the majority opinion in *Gonzales v. Carhart* with the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. My suggestion that judicial statesmanship does not necessarily counsel judicial restraint is illustrated by the analysis in Part IV, where I argue that Justice Kennedy’s controlling opinion in *Parents Involved in Community Schools v. Seattle School District No. 1* was more statesmanlike than his opinion for the Court in *Gonzales v. Carhart*. Kennedy voted to invalidate the race-conscious student-assignment plans at issue in *Parents Involved* but wrote the majority opinion facially upholding the federal ban on a controversial method of abortion in *Gonzales v. Carhart*.

185. See, e.g., Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 314 (“But in these constitutional cases, since what is done is what you [i.e., Frankfurter] call statesmanship, nothing is ever settled—unless statesmanship is settled & at an end.” (quoting Brandeis)).

186. See, e.g., FRANKFURTER, *The Court and Statesmanship*, *supra* note 12, at 34; Edward A. Purcell, Jr., *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 LAW & SOC. INQUIRY 679, 702 (1999) (observing that for Frankfurter, the Court was “a

The danger in attempting such an account is that it becomes relatively “loose” relatively quickly, as it must in light of the nature of the phenomenon under investigation. To repeat an earlier confession, it is difficult to make general statements about this subject.

My account, however, does help to explain the vagueness one ineluctably encounters in thinking about judicial statesmanship. Vagueness is to be expected when the purposes of law that statesmanship seeks to accomplish are multiple and relate paradoxically. There is a trade-off between analytical tractability and overall accuracy in offering an account of judicial statesmanship, and I have elected to emphasize the latter in order to do justice to the ambiguities that seem to me inherent in a complex social practice.

Another problem concerns the proper bounds of judicial statesmanship. May all judges properly practice it, or only federal judges, or only Supreme Court Justices? May judges properly practice judicial statesmanship in all cases or only in constitutional cases? Is statesmanship appropriate regardless of the subject matter of the controversy at hand or only in particularly divisive cases—those implicating questions of personal and community identity?

Those are complex questions, and I do not have sufficient answers to them. I do, however, offer three observations. First, it seems unlikely that crisp general bounds of the kind suggested above can persuasively be articulated and defended in light of the general preconditions and purposes of law that statesmanship seeks to accomplish. It is not as if they are implicated only when certain kinds of judges must decide specific categories of cases.

Second, the question of the propriety of judicial statesmanship seems more a matter of degree rather than a matter of “yes” or “no.” Various purposes of law may need to be balanced in a given case. It therefore seems unlikely that statesmanship is a one-size-fits-all sort of phenomenon, such that there exists a discrete universe of cases calling for statesmanship and another discrete universe calling for no statesmanship.

Third, it nonetheless seems probable that in the federal courts, the practice of judicial statesmanship will be most necessary when the Supreme Court of the United States considers constitutional controversies involving conflicts over questions of personal and collective identity. Those are the cases in which: (1) the discretion and power of judges are at a maximum; (2) the social consequences of judicial decisions can have the greatest (positive or negative) impact on the preconditions and purposes of law that statesmanship seeks to accomplish; and (3) rule-of-law values can most appropriately be compromised in pursuit of other public ideals.

Situated at the top of the judicial hierarchy, Supreme Court Justices have more discretion and authority than other judges. That is particularly

forum for ‘statesmanship.’ In that new role, the Court had to recognize the nondeterminative nature of the Constitution’s vague provisions, the wisdom and propriety of deferring to legislative judgments, and the unavoidable need ‘to gather meaning not from reading the Constitution but from reading life’” (citations omitted) (quoting FRANKFURTER & LANDIS, *supra* note 4, at 310)).

true in constitutional cases, where the text at issue is often open-ended and the constraints imposed by *stare decisis* are conventionally understood to be less demanding.¹⁸⁷ In identity-defining cases, moreover, people care most about the social values that the law authoritatively will endorse, and decisions may require a choice among deeply held but incommensurable commitments. That is why such cases threaten social solidarity to a greater extent than do other kinds of conflicts.¹⁸⁸ That is also why the content of the social values authoritatively expressed by courts in such cases tends to matter more than the consistency of that content with the values expressed in prior decisions.

Besides charges of excessive vagueness and boundary problems, another criticism sounds in legality. Judicial statesmanship, an unsympathetic reader might suggest, is just a euphemism for political approval of the lawless conduct, however well intended, in which judges sometimes engage. One version of the argument maintains that judges sit on courts *of law*, and thus they should simply do their jobs of interpreting and applying the law by following the rules laid down in the various conventional sources of law—that is, the text of the Constitution, historical understandings of the text, relevant statutes, past judicial decisions, etc.¹⁸⁹

Several responses seem pertinent. First, statesmanship need not serve only as a safety valve deployed to justify avoidance of the “right answer” as a matter of professional reason in particular cases. Statesmanship may also contribute substantially to the design of legal doctrines in the first place, particularly when the expression of evolving social values and the promotion of social solidarity are internal to one’s approach to constitutional interpretation. Moreover, at least some of those doctrines could take a fairly rule-like cast. For example, the rule of *Bolling v. Sharpe*¹⁹⁰ may be most defensible on grounds of statesmanship, and that rule is fairly determinate in application.

187. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (“[T]he Court applies *stare decisis* more ‘rigidly’ in statutory than in constitutional cases.”).

188. Kronman describes “the destructive force let loose in these identity-defining moments,” KRONMAN, *supra* note 15, at 96:

In all but the simplest communities, disagreements are bound to arise concerning its aims and ambitions, and how such disagreements are resolved is often decisive for the community’s identity. Disagreements of this sort put great strain on a community. Like powerful conflicts within a person’s soul, they exert centrifugal force that threatens to pull the community apart and destroy its unity.

Id. at 95–96.

189. Justices Scalia and Thomas often espouse similar views. See *supra* note 90; *infra* note 199.

190. See 347 U.S. 497 (1954) (construing the Due Process Clause of the Fifth Amendment to require the federal government to comply with equal-protection principles even though the Constitution does not contain an Equal Protection Clause applicable to the federal government); *id.* at 500 (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

Second, and again from an interpretive perspective that conceives of statesmanship as internal to the practice of constitutional interpretation, there is good reason to question the realism of regarding federal judges, particularly Supreme Court Justices, as severely constrained in constitutional cases. One need not agree with Judge Posner that the Justices operate on “an ocean of discretion”¹⁹¹ to appreciate that the body of open water on which they swim (or sink) is large indeed.¹⁹² It is hardly novel to suggest that the pertinent constitutional text itself is often indeterminate and that the potential source materials for gleaning its meaning in particular settings can be both numerous and contested.¹⁹³ That is why it makes a great deal of difference who *in particular* sits on the Supreme Court of the United States.¹⁹⁴

Third, it bears repeating that judicial statesmanship is best derived in part from the political foundations of the rule of law. Because law is not self-validating, judges must account for the terms of the law’s own legitimation, however that law is understood to have been arrived at. In the long run, judges cannot avoid statesmanship because they must achieve public acceptance. If unqualified by statesmanship, therefore, neither originalism nor a relentlessly principled progressive jurisprudence can achieve what courts must achieve in order to discharge their responsibilities and maintain the rule of law.¹⁹⁵

Accordingly, statesmanship has a role to play even if one’s theory of interpretation rejects the expression of contemporary values and the maintenance of solidarity as purposes of law and as internal to the practice of interpretation. Even if one believes that a theory of interpretation goes to the

191. Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 41 (2005). Of course, the assertion that Justices are not severely constrained is hotly contested in much of the legal literature, particularly among originalists.

192. Even for those who believe that the relevant legal materials are rarely underdeterminate, judicial statesmanship may still be relevant to those parts of the job of judging that undoubtedly entail the exercise of discretion—for example, the use of the certiorari power and the manner in which a judge crafts an opinion.

193. In addition to the text, other potential sources of constitutional meaning include the original intent(s) of those who wrote or ratified the text, the original meaning(s) of the text (stated at various possible levels of abstraction), considerations of constitutional structure, Supreme Court precedent (which does not bind the Justices), American tradition and historical practice (stated at various possible levels of abstraction), fundamental social values, and possibly other considerations as well.

194. For a discussion of the “umpire analogy” employed by Chief Justice Roberts during his confirmation hearings that charges the analogy with occluding the reality of the situation, see generally Siegel, *supra* note 102.

195. Thus, for example, some originalists worry about precedent and *Brown*. See, e.g., *supra* note 65 (discussing attempts to defend *Brown* on originalist grounds). Some originalists also worry about far more than precedent and *Brown*. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (“[S]tare decisis alone is not enough to prevent originalism from being what many would consider too bitter a pill.”); Mitchell N. Berman, *Originalism Is Bunk* 30 (Feb. 18, 2008) (unpublished manuscript, on file with author) (labeling Justice Scalia a moderate originalist in light of his confession in the above article that most originalists would temper originalism with some deference to social changes other than judicial precedent and his strong intimation that he would as well).

rule-of-law component of a decision—to the “right answer” in terms of “logic and reason”¹⁹⁶—and that statesmanship is entirely extrinsic to that component, statesmanship may still be necessary to qualify the ability of a court straightforwardly to adopt the rule-of-law conclusion. In other words, statesmanship can take some of the pressure off of—or simply offer another way of thinking about—the debate over theories of interpretation. For example, Justice Scalia’s relatively moderate brand of originalism can be understood as reflecting his wise recognition that originalism must at times be qualified by statesmanship.¹⁹⁷

Whatever one’s theory of constitutional interpretation, statesmanship advises judges to subscribe to what Weber called “an ethic of responsibility, in which case one has to give an account of the foreseeable results of one’s action.”¹⁹⁸ Judges ought to regard themselves as responsible for—as author of—the reasonably foreseeable social consequences of their official actions.¹⁹⁹ That “demand” upon them—“to make some forecast of the

196. See *supra* note 120 and accompanying text (quoting Justice Scalia).

197. See, e.g., Scalia, *supra* note 195, at 861 (“I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.”). This passage clearly demonstrates Scalia’s understanding that judges cannot proceed with strictly originalist premises because law must express evolving social values.

198. MAX WEBER, *POLITICS AS A VOCATION* 47 (H.H. Gerth & C. Wright Mills trans., Fortress Press 1965) (1919); cf. SELZNICK, *supra* note 2, at 142 (“[T]he need for institutional responsibility . . . accounts for much of what we mean by statesmanship.”). Weber himself conceived of judges as bureaucrats, not as political actors. See, e.g., WEBER, *supra*, at 12–13 (contrasting “leading politicians” with “expert officialdom,” including “the trained jurist”). But then Weber likely did not have in mind judges with the discretion and power of federal judges in modern America, especially U.S. Supreme Court Justices.

199. See WEBER, *supra* note 198, at 20 (“The honor of the political leader, of the leading statesman, . . . lies precisely in an exclusive *personal* responsibility for what he does, a responsibility he cannot and must not reject or transfer.”). Justice Thomas recently voiced a profoundly different understanding of judicial role:

The dissent accuses me of “feel[ing] confident that, to end invidious discrimination, one must end all governmental use of race-conscious criteria” and chastises me for not deferring to democratically elected majorities. Regardless of what Justice BREYER’s goals might be, this Court does not sit to “create a society that includes all Americans” or to solve the problems of “troubled inner city schooling.” We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.

Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2779 n.14 (2007) (Thomas, J., concurring) (citations omitted). Justice Scalia has at times recorded similar views. See, e.g., Cheney v. U.S. Dist. Court, 541 U.S. 913, 920 (2004) (mem. of Scalia, J.) (“To expect judges to take account of political consequences—and to assess the high or low degree of them—is to ask judges to do precisely what they should not do.”). That understanding of judicial role is hardly limited to conservative Justices. See, e.g., Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 226 (1988) (“In a 1968 television interview, Justice Black was asked about certain unpopular constitutional decisions of the Supreme Court. ‘Well,’ he replied, ‘the Court didn’t do it The

consequences of [their] action[s]”—Frankfurter described as “perhaps the heaviest.”²⁰⁰ Judges should not often be moved by the words “fiat justitia, ruat coelum.”²⁰¹ There is undeniable judicial heroism associated with the sentiment expressed by those words.²⁰² In truth, however, there could be no justice—or any other social good, including the rule of law—if the heavens were actually to fall.

Statesmanship counsels judges to understand well their power to undermine the political trust that sustains the rule of law by intervening in divisive cultural conflicts without the reasonable concerns of all in mind. Statesmanship advises them to be genuinely humbled by their power²⁰³ and to wield it wisely, with judgment, and with a sense of “proportion.”²⁰⁴ Judges should seek always to “measur[e] up to their own doings.”²⁰⁵ In so acting, they remain within the law by providing crucial support for the rule of law, particularly when it is threatened by profound disputes over the identity of the community.

