THE USE AND ABUSE OF HUMANISTIC THEORY IN LAW: REEXAMINING THE ASSUMPTIONS OF INTERDISCIPLINARY LEGAL SCHOLARSHIP

CHARLES W. COLLIER*

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* Associate Professor of Law, University of Florida; Alexander von Humboldt Research Fellow, Universities of Göttingen and Frankfurt. B.A. 1972, Reed College; M.A. 1973, M.Phil. 1975, Ph.D. 1978, Yale University; J.D. 1985, Stanford Law School.

Our age is, in especial degree, the age of criticism, and to criticism everything must submit.

—Immanuel Kant¹

INTRODUCTION: LAW REFRACTED THROUGH THE PRISM OF LEGAL SCHOLARSHIP

In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution. These changes have been wrought in part by a generation of new legal scholars with professional academic training in the humanities and social sciences, and in part by others who undoubtedly would have entered such disciplines in more auspicious times. Where legal scholars once confined themselves to modest contributions on such topics as *The Law of Ponds*² and *The Meaning of Fire in an Insurance Policy*,³ this new generation of legal academicians is weighing in with elaborate, highly nuanced, and intensely ambitious treatises—published in the leading law reviews—on such heady subjects as *The Metaphysics of American Law*⁴ and *The Politics of Reason*.⁵ Even relatively established scholars, who once were content to tinker with refinements in judicial doctrine, are today viewing judicial decisionmaking—particularly that of the U.S. Supreme Court—from a new, more dramatic, and more portentous perspective. They are “set[ting] before us a constitutional epic of tragic conflict, along with a rich and evocative language with which to comprehend that epic.”⁶ And

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This Article is dedicated to the memory of Michael D. Bayles, 1941-1990.

1. IMMANUEL KANT, *CRITIQUE OF PURE REASON* at xi (1781).
2. Samuel D. Warren & Louis D. Brandeis, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).
3. Edwin H. Abbot, Jr., *The Meaning of Fire in an Insurance Policy Against Loss or Damage by Fire*, 24 HARV. L. REV. 119 (1910).
4. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).
5. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985).
6. Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 4 n.1 (1986).

they are setting before us a more serious and sustained scholarly focus on judicial opinions than has ever been seen before.

As I see it, these developments present a dual aspect: First, contemporary legal scholars are moving away from traditional, doctrinal scholarship and its methodological assumptions. The best explanation for this departure and evasion is to be found in the theory of intellectual influence and revisionism.⁷ At the same time, they are moving toward other academic disciplines and the forms of external (non-legal) scholarly authority those disciplines seem to offer.

Legal study, teaching, and scholarship have been immensely enriched by the outpouring of interdisciplinary legal work in the 1980s. In many ways, this work represents, in law, *the* intellectual development of our time. Interdisciplinary legal work has now attained a level of maturity and development comparable to that of other established subfields of law. It is only to be expected that a period of reappraisal, reassessment, and selective criticisms of its overextensions will follow this evident popular success.

When a field of study and scholarship has become sufficiently established and institutionalized to withstand constructive criticism, the highest compliment one can pay it is to subject it to the most rigorous applicable standards of intellectual validity. At this relatively advanced stage in the interdisciplinary legal movement, one may be permitted the assumption that its contributions can be assessed, not only in terms of their enrichment of legal discourse, but also according to the criteria and professional canons of the non-legal disciplines from which concepts and methodologies have been "borrowed." It is on this basis that this Article proceeds. Without in any way deemphasizing or discounting the vast enrichment of law through its interdisciplinary associations, I take seriously the methodologies, working assumptions, and professional canons that those other non-legal disciplines have developed and deployed over lengthy periods of their history. Measured against these criteria, I find that the legal "use" of those other disciplines is in many ways, and in many instances, an "abuse" of them.⁸ This abuse has two distinct

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7. See WALTER J. BATE, *THE BURDEN OF THE PAST AND THE ENGLISH POET* (1970); HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (1973).

8. Cf. Francis A. Allen, *The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 183, 189 (Peter Hay & Michael Hoeflich eds., 1988) ("[P]erhaps the most striking aspect of the current fascination with high theory is the absence of what might be called a redeeming skepticism, a failure to be sufficiently concerned with the characteristic limitations of theoretical systems."); Mark Tushnet, *Legal Scholarship in the United States: An Overview*, 50 MOD. L. REV. 804, 812 (1987) (The "search by leading legal scholars in the United States for foundations of the law in

sources or causes: the particular characteristics of the non-legal disciplines involved; and the more notable peculiarities of law as an intellectual discipline, as a subject of scholarship, and as the social institution called "adjudication."

As legal theorists have become increasingly trained in and familiar with the methodologies of other disciplines, they have begun to acquire "the ways of the scholar." It is only natural that they will seek for law the forms of intellectual legitimacy and scholarly authority that those other disciplines possess and that the legal discipline and profession so conspicuously lack.⁹ It is here, however, that they must necessarily be disappointed. As I shall show, legal scholars today are, in effect, seeking in philosophy and humanistic theory generally something that law cannot offer and *cannot even tolerate*: "intellectual authority," an external, non-legal source of scholarly legitimacy.

This Article examines these developments, and it does so from a particular angle: I focus on the use of humanistic theory—especially philosophical theory, but also literary, cultural, and social theory—in contemporary legal scholarship, with special reference to the intellectual and institutional roles of the judiciary in our legal scheme. My thesis is that because of the radically different structures of authority in law and the humanities, the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely a vain one.

Part I of this Article begins the discussion with a brief and selective contrast between contemporary legal scholarship and that of the late nineteenth century. Part II develops an account of humanistic methodology that emphasizes the "intellectual authority" of original texts and primary sources, but also explains the emergence of a distinctive humanistic skepticism of non-intellectual forms of authority. I then analyze the very different relationship of the judiciary to the forms of "institutional authority" that sustain its pronouncements. Part III documents my conclusions about the primarily institutional role of the judiciary through an analysis of the main factors that affect judicial selection, appointment, and confirmation. I then extend my analysis to the work of the judiciary

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other disciplines . . . is usually a sort of scavenging, motivated by the lawyer's effort to find something in the discipline that will help solve a predefined problem, rather than by the discipline's own definition of its problems and goals.").

9. See Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 VA. L. REV. 1351, 1351 (1986) ("After a century as an autonomous discipline, academic law in America is busily ransacking the social sciences and the humanities for insights and approaches with which to enrich our understanding of the legal system."); Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 430 (1987) (Contemporary proponents of critical legal studies are "attempting . . . to reinterpret law and legal education in the context of the most prestigious and authoritative intellectual currents available.").

and demonstrate the very limited intellectual authority of judicial decisionmaking. This discussion bears importantly on my analysis of legal scholarship because an improper conception of the judicial role often underlies legal theorizing. Finally, Part IV considers some prominent examples of contemporary legal scholarship in light of this Article's analysis.

I. FROM *THE LAW OF PONDS* TO *NOMOS* AND *NARRATIVE*

[E]ach generation gets the past it deserves.

—Grant Gilmore¹⁰

A. *The "Judicious Scholarship" of the Late Nineteenth Century*

In this Section I undertake a brief and selective survey of legal scholarship in the late nineteenth century. One purpose of this is to provide a context for viewing contemporary legal scholarship. Use of a relatively long-term perspective heightens the contrast between earlier periods and our own, and allows the changes in legal scholarship to emerge most dramatically. The late nineteenth century is a particularly significant period for this purpose, because it was then that the modern, student-edited law reviews began, and it is also the period when Langdellian formalism, or conceptualism, began to emerge as a paradigm for legal scholarship. A secondary purpose is to provide a view of law as an intellectual discipline in comparison with other disciplines. Just as Dilthey sought the "structure of the historical world" in the human sciences,¹¹ I seek the nature of law through the conditions of legal scholarship.

To peruse a nineteenth-century law review is to page through a world that no longer exists and to re-acquaint oneself with a vision of legal scholarship that has long since vanished. Legal scholarship has traditionally been conceived as a modest, unambitious enterprise. The doctrinal scholarship of the late nineteenth century is much like the work of a good judge: It is "judicious," in the sense of being balanced, reasonable, moderate, temperate, and pragmatic; it is largely descriptive, respectful of previous authority, and faithful to existing law; and it recommends only modest improvements in the law—"the proposal of some well-crafted incremental change in the law which is the hallmark of the excellent judge."¹²

10. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 102 (1977).

11. See WILHELM DILTHEY, *Der Aufbau der Geschichtlichen Welt in den Geisteswissenschaften*, in 7 *GESAMMELTE SCHRIFTEN* (6th ed. 1973).

12. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 2439, 2442 (1987).

The proposition that legal scholarship has undergone fundamental changes in the past century or so may strike one initially as an almost unfairly "easy" thesis. But it is by no means a thesis upon which there is universal agreement. Before proceeding to my main theme, therefore, it may be useful to dispose of the counter-thesis that legal scholarship has *not* changed appreciably. The introduction to a recent symposium maintains, under the title *Plus Ça Change . . . ?*, that on the subject of legal scholarship, "there is little new under the sun."¹³

I think this thesis is wrong—demonstrably wrong. Perhaps the simplest and most dramatic demonstration to the contrary is to juxtapose two issues of the *Yale Law Journal*, separated by almost 100 years. Here are the contents of one of the issues:

Injunction in the Federal Courts
When May a Railroad Company Make Guaranties?
The Law of Icy Sidewalks in New York State
Some Questions Relating to the Measure of Damages in Street
Opening Proceedings in New York City

And here are the contents of the other issue:

Unger's Philosophy: A Critical Legal Study
Critical Legal Studies and a Liberal Critic
Don't Know Much About the Middle Ages: Posner on Law and Literature
The Structure of Blackstone's Commentaries

It is not much of a challenge to locate these two issues historically (hint: The second issue also contains a student note entitled *Figuring the Law: Holism and Topological Inference in Legal Interpretation*). The discerning reader will have surmised that the first issue dates from the late nineteenth century,¹⁴ whereas the second is a product of the 1980s.¹⁵ One remarks immediately on obvious differences in titles and subject matter; these imply profound differences in what I shall term "*intellectual ambitiousness*" and in the authors' relatively *theoretical or conceptual approaches*. One remarks also that the 1980s authors are mostly not

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[hereinafter *Bork Hearings*] (statement of George L. Priest); see also *id.* at 2440-43 (discussing differences between Judge Bork's legal scholarship and his judicial opinions); cf. Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983):

Progress occurred when the scholar (or the great judge or lawyer) discovered a previously unrecognized principle, one that provided a simple and satisfying explanation for existing decisions, and that at the same time reflected the slowly changing needs and conditions of society. Such a principle, because immanent in decided cases, was already the law, so that its articulation was an act of discovery, not one of illegitimate legislation.

Id. at 31.

13. Stephen B. Burbank, *Introduction: "Plus Ça Change . . . ?"*, 21 U. MICH. J.L. REF. 509, 509 (1988).

14. 6 YALE L.J. 245 (1897).

15. 97 YALE L.J. 665 (1988).

even law professors: One author is a tutor in philosophy;¹⁶ another is a professor of religion.¹⁷ These two authors discuss the "philosophy" of a scholar who, though nominally a law professor, has also been described as a "prophet, if not [a] messiah" (at least of the Critical Legal Studies movement).¹⁸ A third author is a professor of English literature,¹⁹ who criticizes the writings of a federal judge—the only one involved who has a full-time legal occupation.²⁰ The federal judge, though, is best known not for his judging, but for his work in law and economics;²¹ in this case, however, it is the judge's more recent delvings into law and literature that are at issue.²² These divergent intellectual pedigrees and persuasions illustrate a third recent trend—one toward the use of *non-legal sources and materials* in legal scholarship.

As for the 1897 *Yale Law Journal*, from today's perspective one is struck immediately by the *lack* of intellectual ambitiousness, the lack of conceptual or theoretical approaches, and the lack of non-legal sources and materials. The one moderately ambitious article in scope and potential generality, *Injunction in the Federal Courts*, is barely seven pages long. *The Law of Icy Sidewalks in New York State* is typical. The purpose of the article is "to recite briefly the present condition of the law of the Empire State bearing on this interesting question":²³ whether a person injured as a result of falling on an icy sidewalk can recover from the city where the accident occurred. It has commonly been assumed, the author says, that our cities are some sort of "accident insurance companies to protect everyone against injuries occasioned by such accidents. The decisions of our courts have, however, very properly held otherwise . . . ." ²⁴ From the existing case law the author extracts two rules: (1) A

16. William Ewald, author of *Unger's Philosophy: A Critical Legal Study*, was a Junior Research Fellow at The Queen's College, Oxford.

17. Cornel West, author of *CLS and a Liberal Critic*, is a Professor of Religion and Director of the Afro-American Studies Program, Princeton University.

18. See Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1781 (1987) (discussing Roberto Unger); cf. Richard Rorty, *Unger, Castoriadis, and the Romance of a National Future*, in 2 ESSAYS ON HEIDEGGER AND OTHERS: PHILOSOPHICAL PAPERS 177, 177 (1991) ("Roberto Mangabeira Unger is a Brazilian philosopher."); see also Stephen Holmes, *The Professor of Smashing: The Preposterous Political Romanticism of Roberto Unger*, NEW REPUBLIC, Oct. 19, 1987, at 30 (reviewing ROBERTO M. UNGER, *POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987)).

19. Stanley Fish, author of *Don't Know Much About the Middle Ages: Posner on Law and Literature*, is Chairman of the English Department at Duke University and Professor of Law at the Duke University School of Law.

20. Richard A. Posner is a Judge on the Court of Appeals for the Seventh Circuit.

21. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

22. See RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); Posner, *supra* note 9.

23. Loran L. Lewis, *The Law of Icy Sidewalks in New York State*, 6 YALE L.J. 258, 258 (1897).

24. *Id.*

city is not liable in damages for any injuries resulting from slippery conditions caused by ice of recent formation; and (2) a city is not liable unless something about the sidewalk beyond mere slipperiness contributed to the fall. All in five pages!

"Intellectual ambitiousness" is perhaps the vaguest and most general of my categories of comparison, but I think it captures something important. The level of intellectual ambitiousness can be indicated indirectly by length, by title or topic, and by manner of treatment. Length is obviously the crudest proxy, but it is interesting that the length of lead articles in the *Harvard Law Review* and the *Yale Law Journal* during the 1890s averages only fifteen pages.²⁵ My favorite example of a short article is one that appeared in the 1893 *American Law Register* (the predecessor to the *University of Pennsylvania Law Review*) entitled *A New Canon of Constitutional Interpretation*—all nine pages of it!²⁶ The inferences that can be made from length are obviously very limited, but I think it is safe to say that a nine page article entitled "A New Canon of Constitutional Interpretation" would be a virtual impossibility today. In other interesting examples, Herbert H. Kellogg treats *The Law of the Telephone*²⁷—including what appears to be the hottest issue of the day: the effect of electric railways on telephonic transmission quality—all in seven pages, which is nonetheless more space than Israel H. Peres needs to dispose of "the general rules regulating" horse and buggy traffic in *The Law of the Road*.²⁸

When one turns to titles, topics, and manner of treatment in the late nineteenth century, one is struck by the preponderance of more modest contributions to an empirical project. A sampling of titles by prominent scholars is revealing: Louis D. Brandeis and Samuel D. Warren on *The Law of Ponds*²⁹ and *The Watuppa Pond Cases*,³⁰ Joseph H. Beale, Jr. on *Tickets*³¹ and *Taxation of Pipes in Public Streets*,³² Samuel Williston on *Successive Promises of the Same Performance*³³ and *The Right to Follow*

25. This figure is based on a survey of 243 lead articles in the *Harvard Law Review* from January 1890 to December 1899, and of 163 lead articles in the *Yale Law Journal* during the portion of this period that it was in existence.

26. Richard C. McMurtrie, *A New Canon of Constitutional Interpretation*, 32 AM. L. REG. 1 (1893).

27. Herbert H. Kellogg, *The Law of the Telephone*, 4 YALE L.J. 223 (1895).

28. Israel H. Peres, *The Law of the Road*, 4 YALE L.J. 137, 142 (1895).

29. Louis D. Brandeis & Samuel D. Warren, *The Law of Ponds*, 3 HARV. L. REV. 1 (1889).

30. Louis D. Brandeis & Samuel D. Warren, *The Watuppa Pond Cases*, 2 HARV. L. REV. 195 (1888).

31. Joseph H. Beale, Jr., *Tickets*, 1 HARV. L. REV. 17 (1887).

32. Joseph H. Beale, Jr., *Taxation of Pipes in Public Streets*, 4 HARV. L. REV. 83 (1890).

33. Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894).