Constitution did it.” (omission in original) (quoting *Justice Black and The Bill of Rights* (CBS television broadcast Dec. 3, 1968))).

200. FRANKFURTER, *The Judicial Process*, *supra* note 6, at 39.

201. “Let justice be done though the Heavens may fall.”

202. See, e.g., Douglas O. Linder, *Without Fear or Favor: Judge James Edwin Horton and the Trial of the “Scottsboro Boys,”* 68 UMKC L. REV. 549, 578 (2000). Recounting the actions of Judge James Horton during the racially charged “Scottsboro Boys” Alabama rape case from the early 1930s, Professor Linder writes:

Despite the knowledge that setting aside the Patterson verdict would likely mean an end to his judicial career, the decision for Horton was not a difficult one. A judge must do his duty. “My mother early taught me a phrase she said was her father’s motto,” Horton later recalled. “It has frequently come to mind in difficult situations.” The phrase Horton learned on his mother’s knee was “Justitia fiat coelum ruat”—“Let justice be done though the Heavens may fall.”

Id.

203. Cf. BURKE, *supra* note 108, at 340 (“The true lawgiver ought to have an [sic] heart full of sensibility. He ought to love and respect his kind, and to fear himself.”).

204. *Id.* at 341; accord Letter from William Howard Taft to George Sutherland, *supra* note 118 (“[T]he functions performed by us are of such a peculiar character that something in addition is much needed to round out a man for service upon that Bench, and that is a *sense of proportion* derived from a knowledge of how Government is carried on, and how higher politics are conducted in the State.” (emphasis added)).

205. WEBER, *supra* note 198, at 54. Delivering remarks at a memorial meeting of the bar of the Supreme Court of the United States, Judge Henry Friendly invoked a passage of Martin Buber, which “could have been Felix Frankfurter’s credo and fairly summarizes his life,” HENRY J. FRIENDLY, *Mr. Justice Frankfurter*, in BENCHMARKS 318, 323 (1967):

I call a great character one who by his actions and attitudes satisfies the claims of situations out of deep readiness to respond with his whole life, and in such a way that the sum of his actions and attitudes expresses at the same time the unity of his being in its *willingness to accept responsibility*.

Id. at 323–24 (emphasis added) (quoting MARTIN BUBER, BETWEEN MAN AND MAN 114 (Beacon Press paperback ed. 1955) (1947)); cf. HENRY J. FRIENDLY, *Judge Learned Hand*, in BENCHMARKS, *supra*, at 308, 310 (“[Judge Hand was] the last of those great men who, in the first decades of this century, remolded our law. Although he would have denied any such pre-eminence with a not inconsiderable show of indignation, in his innards he knew of it, and of the *responsibilities attending it*.” (emphasis added)).

Next, I consider the objection that views about judicial statesmanship are heavily influenced by views about the particular values that courts elect or decline to enforce. For example, a critic might charge that I would not be inclined to view *Bakke* and *Grutter*²⁰⁶ as instances of judicial statesmanship if I were persuaded that the government treats its citizens unjustly whenever it distributes benefits and burdens on the basis of race. There is undeniable truth in that suggestion, and my account of judicial statesmanship helps to explain why views on statesmanship are influenced (although not exclusively determined) by views on substantive values. A judicial statesman has ends that she wants to accomplish; one is always a statesman (or not) from a point of view. As would-be statesmen recede into the past, so that the future is known and the causes they championed become less controversial, an interpretive community can generate greater consensus on the question whether they qualify as statesmen. But when potential statesmen are betting on the future in the present regarding issues that do and will affect us, our own predictions and understandings of the values and identity of the community—our own potential for statesmanship—must increasingly be implicated in our judgments of judicial statesmanship. The question of judicial statesmanship focuses on how the would-be statesman acts to further the values, identity, and solidarity of the polity. Among the things that statesmanship entails, therefore, is a substantive vision of the political community. There are no mechanical, value-free indicia of statesmanship.

Yet my account also demonstrates that talk of judicial statesmanship is not misleading or superfluous because it is coextensive with talk of one's own values. For example, I disagree strongly with the doctrinal analyses supporting the judgments in *Elk Grove Unified School District v. Newdow*²⁰⁷ and *Van Orden v. Perry*,²⁰⁸ and like Justice Scalia I perceive no relevant difference between the question that the Court decided in *Lawrence v. Texas*²⁰⁹ and the question of the constitutionality of bans on gay marriage, which the Court purported to leave for another day.²¹⁰ Yet I recognize the

206. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

207. *See* 542 U.S. 1 (2004) (reversing a lower court judgment invalidating a school-district policy requiring teacher-led recitation of the Pledge of Allegiance but avoiding the merits of the constitutional claim by holding that the respondent-father lacked prudential standing).

208. 545 U.S. 677 (2005). In *McCreary County, Kentucky v. ACLU of Kentucky*, 545 U.S. 844 (2005) and *Van Orden v. Perry*, the Court held 5–4 that the *McCreary County* Ten Commandments display violated the Establishment Clause but that the *Van Orden* monument did not. *McCreary County*, 545 U.S. at 881; *Van Orden*, 545 U.S. at 692. Only Justice Breyer was in the majority in both cases, and his narrow concurrence in the judgment was decisive in *Van Orden*. Breyer declared that he was acting to reduce the “divisiveness” that Ten Commandments cases generate. *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring in the judgment). He sent a strong signal that advocates of church–state separation should not challenge longstanding displays and that their ideological adversaries should not build new ones. *See id.* at 703–04.

209. 539 U.S. 558 (2003).

210. In *Lawrence v. Texas*, the Court overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), announcing a right of sexual privacy in the home that extends to homosexuals. *Lawrence*, 539 U.S. at 578. Yet the Court seemed ambivalent about whether the right sounded in liberty or equality, *see*

fundamental importance in those cases of the practice of judicial statesmanship that seemed partially to animate each majority opinion. Statesmanship requires judges not simply to enforce their own values but to assess all of the implicated values in light of their best sense of what will work in the situation—to consider what the situation demands in light of the various preconditions and purposes of law that help to sustain the long-term legitimation of the legal system. Statesmanship insists that judges respond to cases not just with their own values in mind but with an appreciation of social values from the standpoint of the nation as a whole and with an eye to maintaining social solidarity over the long run.²¹¹ Accordingly, while one's substantive values necessarily affect one's judgments about what statesmanship requires, statesmanship is no mere property of the substance of a view. Statesmanship is most critically a property of how persons with a particular view act.

Finally, I consider a series of objections that concern the relationship between judicial role and the pursuit of legitimacy. A critic might argue that judges should not concern themselves with legitimacy, either because doing so is counterproductive or because doing so is inappropriate. Alternatively, a critic might insist that judges should concern themselves with legitimacy but not in the ways I have suggested. I consider each objection in turn.

There may be goals that are best achieved when one is not focusing on accomplishing them. It seems improbable, however, that courts are most likely to sustain their legitimacy over the long run by never self-consciously considering the impacts of what they do on popular acceptance of their authority. As discussed in subpart II(A), for example, the *Lochner* Court eventually faced a crisis of legitimacy that was avoidable and that likely would have been avoided had the Court focused explicitly on whether it was consistent with the maintenance of its own legitimacy to prohibit the political branches from taking decisive action during the Great Depression. The Taney Court also would have been wise to contemplate the limits on its authority to settle the slavery question.²¹² Those examples may be dramatic, but the point they exemplify seems generally applicable: courts that do not work at maintaining their own legitimacy, at least to some extent, are likely over the long run to possess less of it.

id. at 575, avoided the language of fundamental rights and strict scrutiny, and suggested that the issue of gay marriage was distinguishable without explaining why or how, *see id.* at 578. If the Court followed to its logical conclusion its defense of the dignity of intimate homosexual relationships and the state's lack of authority to demean homosexuals, *id.* at 560, 567, 575, 578, prohibitions of gay marriage would almost certainly violate equal protection. Yet the Court explicitly avoided that conclusion. *Id.* at 578.

211. Thus, results may matter to the judicial statesman but then so do judicial rhetoric, reasoning, and other considerations as well.

212. *See generally* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendments*, U.S. CONST. amends. XIII, XIV.

According to the next criticism, courts should simply “do their jobs,” as a result of which they will earn legitimacy; courts should leave the conscious pursuit of judicial legitimacy to other governmental and private institutions. Because I understand expressing social values and sustaining social solidarity to be fundamental purposes of law and thus part of what it means for courts to “do their jobs,” there is less distance between that objection and my account of judicial statesmanship than might at first appear. But because I also conceive of legitimation as a precondition of effective law, the objection retains some force. For example, there may be times when statesmanship would counsel compromising the scope of the vindication of a constitutional claim. It is also possible that judicial sensitivity to popular reactions could encourage citizens to undermine the authority of courts that issue disappointing rulings.

Such concerns counsel caution, but they are not the whole story. Law cannot achieve any of its purposes, including the protection of individual rights, unless the preconditions for fulfilling its social functions are established and sustained. And as I have argued, legitimation is one such precondition. Moreover, while the political branches and other institutions have essential roles to play in maintaining those preconditions—for example, by supporting the ideal of judicial independence—it seems unlikely that their activities could suffice by themselves. Like the rest of us, courts are ultimately judged not just by what others say about them but by what they do. It follows that an attribute of judicial role must be to ensure legitimation.

The last objection concedes that courts should consciously pursue legitimacy, at least to some extent. It nonetheless argues that courts should do so in different ways—specifically, by emphasizing a sharp divide between law and politics, thereby validating popular beliefs or aspirations about the autonomy of law.²¹³ I have considered that perspective at length elsewhere.²¹⁴ Here I will observe only that such an approach is insufficient by itself to legitimate the legal system. If citizens want judicial “umpires,”²¹⁵

213. Justice Scalia suggested such a view in his *Casey* dissent:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments*; if we can ignore a long and clear tradition clarifying an ambiguous text . . . ; if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (*ought to be*) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 1000–01 (1992) (Scalia, J., dissenting).

214. See Post & Siegel, *supra* note 88, at 1507–11; Siegel, *supra* note 102.

215. See *supra* note 194 (noting John Roberts’s use of the “umpire analogy” during his confirmation hearings to become Chief Justice of the United States).

they also want judges who call the game “their way,” at least to some extent some of the time. To return to a lesson of *Lochner*, no amount of talk about the autonomy of law and the constitutional necessity of shutting down President Roosevelt’s legislative program was able to save the Court during the crisis of the New Deal.²¹⁶ Likewise, no amount of such talk could have muted Southern reaction to *Brown*.²¹⁷

IV. Judicial Statesmanship or Its Absence: The Kennedy Court(s)

In this Part, I examine two momentous interventions by the Supreme Court during its October 2006 Term. My aim is not to analyze comprehensively the decisions or opinions in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Gonzales v. Carhart*. My purpose, rather, is to illustrate the importance of judicial statesmanship in negotiating some of the most divisive controversies in contemporary constitutional law, controversies that require judges to act in ways that maintain the sources of law’s own legitimacy. I focus on Justice Kennedy’s opinions because they proved decisive in *Parents Involved* and *Gonzales v. Carhart* and because the contrast between the two opinions is illuminating.²¹⁸

216. See *supra* note 61 and accompanying text (quoting Barry Friedman’s discussion of *Lochner*).

217. In this Article, I do not canvas comprehensively the potential list of judges who have practiced judicial statesmanship. There are, of course, examples beyond some of the work (or extrajudicial writings) of Holmes, Brandeis, Frankfurter, Warren, Powell, and O’Connor. For example, one could make a case for Justices Marshall, Hughes, and Jackson. In important opinions, each arguably succeeded in expressing social values with an appreciation of both the limits of the past and the needs of the present and future. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (articulating a realistic framework for adjudicating the constitutionality of assertions of executive authority that promised both meaningful limits on executive power and substantial flexibility to exercise it as a post-World War II superpower); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (Hughes, C.J.) (holding that the regulation of intrastate activities with a “close and substantial relation to interstate commerce” was a constitutional exercise of Congress’s power under the Commerce Clause, signaling an end to the Court’s invalidation of much New Deal economic legislation); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, C.J.) (broadly construing the scope of Congress’s powers and prohibiting state taxation of the federal government, thereby facilitating the supremacy of the federal government over the states); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.) (claiming the power of judicial review but declining to exercise it in a way that could have provoked a crisis of judicial legitimacy); see also, e.g., R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. COLO. L. REV. 1365, 1376 (2000) (“Marshall’s instinct was to balance principle and doctrine with down-home practicality—a sense of what the American people needed and what history would allow.”).