Trust Property When Confused with Other Property;³⁴ J.B. Ames on *The Disseisin of Chattels*.³⁵

The legal issues treated in the late nineteenth century seem to arise mainly out of pragmatic, everyday concerns. Lee Max Friedman's *The Bicycle and the Common Carrier*,³⁶ for example, appears to arise from a pet peeve of the author, who vigorously defends the bicyclist's "right" to bring his bicycle on a train. With the general rule in mind that a common carrier must transport a passenger's "ordinary baggage," the author extracts from American and English case law a test for ordinary baggage, including length of trip, purpose of travel, and even wealth of the passenger.³⁷ Generally the bicyclist is traveling a short distance on the train, such trains are slow-moving, and the bicyclist is usually traveling on a Sunday or holiday, when the trains are not full. From this the author concludes that, under "normal" circumstances, a bicycle is ordinary baggage.³⁸

Since the late nineteenth century, legal scholarship has overwhelmingly meant the production and publication of articles engaged in doctrinal problem-solving.³⁹ The assumption of this form of legal scholarship is that doctrinal problems admit of doctrinal solutions: There is no need to go beyond or outside legal doctrine. Classical doctrinal scholarship represents in this sense an "internal" perspective—internal to (case) law, that is.⁴⁰ In *The Bicycle and the Common Carrier*, for example, the author begins with the premise that the advent of bicycling "furnishe[s] another interesting example of what has long been the chief boast and glory of our common law,—the flexibility of its precedents and the adaptability of its general principles to new facts and changed conditions."⁴¹

34. Samuel Williston, *The Right to Follow Trust Property When Confused with Other Property*, 2 HARV. L. REV. 28 (1888).

35. J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 23 (1889).

36. Lee M. Friedman, *The Bicycle and the Common Carrier*, 12 HARV. L. REV. 119 (1898).

37. *Id.* at 123 ("[T]he Supreme Court of the United States has said that two hundred and seventy-five yards of lace worth \$10,000 [is ordinary baggage to] a Russian lady of fortune.") (citing *New York Cent. & H.R.R.R. v. Fraloff*, 100 U.S. 24 (1879)).

38. *Id.* at 124-25.

39. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 270-71 (1984).

40. See Grey, *supra* note 12, at 6 ("Classical orthodoxy was a particular kind of legal theory—a set of ideas to be put to work from *inside* by those who operate legal institutions, not a set of ideas about those institutions reflecting an *outside* perspective, whether a sociological, historical or economic explanation of legal phenomena."); cf. *id.* at 47 ("Classical scientists had purported to do no more than make precise and scientific what had always been implicit in the substance of the common law and the methods of common lawyers.").

41. Friedman, *supra* note 36, at 119.

On such premises, a classic pattern or "formula" for doctrinal scholarship emerges: (1) state the problem; (2) propose a solution; (3) show how the common law, properly reinterpreted, affords the proposed solution.⁴²

Here the influence of and connection with Langdellianism must be noted.⁴³ A central implication of Langdell's case method was that, in the study of law, one need not venture beyond appellate judicial opinions.⁴⁴ If, as Langdell postulated, law is a self-contained science, with the law library as its "laboratory"⁴⁵ and cases as its "specimens,"⁴⁶ one need only study those appellate decisions. But, according to Richard Cosgrove: "For all the emphasis on law as science, Langdell's declarations had the curious result of limiting the field of legal inquiry rather than expanding it. . . . [T]he Langdellian account of law implied a closed, logical legal system where theoretical questions, if not exactly ruled out, never occupied a central position."⁴⁷

This deemphasis of theory implies a distrust of non-legal sources and materials, perspectives, and frames of reference. For the ultimate answers to all legal questions it was, according to Langdell, unnecessary to ponder considerations of justice and social policy, or study the evolution of legal institutions in their social contexts, or consider other sources of power and authority in social life, or even ascertain the actual effects of law on people. It was, in short, "unnecessary to look with any particularity at what was actually going on in the real world";⁴⁸ and it was *certainly* not necessary to learn other disciplines or study non-legal sources or materials.⁴⁹ That is, Langdell taught ("with a vengeance," according to Lawrence Friedman⁵⁰) that law is *autonomous*.

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42. For another, more recent, paradigm of "the traditional goals of legal theory," see Robert M. Hayden, *Social Theory and Legal Practice: Intuition, Discourse, and Legal Scholarship*, 83 NW. U. L. REV. 461, 461 (1989) (arguing that traditional goals are "to explain the existing law, to justify legal principles, to critique existing doctrine, and to prescribe the directions that law ought to take").

43. On Langdellian scholarship, see GILMORE, *supra* note 10, at 47-48, 57-60; G. EDWARD WHITE, *TORT LAW IN AMERICA* 31, 35 (1980); G. Edward White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 225-26, 230 (1978).

44. See WHITE, *supra* note 43, at 217.

45. Christopher C. Langdell, *Address to Harvard Law School Association, in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* 84, 86-87 (Justin Winsor ed., 1887).

46. William A. Keener, *Methods of Legal Education*, 1 YALE L.J. 143, 144 (1892) (discussing the basic elements of the case method introduced at Harvard Law School).

47. RICHARD A. COSGROVE, *OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY 1870-1930*, at 30 (1987).

48. GILMORE, *supra* note 10, at 56.

49. See COSGROVE, *supra* note 47, at 28.

50. See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1581 (1989).

B. The Current "Scholarship Amok" Muck

By the 1950s, the average length of lead articles in the *Harvard Law Review*, the *Yale Law Journal*, and the *University of Pennsylvania Law Review* had grown to about thirty-four pages, thirty-two pages, and twenty-eight pages, respectively.⁵¹ By the 1980s, the comparable averages for these same law reviews had increased to sixty-five pages, fifty-five pages, and seventy-one pages, respectively.⁵² Our contemporary counterpart to the nine page piece from 1893 on *A New Canon of Constitutional Interpretation* is Jesse Choper's 212 page article (with 1611 footnotes) on *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*,⁵³ or perhaps Donald Regan's 197 page article on the dormant commerce clause,⁵⁴ "probably the duller subject in constitutional law."⁵⁵ (Regan's *Introduction* alone is nineteen pages long, and contains five sections.⁵⁶) G. Edward White has suggested that the inordinate length of modern law review articles may be due in part to a collapse of consensus; if nothing can be assumed as common knowledge and taken for granted, then foundations must be relaid completely for every argument.⁵⁷ My colleague Frank Allen has remarked on "the fascination now revealed in some parts of the contemporary law school world with the creation of intricate theoretical systems"⁵⁸ and observed:

Often when I have seen an article in which the fledgling author is attempting to expand a modest insight into at least galactic significance, I am reminded of an incident in a Peter De Vries novel. A young man

51. The period surveyed was January 1950, through December 1959.

52. These figures are based on 104 articles for Harvard (including "Forewords"), 116 articles for Yale, and 124 articles for Pennsylvania, from January 1980, to May (Harvard and Yale) and April (Pennsylvania) 1989. See also W. Lawrence Church, *A Plea for Readable Law Review Articles*, 1989 WIS. L. REV. 739, 740-41; Roger C. Cramton, "The Most Remarkable Institution": *The American Law Review*, 35 J. LEGAL EDUC. 1, 6 n.24 (1986); Ira M. Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 682 (1983); Michael J. Saks, *Law Journals: Their Shapes and Contents, 1960 and 1985* (Jan. 6, 1989) (draft report presented at the Association of American Law Schools (AALS) Executive Committee's Symposium on Legal Scholarship).

53. Jesse Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984).

54. Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

55. D.A.F., *The Zapp Complex*, 5 CONST. COMMENTARY 13, 14 (1988). For other examples of extremely long articles, see Dennis W. Arrow, *Federal Question Doctrines and American Indian Law*, 14 OKLA. CITY U. L. REV. 263 (1989) (127 pages with 796 footnotes); David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205 (1983) (151 pages with 923 footnotes); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (146 pages and 790 footnotes).

56. See Regan, *supra* note 54, at 1091-109.

57. See WHITE, *supra* note 43, at 211-15.

58. Allen, *supra* note 8, at 188.

much concerned with the problems of the Cosmos is consoled by a female companion: "The Universe," she said, "isn't everything."⁵⁹

Geoffrey Miller has offered this summary:

These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques. Strange-sounding jargon imported from other disciplines—the Frankfurt School of sociology, existentialism and phenomenology, neoclassical economics and capital-markets theory—is appearing in the law journals. New ideas are spreading across the empire of doctrinal analysis.⁶⁰

Even the parodies of legal scholarship of the 1980s are revealing:

We write, uni, about metalaw.

Metalaw! What's that?

Oh, it's about—you know—the deep structures of law, its normative resonances, metaphorical power, and dialogic quality.⁶¹

The term "postmodern"⁶² nicely suggests the plight of scholarship that has arrived, very late in the day, at a field that has already been thoroughly and exhaustively tilled by others. And there are suggestions that even postmodernism may have arrived too late.⁶³ In an overall view, Paul Brest suggests that "the current ferment in legal theory" amounts to attacks on "the self-congratulatory and complacent reign of 'legal process.'"⁶⁴ After the Legal Process project of the 1950s and 1960s had attained a certain state of development and completion, the question began to arise with particular urgency: *What is left to do?* Legal Process has run its course. In order to carve out creative space for themselves, contemporary legal scholars are forced—by default, and at all costs—to

59. *Id.* at 192 (quoting PETER DE VRIES, *THE TUNNEL OF LOVE* 108 (1958)).

60. Geoffrey Miller, *A Rhetoric of Law*, 52 U. CHI. L. REV. 247, 247 (1985) (reviewing JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* (1984)).

61. Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 336 (1989).

62. For a general discussion of postmodernity, see JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* (Frederick Lawrence trans., 1987); JEAN FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* (1984); see also David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1656 (1986) (arguing that Critical Legal Studies "is to legal theory as modernist art was to traditional art").

63. See *The New Public Interest Law: Strategies for Revitalizing Legal Activism in the '90s* (New Public Interest Law Conference, New College Law School, San Francisco, Jan. 7-8, 1990) (a conference going, *inter alia*, "Beyond Post-Modernism"); cf. ROGER KIMBALL, *TENURED RADICALS* 149 n.* (1990) ("One may safely hazard that the nonsensical phrase *postcontemporary* was the result of a search for something even more up to date, more fashionable, than *postmodern* . . ."). For an old-fashioned analysis of the pathological aspects of post-postmodernity, see Søren Kierkegaard, *The Rotation Method*, in 1 EITHER/OR 279 (David F. Swenson & Lillian M. Swenson trans., 1944).

64. Paul Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 765 (1982).

do *something else* or, in any event, *something different*. This is the “negative moment” (to use a Hegelian term) in the contemporary scholarly situation; here the movement is viewed in its aspect as a *movement away* from something:

It is essential to this task and to this form of scholarship that the writer be skeptical of previous learning and to challenge what is the accepted wisdom. Indeed, to assert the primacy of his or her own ideas, the scholar must insist that the accepted wisdom is of little value at all. . . . [L]egal scholars, if they are to make any mark whatsoever, must be hostile to authority.⁶⁵

As I have suggested, this phenomenon can best be explained in terms of the theory of intellectual influence and revisionism. This theory has been expounded and elaborated in the area of poetic influence, and I think the situation is formally and structurally the same for legal scholars of the 1980s. W. Jackson Bate has explored the melancholy that poets of the Enlightenment faced in trying to wrest themselves free of the embarrassment of riches deposited before them by the ancients and the Renaissance masters.⁶⁶ Harold Bloom has carried the theme further in discussing the “anxiety of influence” that strong poets feel as they attempt to step out of the shadows of powerful—indeed, overwhelming—poetic predecessors and say something new.⁶⁷ Legal scholarship of the 1980s exhibits all the symptoms of an “anxiety of influence,” and for good reasons: “There is no credit given in academics for the proposal of some well-crafted incremental change in the law . . . . There is no credit given in academics to fidelity to previous ways of thinking.”⁶⁸

These observations capture well the interdisciplinary explosion in contemporary legal scholarship and the centrifugal force it has generated in progressively exfoliating and departing from traditional doctrinal approaches. To that considerable extent the movement *is* a movement away from something. But there is also a positive, “centripetal” movement, so to speak. In this departure and evasion, something is being affirmatively sought after: a source of scholarly authority outside law. Yet this perceived need for intellectual authority is not new at all.

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65. *Bork Hearings*, *supra* note 12, at 2440-41 (statement of George L. Priest); cf. RICHARD LEVIN, *NEW READINGS VS. OLD PLAYS* 196 (1979) (University teachers “know that their interpretations are not likely to be published unless they say something . . . that has never been said before, which all too often means . . . that they must say something very strange.”).

66. See W. JACKSON BATE, *THE BURDEN OF THE PAST AND THE ENGLISH POET* (1970).

67. See BLOOM, *supra* note 7; HAROLD BLOOM, *A MAP OF MISREADING* (1975). For further discussion of this theme, see *infra* text accompanying notes 315-42.

68. *Bork Hearings*, *supra* note 12, at 2442 (statement of George L. Priest).

"I begin with Nietzsche, perhaps (un)fashionably," writes the author of a recent article on *Section 1983 Discourse: The Move from Constitution to Tort*.⁶⁹ "No," I am tempted to reply, "you begin very fashionably indeed."⁷⁰ Admittedly, it might upon first glance seem highly improbable that the work of an exotic, nineteenth-century German philosopher would provide telling glosses on the contemporary U.S. Supreme Court's section 1983 adjudication.⁷¹ (On second thought, it seems even more implausible.)

Undeterred, the author proceeds to an elaborate discussion of the work of Ferdinand de Saussure,⁷² Jacques Derrida, and Michel Foucault.⁷³ Here in my exposition I was going to analyze how the author's use of Nietzsche, Saussure, Derrida, and Foucault contributed to his discussion of section 1983 "discourse," but I could not find a single instance in which their ideas were actually applied to the author's legal subject. The closest he came were these: "[Derrida's] deconstruction of margins helps us to understand the relative ease of the previously described shift in emphasis from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 case law."⁷⁴ *As applied to the move from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 jurisprudence, Foucault's approach suggests at the very least that an event of deep significance has occurred.*⁷⁵

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69. Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1731 (1989).

70. It has been suggested to me that the objects of my criticism are merely fads or fashions. My response is that these are considered major or at least reputable scholarly works, published in the leading law reviews. If these are fads or fashions, then they are fads or fashions of genuine intellectual significance for the sociology of knowledge.

There is a second, perhaps deeper, basis for my concern. These and other similar works exemplify what I see as an emerging postmodern thesis to the effect that fashionableness or modishness is in itself a sufficient justification for legal scholarship. See David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1423 (1985) ("[I]ndeterminacy analysis might yield a situated anti-authoritarian practice, or might be simply the ultimate assertion of self: transforming the work of legal scholarship into either *strategy* or *fashion*, constantly shifting its ground.") This thesis tends to erode the crucial distinction between "intellectual authority" and "institutional authority." For further discussion of these issues, see *infra* Part II.

71. The reference is to 42 U.S.C. § 1983 (1988), a post-Civil War civil rights statute that has been the subject of a tremendous amount of litigation in recent years. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* §§ 8.1-11 (1989).

72. See Nahmod, *supra* note 69, at 1733 ("Structural linguistics, as formulated by Ferdinand de Saussure, provides valuable insights into the Supreme Court's § 1983 jurisprudence.")

73. See *id.* at 1734 ("Specifically relevant to my analysis of the Supreme Court's § 1983 jurisprudence are Jacques Derrida and Michel Foucault.")

74. *Id.* at 1736.

75. *Id.* at 1738 (emphasis added). After the sections of the article on Nietzsche, Saussure, Derrida, and Foucault, none of their ideas nor even any of their names is mentioned again—explicitly or implicitly—in the remainder of the article. The only possible exceptions to this are three mentions of the words "margin" and "marginalize" (a term of Derrida's) at 1738, 1742, and 1750.

What does it mean that wholly gratuitous discussions of Nietzsche, Saussure, Derrida, and Foucault are now *de rigueur* in law review articles about section 1983, common law contract doctrine,⁷⁶ poverty law,⁷⁷ and even Uruguayan prisons?⁷⁸ I think it means that legal scholars are desperately groping for an external, non-legal source of legitimacy or authority.⁷⁹ The hope that this will be found in humanistic theory, however, is largely a vain one. These legal scholars' use of non-legal (primarily humanistic) methods and concepts is an attempt to bring greater "intellectual authority" to a form of scholarship that, nevertheless, remains intractably dependent upon and derivative of the "institutional authority" of the judiciary.

At the same time that legal scholars increasingly seek a source of intellectual authority outside of law, by a strange irony these same scholars focus attention as never before on *judicial opinions* as "original texts" or "primary sources" of theory. As I shall explain below,⁸⁰ this focus on "texts" reflects an essentially humanistic technique or method, but the result is that adjudication remains the preferred theoretical model for scholarship, and the legal opinion is increasingly elevated to something it never was even for the classical doctrinal scholars. In this sense, and with a few notable exceptions,⁸¹ the widely advertised divergence between the work of the judge and that of the legal scholar has not in fact

76. See, e.g., Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007-10 (1985) (introducing, but then quickly dropping, a discussion of Derrida).

77. See, e.g., Anthony Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2120 n.43 (1991) ("I attribute my analysis of power to Michel Foucault."); *id.* at 2120 n.46 ("Continental theory is represented here by Michel Foucault, Hans-Georg Gadamer, Jurgen Habermas, Paul Ricoeur, and Roberto Unger. I also count Clifford Geertz and Wayne Booth to be among this group.").

78. See Kennedy, *supra* note 70, at 1417-23; see also *id.* at 1422 (retracing the author's project of "decentering my own textual presence" to "illustrate the process by which the analyzing subject constructs itself out of ambiguity" and to "champion a practice of determinacy and indeterminacy analysis in which one is always both challenging particular assertions of openness or closure and maintaining an alternative position that asserts its openness and closure," and citing Derrida and Rorty for further illumination); *id.* at 1423 (posing but not answering questions like "Do we demystify a text or is the text always already self-deconstructing? Are we the shock troops of anti-authoritarianism or the genteel revealers of the full complex texture of legal writing and the mechanisms of its power of social persuasion?," and citing Foucault and De Man).

79. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 525 n.56 (1988) (criticizing the use of phrases like "post-Wittgensteinian" as "attempting to lean on the argumentative props of associations with philosophers whose names are currently fashionable in legal circles"). But see Dennis Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 945 (1990) ("The choice between the two readings of Wittgenstein has important implications for legal jurisprudence.").

80. See *infra* notes 83-101 and accompanying text.

81. See, e.g., Jeff Strnad, *Taxation of Income From Capital: A Theoretical Reappraisal*, 37 STAN. L. REV. 1023 (1985) (85 page article on tax policy citing no cases); Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983), a 112 page article—later published

materialized. The prominent examples of contemporary legal scholarship examined in Part IV all markedly exhibit this tendency to apply non-legal, humanistic methods and concepts to that quintessentially legal primary source—the judicial opinion.

In effect, these new legal scholars want to “have it both ways.” They want to take a page out of the book of the poets and philosophers and bring to the study of judicial opinions the transferred intellectual authority and humanistic methods that are appropriate only in those other disciplines. As I shall explain, this strongly misconstrues the very different nature of scholarly authority in law and in the humanities.

In support of these conclusions I undertake in the following Part an examination of the different bases of authority in law and the humanities. Next, in Part III I explore the implications of these notions of authority for the work of the judiciary. These findings are, finally, applied to some prominent examples of contemporary legal scholarship.

II. INTELLECTUAL AUTHORITY AND INSTITUTIONAL AUTHORITY

With force I have subdued the brains of the proud.

—Contemporary epigraph engraved on the
tomb of Cardinal Roberto Bellarmino,
consultant to the Roman Inquisition⁸²

A. *The Origins of Humanistic Methodology*

In this Section, I elaborate an interpretation of humanistic methodology that emphasizes and draws upon two early stages in its historical development: (1) the Renaissance rediscovery and appreciation of classical texts and traditional authors; and (2) the development, which reached full fruition in the scientific revolution of the seventeenth century, of a decidedly skeptical attitude toward non-intellectual forms of authority. As I shall show, these two features are related, yet they coexist only uneasily. Because some of the classical texts and authors would eventually not stand up to modern scientific and intellectual scrutiny, in some instances their authority could be sustained only by reliance on non-intellectual forms of support.

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as a book—pursuing, “[f]or the sake of specificity,” *id.* at 648 (emphasis added), extensive analyses of “current American equal protection doctrine,” *id.* at 609, and “contemporary Anglo-American contract law,” *id.* at 621, without discussing or even mentioning a single case; see also Drucilla Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988) (95 page article, with 295 footnotes, citing three cases); Michael Moore, *The Interpretive Turn in Modern Theory: A Turn for The Worse?*, 41 STAN. L. REV. 871 (1989) (87 page article, with 352 footnotes, citing four cases).

82. See PIETRO REDONDI, GALILEO: HERETIC 7 (1987).

In the classical tradition of the humanities, authority derives principally from an original text or other primary source.⁸³ Etymologically, the classical "authority" is the author (*auctor*, later *auctour*), the originator of something.⁸⁴ The history of humanistic learning resembles a perpetual "querelle des anciens et des modernes,"⁸⁵ a "Great Conversation"⁸⁶ across the ages. The source and subject of this dialogue is the ancient learning embodied in classical texts.⁸⁷ Understanding these works, and comprehending their significance for modern times, are the traditional goals of education in the humanities.⁸⁸

The humanist tradition also has a normative significance; these are the issues, ideas, and thinkers we *ought* to be concerned with if we value our humanity and our humanistic heritage. They command our intellectual respect, if not assent.⁸⁹ "In a literary context, the term *auctor* denoted someone who was at once a writer and an authority, someone not

83. See Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 Wis. L. REV. 771, 805-09.

84. See 1 OXFORD ENGLISH DICTIONARY 571-72 (1970); ALASTAIR J. MINNIS, *MEDIEVAL THEORY OF AUTHORSHIP* 10-12 (1984) ("The Terms *Auctor* and *Auctoritas*"); E. D. WATT, *AUTHORITY* 11-17 (1982) ("*Auctoritas* and Authority").

85. See CARL BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* 134 (1951) (citing the main sources); HANS R. JAUSS, *LITERATURGESCHICHTE ALS PROVOKATION* 11-66 (1974); Joseph Levine, *Giambattista Vico and the Quarrel Between the Ancients and the Moderns*, 52 J. HIST. IDEAS 55 (1991); cf. HUBERT GILLOT, *LA QUERELLE DES ANCIENS ET DES MODERNES EN FRANCE* (1914); H. RIGAULT, *Histoire de la Querelle des Anciens et des Modernes*, in 1 *OEUVRES COMPLÈTES DE H. RIGAULT* (1859).

86. See generally ROBERT M. HUTCHINS, *THE GREAT CONVERSATIONS: THE SUBSTANCE OF A LIBERAL EDUCATION* (1952) (volume one of the 54 volume *Great Books of the Western World*).

87. See *id.*:

The tradition of the West is embodied in the Great Conversation that began in the dawn of history and that continues to the present day. Whatever the merits of other civilizations in other respects, no civilization is like that of the West in this respect. No other civilization can claim that its defining characteristic is a dialogue of this sort. No dialogue in any other civilization can compare with that of the West in the number of great works of the mind that have contributed to this dialogue. . . .

. . . [T]o the extent to which books can present the idea of a civilization, the idea of Western civilization is here presented.

These books are the means of understanding our society and ourselves. They contain the great ideas that dominate us without our knowing it. There is no comparable repository of our tradition.

Id. at 1-2.

88. See *id.* at 3-14; RENÉ WELLEK & AUSTIN WARREN, *THEORY OF LITERATURE* 3-45 (1949); Matthew Arnold, *The Function of Criticism at the Present Time*, in *ESSAYS IN CRITICISM: FIRST SERIES* 8 (Thomas M. Hooctor ed., 1968).

89. As Edward Shils stated:

Tradition is . . . far more than the statistically frequent recurrence over a succession of generations of similar beliefs, practices, institutions, and works. The recurrence is a consequence of the normative consequences—sometimes the normative intention—of presentation and of the acceptance of the tradition as normative. It is this normative transmission which links the generations of the dead with the generations of the living in the constitution of a society.

EDWARD SHILS, *TRADITION* 24 (1981).

merely to be read but also to be respected and believed."⁹⁰ The pronouncements of primary authorities are not necessarily true, but they are entitled to be considered "presumptively important."⁹¹ The great classical thinkers provided "the great 'topics' of thought—the themes for discussion and the standard 'commonplaces' on these themes," as well as a terminology "in the grooves of which thought could run."⁹²

In the European Middle Ages the development of commentaries and glosses on primary sources became particularly marked when such great thinkers as Averroes and Thomas Aquinas devoted the greater part of their lives to the works of Aristotle.⁹³ The "rediscovery" of Aristotle's works, some of which had lain in desuetude and others of which had actually been lost for centuries, was the primary and precipitating cause of the great revival of learning and scholarship in the European Middle Ages.⁹⁴

The core subjects of what are now termed the "humanities" originated in the humanistic studies of the Renaissance.⁹⁵ The aim of the original humanists of the Renaissance was simply to get their contemporaries to read a few good books—the "primary sources" to which I

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90. MINNIS, *supra* note 84, at 10 ("The writings of an *auctor* contained, or possessed, *auctoritas* in the abstract sense of the term, with its strong connotations of veracity and sagacity. . . . [A]s Aristotle says, an *auctoritas* is a judgment of the wise man in his chosen discipline.").

91. See SHILS, *supra* note 89, at 24 ("Scientific and scholarly propositions, once they have been enunciated, have [a] factually normative character. Representing the state of correct belief in, let us say, mathematics or chemistry, their assertion both assumes their correctness and recommends their acceptance. This is the barest normative minimum of any tradition of belief.").

92. 2 ENCYCLOPAEDIA BRITANNICA *Aristotle* 354 (1929) ("When thought had to be rebuilt after the collapse of classical civilization, and while the middle ages were toiling at the work, it was no small thing that men should have the tools of a terminology and the rules of accepted axioms.").

93. See ALLEN WHEELIS, *THE END OF THE MODERN AGE* 10 (1971).

94. See generally PIERRE MANDONNET, *SIGER DE BRABANT ET L'AVERRŌISME LATIN AU XIIIÈME SIÈCLE* (2d ed. 1911); ALEX PREMINGER ET AL., *CLASSICAL AND MEDIEVAL LITERARY CRITICISM* 263-98, 341-48 (1974); RICHARD SHUTE, *ON THE HISTORY OF THE PROCESS BY WHICH THE ARISTOTELIAN WRITINGS ARRIVED AT THEIR PRESENT FORM* (1888). See also WERNER JAEGER, *ARISTOTLE: FUNDAMENTALS OF THE HISTORY OF HIS DEVELOPMENT* (Richard Robinson trans., 1934).

On the medieval "rediscovery" of Aristotle, see DAVID KNOWLES, *THE EVOLUTION OF MEDIEVAL THOUGHT* 185-92 (1962); Paul O. Kristeller, *Philosophical Movements of the Renaissance*, in *STUDIES IN RENAISSANCE THOUGHT AND LETTERS* 17 (1956).

95. See ERNST CASSIRER ET AL., *THE RENAISSANCE PHILOSOPHY OF MAN* 4 (1948).

referred.⁹⁶ Unlike the Scholastics, "they exercised their scholarship only to [provide] reliable texts" of the classical authors.⁹⁷

But the development of Renaissance text criticism, of philology, had deeper implications, which came "in the most unlikely way from the study of Latin and Greek, which stimulated in literary scholars a feeling for exactness as passionate as the new-found Greek mathematics stimulated in scientists. As a result, they learned to analyse the grammar, the locutions, and the references in old texts precisely enough to challenge the traditional dates that had been accepted for these texts."⁹⁸ This development was of more than historical interest: It was revolutionary because it inaugurated in Renaissance scholarship the standard of *tested truth* and a corresponding new understanding of the relationship to "authority."⁹⁹ Eventually, then, even the humanists—those least inclined to scientific experimentation and most enamored of the classical book-learning—adopted a more skeptical and considered view of their primary sources.

This new relationship to authority is what I shall refer to as "intellectual authority." It may be defined as "the authority exerted by arguments that make their way simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution."¹⁰⁰ Intellectual authority has withstood "the test of time," in the sense of withstanding intellectual scrutiny in the free

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96. See Jacob Bronowski, *Copernicus as a Humanist*, in *THE NATURE OF SCIENTIFIC DISCOVERY* at 179 (Owen Gingerich ed., 1975) ("Humanism in any sense is by origin an academic movement, because the sources at which it seeks its new knowledge are classical texts."); see also Kristeller, *supra* note 94, at 24 ("[T]he core and center of Renaissance humanism [is] the emphasis on the Greek and Latin classics as the chief subjects of study and as unrivaled models of imitation, in writing and in thinking and even in actual conduct."); CASSIRER, *supra* note 95, at 3-4 ("The major concern of the Humanists was an educational and cultural program based on the study of the classical Greek and Latin authors.").

97. Michael Shenefelt, *Disposable Scholarship*, WASH. POST, Sept. 2, 1989, at A21.

98. Bronowski, *supra* note 96, at 183-84.

99. See *id.* at 184; ROBERTO WEISS, *THE RENAISSANCE DISCOVERY OF CLASSICAL ANTIQUITY* (2d ed. 1988); cf. Kristeller, *supra* note 94:

[T]he so-called philosophers of nature . . . emphasized the direct study of nature and their own originality . . . . This claim of originality . . . undermined the accepted authority of Aristotle, opened the way for new alternatives and presupposed the notion, more or less explicitly, that human knowledge could make definite progress beyond the attainments of the ancients.

Id. at 28.

100. Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1342 (1984) (summarizing Fiss and Toulmin). In some sense this is not "authority" at all. See Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

marketplace of debate and in the history of ideas. In other words, intellectual authority is based not on power, but on conviction; not on rhetoric, but on rational persuasion.¹⁰¹ (The contrastive notion of "institutional authority," which arises when these conditions are *not* present, will be elaborated in the following Section.)

"In the Renaissance, as always, men turned to the careful observation of nature only after every other idea and authority had failed."¹⁰² But fail they did. Even among the classical humanist scholars of the Renaissance, it eventually became clear that the authority of many received, medieval, Aristotelian views extended far beyond what could be justified on purely intellectual grounds. For example, one of the Aristotelian treatises states that men have more teeth than women, and this was long believed, on Aristotle's authority alone, to be true.¹⁰³ Finally, someone checked, and it turned out to be false. Similarly, Aristotle taught that a needle cannot float on water, which is also untrue and would have been easy to check.¹⁰⁴ (I have performed the experiment myself.) The Scholastics maintained that Aristotle must have had in mind a large, heavy needle, or intended it to be placed erect in the water; Galileo, however, had the temerity to claim that Aristotle must never have performed the experiment.¹⁰⁵

In the scientific thought of the Renaissance, of course, a main thrust was the revolt against and rejection of Aristotle's authority.¹⁰⁶ But perhaps what we see most clearly here is the *evolution* of Aristotle's intellectual authority into a form of "institutional" authority, and it is this that explains the durability of his thought even into the scientific revolution of the seventeenth century.¹⁰⁷

101. See Peter Munz, *The Rhetoric of Rhetoric*, 51 J. HIST. IDEAS 121, 121-22 (1990).

102. JOHN H. RANDALL, JR., *THE MAKING OF THE MODERN MIND* 218 (1976) ("What the revival of ancient learning did for science was to bring a wealth of conflicting suggestions into men's ken, and force them to appeal to reason to decide . . . . With so many newly-found doctrines in the field, bitterly fighting each other, . . . one outcome of the whole period was the growth of skepticism.").

103. See ARISTOTLE, *Problems*, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1519 (963b20) (Jonathan Barnes ed., 1984). This work was probably written not by Aristotle himself but by one or more of his later disciples. See *Note to the Reader*, in 2 *THE COMPLETE WORKS OF ARISTOTLE*, *supra*, at xiii. Nevertheless, it was accepted as canonical Aristotelianism throughout the periods in question here.