218. To be sure, Kennedy was not writing for himself alone in *Gonzales v. Carhart*, as he was in *Parents Involved*, and his freedom of action was arguably less than it would have been had he been writing only for himself, particularly considering the need for internal statesmanship—that is, statesmanship vis-à-vis one’s colleagues on a collegial court. See *supra* note 15 (noting the phenomenon of internal statesmanship). In a case of such magnitude, however, Kennedy could have elected to write separately in *Gonzales v. Carhart*, just as he did in *Parents Involved*, if he was not prepared to endorse any of the views that his colleagues in the majority wanted to express in the

I proceed by inquiring whether each Kennedy opinion attends sufficiently to the preconditions and purposes of law that judicial statesmanship is charged with accomplishing. Applying the rough criteria that I identified in Part III, I investigate the extent to which each opinion faithfully expresses contemporary social values, is likely to help sustain social solidarity over the long run, and is likely to succeed in shaping social values over the long run. I conclude that Kennedy's controlling opinion in *Parents Involved* seems in important ways to exhibit the practice of judicial statesmanship but that his majority opinion in *Gonzales v. Carhart* will in most respects likely prove a failure of statesmanship.²¹⁹

A. Parents Involved

In *Parents Involved*, the Court considered the extent to which local communities could use race as a factor in student assignment in the absence of a federal court order requiring such use.²²⁰ Framed precisely, the question presented was the extent to which the Equal Protection Clause allowed the school districts in Seattle, Washington, and Jefferson County, Kentucky, to use racial criteria—whether explicit racial classifications or implicit race consciousness—in assigning students to elementary or secondary schools on a nonmerit basis.²²¹ The school boards asserted that two interests justified their use of race in student assignment: securing the civic, social, and educational benefits alleged to be associated with racially integrated schools and reducing minority-student isolation in educationally inferior schools.²²²

The cases generated a 4–1–4 split within the Court. The three-way fracture brought immediately to mind *Regents of the University of California v. Bakke*,²²³ the decision in which the Supreme Court first articulated constitutional standards for affirmative action in higher education.²²⁴ Chief Justice Roberts, in a plurality opinion that was joined by Justices Scalia, Thomas, and Alito,²²⁵ appeared to prohibit broadly the use of race in student

opinion of the Court. It therefore seems fair to hold Kennedy (although not only Kennedy) responsible for the content of the majority opinion in *Gonzales v. Carhart*.

219. Because some of the relevant questions are empirical and the associated answers are uncertain at this point, the assessments I offer in the following pages are unavoidably preliminary and somewhat speculative.

220. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2746 (2007) (plurality opinion of Roberts, C.J.).

221. *Id.* at 2748–49.

222. *Id.* at 2755–59. For an analysis of those interests, see Siegel, *supra* note 162, at 814–33.

223. For a discussion of Powell's opinion in *Bakke*, see Post & Siegel, *supra* note 88, at 1489–97 and Siegel, *supra* note 162, at 790–94.

224. Because Justice Kennedy joined parts of the Chief Justice's opinion, *Parents Involved*, 127 S. Ct. at 2745, the split in *Parents Involved* was not as "clean" as it was in *Bakke*. But it seems more appropriate to characterize *Parents Involved* as 4–1–4, rather than 5–4, because Kennedy's approach differed significantly from both that of the plurality and that of the dissent.

225. See *Parents Involved*, 127 S. Ct. at 2746. Justice Thomas also wrote a concurrence in which he strongly defended "a color-blind interpretation of the Constitution." *Id.* at 2768 (Thomas, J., concurring); see also *supra* note 199 (quoting the Thomas opinion).

assignment. Roberts seemed to perceive no compelling interest supporting such use, concluding that Seattle and Jefferson County had engaged in unconstitutional race balancing.²²⁶ Roberts articulated forcefully the anticlassification conception of equal protection,²²⁷ provocatively insisting that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²²⁸ He made that assertion even though the underlying empirics are not obvious and may be context sensitive and even though the Seattle and Jefferson County school boards had not in fact asserted that they were using race in student assignment in order to stop discrimination on the basis of race.

Justice Breyer authored a long, passionate dissent that was joined by Justices Stevens, Souter, and Ginsburg.²²⁹ Breyer would have upheld assignment plans that employ racial classifications or other forms of race consciousness in pursuit of racial integration, including the plans in question. He acknowledged “that there is a cost in applying ‘a state-mandated racial label,’”²³⁰ but he did not identify any constitutional limits on the use of race

226. Roberts wrote:

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

Parents Involved, 127 S. Ct. at 2755 (plurality opinion of Roberts, C.J.). One might argue that Roberts’s opinion was more incrementalist than I have suggested—that he viewed the plans at issue as narrowly tailored to advance only unconstitutional race balancing and that he did not decide whether such a plan could advance a compelling interest. Yet Roberts offered no support for the ideal of racial integration and expressed no concern about the harms of racial isolation. He instead equated race-conscious student assignments with “discrimination on the basis of race.” *Id.* at 2768. It therefore seems unlikely that he and his colleagues in the plurality would approve any race-conscious assignment plan. Justice Thomas agreed with that reading of the plurality opinion. *See id.* (Thomas, J., concurring) (“Today, the Court holds that state entities may not experiment with race-based means to achieve ends they deem socially desirable.”); *accord id.* at 2791 (Kennedy, J., concurring in part and concurring in the judgment) (“The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling.”).

227. *See generally* Balkin & Siegel, *supra* note 63 (analyzing the interaction between anticlassification and antisubordination perspectives).

228. *Parents Involved*, 127 S. Ct. at 2768 (plurality opinion of Roberts, C.J.).

229. *See id.* at 2800 (Breyer, J., dissenting). Justice Stevens also wrote a short dissent in which he announced his “firm conviction that no Member of the Court that [he] joined in 1975 would have agreed with today’s decision.” *Id.* at 2800 (Stevens, J., dissenting). It is not clear whether he was referring in part to the Justice Rehnquist of 1975, the Chief Justice Rehnquist of 2005, or both.

230. *Id.* at 2836 (Breyer, J., dissenting) (quoting *id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment)). Notably, Breyer focused almost entirely on responding to the plurality opinion even though Justice Kennedy’s separate opinion states the law (for reasons noted *infra* note 234). Moreover, Breyer’s references to the Kennedy opinion often come at the end of paragraphs. Accordingly, one might wonder whether the entire Roberts opinion was initially the majority opinion and Kennedy decided to write separately later in the opinion-drafting process.

in making assignments that he would be prepared to enforce.²³¹ Rather than inquiring whether the Constitution speaks to the imposition of such potentially race-based burdens as long daily bus commutes, various forms of family hardship, or placement in a school of significantly lower educational quality,²³² Breyer insisted that the cost associated with using racial criteria in order to advance racial integration “does not approach, in degree or in kind, the terrible harms of slavery, the resulting caste system, and 80 years of legal racial segregation.”²³³

That left Justice Kennedy by himself, much as his predecessor, Justice Powell, had been by himself in *Bakke*. In a separate opinion that is now the law of the land,²³⁴ Kennedy strongly endorsed racially integrated schools while restricting significantly the ability of school boards to classify individual students on the basis of race. Kennedy concluded that a “compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”²³⁵ He further concluded that “a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”²³⁶

Turning from ends to means, Kennedy approved the candid consciousness of race in student assignment:

231. For an articulation of meaningful constitutional limits grounded in the Court’s precedent that nonetheless would have advised the Court to uphold the assignment plans of Seattle and Jefferson County, see Siegel, *supra* note 162, at 834–51.

232. For a discussion of some of the potential burdens associated with race-conscious student assignments, see *id.* at 845–58.

233. *Parents Involved*, 127 S. Ct. at 2836 (Breyer, J., dissenting).

234. Under *Marks v. United States*, 430 U.S. 188, 193 (1977), the controlling opinion in the absence of a majority opinion is the narrowest opinion in support of the judgment. See, e.g., Panetti v. Quarterman, 127 S. Ct. 2842, 2856 (2007) (“When there is no majority opinion, the narrower holding controls.” (citing *Marks*, 430 U.S. at 193)). While it is not always clear which opinion is the narrowest, in *Parents Involved* it is evident that Justice Kennedy’s opinion is the narrowest in support of the judgment of constitutional invalidity because he would allow more instances of race-conscious government action than would the plurality.

235. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

236. *Id.* Kennedy made explicit his rejection of the plurality’s approach:

The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” is not sufficient to decide these cases. Fifty years of experience since [*Brown*] should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Id. at 2791 (first emphasis added) (citations omitted).

In the administration of public schools by the state and local authorities it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.²³⁷

He also offered some examples of methods of racial integration that remained available to school districts:

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.²³⁸

Kennedy acknowledged the historical reality that elected officials “for generations now have considered these types of policies and procedures,” and he insisted that they “should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”²³⁹ Indeed, he thought it “unlikely” that any of the race-conscious methods he had identified “would demand strict scrutiny to be found permissible.”²⁴⁰

Kennedy, however, also proclaimed that “[a]ssigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.”²⁴¹ He appeared concerned about the social meaning he attributed to the government’s use of racial classifications to pursue even concededly compelling interests. According to Kennedy, such use “tells

237. *Id.* at 2792 (citations omitted).

238. *Id.* (citations omitted).

239. *Id.*

240. *Id.* For a “domain-centered” interpretation of Kennedy’s opinion in *Parents Involved* that differs from the interpretation offered here and links his embrace of race-conscious student assignments to his opinion announcing the judgment of the Court in *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006), see generally Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104 (2007).

241. *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concurring in part and concurring in the judgment).

each student he or she is to be defined by race.”²⁴² That message Kennedy found demeaning and divisive:

When the government classifies an individual by race, it must first define what it means to be of a race. Who exactly is white and who is nonwhite? To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. And it is a label that an individual is powerless to change. Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process.²⁴³

Kennedy suggested that when the government classifies citizens on the basis of race, it can demean the citizens so classified and balkanize the community.²⁴⁴ By contrast, “race-conscious measures that do not rely on differential treatment based on individual classifications present these problems to a lesser degree.”²⁴⁵

Yet Kennedy did not prohibit categorically the use of racial classifications in student assignment. He instead concluded that “individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.”²⁴⁶ “If necessary,” he wrote, school districts may employ a “nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”²⁴⁷ That approach “would be informed by *Grutter*, though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.”²⁴⁸

In important ways, Kennedy’s effort in *Parents Involved* seems to exhibit the practice of judicial statesmanship. He appeared not merely to tolerate but actually to entertain the strongly held moral claims of each party to the conflict over exactly whom equal protection protects and in what

242. *Id.*

243. *Id.* at 2796–97.

244. *See id.* at 2796 (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the basis of individual racial classifications.”); *id.* at 2797 (“Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school’s supply and another’s demand.”).

245. *Id.* at 2797.

246. *Id.* at 2792.

247. *Id.* at 2793.

248. *Id.* It is striking that Kennedy seemed to embrace *Grutter*, a decision in which he dissented. *See Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting). His opinion in *Parents Involved* may suggest that he would be loath to revisit *Grutter*.

ways.²⁴⁹ To a significant extent, he considered those competing claims from the perspectives of those asserting them. He neither demeaned their submissions nor fundamentally recast them so as to lend a false sense of commensurability to a controversy implicating acute and irreconcilable value conflict.²⁵⁰

There are several examples in the opinion of Kennedy's genuine struggle to consider incompatible commitments and arguments on their own terms. He did not run from the tensions between a color-conscious social reality and a color-blind social ideal.²⁵¹ He held in view both the legitimate claims of longstanding government practice and the conflicting demands of one part of an evolving culture.²⁵² He was able to register both the nondecisive nature of certain precedent and yet the relevance of that very precedent.²⁵³ He understood the problem of private discrimination even while reinforcing the Court's prohibition of attempts to remedy so-called societal discrimination.²⁵⁴ He acknowledged the particular role of the distinction between de jure and de facto segregation in post-*Brown* school cases even as he insisted upon the relevance of that distinction to the cases at

249. See generally KRONMAN, *supra* note 15, at 94 (analyzing the distinction between tolerating a point of view and entertaining a point of view).

250. Cf. *id.* at 340 (“[T]he claims which compete for judicial endorsement cannot always be commensurated without recharacterizing them in a way that alters their essential meaning for the parties involved.”).