104. See ARISTOTLE, *On the Heavens*, in *THE BASIC WORKS OF ARISTOTLE* 465 (313a18) (Richard McKeon ed., 1941).

105. See WILLIAM R. SHEA, *GALILEO'S INTELLECTUAL REVOLUTION* 33 (1972).

106. See, e.g., ALEXANDRE KOYRÉ, *FROM THE CLOSED WORLD TO THE INFINITE UNIVERSE* (1957); Kristeller, *supra* note 94, at 28-30.

107. See, e.g., ALEXANDRE KOYRÉ, *GALILEO STUDIES* (1978):

[The scientific revolution of the seventeenth century] seems to have been the outcome of a decisive mutation. It is this which explains why the discovery of things which seem to us nowadays childishly simple required such prolonged efforts—and not always crowned with

Probably the most momentous conflict between intellectual authority and institutional authority ever recorded is that between Galileo Galilei and medieval Aristotelianism. But the picture is complicated, because Galileo may be regarded as struggling on two distinct fronts—one scientific and one religious—against both medieval Aristotelianism and its institutional patron, the Catholic Church.¹⁰⁸ As Milton commented after visiting Galileo in Florence, “There it was that I found and visited the famous Galileo grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought.”¹⁰⁹

Since the thirteenth century, Aristotelianism had been the model for science in European universities, partially because Aristotle’s views were (or could be made) generally congenial to Church doctrine.¹¹⁰ For example, when a huge meteorite fell to earth at Aegospotami, Aristotle explained that “it had been carried up by a wind and fell down.”¹¹¹ The heavens (which were supposed to be light, luminous, spherical, perfect, and eternal¹¹²) were thus spared the indignity of having harbored a heavy, ugly, odd-shaped, dirty rock—especially one that could accidentally come crashing down to earth.

By contrast, Galileo’s Copernican, heliocentric views constituted an outright affront to the authority of Scripture. If the sun stood still, for example, the biblical story that God caused the sun to stand still at Joshua’s request would be nonsensical.¹¹³ But Galileo remained stubbornly unwilling or unable to recognize or acknowledge that he was entangled in an essentially political, religious, dogmatic, institutional

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success—by the greatest of geniuses, by Galileo and Descartes. This is because it was not a matter of battling against theories which were simply inadequate or erroneous, but of changing the very intellectual framework itself, of overthrowing an intellectual attitude, one which was when all is said and done a perfectly natural one, and substituting for it another, one which was not natural at all.

Id. at 3 (footnote omitted).

108. For documentary histories, see MAURICE A. FINOCCHIARO, *THE GALILEO AFFAIR: A DOCUMENTARY HISTORY* (1989); EMILE NAMER, *L’AFFAIRE GALILÉE* (1975). For a brief but fascinating account, see Owen Gingerich, *The Galileo Affair*, *SCIENTIFIC AM.*, Aug. 1982, at 132.

109. JOHN MILTON, *AREOPAGITICA* 27 (K.M. Lea ed., 1973).

110. See CHARLES SCHMITT, *THE ARISTOTELIAN TRADITION AND RENAISSANCE UNIVERSITIES* 303-06 (1984); *Aristotle in the Middle Ages*, in 1 *DICTIONARY OF THE MIDDLE AGES* 456, 461-63 (Joseph Strayer ed., 1982).

111. Aristotle, *Meteorology*, in 1 *THE COMPLETE WORKS OF ARISTOTLE*, *supra* note 103, at 563 (344b32); cf. G.S. KIRK & J.E. RAVEN, *THE PRESOCRATIC PHILOSOPHERS: A CRITICAL HISTORY WITH A SELECTION OF TEXTS* 392 (1957) (discussing the meteorite and Anaxagoras’s more “rational” belief that the heavenly bodies were made of stone); JOHN BURNET, *EARLY GREEK PHILOSOPHY* 252 (4th ed. 1957) (discussing the meteorite and Aristotle’s explanation for its appearance).

112. See C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE* 92-121 (1967); EUSTACE M.W. TILLYARD, *THE ELIZABETHAN WORLD PICTURE* 34-36 (1944).

113. See *Joshua* 10:12-13.

thicket as well as a rational, logical, scientific, intellectual debate. Characteristic is his response to the charge of having undermined the Joshua passage. He offered, in all earnestness, an elaborate scientific proof that the Joshua story was self-contradictory and unintelligible, "regardless of the world system one assumes."¹¹⁴ Of course, Galileo had never heard of, much less read, the works of Thomas Kuhn, Richard Rorty, or even Stanley Fish, which perhaps explains his naive insistence on defending the Copernican system as physically real and actually true—and not merely as a simpler "working hypothesis" that yielded more precise results and agreed better with the observations.¹¹⁵

Galileo's struggle with medieval Aristotelianism provides a key contrast between the scholarly, intellectual relationship to authority and what I shall discuss later as the different and specifically *legal* relationship to it.¹¹⁶ In a letter to the lawyer Francesco Ingoli, Galileo clearly stated the difference:

I must tell you that in natural phenomena human authority is worthless. Like a lawyer, you seem to capitalize on it; but nature, Dear Sir, makes fun of constitutions and decrees of princes, emperors, and monarchs, and at their request it would not change one iota of its laws and statutes. Aristotle was a man, saw with his eyes, heard with his ears, and reasoned with his brain. I am a man and see with my eyes much more than he did; as regards reasoning, I believe he reasoned about more things than I, but whether he reasoned better than I about those things which we have both examined will be shown by our arguments and not by our authorities.¹¹⁷

As Galileo's favorite disciple Benedetto Castelli described him, "the truth . . . he fittingly places above everything else, just as, in natural questions, he puts nature above the authority of any famous author, as any one who wishes to philosophise properly ought to do."¹¹⁸ Similarly,

114. FINOCCHIARO, *supra* note 108, at 110 (quoting letter from Galileo to the Grand Duchess Christina (1615)); *see also id.* at 52-54 (discussing letter from Galileo to Castelli (Dec. 21, 1613)); *cf. id.* at 114-18 (examining to what extent Joshua passage can be taken without altering literal meaning of words).

115. *See* RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 329 (1979) (Galileo might have avoided difficulties by presenting his conception as "really just an ingenious heuristic device for, say, navigational purposes and other sorts of practically oriented celestial reckoning. . ."); *see also id.* at 327-33 (analyzing the difficulties Galileo faced in creating purely scientific questions).

116. *See infra* text accompanying notes 149-64.

117. FINOCCHIARO, *supra* note 108, at 178 (quoting letter from Galileo to Ingoli (1624)).

118. WILLIAM R. SHEA, *GALILEO'S INTELLECTUAL REVOLUTION* 34 (1972) (quoting BENEDETTO CASTELLI, *RISPOSTA ALLE OPPOSIZIONI* (1615)). Consider Shea's further observations:

What strikes (and usually annoys) the modern reader of sixteenth- and seventeenth-century scientific literature is the constant appeal to the writings of great men of the past. Where a modern scientist introduces experimental evidence to prove a point, a medieval or a Renaissance scholar will quote a relevant passage from one of the Greek philosophers. . . .

in a letter to the Grand Duchess Christina, Galileo wrote: "I think that in disputes about natural phenomena one must begin not with the authority of scriptural passages but with sensory experience and necessary demonstrations."¹¹⁹

Although Galileo has often been described as "the father of modern science," he is also at one with the humanists in his understanding of the intellectual's uneasy relationship to institutional authority. In a Foreword to the *Dialogue Concerning the Two Chief World Systems*—Galileo's main work and the work for which he was mainly condemned—Albert Einstein writes:

The *leitmotif* which I recognize in Galileo's work is the passionate fight against any kind of dogma based on authority. Only experience and careful reflection are accepted by him as criteria of truth. Nowadays it is hard for us to grasp how sinister and revolutionary such an attitude appeared at Galileo's time, when merely to doubt the truth of opinions which had no basis but authority was considered a capital crime and punished accordingly. Actually we are by no means so far removed from such a situation even today as many of us would like to flatter ourselves; but in theory, at least, the principle of unbiased thought has won out, and most people are willing to pay lip service to this principle.¹²⁰

Likewise, "[t]he humanist . . . rejects authority," in the sense of *institutional* authority. "But he respects tradition," which is another word for what I have termed *intellectual* authority. "Not only does he respect it, he looks upon it as upon something real and objective which has to be

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This attitude of mind irritated Galileo for whom the interpreter of nature was neither Aristotle, nor Plato, nor Democritus, nor any of the Ancients but nature speaking for itself. While the Aristotelians sought to solve a problem, *as though it were a legal question, by appealing to authority*, Galileo went directly to the tribunal of nature—albeit with Archimedes as his barrister.

Id. at 31, 33 (emphasis added). Lest one assume, however, that we now have a regime of pure intellectual authority in science, see Gina Kolata, *To Make the Big Time of Science, Better Take Your Show on the Road*, N.Y. TIMES, Jan. 2, 1990, at C1.

119. FINOCCHIARO, *supra* note 108, at 93 (quoting letter from Galileo to the Grand Duchess Christina (1615)). These sentiments brought Galileo into direct conflict with the Roman Catholic authorities, and he was eventually put on trial by the Roman Inquisition on charges of heresy. In 1633, Galileo was convicted and sentenced as follows:

We say, pronounce, sentence, and declare that you, the above-mentioned Galileo, because of the things deduced in the trial and confessed by you as above, have rendered yourself according to this Holy Office vehemently suspected of heresy, namely of having held and believed a doctrine which is false and contrary to the divine and Holy Scripture: that the sun is the center of the world and does not move from east to west, and the earth moves and is not the center of the world, and that one may hold and defend as probable an opinion after it has been declared and defined contrary to Holy Scripture. Consequently you have incurred all the censures and penalties imposed and promulgated by the sacred canons and all particular and general laws against such delinquents.

Id. at 291 (quoting Sentence of June 22, 1633).

120. Albert Einstein, *Foreword* to GALILEO, *DIALOGUE CONCERNING THE TWO CHIEF WORLD SYSTEMS* at xvii (Stillman Drake trans., 1962).

studied and, if necessary reinstated."¹²¹ The humanist may be obsessed with a few primary, original sources, but these are "authorities" that have *earned* their authority.

This perspective allows one to make some distinctions that were previously unavailable. We may safely discard the bulk of Aristotle's cosmology, for example, as a quaint relic that did not pass "the test of time," while still appreciating the importance and relevance of his ethical and political writings.¹²² In fact, even today, and even among *legal* scholars, those latter works retain considerable currency.¹²³

In summary, the distinction between primary sources and secondary sources is basic to scholarly work in the humanities.¹²⁴ That which is authoritative is original, unique, and complete unto itself; all else is secondary and derivative. Thus, in a "normal" humanistic discipline, scholarly authority resides in "primary" or original sources, which typically are few and far between. These primary sources have earned what I term "intellectual authority." In philosophy, for example, the works of Plato, Aristotle, Descartes, Hume, Kant, and Hegel are generally acknowledged to be primary sources.¹²⁵ They have earned their authority because, over the course of centuries, they have provided enduring

121. Erwin Panofsky, *The History of Art as a Humanistic Discipline*, in *MEANING IN THE VISUAL ARTS: PAPERS IN AND ON ART HISTORY* 3-4 (1955).

122. See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 7-78 (1958).

123. See, e.g., Donald F. Brosnan, *Virtue Ethics in a Perfectionist Theory of Law and Justice*, 11 *CARDOZO L. REV.* 335 (1989) (analyzing Aristotle's virtue-based theory of ethics); Linda Hirshman, *The Virtue of Liberty in American Communal Life*, 88 *MICH. L. REV.* 983, 996-1001 (1990) (discussing "[t]he current fashion for Aristotle"); Anthony T. Kronman, *Living in the Law*, 54 *U. CHI. L. REV.* 835 (1987) (discussing Aristotelian philosophy in legal ethics); Lawrence B. Solum, *The Virtue and Vices of a Judge: An Aristotelian Guide to Judicial Selection*, 61 *S. CAL. L. REV.* 1735 (1988). But see Schauer, *supra* note 100, at 847 ("Unfashionably, I start with Aristotle.").

124. See, e.g., HUTCHINS, *supra* note 86, at xxiv (discussing the "cult of scholarship surrounding" Dante's *Divine Comedy*, and telling the "ordinary reader" that he will be "surprised to find that he understands Dante without it").

The slogan "Back to Kant!" summarizes an intellectual movement in the nineteenth and early twentieth centuries that illustrates the humanistic preoccupation with original texts and primary sources. See Lewis W. Beck, *Neo-Kantianism*, in 5 *ENCYCLOPEDIA OF PHILOSOPHY* 468, 468 (1967).

125. So too are, arguably, Nietzsche, Wittgenstein, Husserl, Heidegger, and Sartre. The jury is still out on Barthes, Derrida, Foucault, and Lacan. Richard Rorty is (perhaps even as a necessary implication of his own views) a secondary source. See, e.g., RORTY, *supra* note 115:

This book is a survey of some recent developments in philosophy, especially analytic philosophy . . . . Thus the reader in search of a new theory on *any* of the subjects discussed will be disappointed. . . . The therapy offered is . . . parasitic upon the constructive efforts of the very analytic philosophers whose frame of reference I am trying to put in question. Thus most of the particular criticisms of the tradition which I offer are borrowed from such systematic philosophers as Sellars, Quine, Davidson, Ryle, Malcolm, Kuhn, and Putnam.

I am as much indebted to these philosophers for the means I employ as I am to Wittgenstein, Heidegger, and Dewey for the ends to which these means are put.

Id. at 7.

responses to what have proved to be enduring concerns. In this sense, "survival is the test of greatness,"¹²⁶ where "survival" is understood as withstanding the test of extended intellectual debate and discussion. Much (if not most) of the "secondary" work in philosophy consists in explicating, analyzing, and criticizing these primary sources and in developing their implications.¹²⁷

The process of earning intellectual authority is thus a *historical* process, and "intellectual authority" is an inherently historical concept. True intellectual authority appeals to disinterested reason and objective observers, over widely separated historical periods.

B. Institutional Authority in Law

What are the "primary sources" of law? Since the late nineteenth century, at least in the Anglo-American legal world, the answer has been judicial opinions.¹²⁸ A brief contrast with the civil law tradition is instructive.

In the civil law tradition, the *scholar* is the legal actor most responsible for the development and refinement of the law. In Germany, for example, one would cite as "primary sources" of legal thought such classic legal scholars as Savigny, Puchta, Windscheid, Jhering, Gierke, Heck, Kelsen, and Radbruch. In the civil law tradition generally,

the legal scholar is the great man of the civil law. Legislators, executives, administrators, judges, and lawyers all come under his influence. He molds the civil law tradition and the formal materials of the law

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126. Posner, *supra* note 9, at 1356 (pondering whether survival is the test of greatness).

127. It is sometimes maintained that "analytic" philosophy does not fit this mold because it is modeled on natural science and has no interest in its own history. See, e.g., THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 137-39, 165 (2d ed. 1970). I doubt, though, that analytic philosophy ever succeeded in being, or even seriously tried to be, rigorously ahistorical. As noted above, Wittgenstein has clearly been elevated to the pantheon of primary sources, such that his every pronouncement—however offhand or obscure—has become canonical. See *supra* note 125. A similar process can already be observed in the treatment of a few contemporary analytic philosophers. See, e.g., DAVID ARMSTRONG, *THE NATURE OF MIND* 85 (1981); JOHN BISHOP, *NATURAL AGENCY* 132-34 (1989); MYLES BRAND, *INTENDING AND ACTING: TOWARD A NATURALIZED ACTION THEORY* 18, 31, 35 (1984); CARLOS MOYA, *THE PHILOSOPHY OF ACTION* 118-25 (1990); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 83, 108-09 (1990); RAIMO TUOMELA, *HUMAN ACTION AND ITS EXPLANATION* 257-58 (1977); Jon Elster, *The Nature and Scope of Rational-Choice Explanation*, in *ACTIONS AND EVENTS: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON* 60, 61-62 (Ernest LePore & Brian McLaughlin eds., 1985) [hereinafter *ACTIONS AND EVENTS*]; Dagfinn Føllesdal, *Causation and Explanation*, in *ACTIONS AND EVENTS*, *supra*, at 311, 322; George Wilson, *Davidson on Intentional Action*, in *ACTIONS AND EVENTS*, *supra*, at 29, 38-40 (all analyzing the same passage in Davidson). As Davidson himself has said, "[a]nalytic philosophy is not, of course, either a method or a doctrine; it is a tradition and an attitude." Donald Davidson, *Preface to ACTIONS AND EVENTS*, *supra*, at xi. See generally LUCIEN BRAUN, *HISTOIRE DE L'HISTOIRE DE LA PHILOSOPHIE* (1973); RORTY, *supra* note 115.

128. See Collier, *supra* note 83, at 809-11.

into a model of the legal system. He teaches this model to law students and writes about it in books and articles. Legislators and judges accept his idea of what law is, and, when they make or apply law, they use concepts he has developed. Thus although legal scholarship is not a formal source of law, the doctrine carries immense authority.¹²⁹

In other words, the ideas of the Continental legal scholar carry weight because of their inherent intellectual authority—the judges are free to accept and adopt or reject and ignore them.

By contrast, in the common law tradition the legal actor most influential in shaping the growth and development of law is the *judge*.¹³⁰ In a real but obviously very problematic sense, “the law is what the judges say it is.” Judicial opinions—rather than legal scholarship, constitutions, statutes, regulations, or other forms of positive or enacted law—have assumed the status of original texts and “primary sources” of law.¹³¹ Historically, this view of law has three main sources.

One such source is William Blackstone. After explaining that “the authority of . . . [the common law] rests entirely upon general reception and usage,”¹³² and that the only method of proving a maxim to be a rule of the common law “is by showing that it hath been always the custom to observe it,”¹³³ he notes that a basic question still remains: “[H]ow are these customs or maxims to be known, and by whom is their validity to be determined?”¹³⁴ To Blackstone, the answer is obvious: “by the judges in the several courts of justice”:¹³⁵

They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study . . . and from being long personally accustomed to the judicial decisions of their predecessors. And indeed *these judicial decisions are the principal and most authoritative evidence, that*

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129. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA* 56, 60 (2d ed. 1985).

130. *See id.* at 60; *see also* John H. Merryman, *The Italian Style*, 18 *STAN. L. REV.* 39, 396, 583 (1965-66).

131. *See* Collier, *supra* note 83, at 813-16; *cf.* James B. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, in *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 108 (1985):

In my own experience at least, the same central method was at work in both legal and literary education, for both to a remarkable degree proceeded by drawing the student's attention to a series of discrete texts, one after another, and holding it there. In law the text was typically the judicial opinion; in literary studies usually, though not always, the poem. In both fields the emphasis was on the text as a self-justifying, self-explaining, self-authenticating object.

Id.

132. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 68 (1765).

133. *Id.*

134. *Id.* at 69.

135. *Id.*

*can be given, of the existence of such a custom as shall form a part of the common law.*¹³⁶

A second principal source of “law as what the judges say it is” may be found in the *Marbury-Cooper* doctrine of judicial review and judicial supremacy. In *Marbury v. Madison*,¹³⁷ Chief Justice Marshall argued for the power of judicial review on the basis of *institutional* competence and notions of the judicial role: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”¹³⁸ If a law and the Constitution both apply to a particular case, says Marshall, “*the court must determine* which of these conflicting rules governs the case. This is of the very essence of judicial duty.”¹³⁹ In *Cooper v. Aaron*,¹⁴⁰ a unanimous Court carried this thought further and saw therein the seeds of judicial “supremacy”; quoting the above language from *Marbury*, the *Cooper* Court stated that the *Marbury* decision:

declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. *It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land.*¹⁴¹

The judicial gloss on the constitutional text has, it would seem, supplanted the authority of that text itself.¹⁴²

Finally, Christopher Columbus Langdell contributed a seminal conceptualization of law as case law. Langdell combined the “scientific”

136. *Id.* (emphasis added) (footnote omitted).

137. 5 U.S. (1 Cranch) 137 (1803).

138. *Id.* at 177.

139. *Id.* at 178 (emphasis added).

140. 358 U.S. 1 (1958).

141. *Id.* at 18 (emphasis added). Justice Frankfurter, writing separately in *Cooper*, maintained that “[o]ur kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is ‘the supreme Law of the Land.’” *Id.* at 24 (Frankfurter, J., concurring) (quoting U.S. CONST. art. VI, § 2).

142. See JOHN BRIGHAM, *THE CULT OF THE COURT* (1987):

The authority of the institution over the Constitution comes from the practice of judicial review. We have come to speak of the Constitution as “what the justices say it is” and we look for “it” in their opinions. Their words are no longer authoritative gloss on the thing itself; they have become the thing itself.

Id. at 31. For suggestion that the *Cooper* doctrine still approximates current judicial practice, see *NLRB v. International Bhd. of Elec. Workers Local 340*, 481 U.S. 573, 597-98 (1987) (Scalia, J., concurring) (“[T]he Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction.”).

project of observing and classifying actual specimens, with the humanistic focus on original texts and primary sources.¹⁴³ For Langdell it is self-evident that law is "embodied" in cases:

Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and in such the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . .¹⁴⁴

Langdell freely indulges the humanist's assumption that knowledge is derived chiefly through the careful study and analysis of original texts and primary sources; the "printed books" of reported cases are, he says, "the ultimate sources of all legal knowledge."¹⁴⁵ The textbooks, treatises, and "hornbooks" that had mainly been relied on up to Langdell's time are decidedly *not* "ultimate sources" for him or his followers.¹⁴⁶ In fact, "the student should . . . be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access."¹⁴⁷ It follows, on Langdellian principles, that "the opinion of the court giving the reasons for the conclusion reached, is really the only authoritative treatise which we have in our law."¹⁴⁸

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143. See Collier, *supra* note 83, at 809-11.

144. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vi (1871).

145. Langdell, *supra* note 45, at 85. Langdell states further: "Accordingly, the Law Library has been the object of our greatest and most constant solicitude." It is to the lawyer "all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists." *Id.* at 86-87. Langdell adds further that "a good academic training, especially in the study of language, is a necessary qualification for the successful study of law." *Id.* at 87 (emphasis added); see also Sanford Levinson, *Law as Literature: Do Legal Texts have Authoritative Interpretations?*, in *THE AUTHORITY OF EXPERTS* 242 (Thomas L. Haskell ed., 1984):

To an extent never sufficiently acknowledged by his many detractors, Langdell was altogether correct in linking the legitimacy of the law to the mastery of texts, whether of cases, statutes, or the Constitution. However much legal positivism justifiably emphasizes the origins of law in social facts, the ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct. One does not have to accept the entire Langdellian system (indeed, I most certainly do not) in order to recognize the centrality of textuality to the lawyer's enterprise.

Id. at 242-43 (footnotes omitted).

146. See EUGENE WAMBAUGH, *THE STUDY OF CASES* 73, 81 (2d ed. 1894).

147. Keener, *supra* note 46, at 144.

148. *Id.* at 145; see also GILMORE, *supra* note 10, at 42-43 (describing Langdell's belief that legal truth is a species of scientific truth, and that once a true rule of law is discovered, it will endure forever); JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 37 (1914) ("The whole law lies in the reports of single cases which have been accumulating for centuries."); White, *supra* note 43, at 220-32 (discussing Langdell's belief in the primary importance of judicial opinions in legal education).

To summarize, there is a long and complicated tradition (in the common law world at least) to the effect that judicial opinions are to the lawyer what original texts and primary sources are to the humanist. They are the lawyer's "source of authority." But here some crucial differences must be noted. How did the authors of those opinions get in a position to write the authoritative texts of the law? Granting, for purposes of argument, that these texts are indeed "authoritative," what makes them so? I suggest that we can see here a crucial difference with the humanistic tradition.

Consider the very different "citation practices" in law and the humanities. In law, one can simply cite a case as authority for a proposition, or indeed for a legal conclusion or as the basis for a judicial decision. The mere fact that a case has been decided one way rather than another, or that a judge has made a particular pronouncement, provides grounds ("authority") for deciding another case similarly or in conformity with the judge's pronouncement—whatever it may be. In law, saying something "with authority" means, literally, saying it "with authorities."¹⁴⁹ In this sense, as Leonardo da Vinci observed, "[w]hoever . . . appeals to authority applies not his intellect but his memory."¹⁵⁰ But what would it mean to cite Plato as authority for a proposition in philosophy? In other words, the fact that Plato said something does not settle the issue in philosophy the way it would in law. At most, the reader is simply referred to Plato for an interesting or relevant treatment of a point under consideration; it always remains to be seen whether Plato's discussion of the issue will be found persuasive or even helpful.

Judicial opinions are authoritative, not because of their inherent intellectual content, but rather because of the social or "institutional" position of their authors. Judicial opinions are authoritative because they are written by people who are *already* in a position of authority. More specifically, these people are in a position to enforce their decrees through

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149. See Collier, *supra* note 83, at 811-12; see also Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991); Schauer, *supra* note 100. For a comparison with "the overwhelmingly bookish or clerkly character" of medieval culture, see LEWIS, *supra* note 112, at 5, 11.

The legal concept of authority also bears comparison with the medieval art of dialectic, which taught that there are three kinds of proof: from reason; from authority; and from experience. "We establish a geometrical truth by Reason; a historical truth, by Authority, by *auctours*. We learn by experience that oysters do not agree with us." *Id.* at 189.

150. W. T. SEDGWICK & H. W. TYLER, A SHORT HISTORY OF SCIENCE 235 (1917) (quoting unpublished work of Leonardo da Vinci).

socially sanctioned physical force, should the persuasive force of reasoned argument and intellectual conviction be insufficient.¹⁵¹

Thus, the authors of judicial opinions have only the authority of an *office*, to which they have been *appointed* (or, in some states, elected). In "normal" humanistic disciplines, primary sources emerge through a process of intellectual recognition; in law the "primary sources" have, in effect, been appointed. They have not *earned* their authority, at least not in the sense that Plato and Aristotle have, by garnering support through centuries of reasoned debate and intellectual assessment. They command our obedience, but not necessarily our intellectual respect.¹⁵² As Justice Robert H. Jackson once remarked of the U.S. Supreme Court, "We are not final because we are infallible, but we are infallible only because we are final."¹⁵³ Justice Jackson further stated that if there were a court above the Supreme Court, a "substantial portion" of the Supreme Court's decisions would be reversed.¹⁵⁴ In the terminology of modern social science, "legitimacy refers to the capacity of an institution to confine political behavior to 'institutionally relevant choices' . . . In practice, the Court's place in the process has become the key to its authority. With the Supreme Court, a loss is the end of the line."¹⁵⁵

Justice Jackson's protestations notwithstanding, Alexander Bickel observes that "there is a tendency nonetheless to believe that everyone else is more fallible than the justices."¹⁵⁶ Bickel contends that "this is only sentiment—understandable and gratifying to those who cherish the

151. For further discussion of these issues, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); Frederick Schauer, *The Authority of Legal Scholarship*, 139 U. PA. L. REV. 1003 (1991); Symposium: *The Works of Joseph Raz*, 62 S. CAL. L. REV. 731 (1989).

152. See Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988):

Judicial authority is essentially political: Decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes an absolute epistemic trust. The political connotations of the word "authoritative" are apt; the word evokes power and submission, not truth and conviction.

Id. at 842-43; see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 79-98 & n.35 (1990).

153. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

154. See *id.* ("[R]eversal by a higher court is not proof that justice is thereby better done.").

155. BRIGHAM, *supra* note 142, at 31 (citation omitted); cf. Robert Grafstein, *The Legitimacy of Political Institutions*, 14 POLITY 51 (1981):

In the purest sense, a legitimate institution secures obedience to its decisions by the very fact of having made them through appropriate institutional procedures. Its outcomes are accepted, in the behavioral sense, when they are generated through the decision-making process of the institution. The process might be a highly ritualized procedure used by a jungle tribe, or it might be a vote taken by the nine members of the United States Supreme Court.

Id. at 58.

156. ALEXANDER BICKEL, *THE CASELOAD OF THE SUPREME COURT: AND WHAT, IF ANYTHING, TO DO ABOUT IT* 13 (1973); see also Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 37 (1934).

institution, but sentiment nevertheless—not any sort of decisive consideration.”¹⁵⁷ Certainly, the development of a “cult of the Court” is a well documented phenomenon, one whose provenance and explanation probably lie more in the realm of psychology than in law.¹⁵⁸ But—cults aside—there is no real, intellectually defensible reason to suppose that the Justices merit serious consideration as intellectual titans alongside Plato and Aristotle, Kant and Hegel. The fact that they have what I shall term “institutional authority” simply obscures the fact that they do not have “intellectual authority.” To my mind, these simple institutional facts make inherently implausible any attempts to attribute grand, philosophical doctrines to the judiciary—which is precisely what those I criticize do.

But I do not rest my case on the theoretical level alone. As an empirical matter it is not difficult to show that most pronouncements of the judiciary owe their authority solely to their status in the institutional scheme. The ideas and opinions of most Supreme Court Justices would not be of the slightest general interest or importance, except for the fact (which must be considered fortuitous from an intellectual point of view) that they are the ideas and opinions of Supreme Court Justices. Certainly, they would not otherwise be assumed to be of theoretical or philosophical significance. The presence on the judiciary of an occasional John Marshall, Oliver Wendell Holmes, Louis Brandeis, or Benjamin Cardozo in no way weakens this argument; they are decidedly the exceptions to the rule that most judges, even Supreme Court Justices, have been plucked from well deserved intellectual obscurity.¹⁵⁹ Yet, because most of the “secondary” scholarly work in law consists in explicating, analyzing, and criticizing judicial opinions, these opinions and their authors have, by default, assumed the status of primary sources and, by extension, suitable subjects for philosophical theorizing.

I do *not* argue that judicial opinions lack intellectual merit because judges are not philosophers or experts in philosophical theory. There are, of course, many kinds of intellectual merit or expertise other than

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157. BICKEL, *supra* note 156, at 14.

158. See THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1969); JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Max Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290 (1937).

159. See BRIGHAM, *supra* note 142, at 78-79 (“The rare case in which the vision of a judge . . . overwhelm[s] nearly all political considerations tells us about factors that are otherwise muted . . . . The Cardozo appointment is the exception that proves the rule and demonstrates the vision that lurks in the background—the vision of a wise man. . . .”). In the context of Hoover’s nomination of Cardozo, Paul Freund has suggested that a surpassingly strong Supreme Court nomination may be understood simply as the attempt of a weak President to shore up his position. See Paul Freund, *Appointment of Justices: Some Historical Perspectives*, 101 *HARV. L. REV.* 1146, 1155 (1988).

the philosophical, and judges are, presumably, selected on some such basis. Rather, I argue that there is no reason to assume, from the obvious institutional authority of judges, that they also possess intellectual authority or produce primary sources comparable to those in other disciplines.

An anecdotal illustration may clarify my thesis. In the Fall 1987 issue of *The Stanford Magazine*, the Senior Editor referred to Justice Thurgood Marshall as an "authority on the Constitution."¹⁶⁰ When in a subsequent issue of the magazine a reader questioned this characterization of Justice Marshall, the Senior Editor offered a one-sentence rebuttal: "If a Supreme Court justice is not an authority on the Constitution, pray tell, who is?"¹⁶¹

There are at least two different senses of "authority" at issue here. The author might have meant that all Supreme Court Justices are, in fact, authorities on the Constitution because they all have (as it happens) studied, pondered, and worked on constitutional issues long enough and thoroughly enough to qualify as authorities. I suspect, however, that the author is making the stronger claim that simply being a Supreme Court Justice makes one, *ipso facto*, an authority on the Constitution. And there is undeniably some truth to this: During his tenure as a Supreme Court Justice, Justice Marshall was one of only nine people ultimately empowered to "say what the law is" (as Chief Justice John Marshall put it). Whatever he said (or even thought) undeniably mattered. And now that Justice Marshall has retired, an even better way to make the distinction is to ask: In what sense, if any, does former Justice Marshall remain an "authority" on the Constitution? Certainly, he is no longer an authority in the second sense, but he might still be considered one in the first, which did not depend on his institutional role.

In our institutional scheme, the opinions of a Supreme Court Justice carry inordinate weight *just because* they are opinions of a Supreme Court Justice. "Institutional authority stems from the *place* of the institution among the available channels of . . . political action."¹⁶² Thus, another implication of judicial authority is power. In this sense, Chief Justice Marshall is more than a little disingenuous in claiming that "Judicial power, as contradistinguished from the power of the laws, has *no*

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160. THE STANFORD MAG., Fall 1987, at 24, 74 (letters to the editor).