251. See, e.g., *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment) (“That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.”); *id.* at 2791 (“The enduring hope is that race should not matter; the reality is that too often it does.”); *id.* at 2792 (“[A]s an aspiration, Justice Harlan’s axiom [that the Constitution is colorblind] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”); *id.* at 2797 (“And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it.”).

252. Compare *id.* at 2792 (“Executive and legislative branches, which for generations now have considered these types of policies and procedures, should be permitted to employ them with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races.”), with *id.* (“Assigning to each student a personal designation according to a crude system of individual racial classifications is quite a different matter; and the legal analysis changes accordingly.”).

253. See *id.* at 2793 (“[T]he compelling interests implicated in the cases before us are distinct from the interests the Court has recognized in remedying the effects of past intentional discrimination and in increasing diversity in higher education. . . . At the same time, these compelling interests, in my view, do help inform the present inquiry.”).

254. Compare *id.* at 2795 (“[A]n injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law. The distinction between government and private action, furthermore, can be amorphous both as a historical matter and as a matter of present-day finding of fact.”), with *id.* (“This Court never has held that societal discrimination alone is sufficient to justify a racial classification.” (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986))), and *id.* (“To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost . . .” (internal quotation marks omitted) (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 505–06 (1989))).

bar.²⁵⁵ Perhaps most significant of all, he apprehended both the potentially balkanizing and stigmatizing consequences of government inaction in the face of widespread residential segregation *and* the potentially balkanizing and stigmatizing consequences of race-conscious state action aimed at ameliorating the problem.²⁵⁶

Kennedy, in short, seemed to appreciate what total defeat would mean for both sides.²⁵⁷ He understood the meaning for Americans who “conceive integration as the enduring moral legacy of *Brown*” and who “view living together across racial and ethnic lines as critical if America is ever going to be the kind of nation that it aspires to be.”²⁵⁸ Yet he also apprehended the stakes for Americans who “view colorblindness—or, at a minimum, a repudiation of racial classifications—as both the true legacy of *Brown* and the embodiment of the sort of community that the nation should aspire to be regardless of who associates with whom.”²⁵⁹

In accordance with his accurate perception of clashing ideals, Kennedy crafted a form of constitutional law that, like Powell’s controlling opinion in *Bakke*, “symbolically and actually recognized the legitimacy of deeply held moral claims on both sides.”²⁶⁰ Kennedy perceived a compelling interest in advancing racial integration and ameliorating racial isolation, and his analysis of narrow tailoring permitted various forms of race consciousness in student assignment. He appeared genuinely concerned not to render unattainable in fact an interest he had just adjudged compelling in theory. At the same time, he was highly sensitive to the costs that many people believe are

255. Regarding the distinction between de jure and de facto segregation, Kennedy wrote: It must be conceded its primary function in school cases was to delimit the powers of the Judiciary in the fashioning of remedies. The distinction ought not to be altogether disregarded, however, when we come to that most sensitive of all racial issues, an attempt by the government to treat whole classes of persons differently based on the government’s systematic classification of each individual by race.

Id. at 2795–96 (citation omitted).

256. *See id.* at 2797 (“Crude measures of this sort threaten to reduce children to racial chits That statement, to be sure, invites this response: A sense of stigma may already become the fate of those separated out by circumstances beyond their immediate control. . . . Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.”).

257. *See generally* KRONMAN, *supra* note 15, at 98 (“Advocates who can see things only from a partisan perspective, who are unable to detach themselves in imagination from their own concerns or to entertain the concerns of others, will have difficulty understanding the meaning of defeat from their adversaries’ point of view.”).

258. Siegel, *supra* note 162, at 859; *see also* *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment) (“The Nation’s schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all.”); *id.* at 2797 (“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”).

259. Siegel, *supra* note 162, at 859; *see also* *Parents Involved*, 127 S. Ct. at 2788 (Kennedy, J., concurring in part and concurring in the judgment) (“To make race matter now so that it might not matter later may entrench the very prejudices we seek to overcome.”).

260. Mishkin, *supra* note 153, at 922; *see also* Post, *supra* note 74, at 76 (“[T]he Court . . . intervenes into a fierce controversy . . . in a way that recognizes and legitimates concerns on both sides of the dispute.”).

imposed on communities and individuals when the government classifies its citizens on the basis of race. He was sensitive in that regard in far more than words or symbols: he demanded that a community striving to integrate try other forms of race consciousness before resorting to racial classifications.

In those ways, Kennedy's opinion may fairly be characterized as a statesmanlike effort to express social values inclusively and to sustain social solidarity in the face of irreconcilable yet reasonable value conflict²⁶¹—as an earnest attempt to articulate “a norm that can elicit the fealty of a divided nation,” thereby “forg[ing] community in dissensus.”²⁶² Those commentators, including myself,²⁶³ who disagree with his analysis and resolution of the cases—whether because they would have upheld the plans or because they would have gone further in banning any use of race—should not be quick to dismiss the ways in which Kennedy handled the controversy in a statesmanlike way.²⁶⁴ He gave authoritative voice to the incompatible social values that partially construct the identities of different subcommunities in contemporary American society. And in acknowledging those competing commitments, he may prove effective in shaping social values over the long run in the ways that he seeks. Accordingly, he may succeed in fashioning law that sustains its own legitimacy despite longstanding and at times bitterly divisive social conflict over race.²⁶⁵

What is more, Kennedy did not compromise professional norms to the same extent that Powell did in *Bakke* and O'Connor did in *Grutter* and *Gratz*.²⁶⁶ As noted above, Kennedy actually articulated the antibalkanization

261. Elsewhere I have explored both the compelling interests that support race consciousness in student assignment and some of the costs potentially associated with such race consciousness. See generally Siegel, *supra* note 162. Of course, commentators who disagree with my judgment that the legal and cultural disagreement implicated in *Parents Involved* falls within the realm of reasonableness are also likely to disagree with my assessment that Kennedy executed his responsibilities in a statesmanlike way.

262. Siegel, *supra* note 63, at 1546.

263. Before *Parents Involved* was handed down, I argued that the Court should uphold the two plans at issue based on a rationale that would allow modest use of racial classifications in student assignment. See Siegel, *supra* note 162, at 834–58 (analyzing the two plans before the Court).

264. Kennedy's performance in *Parents Involved* is particularly noteworthy in light of how much he implicitly distanced himself from the reasoning and rhetoric in his past pronouncements on the subject of race and equal protection. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 387–95 (2003) (Kennedy, J., dissenting); *Rice v. Cayetano*, 528 U.S. 495, 498–524 (2000) (Kennedy, J., delivering the opinion of the Court); *Miller v. Johnson*, 515 U.S. 900, 903–28 (1995) (Kennedy, J., delivering the opinion of the Court); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 631–38 (1990) (Kennedy, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518–20 (1989) (Kennedy, J., concurring in part and concurring in the judgment).

265. Concerns about legitimacy have been a persistent undercurrent in the Court's post-*Brown* equal-protection jurisprudence in the area of race. See Siegel, *supra* note 63, at 1475 (“The debates over *Brown*'s implementation show the complex ways in which concerns about legitimacy have moved courts to mask and to limit a constitutional regime that would intervene in the affairs of the powerful on behalf of the powerless.”).

266. *Gratz v. Bollinger*, 539 U.S. 244 (2003); see *supra* notes 162–64 and accompanying text (discussing Powell's rationale in *Bakke* and O'Connor's rationales in *Grutter* and *Gratz*).

rationale for disfavoring certain forms of race consciousness while allowing others. He thus announced the very rationale that lay submerged in Powell's opinion in *Bakke* and O'Connor's opinions in *Grutter* and *Gratz*. Kennedy was apparently not as fearful as Powell and O'Connor may have been that explicitly stating the grounds of his opinion would undermine the intended effect of his judicial speech.²⁶⁷

Yet it bears mention that throughout his opinion, Kennedy too was not completely transparent. He did not explain why addressing the problem of de facto segregation "in a *general way*"²⁶⁸—"by *indirection* and *general policies*"²⁶⁹—is less troubling than doing so through "*individual* typing by race."²⁷⁰ He did not specify why a racial classification that determines some student assignments "*tells* each student he or she is to be defined by race"²⁷¹ to a greater extent than, say, a race-conscious attendance zone. He did not identify why it mattered so much that the "racial classifications at issue here"²⁷² were "*personal*"²⁷³ and "*explicit*"²⁷⁴—why it made a difference that the cases involved "official labels *proclaiming* the race of all persons in a broad class of citizens."²⁷⁵ He did not clarify why "*individual* classifications" present "dangers that are not as pressing when the same ends are achieved *by more indirect means*"²⁷⁶—why "race-conscious measures that do not rely on differential treatment based on *individual* classifications present these problems to a lesser degree."²⁷⁷

Those are not trivial omissions. It is not as if race-conscious attendance zones avoid classifying groups of citizens in part based on their race. Nor is it the case that race-conscious attendance zones necessarily avoid imposing material harms on individuals based on their race: carving a district one way as opposed to another determines who goes to which schools. The primary difference between the methods that Kennedy approved and those that he disapproved may lie in the likelihood that the individual who is treated by the government in part as a member of a racial group will actually register that he or she is being so treated. In other words, the constitutional problem for Kennedy (and Powell and O'Connor) may lie not in "be[ing] forced to live

267. See *supra* note 164 and accompanying text (flagging the issue of the potential impact of the Court's speech on the realization of the Court's goals).

268. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

269. *Id.* at 2796 (emphasis added).

270. *Id.* at 2792 (emphasis added).

271. *Id.* (emphasis added).

272. *Id.* at 2793.

273. *Id.* at 2792 (emphasis added).

274. *Id.* at 2793 (emphasis added).

275. *Id.* at 2788 (emphasis added).

276. *Id.* at 2796 (emphasis added).

277. *Id.* at 2797 (emphasis added).

under a state-mandated racial label”²⁷⁸ but in the individual’s perception that he or she is living in that way.²⁷⁹

Like the approaches employed by Powell and O’Connor, therefore, Kennedy’s rationale may depend for its success on the failure of citizens to recognize that certain instances of race-conscious government action are more similar in their net operative results than they may at first appear.²⁸⁰ Powell and O’Connor are gone, but “appearances” apparently still “do matter” in constitutional law.²⁸¹ It is striking that three major efforts at

278. *Id.*

279. See Mishkin, *supra* note 153, at 927–28 (“Even when the net operative results may be the same, the use of euphemisms may serve valuable purposes; . . . they may facilitate the acceptance of needed measures.”); *id.* at 928 (“A program formulated along the lines Justice Powell’s opinion approves would, by the very lack of ‘sharp edges,’ avoid such visibility in its operations and tend to enhance the acceptability of the program.”); Post, *supra* note 74, at 74 (“The potential for balkanization is muted within the Law School program . . . because the value assigned to race is camouflaged by an opaque process of implicit comparisons.”); *id.* at 75 (“Racial inequalities can be addressed, but only in ways that efface the social salience of racial differences.”). Note, however, that the schoolchildren in *Parents Involved* self-identified their race. See, e.g., Petition for Writ of Certiorari at 3, *Parents Involved*, 127 S. Ct. 2738 (No. 05-908) (“A student is deemed to be of the race specified in her registration materials (and if a parent declines to identify a child’s race, the District assigns a race to the child based on a visual inspection of the student or parent).”). It is therefore not clear how the children were having an identity imposed on them.

280. I have previously explored why a given degree of race consciousness might be regarded as more suspect when deployed at the micro level of individual racial classifications than at the macro level of attendance zones:

The answer lies in the concern animating Justice Powell’s distinction between using racial quotas and using race as a “plus” factor, and the Rehnquist Court’s distinction between a publicly declared award of twenty points and a publicly undefined “plus” factor. Judging from the Court’s previous interventions, the felt impact of race-consciousness on those who are burdened by it is less acute when it is less publicly apparent. In other words, the individualized consideration requirement that I endorse would apply the lesson of *Bakke*, *Grutter*, and *Gratz* to a different setting: racial criteria are less likely to be balkanizing when government does not needlessly impress on people that they (or their children) are being treated in part as members of racial groups. In the assignment context, moreover, the use of race is more general and diffuse—that is, less seemingly “personal”—in drawing attendance zones than in disposing of individual requests for certain schools.

Siegel, *supra* note 162, at 849–50 (footnote omitted).