161. THE STANFORD MAG., Spring 1988, at 20, 21 (letters to the editor).

162. BRIGHAM, *supra* note 142, at 31 (emphasis added); see also Posner, *supra* note 152, at 841 ("'Authority' has a different connotation in law; indeed it is a different concept. Decisions are authoritative not when they command a consensus among lawyers, corresponding to a consensus among scientists, but when they emanate from the top of a hierarchy, normally a judicial one.").

existence.”¹⁶³ Equally untenable is Alexander Hamilton’s related claim, which seems particularly remarkable today, that the judiciary will always be “the least dangerous” branch of government, because “[t]he judiciary . . . has *no influence* over either the sword or the purse, *no direction* either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . .”¹⁶⁴

These claims sound strange and unconvincing today. Their authors want to maintain that the judiciary has only intellectual authority and no institutional authority. But as Alexis de Tocqueville observed 150 years ago, “[n]o other nation ever constituted so powerful a judiciary as the Americans.”¹⁶⁵ In subsequent sections of this Article, I examine the judiciary’s questionable claims to intellectual authority and analyze in some detail its many forms of institutional authority. But for now it is important simply to distinguish institutional authority from intellectual authority—which is always independently persuasive regardless of social or institutional position, and regardless of power to impose one’s personal views on others.

III. THE DWINDLING INTELLECTUAL AUTHORITY OF THE COURT

It is strange to talk of Hercules when your starting point is Harry Blackmun.

—John T. Noonan, Jr.¹⁶⁶

A possible objection to my position is: Why should our analysis differ depending on how authority is generated? A preliminary answer would be that it should not. In the following Sections, I apply such an independent intellectual standard and demonstrate that the work of the judiciary falls short when measured against such a standard. These Sections show just how much of the judiciary’s authority might be termed “unearned.”

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163. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 866 (1824) (emphasis added). Chief Justice Marshall continued:

Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Id.

164. THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

165. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 135 (J. P. Mayer ed., 1966) (emphasis omitted).

166. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 174 (1976).

Another way to phrase the objection is: Why isn't the "humanistic theory of what judges do" related to "what judges do" in the same way that philosophy of science is related to what scientists do? Philosophers of science observe and record what working scientists do; they note, for example, how scientists define problems, what working hypotheses are employed, what standards of precision are appropriate, and what counts as proof. One answer is that institutional authority is dictated not only to and by judges; it also affects legal scholars. One can criticize *Plessy v. Ferguson*,¹⁶⁷ but one cannot really "say what the law is" without referring to the institutional authority of the judiciary. In this sense, "what judges do" has an impact on the *substance* or *content* of legal theory.

Another reason the analogy does not hold is that humanistic legal theory does not try to be the "humanistic theory of what judges do." It is possible to imagine approaching the work-product of the judiciary the way a philosopher of science approaches "what scientists do." But it would not resemble the way "what judges do" is assimilated and appropriated in humanistic theories of law—where attention is firmly focused on the supposed *intellectual content* of judicial decisionmaking, and the judicial work-product is examined and interrogated with the same intellectual and methodological tools that are applied to any product of the human intellect.

One could look outside judicial doctrine, language, and opinions for other sources of law,¹⁶⁸ but humanistic legal scholars *do not*. Rather, they focus exclusively on judicial opinions, but then use theories to explain them (from outside the law) that are conspicuously at odds with our judicial system and the institutional realities of adjudication.

To return to the analogy with philosophy of science, it is as if "what scientists do" is not simply being observed and recorded; "what judges do" is being grappled with intellectually. It is as if "what scientists do" has been elevated to the level of "philosophy of science." (It is, however, easier to imagine such a study of "what judges do" being undertaken by a social scientist.) The following Sections document the inappropriateness of elevating "what judges do" to the level of "humanistic legal theory."

A. *The Institution of the Judiciary*

Obviously, judges are "doctrinal" authorities. They have the power or institutional authority to shape—indeed, create—legal doctrine. But this does not mean that these judges are authoritative or even competent

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167. 163 U.S. 537 (1896).

168. See White, *supra* note 43, at 216-17.

legal *theorists*. A systematic examination of the institutional setting of adjudication makes this clear.

1. *The Judicial Appointment Process—and Its Results.* The constitutional process by which federal judges are selected, nominated, and confirmed has always been inherently political.¹⁶⁹ It is not a process at all suited for filtering out and anointing those with superior credentials as legal theorists and philosophers.¹⁷⁰ And today, as never before, the nation's political processes practically guarantee that those who attain the offices of President and Senator will be eminently unqualified to undertake a searching, intellectually sophisticated inquiry into "judicial philosophy."¹⁷¹

The delegates to the Constitutional Convention of 1787 agreed that judicial nominees should be "fit characters," of the "requisite," "essential," or "proper" qualifications.¹⁷² These terms were not defined, most likely because the delegates had no special requirements in mind for the judiciary, other than completely traditional, conventional ones.¹⁷³ In designing an appointment process, the delegates to the Constitutional Convention were concerned primarily to ensure that "intrigue," "selfish motives," and "flagrant partiality or error" did not enter into the process.¹⁷⁴

Even these modest goals seem to have been elusive. For better or for worse, the Supreme Court has never been, and never will be, a "meritocracy"—and for two main reasons: the President and the Senate. The Constitution did not spell out any criteria for the President to apply in making nominations, and it did not provide any institutional mechanism for securing meaningful "advice" from the Senate or set any limitations on its (essentially unreviewable) power to refuse "consent."¹⁷⁵

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169. See GEORGE J. LANKEVICH, *THE SUPREME COURT IN AMERICAN LIFE: THE FEDERAL COURT, 1787-1801*, at viii (1986); Henry P. Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1203 (1988).

170. See Stephen L. Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1186-87 (1988).

171. See Monaghan, *supra* note 169, at 1210; Bruce Fein, Comment, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 673 (1989).

172. See JOINT COMMITTEE ON PRINTING, *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF AMERICAN STATES*, H.R. DOC. NO. 398, 69th Cong., 1st Sess. 154, 198-99, 430 (1925) [hereinafter *ILLUSTRATIVE DOCUMENTS*]; see also JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE 17-35* (1953); CHARLES WARREN, *THE MAKING OF THE CONSTITUTION 176-79, 327-29, 639-43* (1937).

173. See *THE FEDERALIST* NO. 78, at 233 (Alexander Hamilton) (Roy P. Fairfield ed., 1966).

174. See *ILLUSTRATIVE DOCUMENTS, supra* note 172, at 153-54, 198-99, 429-31; see also *THE FEDERALIST* NO. 76, at 456-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

175. See Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657 (1970); Monaghan, *supra* note 169, at 1205.

According to Henry Abraham, there are four "historically demonstrable major motivations" or "ascertainable decisional reasons"¹⁷⁶ for Presidents' selections of Supreme Court Justices: (1) objective merit; (2) personal and political friendship; (3) balancing "representation" or "representativeness" on the Court; and (4) "real" political and ideological compatibility.¹⁷⁷ In a similar vein, Charles Warren has noted that appointments to the Court "have not been made from a cloister of juridical pedants, but from the mass of lawyers and Judges taking active parts in the life of the country."¹⁷⁸ Presidents have felt free to emphasize personality, politics, geography, race, gender, and even religion in selecting Justices, often on the theory that the Court should be balanced or representative.

The Senate, too, has its role to play in what Justice Frankfurter called "that odd lottery by which men get picked for the Supreme Court."¹⁷⁹ And here Warren's converse observation merits mention: "The Senate, in rejecting for partisan reasons nominees of eminent legal ability, has more than once influenced the course of history."¹⁸⁰ Although this result may seem undesirable, there is nothing to suggest that it is somehow unconstitutional; "all the relevant historical and textual sources support the Senate's power when and if it sees fit to assert its vision of the public good against that of the President."¹⁸¹ Short of breaching some independent constitutional restriction—such as the Equal Protection Clause—the Senate may, in effect, decline to confirm a judicial nominee for any reason it sees fit to invoke, or indeed for no reason at all.¹⁸² The primary restraint on the Senate's confirmation power is thus political, rather than legal, accountability.

The most recent nomination experiences offer the best available evidence as to the standards and criteria now, and for the future, to be applied in the selection and confirmation of Justices to the U.S. Supreme

176. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS* 5-6 (2d ed. 1985); see also LANKEVICH, *supra* note 169; Ronald Dworkin, *The Reagan Revolution and the Supreme Court*, N.Y. REV. OF BOOKS, July 18, 1991, at 23; Timothy B. Tomas & Jess A. Velona, Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 768 (1987).

177. ABRAHAM, *supra* note 176, at 323-24.

178. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 2 (rev. ed. 1926).

179. Felix Frankfurter, *Learned Hand's Fiftieth Anniversary as a Federal Judge*, in *OF LAW AND LIFE & OTHER THINGS THAT MATTER* 135 (Philip B. Kurland ed., 1967).

180. WARREN, *supra* note 178, at 2-3.

181. Monaghan, *supra* note 169, at 1204.

182. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 74-76 (2d ed. 1991); Monaghan, *supra* note 169, at 1206-08 & n.20 (pondering an additional "structural" limitation—"the Senate may not act so as materially to impair the functioning of the Court"—without being sure, however, "where this potential limitation leads").

Court.¹⁸³ The Senate, like the Presidency, is a historical institution that operates in a context of tradition, custom, and precedent. Especially where the Constitution is silent, the Senate defines its role and refines its rules through a political process of usage, acquiescence, and accommodation.¹⁸⁴ The rules of the confirmation game have been changed, and in the future it will no longer be possible to play by the old rules.¹⁸⁵

As it is presently conceived, there is a perverse kind of logic at work in the judicial appointment process. As things now stand, the Senate is probably incapable of making a truly searching, sophisticated, and intellectually respectable inquiry into the "judicial philosophy" of a nominee—should it even attempt to do so.¹⁸⁶ Usually, of course, it does not attempt to do so.¹⁸⁷ But the Bork hearings set an unforgettable precedent to the effect that a more intrusive form of "philosophical" review is now available *for nominees who invite it*—for example, by publishing controversial and highly visible scholarly works that challenge the legitimacy of important constitutional doctrines. So now, instead of having just one way to curtail the intellectual authority of the Court, the Senate actually has three: It can misapply intrusive philosophical review for nominees who present strong, highly developed intellectual credentials; (more likely) it can scare away such nominees in the first place by discouraging their nomination by the President; and (most likely of all) it can confirm obscure, mediocre, and uncontroversial nominees. The "perversity" inheres in the circumstance that the very availability of a

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183. The cases of the most recent nominees to the Supreme Court are particularly illuminating for what they reveal about the nomination process and the criteria now employed in the selection of Supreme Court Justices. Anthony M. Kennedy, like Harry Blackmun, was a third choice. Robert Bork, President Reagan's first choice for the seat vacated by Justice Powell, was a prominent law professor at Yale Law School, had served as Solicitor General of the United States, and at the time of his nomination was a leading judge on the Court of Appeals for the District of Columbia Circuit. Judge Bork had developed and articulated over the years, in numerous influential scholarly writings, a powerful (if extreme) legal philosophy; he was, according to Senate Judiciary Committee Chairman Joseph Biden, "a leading—perhaps the leading proponent of a provocative constitutional philosophy." *Bork Hearings*, *supra* note 12, at 95 (emphasis added).

184. See Madeline Morris, *The Grammar of Advice and Consent: Senate Confirmation of Supreme Court Nominees*, 38 *DRAKE L. REV.* 863, 864 (1988-1989) (attempting to "articulate and then evaluate the practice that the Senate has developed to govern criteria for advice and consent decisions").

185. See G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* at xi (expanded ed. 1988).

186. See Monaghan, *supra* note 169, at 1203; see also *Bork Hearings*, *supra* note 12, at 2525 (statement of Thomas C. Grey).

187. See, e.g., *Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 33 (1986) [hereinafter *Scalia Hearings*] (testimony of Antonin Scalia) ("I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as *Marbury v. Madison*").

more intense, more intrusive form of scrutiny (whether used or not) is actually associated with a palpable *lowering* of intellectual standards.¹⁸⁸

The post-Bork appointinent strategies (Ginsburg, Kennedy, Souter, Thomas) should thus be viewed not as anomalies, but as carefully—and painfully—calculated responses in, and to, a political and legal climate that tends to “skew the process in favor of judicial nominees who have eschewed writing and speaking on vexing and contentious legal issues.”¹⁸⁹ Seen in that light, these most recent experiences exhibit a certain internal logic, and they confirm that intellectual authority is, as never before, a precipitately vanishing factor in the appointinent process. “[S]omething’s seriously amiss,” lamented one commentator in the *Wall Street Journal* at the time of the Souter nomination, “when an unknown record becomes a huge advantage in Washington.”¹⁹⁰ What is “amiss” is simply that the myth of judicial intellectual authority, despite all evidence and experience to the contrary, still persists.

2. *The “Bureaucratic Writing” of Judicial Opinions.* Even under the best of circumstances, judicial opinions only imperfectly approximate the unified intellectual product of a discerning mind.¹⁹¹ As Harry Wellington has put it, “majority opinions are desperately negotiated documents and not the carefully crafted work of a philosopher.”¹⁹² For the simple reason that judicial decisions are in some sense authored by a “committee,” it is difficult to conceive of them as primary or original sources. “Only a man wholly out of touch with reality could expect an opinion writer [holding together a 5-to-4 majority] to ‘illumine large areas of the law,’ ”¹⁹³ wrote Thurman Arnold. “He would find that men can sometimes agree on a result, but rarely on all of the reasons for that result, and that attempts to spell out reasons may be futile.”¹⁹⁴ More

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188. See Fein, *supra* note 171, at 673, 683.

189. *Id.* at 683.

190. *Justice Who?*, WALL ST. J., July 24, 1990, at A14.

191. See PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1097-98 (1975) (quoting FELIX FRANKFURTER, CONVERSATIONS WITH MR. JUSTICE FRANKFURTER 292-96 (Oral History Collection of Columbia University (1956)) (“When you have to have at least five people to agree on something, they can’t have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammelled by what anybody else may do or not do if he put that out.”)).

192. Harry H. Wellington, *Challenges to Legal Education: The “Two Cultures” Phenomenon*, 37 J. LEGAL EDUC. 327, 329 (1987). See generally Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986) (analyzing the group decisionmaking process within multi-member courts).

193. Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298, 1312 (1960).

194. *Id.* For a spectacular depiction of this situation, see Mark Tushnet, *The Optimist’s Tale*, 132 U. PA. L. REV. 1257, 1263-65 (1984) (reviewing THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T (Vincent Blasi ed., 1983)).

recently, the inconsistency and instability inherent in group decisionmaking have been explained in formal terms by Kenneth Arrow,¹⁹⁵ and this analysis has been applied to the work of the Supreme Court by Frank Easterbrook.¹⁹⁶

At a second level, judicial opinions cannot be viewed as the unified product of an original mind because they are, increasingly, not even written by a judge or Justice. They are largely "ghostwritten" by law clerks.¹⁹⁷ Such a procedure would never be tolerated in "normal" intellectual disciplines, and especially in humanistic scholarship—which again shows how much the humanists' original sources differ from judicial opinions.¹⁹⁸ It has further been suggested that the increasing reliance on law clerks is at least partially responsible for doctrinal breakdown in the modern Supreme Court and the tendency toward separate opinions and plurality decisions: "Because each Justice has a number of law clerks and typically none serves more than one or two years, a heroic effort by a Justice would be required to impart unity of philosophy and authorship to the law clerks' drafts."¹⁹⁹

In discussing the Court's steadily increasing workload, the Frennd Committee warned in 1972: "If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change."²⁰⁰ There are increasing indications that the function of the Court *has* changed over time, and that one is no longer entitled to consider the work of a Justice as analogous to that of a poet or philosopher, i.e., as the intellectual product of a unified mind. In other words, at the same time that legal scholarship is becoming more ambitious, more theoretical, and more creative, Supreme Court opinions are becoming less so—less the product of an individual and powerful mind,

195. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 92-120 (2d ed. 1963).

196. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 813-32 (1982).

197. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 105-19 (1985).

198. See Posner, *supra* note 9, at 1352 ("The literary character of judicial opinions . . . is an interesting and significant phenomenon, though regrettably a diminishing one, as more and more opinions are ghostwritten by newly graduated law students neither chosen for nor encouraged in literary flair."); see also Patricia M. Wald, *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153-54 (1990).

199. Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980). But see Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1135 n.57 (1981) ("A Justice writing a lead opinion will value the support of his fellow Justices more than the good will of his clerks, and the Justices will surely make their own decision whether or not to write an opinion. It is also unlikely that the Justices would continue a practice they thought caused plurality decisions.").