281. *Shaw v. Reno*, 509 U.S. 630, 647 (1993). The writing may have been on the wall before the Court decided *Parents Involved*:

In evaluating colorblindness discourse in this setting, it is important to bear in mind that a genuine commitment to colorblindness would prohibit any race consciousness even in drawing attendance zones, siting schools to increase integration, establishing magnet schools to prevent white flight, etc. Districts could be hard-pressed to achieve even modest levels of integration. The Justices presumably know this and care. If the Court invalidates the Jefferson County and Seattle plans, therefore, it is more likely to prohibit explicit racial classifications that impose obvious individual burdens (e.g., a race-based denial of an assignment request) than it is to prohibit implicit race consciousness that imposes non-obvious individual burdens (e.g., race-conscious attendance zones)—even when the former use of race is more limited than the latter. Justices Powell and O’Connor are gone, but appearances may matter to several current Justices.

Siegel, *supra* note 162, at 850 (footnote omitted).

judicial statesmanship in the area of race and equal protection put pressure on the rule-of-law value of transparency.²⁸² Although the sample size is small, the pattern suggests a potential tension between statesmanship and transparency. Indeed, that tension constitutes a specific instantiation of the more general potential tension between the practice of statesmanship and fidelity to rule-of-law values.

As with any recent attempt at judicial statesmanship, it is too soon to tell whether Kennedy's controlling opinion in *Parents Involved* will prove statesmanlike in the ways that I have suggested it may. The ultimate test of statesmanship is whether it succeeds over the long run in sustaining the public legitimacy of law by accomplishing the preconditions and purposes of the legal system that statesmanship is charged with pursuing. A crucial question going forward is the extent to which Kennedy's approach will allow school districts to achieve meaningful levels of racial integration at a politically and educationally feasible cost. At the end of his opinion, Kennedy seemed confident about the answer to that question:

The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds. Due to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole. Those entrusted with directing our public schools can bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests they face without resorting to widespread governmental allocation of benefits and burdens on the basis of racial classifications.²⁸³

Kennedy offered an empirical assertion about the probable efficacy of achieving a concededly compelling end with certain means and not others. The problem from the standpoint of statesmanship, however, is that Kennedy provided no empirical evidence in support of his causal claim, and he seemed unconcerned that he had none. It is presently uncertain how much racial integration (and at what cost) local communities that value integration will be able to achieve without resort to even limited use of racial classifications.²⁸⁴

282. See, e.g., Siegel, *supra* note 36, at 2015–16 (discussing rule-of-law values); cf. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) (“Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”); *id.* at 305 (Ginsburg, J., dissenting) (“If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”).

283. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

284. See, e.g., Goodwin Liu, “History Will Be Heard”: An Appraisal of the Seattle/Louisville Decision, 2 HARV. L. & POL’Y REV. (forthcoming 2008) (manuscript at 1, on file with the Texas Law Review) (“[T]he efficacy of the race-conscious strategies left open by Justice Kennedy’s controlling opinion remains to be seen.”). Justice Breyer insisted that the various methods approved

In that regard, Kennedy's opinion is potentially different from Powell's approach in *Bakke* and O'Connor's approach in *Grutter* and *Gratz*, both of which clearly allowed a continuation of the processes of social adjustment that those Justices plainly believed were necessary. The practice of judicial statesmanship might have counseled less confidence and more caution on Kennedy's part before categorically prohibiting a proven method of integration "absent a showing of necessity not made here,"²⁸⁵ a requirement that Kennedy also described as "some extraordinary showing not present here."²⁸⁶

Regrettably, Kennedy did not indicate what kind of showing he had in mind. The above concerns become acute to the extent that Kennedy's uses of words like "necessity" and "extraordinary"²⁸⁷ are construed by lower courts to render it effectively impossible for school districts to make the required showing. It can be very difficult for local communities to achieve significant levels of integration in light of limited resources, changing demographics, concerns about white flight, competing priorities, threats of litigation, and other challenges that school officials routinely confront. Although I do not believe that Justice Kennedy's opinion can fairly be read as having set up communities around the country for failure, the ultimate extent of his success as a judicial statesman in *Parents Involved* will be determined in the crucible of political and legal struggle that is sure to continue in the wake of his potentially historic intervention.

B. *Gonzales v. Carhart*

In *Stenberg v. Carhart*,²⁸⁸ the Rehnquist Court invalidated a Nebraska statute prohibiting a method of abortion that opponents of the procedure called partial-birth abortion.²⁸⁹ The law prohibited the removal of a living

by Kennedy had been tried and had not worked effectively. *Parents Involved*, 127 S. Ct. at 2828 (Breyer, J., dissenting). It may be noteworthy, however, that use of individual racial classifications determined very few student assignments in the Jefferson County plan that was before the Court. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp. 2d 834, 845, 861–62 (W.D. Ky. 2005), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *rev'd sub nom. Parents Involved*, 127 S. Ct. 2738; *see also* Liu, *supra* (manuscript at 25–26) (discussing the race-conscious student-assignment plan of Berkeley, California, which appears constitutional under Kennedy's approach); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007) ("It is not entirely clear whether the tools left to them will be sufficient to the task, but Justice Kennedy, whose lone opinion is effectively controlling on this issue, does leave the door ajar for districts interested in racial integration."); *id.* at 148 ("[D]istricts that would like to have racially integrated schools have tools available to make that happen.").

285. *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concurring in part and concurring in the judgment).

286. *Id.* at 2796.

287. From the perspective of the guidance function of the rule of law, that omission is unfortunate. Communities around the country cannot be confident about how they may proceed, and they will find out only as a result of much legislative effort and litigation.

288. 530 U.S. 914 (2000).

289. *Id.* at 922.

fetus or a substantial part of a living fetus with the intent of ending the life of the fetus.²⁹⁰ The Court held the statute unconstitutional on two independent grounds: (1) it was drafted so broadly that it likely prohibited the most common method of second-trimester, previability abortion and (2) it lacked an exception for the health of the woman.²⁹¹ Justice Breyer wrote the majority opinion, which Justices Stevens, O'Connor, Souter, and Ginsburg joined.²⁹²

Justice O'Connor indicated in a concurring opinion that she would allow a ban on "partial-birth" abortion if a legislature cured the vagueness problem and included a health exception.²⁹³ Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas each wrote dissenting opinions.²⁹⁴ Kennedy wrote with great passion and bitterness, appearing to suggest that the Court had betrayed the balance he had allowed it to establish in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹⁵

In response to *Stenberg*,²⁹⁶ Congress passed the Partial-Birth Abortion Ban Act of 2003.²⁹⁷ The statute provides that "[a]ny physician who, in or

290. The Nebraska statute defined "partial birth abortion" as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." *Id.* (quoting NEB. REV. STAT. ANN. § 28-326(9) (LexisNexis Supp. 1999)). It further defined the phrase "partially delivers vaginally a living unborn child before killing the unborn child" to mean "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child." *Id.* (quoting § 28-326(9)).

291. The Court concluded that the Nebraska law was unconstitutional "for at least two independent reasons. First, the law lacks any exception for the preservation of the . . . health of the mother. Second, it imposes an undue burden on a woman's ability to choose a D & E abortion, thereby unduly burdening the right to choose abortion itself." *Id.* at 930, 929–30 (internal quotation marks and citations omitted). "D & E" refers to "dilation and evacuation," the most common method of second-trimester, previability abortion. *Id.* at 924.

292. *See id.* at 918.

293. *See id.* at 951 (O'Connor, J., concurring) ("[A] ban on partial birth abortion that only proscribed the D & X method of abortion and that included an exception to preserve the life and health of the mother would be constitutional in my view."). "D & X" refers to "dilation and extraction," *id.* at 927 (majority opinion), the procedure that is called partial-birth abortion by those who seek to ban it, *id.* at 931. "D & X" is sometimes called "intact D & E." *Id.* at 927.

294. *Id.* at 952 (Rehnquist, C.J., dissenting); *id.* at 953 (Scalia, J., dissenting); *id.* at 956 (Kennedy, J., dissenting); *id.* at 980 (Thomas, J., dissenting).

295. Kennedy wrote that "[w]hen the Court reaffirmed the essential holding of *Roe*" in *Casey*, "a central premise was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right the Court restated and again guaranteed." *Id.* at 956–57 (Kennedy, J., dissenting). *Stenberg*, he believed, "repudiates this understanding by invalidating a statute advancing critical state interests, even though the law denies no woman the right to choose an abortion and places no undue burden upon that right." *Id.* at 957; *see also id.* ("The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life."); *id.* at 979 ("The State chose to forbid a procedure many decent and civilized people find so abhorrent as to be among the most serious of crimes against human life, while the State still protected the woman's autonomous right of choice as reaffirmed in *Casey*. The Court closes its eyes to these profound concerns.").

296. *See Gonzales v. Carhart*, 127 S. Ct. 1610, 1623 (2007) ("The Act responded to *Stenberg* in two ways."). As Justice Ginsburg noted:

affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.”²⁹⁸ The law defines the term “partial-birth abortion” as:

an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus²⁹⁹

The statute contains an exception for situations in which performing the banned procedure “is necessary to save the life of a mother.”³⁰⁰ The law does not contain a health exception, as Congress found as a fact the existence of a medical consensus that the prohibited procedure is never medically necessary.³⁰¹

In *Gonzales v. Carhart*, the Roberts Court rejected two facial challenges to the law, splitting 5–4 along ideological lines. Justice Kennedy wrote the majority opinion on behalf of himself, Chief Justice Roberts, and Justices Scalia, Thomas, and Alito.³⁰² Assuming for purposes of his opinion that *Casey* remained the law of the land,³⁰³ Kennedy held on behalf of the Court

The Act’s sponsors left no doubt that their intention was to nullify our ruling in *Stenberg*. See, e.g., 149 CONG. REC. 5731 (2003) (statement of Sen. Santorum) (“Why are we here? We are here because the Supreme Court defended the indefensible We have responded to the Supreme Court.”). See also 148 CONG. REC. 14273 (2002) (statement of Rep. Linder) (rejecting proposition that Congress has “no right to legislate a ban on this horrible practice because the Supreme Court says [it] cannot”).

Id. at 1643 n.4 (Ginsburg, J., dissenting) (alteration in original) (typeface altered) (citation omitted).
297. 18 U.S.C. § 1531 (Supp. IV 2004).

298. *Id.* § 1531(a).

299. *Id.* § 1531(b)(1).

300. *Id.* § 1531(a).

301. See § 1531 note (Findings subsec. 1) (“A moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited.”). The Court in *Gonzales v. Carhart* determined that no such medical consensus exists. *Gonzales v. Carhart*, 127 S. Ct. at 1638.

302. See *id.* at 1618. Justice Thomas wrote a short concurring opinion in which he stated that he was joining the opinion of the Court “because it accurately applies current jurisprudence, including [*Casey*].” *Gonzalez v. Carhart*, 127 S. Ct. at 1639 (Thomas, J., concurring). He further reiterated his “view that the Court’s abortion jurisprudence, including *Casey* and [*Roe*], has no basis in the Constitution.” *Id.* Justice Scalia joined his opinion, but Chief Justice Roberts and Justice Alito did not. See *id.*

303. See *id.* at 1626 (majority opinion) (“We assume the following principles [articulated in *Casey*] for the purposes of this opinion.”); *id.* at 1632 (“Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional ‘if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’”

that “a premise central to [the *Casey* joint opinion’s] conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals” invalidating the statute.³⁰⁴

Kennedy first concluded for the majority that Congress had cured the coverage problem that partially had doomed the Nebraska law in *Stenberg*.³⁰⁵ Applying *Casey*,³⁰⁶ he then held that the purpose of the statute was not to impose a substantial obstacle in the path of a woman seeking an abortion before viability but rather to “express[] respect for the dignity of human life.”³⁰⁷ As for the effect of the statute on the health of women, he concluded that the Court should reject a facial challenge to the law in the face of “documented medical disagreement whether the Act’s prohibition would ever impose significant health risks on women,”³⁰⁸ regardless of whether some “abortion doctors” might express a “preference” for the “mere convenience” of using the banned procedure.³⁰⁹ Finally, Kennedy indicated that an “as-applied” challenge was the appropriate way to adjudicate the constitutionality of applying the ban in a medical emergency.³¹⁰ He held that the absence of a health exception was not fatal in the context of a facial challenge because

(quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality opinion)); *id.* at 1635 (“The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it ‘subject[ed] [women] to significant health risks.’” (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328 (2006))). In effect, therefore, Chief Justice Roberts and Justice Alito have committed themselves only to the facial constitutionality of the federal law, not to *Casey*. Technically, Roberts and Alito are committed only to the facial validity of the law *when evaluated under Casey*—that is, they could in theory conclude that the law is unconstitutional under a more appropriate test. But that theoretical possibility strikes me as overwhelmingly unlikely in light of their previously expressed views on the legality of abortion, their more-general ideological commitments, and their votes in *Gonzales v. Carhart*.

304. 127 S. Ct. at 1626.

305. *See id.* at 1619 (“Compared to the state statute at issue in *Stenberg*, the Act is more specific concerning the instances to which it applies and in this respect more precise in its coverage.”). The Court thus held that the statute was not void for vagueness and did not impose an undue burden as a result of overbreadth. *Id.* at 1627–32.

306. *See supra* note 303 (quoting the governing law as set forth in *Casey*).

307. *Gonzales v. Carhart*, 127 S. Ct. at 1633; *see also id.* (“Congress stated as follows: ‘Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life.’” (citing 18 U.S.C. § 1531 note (Supp. IV 2004) (Findings subsec. 14(N)))).

308. *Id.* at 1636; *see also id.* (“The question becomes whether the Act can stand when this medical uncertainty persists. The Court’s precedents instruct that the Act can survive this facial attack.”).

309. *See id.* (“The law need not give abortion doctors unfettered choice in the course of their medical practice . . .”); *id.* at 1620, 1625, 1631, 1632, 1635, 1638 (using the words “abortion doctor,” “preference,” or “mere convenience”).

310. Kennedy thought an “as-applied challenge . . . is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.” *Id.* at 1638. He reasoned that “[i]n an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.” *Id.* at 1638–39.

“respondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.”³¹¹

In support of the Court’s conclusions, Kennedy introduced a novel rationale into due-process jurisprudence:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.³¹²

Kennedy appeared to be suggesting that the federal ban was justified in part by a particular conception of the appropriate role of women in contemporary American society (that is, their role as loving mothers), as well as by a particular conception of the capacity of women to make autonomous decisions (that is, their vulnerability to the experience of regret).

Kennedy also suggested that the federal law was justified as a way of informing the choice of a woman who is considering an abortion:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. . . .

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. . . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.³¹³

Kennedy apparently believed that the federal ban informed choice, as opposed to prohibiting choice, because “[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.”³¹⁴

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer, dissented with uncharacteristic and possibly unprecedented anger:

311. *Id.* at 1639; *see also id.* (“We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications.”).

312. *Id.* at 1634 (citations omitted).

313. *Id.*

314. *Id.*

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey*, between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.³¹⁵

Ginsburg insisted that the Court's treatment of the medical evidence was "in undisguised conflict with *Stenberg*"³¹⁶ and that the statute did not advance the government's interest in protecting fetal life because "[t]he law saves not a single fetus from destruction, for it targets only a *method* of performing abortion."³¹⁷ She further insisted that it is "simply irrational" to regard the banned procedure as warranting state intervention to a greater extent than the most common method of second-trimester, previability abortion and that the Court "dishonors our precedent" by allowing "moral concerns" to "overrid[e] fundamental rights."³¹⁸

Ginsburg seemed most provoked by the Court's invocation of "an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices."³¹⁹ She took exception to the Court's fear that doctors might withhold information about the nature of the banned procedure "[b]ecause of women's fragile emotional state and because of the 'bond of love the mother has for her child.'"³²⁰ She stated sharply that "[t]he solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks"³²¹ but to "depriv[e] women of the right to make an autonomous choice, even at the expense of their safety."³²² The Court's "way of thinking," she charged, "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."³²³

Ginsburg would have invalidated the statute on its face because "the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require [the banned procedure]

315. *Id.* at 1641 (Ginsburg, J., dissenting).

316. *Id.* at 1646.

317. *Id.* at 1647.

318. *Id.* (quoting *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (Stevens, J., concurring)).

319. *Id.* at 1648.

320. *Id.* (quoting *id.* at 1634 (majority opinion)).

321. *Id.* at 1648–49.

322. *Id.* at 1649.

323. *Id.* Ginsburg compared *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908) and *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) with *United States v. Virginia*, 518 U.S. 515, 533, 542, n.12 (1996) and *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977). *Gonzales v. Carhart*, 127 S. Ct. at 1649 (Ginsburg, J., dissenting).

because other procedures would place their health at risk.”³²⁴ She also asserted that the Court “offers no clue” regarding what an appropriate as-applied challenge “might look like.”³²⁵ Concluding with extraordinary bluntness, she wrote that “the Court, differently composed than it was when we last considered a restrictive abortion regulation, is hardly faithful to our earlier invocations of ‘the rule of law’ and the ‘principles of *stare decisis*.’”³²⁶ In her view, “the Act, and the Court’s defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women’s lives.”³²⁷

It is apparent that the Court implicitly overruled precedent in deciding *Gonzales v. Carhart*. As a matter of professional reason, there seems no way that the same Justice reasonably could vote to invalidate facially the Nebraska law in *Stenberg* on the ground that it lacked a health exception required under *Casey* while voting to uphold facially the federal law in *Gonzales v. Carhart* on the ground that it did not require a health exception under *Casey*.³²⁸ No Justice reasonably could vote that way because the medical evidence before the Court had not changed materially in the seven years between *Stenberg* and *Gonzales v. Carhart*. The *Stenberg* Court noted the “division of medical opinion”³²⁹ on the need for a health exception but nonetheless held that such an exception was required as long as “substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health.”³³⁰ In *Gonzales v. Carhart*, by contrast, the Court held that “the Act can stand when this medical uncertainty persists.”³³¹ There also appears to be serious tension between *Casey*’s facial invalidation of a spousal notification provision and the “large fraction” test as interpreted and applied by the Court in *Gonzales v. Carhart*.³³² Tellingly, no Justice was in the majority in *Stenberg* and *Gonzales v. Carhart*, and all six

324. *Gonzales v. Carhart*, 127 S. Ct. at 1651 (Ginsburg, J., dissenting).

325. *Id.*

326. *Id.* at 1652.

327. *Id.* at 1653.

328. The vagueness issue is another matter. For all the reasons offered by Justice Kennedy in his majority opinion, the federal law seemed significantly less vague in its coverage than the Nebraska law. *See id.* at 1626–33 (majority opinion). Justice Ginsburg did not object to the federal law or the majority opinion on grounds of vagueness.

329. *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000).

330. *Id.* at 938.

331. *Gonzales v. Carhart*, 127 S. Ct. at 1636.

332. *Compare* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (plurality opinion) (“The analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”), *with* *Gonzales v. Carhart*, 127 S. Ct. at 1639 (“[R]espondents have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases. We note that the statute here applies to all instances in which the doctor proposes to use the prohibited procedure, not merely those in which the woman suffers from medical complications.” (citation omitted)).

lower courts that considered the federal law invalidated it under existing Supreme Court precedent.³³³

I proffer the foregoing interpretation of the doctrine as a matter of analysis, not necessarily as a matter of critique. If it is plain that the Court implicitly overruled precedent in *Gonzales v. Carhart*, it is also unsurprising for several reasons. “Whatever the Court has *said*,” Llewellyn instructed many years ago, “it has departed from its own precedents whenever it saw fit to do so. It has refined and whittled precedents into unrecognizability, or shifted the line of their development from East to West.”³³⁴ Llewellyn may have indulged in overstatement, but the pressure for doctrinal change can be particularly great following a significant change in the composition of the Court³³⁵ and bipartisan political support for a federal law that is unconstitutional under existing doctrine.³³⁶ Such doctrinal change no doubt puts pressure on rule-of-law values, and the Court in *Gonzales v. Carhart* compromised rule-of-law values to an unusual extent by only assuming for purposes of its decision that controlling law remained controlling.³³⁷ But for reasons articulated in Part II, doctrinal change is also necessary if constitutional law is to legitimate itself by expressing social values as those values evolve in history.

Indeed, there may be a sense in which the result in *Gonzales v. Carhart* suggests that principled proponents of a living Constitution—of the authority of the Constitution as an expression of the American ethos³³⁸—must be prepared to take the bitter with the sweet. If in fact most Americans view

333. See *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd*, 413 F.3d 791 (8th Cir. 2005), *rev'd*, *Gonzales v. Carhart*, 127 S. Ct. 1610; Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd sub nom.* Nat'l Abortion Fed'n v. Gonzales, 437 F.3d 278 (2d Cir. 2006); Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd*, 435 F.3d 1163 (9th Cir. 2006), *rev'd*, *Gonzales v. Carhart*, 127 S. Ct. 1610. In *Gonzales v. Carhart*, the Supreme Court was reviewing the judgments of the Eighth and Ninth Circuits. *Gonzales v. Carhart*, 127 S. Ct. at 1619–20.

334. Llewellyn, *supra* note 104, at 40.

335. In light of Justice Kennedy's bitter dissent in *Stenberg* and the apparent ideological reliability of the Chief Justice and Justice Alito, it was not difficult to count to five in *Gonzales v. Carhart*, even if some liberals held out hope that Kennedy would object to the federal law on grounds of judicial supremacy or federalism akin to the concerns animating his opinion for the Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, Kennedy rejected a congressional effort effectively to undo a previous Supreme Court interpretation of the Constitution. *Id.* at 511. For a discussion of that aspect of *City of Boerne*, see Neil S. Siegel, *Dole's Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming Apr. 2008), available at <http://ssrn.com/abstract=963190>.

336. The final vote on the conference report of the bill in the House of Representatives was 281–142, with 63 of 200 Democrats voting in favor of the bill. Partial-Birth Abortion Ban Act of 2003 – Congresspedia, http://www.sourcewatch.org/index.php?title=Partial-Birth_Abortion_Ban_Act_of_2003#House_2 (last modified July 5, 2007). The vote in the Senate was 64–34, with 17 of 47 Democrats voting in favor. *Id.*

337. See *supra* note 303 and accompanying text (noting the Court's assumption that *Casey* was controlling).

338. See *supra* subpart II(C) (discussing the ethos conception of constitutional authority).

“partial-birth” abortion as morally more troubling than the more typical dilation-and-evacuation procedure and if their moral concerns are based on accurate information about the actual differences between the two procedures,³³⁹ then it is not clear that the appropriate judicial response should be to dismiss those concerns as irrational and to reify existing doctrine.³⁴⁰ Particularly in an area of law as emotionally freighted as abortion, deeply contested conceptions of rationality may not be the only relevant consideration. As explored in Part III, part of the function of judicial statesmanship is to register and express authoritatively prevailing social values, fully “rational” or not.

In *Gonzales v. Carhart*, however, the Court did not merely stretch precedent to the breaking point in order to express certain social values. From the vantage point of judicial statesmanship, it is striking that the same Justice who wrote the controlling opinion in *Parents Involved* also wrote the majority opinion in *Gonzales v. Carhart* in the same Term. Much of the rhetoric, the reasoning, and the result of Justice Kennedy’s majority opinion seems likely to inflame public sentiment over the issue of abortion—to diminish whatever spirit of moderation remains in America regarding that question. The Court validated the concerns of antiabortion groups while demeaning and recharacterizing the concerns of advocates of abortion rights to the point that they likely no longer recognized those concerns as their own when the Court was finished with them. The Court did so, moreover, not in order to avoid compromising the semiautonomous integrity of professional legal reason but at the expense of rule-of-law values.³⁴¹

The Court failed to entertain genuinely the arguments of advocates of abortion rights—to approach the cases even in part from their point of view. Revealing in that regard is the Court’s choice of language, which can fairly be described as insulting. Kennedy did not refer to doctors who perform

339. I do not know the extent to which those conditions hold. There is some indication that members of even the concerned public are not fully informed. See Alan Cooperman, *Supreme Court Ruling Brings Split in Antiabortion Movement*, WASH. POST, June 4, 2007, at A3 (reporting that certain antiabortion groups accused Focus on the Family founder James C. Dobson of misleading them about what the federal ban would accomplish).

340. It is in part for this reason that those who fear legal change in a conservative direction should concentrate on articulating a constitutional vision with the persuasive power to influence elections and judicial appointments, not on stressing the importance of fidelity to precedent:

I am very seldom a user of charts, but on this one I prepared a chart because it speaks—a little too heavy to lift, but it speaks louder than just—thank you, Senator Grassley. Thirty-eight cases where *Roe* has been taken up, and I don’t want to coin any phrases on super precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light—

[Laughter.]

Chairman SPECTER.—of 38 occasions to overrule it?

Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

341. See *supra* note 337 and accompanying text.

abortions in the way that the medical community refers to them or in the way that they refer to themselves—as obstetrician-gynecologists, surgeons, physicians, or simply doctors. Instead, he repeatedly labeled them abortion doctors.³⁴² In his *Stenberg* dissent, he used the term “abortionist.”³⁴³ There is no public-spirited justification for such discourse; it is toxic to the cause of maintaining community despite robust disagreement over the issue of abortion. In *Parents Involved*, Kennedy warned about “a new divisiveness,” about “corrosive discourse.”³⁴⁴ In *Gonzales v. Carhart*, he seemed to enact both. He neglected Frankfurter’s counsel “[t]hat the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding.”³⁴⁵ That admonition applies to judges as well.

Of course, one might suggest that form matters far less than substance, so that it may not matter much what kind of language the Court uses when the “bottom line” remains the same. At least two responses seem appropriate. First, it can be less difficult to sustain social solidarity in the face of acute value conflict when the losers in a particular fight believe that they have been treated with respect and that their concerns have been taken seriously.³⁴⁶ The social-psychological literature demonstrates that Americans care deeply about procedural justice;³⁴⁷ a process that is perceived as fair can help to heal wounds when the process yields disappointing outcomes. The form of words, in other words, reflects the functioning of the

342. See *supra* note 309 and accompanying text.

343. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting) (“The majority views the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life.”).

344. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

345. *Cooper v. Aaron*, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring).

346. See, e.g., KRONMAN, *supra* note 15, at 95 (“The inevitable pain of losing will be tempered by a sense on the part of those who have lost that their claims have been treated with generosity, and by a willingness on the part of those who have won to make real and symbolic concessions to preserve this climate of good will, though strictly speaking such concessions are unnecessary.”).

347. See generally TOM R. TYLER & E. ALLAN LIND, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (finding that people care more about the fairness of procedures than about the favorability or fairness of outcomes and that people do not value procedures as a way to obtain outcomes but because they communicate status and inclusion in groups); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994) (finding, among other things, that procedural justice in decision making is the critical factor underlying views of authority); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115 (1992) (finding that people view group authorities as representatives of the group and that exercising authority through fair procedures communicates that the group respects those who are subject to authority and suggests that they have reason to identify with and become involved in the group).

process, and that process is itself part of the substance about which people may care intensely.³⁴⁸

Second, form and substance may sometimes be related in more direct ways. Had Kennedy approached *Gonzales v. Carhart* in the same statesmanlike way that he approached *Parents Involved*, the substance might have turned out somewhat differently.³⁴⁹ A central concern of those challenging the federal law was how a national ban on a particular abortion procedure would affect the physical health of women. Many, if not most, Americans presumably share that concern. Yet with the possible exception of allowing for the possibility of as-applied challenges to the law (discussed below), Kennedy never really seemed to register it, even though doing so may be necessary to sustain the social legitimacy of constitutional law on the divisive subject of abortion.

If Kennedy had registered the concern about women's health, he would have been less inclined to simplify the case by recharacterizing the claim to constitutional attention as sounding in the "preference" or "mere convenience" of the doctor performing the abortion procedure.³⁵⁰ He would have been less likely to describe the evidence at issue simply as "documented medical disagreement"³⁵¹ when, as every lower court had found, the weight of credible evidence heavily favors the position of the American College of Obstetricians and Gynecologists that the banned procedure is safest for women in certain circumstances.³⁵² His statement that "[a] zero tolerance policy would strike down legitimate abortion regulations, like the present

348. Cf. *supra* notes 41–43 and accompanying text (discussing the normative importance of communicative processes in democratic theory). One might object that public sentiment on any aspect of the abortion issue will not be swayed to any extent by the words Kennedy used, whatever their tone or logic, because the public does not read judicial opinions. But it is not necessary to assume that the public parses Supreme Court opinions. It is necessary to assume only that how the Court speaks is relevant to the actual effects of its holding and that the meaning of Court opinions is conveyed to the public in complex, highly mediated ways.

349. I do not suggest that the Court would then have affirmed the lower court judgments invalidating the law facially. I do suggest that the Court's rhetoric and rationales likely would have been less inflammatory and seemingly broad. I also suggest that the Court would have considered more seriously the possibility of invalidating the law facially only in medical emergencies, thereby following the course unanimously endorsed the previous Term in Justice O'Connor's final majority opinion. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 323 (2006) ("If enforcing a statute that regulates access to abortion would be unconstitutional in medical emergencies, what is the appropriate judicial response? We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.").

350. See *supra* note 309 and accompanying text.

351. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1636 (2007).

352. See, e.g., Charles Fried, *Supreme Confusion*, N.Y. TIMES, Apr. 26, 2007, at A25 ("The federal ban cured the vagueness, but sought to overcome the medical testimony by a legislative proclamation of a fact that is not a fact: that the procedure was never safer for the mother."). This is one of several ways in which Congress's fact-finding was demonstrably false. See *supra* note 301 (noting that problem). While there are substantial arguments for some deference to congressional fact-finding, even in the area of fundamental rights, the force of such arguments is significantly diminished when Congress repeatedly finds facts that are not facts.

one, if some part of the medical community were disinclined to follow the proscription³⁵³ seems like an effort to avoid considering the force of the submission in question. There is a difference between “zero tolerance” and *Stenberg*’s requirement of “substantial medical authority.”³⁵⁴ Moreover, if Kennedy had registered the concern about women’s health, he might have been loath to leave open the possibility of mounting an as-applied challenge without explaining how such a challenge could be brought by a woman confronting a medical emergency.³⁵⁵

It is also appropriate to inquire whether, had Kennedy approached *Gonzales v. Carhart* in the same statesmanlike way he approached *Parents Involved*, he would have elected to bring the politically explosive woman-protective rationale for limiting access to abortion into the middle of due-process jurisprudence. As Kennedy himself conceded, there is no “reliable”³⁵⁶ scientific evidence of a “post-abortion syndrome” (PAS). Kennedy’s assertion that “it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained”³⁵⁷ is so watered down in light of empirical uncertainty as to be trivially true. He just as readily could have stated that “it seems unexceptionable to conclude some women do not come to regret their choice to abort the infant life they once created and sustained.” He also could have stated with equal likely accuracy that “it seems unexceptionable to conclude some women come to regret their choice to carry the fetus to term because they lacked the resources to raise the child properly.” What “some women” believe is not a demanding test, nor did he explain why the views of “some women” should determine national law on such a divisive issue.

No doubt there are people who believe in PAS in utter good faith, and Justice Kennedy may be such a person. But there is also substantial evidence that PAS has been used manipulatively in politics and law in order to advance the cause of restricting access to abortion.³⁵⁸ As illustrated by the amicus brief³⁵⁹ Kennedy cited as the only evidence of such a syndrome,³⁶⁰ the idea of PAS has been deployed by ardent opponents of abortion rights in

353. *Gonzales v. Carhart*, 127 S. Ct. at 1638.

354. *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000).

355. See, e.g., Fried, *supra* note 352 (“Does the court contemplate a surgeon pausing in the midst of an operation in which he determines the banned procedure might be less risky, and seeking a court order?”). A doctor could contest the constitutionality of the law as a defense to a criminal prosecution for performing the procedure prohibited by the statute. The prospect of criminal prosecution, however, presumably will dissuade most doctors from performing the procedure, even in a medical emergency.

356. *Gonzales v. Carhart*, 127 S. Ct. at 1634.

357. *Id.*

358. See generally Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. (forthcoming Mar. 2008).

359. Brief of Sandra Cano et al. as Amici Curiae Supporting Respondents, *Gonzales v. Carhart*, 127 S. Ct. 1610 (No. 05-380), 2006 WL 1436684.

360. *Gonzales v. Carhart*, 127 S. Ct. at 1634.

response to a series of legal and political defeats in which they had stressed the rights of the fetus over the concerns of pregnant women.³⁶¹ After decades of national, state, and local laws prohibiting gender discrimination and a constitutional sea change in equal-protection doctrine that began during the 1970s and is legitimate today beyond reasonable question,³⁶² it seems fair to suggest that the Court could have expressed its concerns about abortion in a less needlessly divisive way by focusing on its impact on the life within the woman, not on the proper role of the woman in American society or her ability to think for herself. Yet Kennedy embraced the woman-protective rationale in the acknowledged absence of reliable scientific evidence. Rather than respond to a charge of gender paternalism from the only woman on the Court,³⁶³ he provocatively labeled the Court's embrace of the woman-protective rationale "unexceptionable" and "self-evident."³⁶⁴ And to underscore again, he adopted that rationale on behalf of the Court even though doing so was unnecessary to support the judgments.³⁶⁵

It is important to underscore the basis of the foregoing criticism. The central concern is not that Kennedy's views on the subject of abortion are somehow wrong or that the practice of judicial statesmanship necessarily requires moderation and compromise regardless of the circumstances. Rather, the point is that statesmanship is the judicial virtue that is most required when trust in law is strained—when the legitimacy of law is threatened by intractable disagreement over the identity of the community—so that judges must discharge their responsibilities in ways that sustain law's legitimacy over the long run and with respect to the nation as a whole. Accordingly, the key question of judicial statesmanship in *Gonzales v. Carhart* is this: In light of the forms of abortion regulation that the opinion will unleash, the fact that pro-choice Americans are not disappearing, and the need to sustain the legitimacy of the legal system as a whole, should Kennedy have authoritatively embodied his views on abortion in the ways that he did?

361. For a historical account of the development of that more-recent antiabortion theme, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991. Siegel's work is prescient in light of the Court's endorsement of the women-protective rationale in *Gonzales v. Carhart*, although I suspect even she was surprised that the Roberts Court moved so far so fast.

362. See, e.g., *United States v. Virginia*, 518 U.S. 515, 539–40 (1996) (holding 7–1 that equal-protection principles prohibited the Virginia Military Institute from excluding women).

363. Kennedy has a practice of not responding to dissenting opinions when he authors the majority opinion. Engaging dissents can encourage those in the majority to take dissenting views more seriously. Kennedy's effort in *Parents Involved* may have been enhanced by the responsibility he felt to distinguish his position from both that of the plurality and that of the dissent.

364. *Gonzales v. Carhart*, 127 S. Ct. at 1634.

365. For a forceful critique of that part of the majority opinion, see Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4, 84–86 (2007).

I do not think so because I do not perceive how the modern constitutional law of abortion can retain its legitimacy over the long haul without a significant measure of moderation regardless of the particular views of particular Justices. Strong opponents of abortion regarded *Roe v. Wade*³⁶⁶ as utterly lawless in much the same way that Justice Ginsburg and other strong proponents of abortion rights now regard *Gonzales v. Carhart* as utterly lawless. Unlike *Brown*, moreover, experience suggests that views on either pole of the controversy are unlikely to change significantly over time—perhaps in part because, also unlike *Brown*, substantial moral concerns support arguments on each side. If that is right (those who reject the premise will reject the conclusion³⁶⁷), then for judges to act in a statesmanlike way in abortion cases—for judges to attend to the sources of law’s own legitimacy in such cases—they must be guided by Judge Hand’s “spirit of moderation.”³⁶⁸

I therefore conclude that Kennedy’s majority opinion in *Gonzales v. Carhart* will likely prove a failure of judicial statesmanship and that our country will suffer the consequences. The Court may have performed the judicial equivalent of throwing gasoline on a fire by reducing a profound national debate over a controversial method of abortion to the “mere convenience” of “abortion doctors” who do not understand how “unexceptionable” and “self-evident” it is that abortion harms women. As a result, one can expect inflamed rhetoric and greater polarization in the legislative arena, in litigation, in political campaigns, in confirmation hearings, and elsewhere. In an identity-defining conflict of great importance to many Americans, the Court registered and expressed the values of only part of the national community while dismissing the incommensurable commitments of another part of that community. Indeed, the Court went further and embraced the values of arguably the most extreme members of one subcommunity. The Court did not craft a form of constitutional law that symbolically and actually recognized the profound concerns of both sides. It spoke for the part, not the whole.

366. 410 U.S. 113 (1973).

367. Those who liken abortion to slavery, genocide, or murder will obviously be unmoved by my criticism of *Gonzales v. Carhart* from the standpoint of judicial statesmanship. From their perspective, it may be most important for the Court to express the “correct” social values, even at the expense of sacrificing a significant degree of social solidarity. In short, they may view the abortion issue much like liberals have historically tended to view *Brown*. A serious problem with embodying such a position on abortion in constitutional law, however, is that it has proven unconvincing to most Americans, just as it has proven unconvincing to liken abortion to contraception. One premise animating the evaluation I offer in the text is that most Americans do not and likely never will adopt a strong antiabortion stance, at least regarding the general subject of abortion and considering abortions that occur in particular circumstances (for example, early in pregnancy, in cases of pregnant minors, in medical emergencies, or in cases of rape or incest). If my reading of the future proves incorrect, then so will my assessment of the Court’s statesmanship in *Gonzales v. Carhart*.