200. FEDERAL JUDICIAL CENTER REPORT OF THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT 9 (1972) [hereinafter FEDERAL JUDICIAL CENTER REPORT].

less an original text or primary source providing a theoretical model for scholarship, and more the product of "bureaucratic writing" by law clerks.²⁰¹ The point is not so much that the Justices have not written their opinions; *no one* has written them. They are the proverbial "work of many hands."

It is tempting to read the obscure, formulaic pronouncements of Supreme Court opinions as heavily freighted with deep significations that human language can only imperfectly capture. But perhaps a simpler interpretation is that:

most constitutional law casebooks are forced by coverage pressure to print only a small part of most opinions. The Court's formulas always survive the editing process. Supreme Court clerks mastered those formulas and were rewarded with high grades; the formulas may be the only way they know of doing constitutional law.²⁰²

It is difficult, for example, to imagine a present-day law clerk drafting the following passage:

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. . . .²⁰³

That passage is unmistakably the product of a brilliant, original (if somewhat egotistical) mind.²⁰⁴ The same inimitable judicial style and personal philosophy can be detected in Justice Frankfurter's *West Virginia*

201. See JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 47 (1986); Robert V. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 177-78 (1985).

202. Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1742-43 (1990) (reviewing ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989)).

203. *Baker v. Carr*, 369 U.S. 186, 267-68 (1962) (Frankfurter, J., dissenting).

204. See JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 251 (1989) ("[T]he emotionally charged message was Frankfurter's own."). Of course, the true test of originality is whether one has inspired any parodies. See, e.g., Richard H. Field, *Frankfurter, J., Concurring . . .*, 71 HARV. L. REV. 77 (1957).

State Board of Education v. Barnette dissent, which he insisted on beginning with a personal statement about belonging to “the most vilified and persecuted minority in history.”²⁰⁵

In writing his *Barnette* dissent, Frankfurter included the passage quoted above against his law clerk’s advice (reportedly with the reminder that “this is my opinion, not yours”).²⁰⁶ Frankfurter also disregarded similar advice from two of his fellow Justices, who “called formally on Frankfurter in his Chambers to plead with him to omit or soften this opening paragraph. They said it was too emotional and too personal for inclusion in a Supreme Court opinion. Frankfurter said they had given him very good reasons for taking these words out, but he had even better reasons for keeping them in; and in they stayed.”²⁰⁷

Robert Ferguson has also addressed some of the issues I have raised about the role of law clerks in the judicial process.²⁰⁸ In so doing, however, Ferguson only strengthens my case. He writes:

As judges relinquish more and more aspects of the judicial opinion to their court clerks, or even to groups of clerks, there is some reason to qualify the designation of “personal” or “individual” writing. But to qualify does not mean to discard the idea altogether. As long as the actual written product remains “the self-conscious measure” of judicial performance, clerks will write with the style and philosophy of their judge in mind, and judges will monitor language and ideas to make sure that opinions remain *in some sense* their own. Clerks, in other words, work within the assumption of a personalized authority in the genre of the judicial opinion. The same assumption, that of a personal authority in the very form of the statement, also nourishes the interest and involvement of *the imputed author*, the judge who signs the opinion.²⁰⁹

Now this is, to say the very least, a decidedly weak defense of the judicial opinion as an original text or primary source. It must be a very rudimentary and insubstantial judicial “style” or even “philosophy” that can be mastered so readily by the youthful law clerk, even one who is dutifully “work[ing] within the assumption of a personalized authority in the genre of the judicial opinion.” And presumably only very casual philosophers or *literati* would be content to “monitor language and ideas” to

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205. 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

206. See SIMON, *supra* note 204, at 118.

207. MAX FREEDMAN, ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 701 (1967).

208. See Robert Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201 (1990).

209. *Id.* at 202 n.5 (emphasis added).

make sure that their works remained “in some sense their own.” Ferguson, undeterred, devotes the remainder of his article to an extended analysis of the *Minersville School District Board of Education v. Gobitis*²¹⁰ and *Barnette* cases, and mainly to Justice Frankfurter’s opinions in those cases. My point precisely. Justice Frankfurter’s opinions are *exceptions*, and rather notable ones at that; they are so exceptional and atypical that I used them myself in the above discussion, as an excellent point of contrast with current judicial practice. Ferguson takes what he terms his “proving ground” of examples exclusively from these two cases in the early 1940s, when the Court had far fewer cases—and the Justices had far fewer law clerks—than they do today. This is undoubtedly what made those examples seem “particularly useful for present purposes”; namely, for supporting the popular but largely unexamined assumption that judicial opinions are “uniquely personal literary product[s]” that form “a distinct literary genre.”²¹¹

B. *The Unedifying Practice of Adjudication*

A standard and familiar distinction used to provide context for explaining the practice of adjudication is the distinction between the work of the judge and that of the politician. Douglas Laycock, for example, gives one version of this familiar distinction:

Courts must give reasons, articulate general principles, and live with their precedents. A series of cases will pressure courts to draw precise lines—to say that this plaintiff wins and that a similar but not quite identical plaintiff loses. Judicial emphasis on principle tends to push arguments to their limit instead of toward acceptable compromise. Politicians and elected officials can finesse controversies with fuzzy language, by avoiding statements of principle, by agreeing on the result without agreeing on reasons, or by not offering reasons at all. Politicians can also engage in occasional emergency suppression without publishing records, without stating formal justifications, and without treating their actions as precedent. Judges have much more difficulty using these techniques.²¹²

Without putting too fine a point on the matter, it may be replied that judges use all of these techniques—naturally, regularly, and with no discernible “difficulty.” Although common law judges may feel obligated to justify their decisions by providing reasons for them, the legal authority of judicial opinions rests not so much on the strength of their

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210. 310 U.S. 586 (1940).

211. Ferguson, *supra* note 208, at 202-03.

212. Laycock, *supra* note 202, at 1714-15 (footnotes omitted). For another classic expression of this distinction, see Arnold, *supra* note 193, at 1310-14.

reasoning as on the judges' place in the institutional scheme. As Goodhart observed, "[a] bad reason may often make good law."²¹³ Our system of case law grants precedential authority to poorly reasoned and well reasoned opinions alike; indeed, the system offers powerful rationales for leaving legal mistakes in place, instead of correcting them. "[I]n most matters," noted Justice Brandeis, "it is more important that the applicable rule of law be settled than that it be settled right."²¹⁴ This is because the concerns of judges are not abstract or theoretical, but practical and prudential—disposing of a contentious case, for example, in circumstances where the court's authority is delicately balanced between grudging acceptance by the public and lukewarm support from the other branches of government. The better part of judicial valor may be to "muddle through" (as Alexander Bickel put it²¹⁵) with a patched-together pastiche of partial reasons, rather than to construct a sweeping intellectual synthesis that is, however, wholly out of touch with social and political reality.²¹⁶ In short, the philosophical virtues of rational coherence, consistency, and completeness are not the operative criteria of legal decisionmaking, and may even be detrimental to that enterprise.²¹⁷ As Laycock also observed: "If coherence and stability are the criteria, almost any consistently applied theory could do better than the Court has done."²¹⁸ It thus cannot be assumed that the body of judicial doctrine forms anything like a philosophical system. To base a legal theory on such an assumption is to build it upon a house of cards.

In effect, the distinction between the work of politicians and that of judges has been vastly but understandably overrated. "These are the clothes which the Court must wear in order to retain its authority and

213. Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 163 (1930).

214. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

215. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 64 (1962).

216. See Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 79 (1959).

217. See *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases."); Oliver W. Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870). Our judges and Justices are not really "theoreticians"—they cannot afford to be—because "unlike their critics, [they] bear the responsibility of decision. People who bear that responsibility soon learn that the welter of life is constantly churning up situations in which the application of clear and consistent theories would produce unacceptable results . . . because the case has stirred some profound countervailing principle." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 351 (1974). In a hard situation, the scholars and critics can "postpone their articles, change their topics, take a sabbatical, or otherwise procrastinate till muddy waters clear." *Id.* at 351-52. By contrast, "[t]he Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old . . ." *Id.* at 352.

218. Laycock, *supra* note 202, at 1715.

public appearance.”²¹⁹ In the following sections of this Article, I shall document and explain this view of adjudication.

1. *“The Passive Virtues” and the Pragmatic Judicial Role.* In this first subsection I trace out some of the predominant ways and reasons that adjudication is and must be non-theoretical. These are at the same time ways and reasons judges do not provide apt models for theory, and legal opinions do not resemble original texts or primary sources like those in the humanities.²²⁰

One way of considering the non-theoretical nature of adjudication is to view it in relation to principles of judicial restraint. These principles make more sense in some contexts than in others, but in any event they are deeply embedded in our legal system.²²¹ Numerous features of the Anglo-American legal system operate to restrain judges from “roaming the stormy fields . . . their black robes flapping in the winds of controversy . . . .”²²² Courts decide only questions presented to them by litigants who properly invoke their jurisdiction.²²³ Party presentation of evidence and argument is a mainstay of the adversary system of proof.²²⁴ These factors allow the judge to assume a passive role not unlike that of a referee.²²⁵ Common law judges do not seek out their cases or perform investigative functions, as they do in some civil law jurisdictions.

Article III of the Constitution provides that federal courts have jurisdiction to adjudicate various types of “Cases” and “Controversies.”²²⁶ This has been interpreted to mean that “advisory opinions” will not be offered, as Secretary of State Thomas Jefferson discovered in 1793 when he asked the Supreme Court to construe certain treaties in light of the

219. Arnold, *supra* note 193, at 1311.

220. Again, the contrast with the civil law tradition is instructive. See MERRYMAN, *supra* note 129, at 63-64; REDLICH, *supra* note 148, at 36.

The civil law scholar does something very different from the task of a common law judge; the scholar develops theory. Elsewhere Professor Merryman describes the Continental legal scholar as “mold[ing] the civil law tradition and the formal materials of the law into a *model of the legal system*.” MERRYMAN, *supra* note 129, at 60 (emphasis added).

221. See LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 29, 31-32 (1968); Collier, *supra* note 83, at 773-75; see also BICKEL, *supra* note 215, at 111-16; ALEXANDER M. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 1-20 (1957); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 271-72.

222. Thurman Arnold, *Judge Jerome Frank*, 24 U. CHI. L. REV. 633, 634 (1957).

223. See LEVY, *supra* note 221, at 31-32.

224. See PAUL D. CARRINGTON & BARBARA A. BABCOCK, CIVIL PROCEDURE 406-09 (2d ed. 1980).

225. The normal passivity of the judge is described in Federal Rule of Evidence 103, which delineates the judge's role when ruling on the admissibility of evidence and the proper recourse for parties subjected to adverse rulings.

226. U.S. CONST. art. III, § 2.

ongoing war between France and England.²²⁷ The Justices declined, citing separation of powers and checks and balances considerations.²²⁸ The federal Declaratory Judgments Act²²⁹ has similarly been interpreted to apply only where there is a justiciable "case or controversy" within the meaning of Article III.²³⁰

These restraints on judicial intervention provide a useful background against which to view the roles of the judge and the legal scholar. Briefly, the requirements of Article III—justiciability, standing, finality, and narrow grounds of decision—all reflect an abhorrence of abstract judicial theorizing at the expense of actual litigants. To be sure (as I shall elaborate in the following subsection²³¹), an appellate court of last resort is not doing its job or its duty and is not fulfilling its "historic and essential functions"²³² if it issues only narrow, fact-specific holdings that do not expound or explain the law to lower courts and to other potential litigants. But, as compared to philosophical or literary theorizing, the questions a judge or even a Justice faces are by nature more mundane, even when formulated generally. Relatively speaking, judicial doctrine is inherently empirical and specific—"case-specific" in this limited sense.

Between the two extremes I have indicated, it appears that the major participants have assumed the worst possible postures—that is, at the extremes. Anthony Kronman has documented the emergence of a new "rationalism" (actually, several new rationalisms) in legal theory, and the rationalist tendencies he describes can be detected in the specific legal theories and forms of legal scholarship that I criticize.²³³ Typically, these theories take their point of departure from a few abstract postulates about human nature and a conception of society as a blank slate upon which social and legal principles may be written.²³⁴ Other legal rationalists seek to expound deep structural regularities (usually expressed in philosophical terms of the utmost generality) that allegedly underlie the "surface confusion" of established legal doctrines.²³⁵ In general, these forms of abstract theorizing completely fail to consider the "details" of

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227. See PAUL M. BATOR ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 64-70 (3d ed. 1988).

228. See *id.*

229. 28 U.S.C. § 2201 (1988).

230. See *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

231. See *infra* notes 240-46 and accompanying text.

232. See FEDERAL JUDICIAL CENTER REPORT, *supra* note 200, at 5.

233. See Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1598-1605 (1985).

234. See *id.* at 1571-72.

235. See *id.* at 1606-07.

social and historical context within which legal decisionmaking necessarily occurs. To the extent that they are supposed to be generalizations of judicial practice, they succeed only in abstracting from or ignoring the pragmatic, situated agenda of the judiciary, as I have described it above.

Where the legal theorists and scholars have taken an impossibly high road, the courts—and particularly the Court—have increasingly captured the low ground. I shall document and discuss these developments in the following subsections, but for now it is instructive to note that this striking divergence of legal theory from judicial practice makes the claims of grand legal theory even more implausible than they otherwise would be.

2. *Adjudication as a Debate.* The symbolism—perhaps unconscious, and certainly unexamined—of the “debate” is symptomatic of the problems I have pointed out, and the motif of the debate is often unthinkingly applied to adjudication on the grand scale, particularly that of the U.S. Supreme Court. The “debate” model has led to the attribution of important theoretical positions to courts and of significant intellectual roles to the Justices. Because the Justices often consider large, important issues, and continually issue position papers on them, it seems natural to think of adjudication as an ongoing debate. But in the broader sense of “public debate” on the great issues of the day, courts are structurally insulated from having to summon up popular support for their views and cannot in this sense really be characterized as carrying on a public debate in their opinions.

In the narrower sense of “a debate,” adjudication presents even more striking differences. The prevailing side gets to enforce its victory at law; it prevails only because it has more votes, not because it has the stronger argument or is “right”—as determined by some higher authority, such as informed professional opinion, social consensus, or human history. Theoretically, the Court does not have to offer any reasons for its decisions; in practice, cases are disposed of more often than not in *per curiam* decisions or by “summary action”—without any argument, reason, or opinion.²³⁶ The conception of the Court “as essentially a voice of authority settling by virtue of its own *ipse dixit* the questions that duly come before it, or that it chooses to permit to come before it . . . unhappily seems to underlie some of the Court’s own actions.”²³⁷ In these

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236. See Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957); Ernest J. Brown, *The Supreme Court, 1957 Term—Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22-23 (1959).

237. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98 (1959).

circumstances, adjudication exhibits only superficial similarity to a real debate; in all its essential attributes, it is an exercise of institutional authority.²³⁸

If the Supreme Court is carrying on a "debate" in its judicial opinions, who or what is the audience? The other Justices? There is little (and increasingly less) to suggest that the Justices are intent on persuading each other, through intellectual argumentation, to change their minds on *fundamental* issues—that is, on matters that might make a difference in "legal theory." The proliferation of separate opinions is only the most visible symptom of this "pathological decisionmaking" that has left "juridical cripples" strewn throughout the pages of the *United States Reports*.²³⁹

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238. In 1959, Henry Hart expressed his concern that the "process of collective deliberation of individuals, gifted or otherwise, who recognize that the wisdom of all, if it is successfully pooled, will usually transcend the wisdom of any," was not resulting in a consistent "maturing of collective thought" at the U.S. Supreme Court. *Id.* at 100; see also HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 3 (1961); Erwin N. Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960). But see Arnold, *supra* note 193 (noting cases, primarily civil rights cases, that contradict Hart's conclusion).