368. See *supra* note 1 (quoting Judge Hand).

The Court, it is true, left open the possibility of bringing as-applied challenges to the law. There are times when leaving open final resolution by focusing on particular cases may be most statesmanlike. Among other potential virtues, such a move may leave everyone with the possibility of fighting another day. If Kennedy shows in subsequent cases that as-applied challenges remain meaningful options in medical emergencies, then his majority opinion in *Gonzales v. Carhart*—despite its balkanizing rhetoric—may prove more statesmanlike than I have suggested. That is one possibility, and I do not dismiss it. The present bases for concern, however, are substantial. Kennedy neither suggested what an as-applied challenge in an emergency might look like, nor did he explain why the better course was not to follow *Ayotte*,³⁶⁹ nor did his stated reason for preferring as-applied challenges seem persuasive.³⁷⁰ In addition, the amount of time and expense associated with mounting a series of as-applied challenges may be prohibitive, so that unconstitutional applications of the law may go unaddressed for years. Kennedy did not explain why the as-applied approach was nonetheless warranted. Those concerns, when combined with his tone and rhetoric, cause me to conclude, at least at present, that his effort in *Gonzales v. Carhart* is unlikely to prove an exemplar of judicial statesmanship.

The contrast between the Court's response to the abortion issue in *Gonzales v. Carhart* and its approach in previous abortion decisions is striking. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality respected and incorporated the incommensurable values of those on both sides of the abortion divide.³⁷¹ Indeed, *Casey*'s undue-burden standard,³⁷² which abandoned *Roe v. Wade*'s "rigid trimester framework"³⁷³

369. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006). For a discussion of *Ayotte*, see *supra* note 349.

370. As the dissent argued:

The Court envisions that in an as-applied challenge, "the nature of the medical risk can be better quantified and balanced." But it should not escape notice that the record already includes hundreds and hundreds of pages of testimony identifying "discrete and well-defined instances" in which recourse to an intact D & E would better protect the health of women with particular conditions. Record evidence also documents that medical exigencies, unpredictable in advance, may indicate to a well-trained doctor that intact D & E is the safest procedure.

Gonzales v. Carhart, 127 S. Ct. at 1652 (Ginsburg, J., dissenting) (citations omitted).

371. Compare, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992) (plurality opinion) (declaring that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture"), *with id.* at 872 (insisting simultaneously that "the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term"). These statements are just two of several ways in which *Casey* sincerely affirmed the moral concerns of each side of the abortion controversy.

372. See *id.* at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

and *Roe*'s insistence on strict scrutiny for regulations of abortion,³⁷⁴ reflected the plurality's belief that *Roe* did not sufficiently validate the concerns of opponents of abortion rights.³⁷⁵ In *Stenberg*, moreover, Justice O'Connor went out of her way to suggest that she would uphold a properly drawn law banning so-called partial-birth abortion as long as the law included a health exception.³⁷⁶ And just last Term in *Ayotte v. Planned Parenthood of Northern New England*, in Justice O'Connor's final majority opinion, the Court registered the concerns of each side and insisted that both find expression in the law.³⁷⁷

Because the Court failed to express social values on the subject of abortion inclusively, *Gonzales v. Carhart* likely will prove damaging to the cause of sustaining social solidarity. In *Stenberg*, Kennedy accused "[t]he majority [of] view[ing] the procedures from the perspective of the abortionist, rather than from the perspective of a society shocked when confronted with a new method of ending human life."³⁷⁸ In *Gonzales v. Carhart*, he appeared intent, at least for now, on reversing the perspective from which the Court viewed the abortion debate—intent on giving powerful voice to a very strong antiabortion worldview. I suggest that long-term legitimacy requires the Court to approach abortion cases from multiple perspectives and to practice greater moderation than it exhibited in *Gonzales v. Carhart*.³⁷⁹

Relatedly, it seems unlikely that the majority opinion will succeed over the long run in shaping social values. Justice Kennedy sometimes seems to

373. *Id.* at 878; see also *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (announcing the trimester framework rejected by *Casey*). As a result, the Court allowed fetal-protective regulations of abortion throughout pregnancy for the first time since *Roe*.

374. See *Roe*, 410 U.S. at 155 (holding that regulations of abortion are subject to strict scrutiny).

375. In retrospect, it appears that the *Roe* Court was taken by surprise. The politics of the day lined up according to the issues of race and crime, not according to abortion, gender, and family values. Thus, most of the Nixon appointees voted with the majority in *Roe*. The Justices seemed to have little idea what would happen regarding the politics of abortion and so were blindsided by subsequent events. Post & Siegel, *supra* note 49, at 411 n.193. For a challenge to the conventional wisdom that *Roe* itself was responsible for subsequent events—for "*Roe* rage"—see *id.* at 410, 410–18.

376. See *supra* note 293 and accompanying text.

377. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 323 (2006). The Government in *Ayotte* argued that it makes scant sense to invalidate an abortion regulation facially when the law can be applied constitutionally in almost all circumstances. *Id.* at 328. Advocates of abortion rights argued that it makes little sense to allow constitutional challenges to such a law only when it is too late—that is, in the middle of a medical emergency. *Id.* The Court's holding in *Ayotte* reflected its conclusion that each argument had force. See *id.* at 331 (weighing both arguments in an effort to reach a satisfactory result).

378. *Stenberg v. Carhart*, 530 U.S. 914, 957 (2000) (Kennedy, J., dissenting).

379. It is worth underscoring that my argument cuts both ways. Statesmanship advises Justices who support abortion rights not to dismiss as irrational genuine and distinct concerns about the morality of the procedure banned by the federal law. Statesmanship would also advise such Justices to take pause before voting to invalidate a narrowly drawn statute that included an exception to protect the physical health of women.

hold the false belief that a court in a constitutional democracy can simply impose consensus.³⁸⁰ If his long-term ambition is to promote the sort of “dialogue”³⁸¹ that can help Americans “to progress in knowledge and understanding and in the attainment of some degree of consensus”³⁸²—or, more realistically, less robust dissensus—on the subject of abortion, then *Gonzales v. Carhart* is again likely to prove a failure of statesmanship. Whatever Kennedy’s short-run goals, the Court’s approach will likely prove unpersuasive over the long haul to most people who are not already inclined to adopt a strong antiabortion stance. Defenders of abortion rights are likely to feel demeaned and to mobilize in response, and most nonideological Americans in 2008 seem unlikely to accept the premises about the roles and agency of women that animate the Court’s opinion.³⁸³ Genuine dialogue and consensus require mutual respect and attempts to experience the world from other reasonable points of view. Regrettably, *Gonzales v. Carhart* offered little of either.

V. Conclusion

I have endeavored to conceptualize the phenomenon of judicial statesmanship, and I have defended statesmanship as a core component of judicial role. Whether one finds my account persuasive or instead views judicial statesmanship as a contradiction in terms, it is important to render the practice somewhat less mysterious, somewhat more analytically tractable. Otherwise, disagreements about the definition of judicial statesmanship are

380. Compare, e.g., Jeffrey Rosen, *Supreme Leader: The Arrogance of Justice Anthony Kennedy*, NEW REPUBLIC, June 18, 2007, at 16, 17 (“By forcing legislators to respect a series of moralistic abstractions about liberty, equality, and dignity, judges, [Kennedy] believes, can create a national consensus about American values that will usher in what he calls ‘the golden age of peace.’”), and *id.* (reporting that Kennedy described “the most important qualities for achievement in his field” as “an understanding that you have an opportunity to shape the destiny of the country” (quoting Justice Kennedy)), with Post & Siegel, *supra* note 49, at 432 (“*Carhart* . . . will inspire antiabortion advocates to push for ever more far-reaching restrictions on abortion, and it will provoke abortion rights advocates to renewed mobilization In a constitutional democracy, such disputes cannot be resolved by fiat, judicial or otherwise.”).

In some ways, *Casey* too seemed to reflect a belief in the possibility of imposing consensus by judicial fiat:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866–67 (1992) (plurality opinion).

381. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

382. *Stenberg v. Carhart*, 530 U.S. at 957 (Kennedy, J., dissenting).

383. See, e.g., Post & Siegel, *supra* note 49, at 432 (predicting that *Gonzales v. Carhart* will provoke political mobilization, “especially now that the debate over women’s agency and women’s roles has been expressly joined”).

sure to be conflated with disagreements about its propriety or existence in particular cases.

While there is more to judging than statesmanship, I have argued that we should not want judges who have no use for “the posture of statesmanship.”³⁸⁴ Judicial statesmanship helps law to legitimate itself over the long run by accomplishing fundamental preconditions and purposes of the legal system, from expressing social values to maintaining social solidarity, all in the face of ceaseless social change, an uncertain future, and divisive conflicts over the identity of the community. While the practice of judicial statesmanship may put pressure on rule-of-law values in a given case, ultimately the rule of law is not possible without the social support it receives from statesmanship.

It can be no simple or untroubling task for judges to practice statesmanship. The potentially competing demands of statesmanship and fidelity to rule-of-law values can be difficult to negotiate, particularly when consistency and transparency are at stake. Further, social values can be conflicting at a given time and over time,³⁸⁵ the pace of societal change can be difficult to discern, and the problems of the future may be too uncertain to imagine concretely.³⁸⁶ Moreover, the manifold social consequences of judicial decisions may be hard to trace out, so that it may be impossible to know for sure at the time an opinion is written whether it is (or will become) statesmanlike. In addition, the country may be loath to go where the judges wish to take them. What is more, judges necessarily bring their own commitments and experiences to their tasks, which they must strive to transcend by attempting to experience the world from other reasonable points of view.

But those and other potentially daunting realities do not make the need for judicial statesmanship go away. Judges, like the rest of us, must do the best they can, with earnestness and humility in light of the magnitude of the challenges they face. The alternatives to practicing judicial statesmanship,

384. SELZNICK, *supra* note 2, at 134. One could agree with the thrust of my argument and still maintain that we should want some number of judges on collegial courts who have no use for judicial statesmanship. On the one hand, no interpretive method can succeed over the long run if it is unqualified by judicial statesmanship, and statesmanship will remain most secure if all judges on a collegial court seek to practice it. Moreover, statesmanlike opinions will tend to carry more authority when they are joined by a greater number of judges. On the other hand, unstatesmanlike judges may discipline their courts not to go too far in compromising the semiautonomous integrity of professional legal norms, including fidelity to rule-of-law values. In addition, some statesmanlike judges may become overly confident about their ability to trace out the social consequences of judicial decisions, so that it may be beneficial to have other types of jurists on hand to push back. There also may be virtue in having jurisprudential dialogue within courts. To the extent that trade-offs abound (I merely flag this fascinating issue without developing it), a potential implication for judicial appointments might be that congressional and public evaluation of a nominee should turn in part on the present composition of the court that he or she would be joining if confirmed.

385. *See, e.g.*, Post, *supra* note 74, at 54 (noting that constitutional culture is neither “diachronically singular” nor “synchronically singular”).

386. *See, e.g.*, *supra* note 375 (noting the *Roe* Court’s apparent failure to imagine the future).

quite possibly involving a lethal combination of self-delusion, irresponsibility, ineffectiveness, and illegitimacy, are hardly less problematic.

Because of the potential difficulties involved and the elusive nature of the phenomenon, it will always be a question of judgment whether the Supreme Court of the United States or another court exercised its responsibilities in a statesmanlike way in a particular case. It has always been that way, and so it always will be for reasons I have identified. The logical structure of statesmanship is suffused with constitutive tensions, and one's own values and predictions are necessarily implicated in evaluating the statesmanship of others. But because law is an institution that must account for the conditions of its own legitimation and because expressing social values and sustaining social solidarity are basic purposes of law, the practice of judicial statesmanship must define a virtue in the role of a judge.

For judges to take responsibility for law's legitimacy and diversity of purposes is for judges to walk the path of statesmanship. To underscore again, it can no doubt be a perilous path: partially unpaved, insufficiently illuminated, and containing opportunities for corruption along the way. But as the contrast between Justice Kennedy's opinions in *Parents Involved* and *Gonzales v. Carhart* suggests, it is also a noble and necessary path. It has been traveled at critical times by some of our most important judges, and it has been embraced by some of our most thoughtful commentators. Our country cannot afford to do without judicial statesmanship if we are to continue getting where we want to go, and if we are to remain one traveler when we arrive.