If contemporary trends are any indication, the Court is rapidly moving ever farther from the model of a Burkean "deliberative assembly" and the "process of collective deliberation" envisioned by Hart. One such indication is the fact that, through the 1979 Term, the Burger Court had made more decisions by a mere plurality than had been made in the entire previous history of the Supreme Court. See Note, *supra* note 199, at 1127 n.1, 1147. There were 45 plurality decisions between 1801 and shortly after the beginning of the Warren Court in 1955, 42 between 1955 and the end of the Warren Court, and 88 from the beginning of the Burger Court through the 1979 Term. See John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60; Comment, *Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis*, 24 U. CHI. L. REV. 99, 99 n.4 (1956). The trend toward split decisions has made a modern mockery of "the opinion of the Court," see generally Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959) (reviewing the history of split opinions on the Supreme Court, and its costs and benefits), with the nine separate opinions in *Furman v. Georgia* representing a low-water mark of sorts; in *Furman*, none of the opinions of the five Justices in the majority could obtain the concurrence of any other members of the Court. See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); see also BREST, *supra* note 191, at 82 n.76 ("[E]ach justice wrote a separate opinion concurring in or dissenting from the Court's judgment, which was announced in a short per curiam opinion."); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 ("*Furman* . . . is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."). In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), four members of the Court found it necessary to remind four other members of the Court—none of whom could find the right words to command a majority—that "[i]t is hardly necessary to state that only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." *Id.* at 408 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, J., and Rehnquist, J.); see also STEPHEN WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 233-36 (3d ed. 1988). Even the comparatively tame facts of *Craig v. Boren*, 429 U.S. 190 (1976)—concerning an Oklahoma statute that prohibited the sale of beer containing 3.2% alcohol to males, but not females, between the ages of 18 and 21—generated seven separate opinions. For other examples, see Note, *supra* note 199, at 1128-29.

239. See Davis & Reynolds, *supra* note 238, at 77; Note, *supra* note 199, at 1127-28.

When the Justices of the Court cannot agree on their *ratio decidendi* they abdicate the expository and explanatory function of adjudication. Bare announcements of decisions, unsupported by reasons, do not suffice as statements of the law; they do not illuminate, explain, expound, or declare "what the law is." One of the historically important functions of appellate courts, and particularly of courts of last resort, has been the heuristic function of teaching and educating parties and institutions as to their legal rights and duties.²⁴⁰ Another important function of appellate adjudication is to provide guidance to lower courts.²⁴¹ Where it is impossible to integrate judicial opinions into a coherent body of law, these functions cannot be served.²⁴²

An obvious *external* manifestation of the Court's contemporary failure to fulfill its "historic and essential functions"²⁴³ is the emergence of fact-specific decisions that seem to turn on increasingly narrow distinctions. One cannot understand or learn from a bare decision, such as "judgment for the plaintiff," because one is not thereby enlightened as to "what it was" about the plaintiff's case that made the decisive difference. For that, one needs reflection on a higher order that makes sense of the particular facts of the specific case. We need to know what these specific facts "mean," and it is this that drives us beyond them. In other words, the Court must expound relatively broad, general rules and principles if we are to understand its decisions and learn from them.²⁴⁴

The *inner* manifestations of breakdown in judicial decisionmaking are the distrust of general rules, the avoidance of objective principles, the elimination of publicly ascertainable and demonstrable grounds of decision, and, finally, the abdication of reason and logic as primary bases for decisionmaking and of rational argumentation as the medium of legal discourse. As the following subsection demonstrates, judicial decisionmaking is always threatening to break down in this way, even in a highly developed legal system. Constant vigilance and enormous intellectual exertions are required to keep legal discourse artificially raised to the level

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240. See Collier, *supra* note 83, at 822.

241. See Frederick Schauer, *Opinions as Rules*, 53 U. CHI. L. REV. 682 (1986) (reviewing BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985)); Frederick Schauer, *Refining the Lawmaking Function of the Supreme Court*, 17 U. MICH. J.L. REF. 1 (1983).

242. See FEDERAL JUDICIAL CENTER REPORT, *supra* note 200, at 9; cf. BICKEL, *supra* note 156, at 32 ("[T]he function of the Court is not to correct error in individual cases, but to declare and harmonize national law."); Kelman, *supra* note 221, at 266 ("[T]he Supreme Court's *raison d'être* is not to dispense justice in the relative handful of cases it is possible to hear but to settle the troublesome questions presented by these cases.").

243. See FEDERAL JUDICIAL CENTER REPORT, *supra* note 200, at 5.

244. See Collier, *supra* note 83, at 822.

of "a rational statement which formulates grounds and exposes connecting or logical links"; the natural, and much easier, tendency is a sort of regression to the mean, to "arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge."²⁴⁵ This regression may be considered complete when the Court no longer commands any "intellectual authority" at all but must rely solely on whatever "institutional authority" it retains as the basis for its decisions and influence. As Archibald Cox warned in 1980:

Perhaps the fragmentation is just one more symptom of a highly individualistic, inward-looking period. Perhaps it results from the breaking down of an older body of law under the pressures of legal positivism and legal realism. . . . But the Supreme Court has additional functions. . . . Continuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law.²⁴⁶

3. *The Calculus of Precedent.* With the departure of Justices Brennan and Marshall, the role of precedent and the doctrine of *stare decisis* are certain to assume central importance in coming years, as a significantly more conservative Court confronts the increasingly inconvenient holdings of its predecessors.²⁴⁷ Timely new legal and policy rationales for the prevailing regime of institutional authority have been

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245. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 24 (1924).

246. Archibald Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 72 (1980).

More recent judicial pronouncements indicate that Cox's concerns were, if anything, understated. In 1985 Justice Rehnquist, on the losing end of a five-to-four vote, penned a four-sentence dissenting opinion that mentioned—without discussing—no fewer than *four* separate approaches, "under *any one of [which]* the judgment in these cases should be affirmed." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (emphasis added). Without pondering further this remarkable case of multiple judicial oversight, Justice Rehnquist simply and abruptly ended with an ominous warning: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." *Id.*

The final stage in the deterioration of judicial "debate" would be represented by the elimination of debate before it has begun. There are indications that this stage has now been reached at the Supreme Court. At the end of its 1989 Term, the Court carried over only 56 cases into the new Term; the comparable number for the previous year was 81 cases; the year before that, the number was 105. Linda Greenhouse, *Mystery for Court: Case of the Dwindling Docket*, N.Y. TIMES, July 9, 1990, at A10. Observers of the Court have noted for some time that the Justices are accepting fewer and fewer cases for decision, despite the fact that the number of appeals continues to rise. In terms of hours of oral argument scheduled at the beginning of the new Term, there has been a drop of 40% over the previous two years, while the number of appeals reaching the Court actually increased. *Id.*

247. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597, 2623 n.2 (1991) (Marshall, J., dissenting) (providing a list of "endangered precedents"); T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1062 (1991) ("Of course, Justice Brennan's departure from the Court adds further uncertainty about doctrinal developments in this area, including the longevity of *Metro Broadcasting*").

obligingly provided by Justice Scalia. In *South Carolina v. Gathers*,²⁴⁸ a death penalty case, Justice Scalia impatiently urged the Court to overrule *Booth v. Maryland*,²⁴⁹ a two-year-old precedent set by Justice Powell shortly before his retirement. In so doing he addressed concerns, expressed by Justice Stevens in an earlier case, regarding:

the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel. . . . Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office.²⁵⁰

Justice Scalia met the implied charge of head-counting straightforwardly: "I doubt that overruling *Booth* will so shake the citizenry's faith in the Court"²⁵¹—perhaps because the citizenry's "faith" in the intellectual authority of the Court is, for good reasons, already at such a low level that it cannot possibly be further shaken. He added that "[o]verrulings of precedent rarely occur without a change in the Court's personnel."²⁵² It is but a short step from this to saying: "Overrulings of precedent occur *because of* changes in the Court's personnel," a position implicitly espoused by the dissenters in *Garcia v. San Antonio Metropolitan Transit Authority*,²⁵³ who noted approvingly that the unprecedented decision in *National League of Cities* had "follow[ed] some changes in the composition of the Court"—namely, the arrival of the four Nixon appointees, all of whom voted in the five-member majority.²⁵⁴

For Justice Scalia, the only distinctive feature of *Gathers* was the fact that, as he blandly put it, "the overruling would follow not long after the original decision."²⁵⁵ But that in itself is, he continued, "hardly unprecedented"—there is no lack of precedent, as it were, for not following precedent.²⁵⁶ "Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes

248. 490 U.S. 805 (1989).

249. 482 U.S. 496 (1987).

250. *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 153-54 (1981) (Stevens, J., concurring).

251. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

252. *Id.*

253. 469 U.S. 528 (1985).

254. *Id.* at 558 n.1 (Powell, J., dissenting).

255. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

256. For another case citing precedent for the power to overrule precedent, see *Alferitz v. Borgwardt*, 58 P. 460 (Cal. 1899).

premised upon their validity.”²⁵⁷ In other words, there is a kind of “reliance interest” in legal precedent.²⁵⁸ Conversely, when judicial error has recently been made, its freshness “counsels that the opportunity of correction be *seized at once*, before state and federal laws and practices have been adjusted to embody it.”²⁵⁹

There is a certain logic to Justice Scalia’s position here. He seems to grant that the day-to-day decisionmaking of the Court is devoid of intellectual authority, although it still of course retains bare institutional authority. In close cases this can present a precarious appearance, as in the period following *National League of Cities*, when the law of the land seemed to depend almost entirely “on whether Justice Blackmun, the crucial vote to establishing a majority on this issue, would find that a federal law could or could not be applied to state and local governments through the use of his rather undefined balancing test.”²⁶⁰ Justice Roberts’s role in *West Coast Hotel Co. v. Parrish*,²⁶¹ as the so-called “switch in time that saved nine,”²⁶² and Justice Powell’s role in *Regents of the University of California v. Bakke*,²⁶³ as a kind of roving ambassador, presented similar situations. “The possibility that Justice Blackmun’s votes will have first created and then destroyed a major constitutional doctrine obviously raises troubling concerns about the judicial process.”²⁶⁴ These concerns do not mean that the Court’s *institutional* authority is or was seriously in question; but they do suggest that the meteoric rise and precipitate decline of the “*National League of Cities* doctrine” (whatever that was) had little to do with the internal logic of legal reasoning, and that the Court’s pronouncements to the contrary cannot be taken at face value, as “doctrinal artifacts” requiring, or meriting, extended intellectual attention.²⁶⁵ During the period following *National League of Cities*, of course, legal scholars were taking the supposed doctrine of that case very seriously, attempting to make *some* sense out of

257. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

258. See *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991); *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring); *Washington v. Dawson & Co.*, 264 U.S. 219, 235-39 (1924) (Brandeis, J., dissenting).

259. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting) (emphasis added).

260. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 165-66 (3d ed. 1986).

261. 300 U.S. 379 (1937).

262. See Philip Frickey, *Stare Decisis in Constitutional Cases: Reconsidering National League of Cities*, 2 CONST. COMMENTARY 123, 142 (1985) (comparing Justice Blackmun’s role in *National League of Cities* with Justice Roberts’s role in *West Coast Hotel*); John E. Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 SUFFOLK U. L. REV. 549, 583, 588 (1983) (same).

263. 438 U.S. 265 (1978).

264. Frickey, *supra* note 262, at 143.

265. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 191-95 (1982).

it, and offering elaborate and imaginative glosses that had undoubtedly never occurred to the Court.²⁶⁶ It would appear in retrospect that those efforts were largely, if not completely, wasted. Perhaps the case was, as Philip Bobbitt has suggested, "not a major doctrinal turn but a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states."²⁶⁷ In any event, *National League of Cities* certainly seems to qualify as the proverbial "restricted railroad ticket, good for this day and train only."²⁶⁸

For Justice Scalia, *National League of Cities* is not an aberration; it is a paradigm. The day-to-day decisionmaking of the Supreme Court is supported primarily by its bare institutional authority and only marginally by the limited intellectual authority the Court can claim on behalf of its adjudication. Just as no particular stigma attaches to changing one's mind when one never claimed to be "right" in the first place, there is no particular intellectual stigma attached to overruling routine decisions, because they had no real claim on our intellect to begin with. Thus, when a shift of voting power on the Court materializes, the opportunity to grab more power should, as Justice Scalia enthusiastically counsels, "be seized at once"²⁶⁹ before it slips through the judicial fingers. Recent decisions may be overruled at will, especially when there is a change in the Court's composition. And in fact, not long after the departure of Justice Brennan—and with the help (and vote) of his replacement, Justice Souter—both *Booth* and *Gathers* were unceremoniously overruled at the end of the Court's most recent Term.²⁷⁰ Chief Justice Rehnquist explained in his majority opinion that both of the overruled precedents had been five-to-four decisions, that "spirited dissents" had accompanied them both, and that in any event the Court had overruled thirty-three of its own decisions in the previous twenty years.²⁷¹ As Plato has Thrasymachus say, "justice is nothing other than the advantage of the stronger";²⁷² or, as Justice Scalia has a "cynic" say, "with five votes anything is possible."²⁷³

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266. See, e.g., Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1166 (1977); Lawrence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1066 (1977).

267. BOBBITT, *supra* note 265, at 194.

268. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

269. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

270. See *Payne v. Tennessee*, 111 S. Ct. 2597 (1991).

271. See *id.* at 2610-11.

272. PLATO, REPUBLIC 338c (Allan Bloom trans., 1968).

273. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (quoting a "cynic").

Nevertheless, exception must be made for "decisions that have become so embedded in our system of government that return is no longer possible."²⁷⁴ In these exceptional cases, the opportunity to overrule them and grab more power has, for whatever reasons, been declined or unavailable for so long that they have acquired, by a kind of adverse possession, "the respect to which long-established practice is entitled."²⁷⁵ Yet, this respect does not necessarily accrue to decisions on the ground that they are "right" or because they are made by an intellectually authoritative institution. It may just as readily be explained by factors wholly external to the Court, such as the fact that we have relied on these decisions and ordered our affairs around them for lo these many years; overruling them now would cause the most dislocation. Thus, if *Marbury v. Madison* had been decided recently, the Court would not hesitate to overrule it at will. It is only *Marbury's* historical pedigree and prestige that make it resistant to overruling this late in the day—not the fact that it was decided on true or correct reasoning or principles.²⁷⁶

Justice Scalia's analysis provides the legal and policy rationales for "head counting" and the relaxed hold of precedent; his demial of intellectual authority to the Court's decisions effectively implies the reduction of its authority to institutional authority alone. Justice Scalia's views thus confirm my suggestion that the outhly real authority for the Court's decisions emerges incidentally, through accommodation and acquiescence, and because it was a "court of last resort" that made the decisions, not because they were necessarily "right" or intellectually sound in the first place.

It might be argued that the "great" opinions operate like primary sources, and create ripple effects of increasing intellectual authority. But, to test this, what would one say about a case like *Plessy v. Ferguson*?²⁷⁷ It was a "landmark" case for almost sixty years, so it certainly had full institutional authority, but did it have "intellectual authority"? In my discussion of that concept I agreed that "survival is the test of greatness,"²⁷⁸ but by "survival" I did not mean bare persistence enforced by power; I meant continued acceptance in the free marketplace of ideas. Was the "*Plessy* doctrine" accepted as a result of intellectual debate? In fact, the authority of *Plessy* steadily declined; it did not "survive," even in the limited sense of retaining institutional authority. And then when it

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274. *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting).

275. *Id.* at 824.

276. At his confirmation hearings Justice Scalia seemed to acknowledge, however grudgingly, that *Marbury* is for this reason *probably* safe from being overruled. See *Scalia Hearings*, *supra* note 187, at 104.

277. 163 U.S. 537 (1896).

278. See *supra* text accompanying notes 121-27.

was replaced by *Brown v. Board of Education*,²⁷⁹ did that mean that *Brown* had more intellectual authority?

Actually, *Brown* is perhaps even better explained against the background of a momentous social transformation, coupled with some fortuitous personnel changes and some extraordinary, non-judicial machinations behind the scenes.²⁸⁰ In other words, *Plessy* did not owe its ascendancy to its intellectual content, and its decline was not due to its lack of intellectual content either. Indeed, many of the great, "landmark" cases—e.g., *Brown*, *Roe v. Wade*²⁸¹—have been criticized as devoid of rational argument or true intellectual authority.²⁸²

The consistent practices of the Presidency, the Senate, and the Supreme Court cannot all be "wrong"—at least not over long periods of time—because these practices eventually take on a normative significance. Historical institutions become defined by what they have been.²⁸³ These considerations force one to reconsider the received view of the judiciary, and particularly the Supreme Court, as a kind of intellectual meritocracy where logic and rational argumentation are the coin of the realm. That view is demonstrably unrealistic and sharply at variance with the institutional setting and contemporary practice of adjudication; it must finally be given up.

IV. STYLES OF LEGAL THEORIZING

[J]udges and scholars have . . . gone off in search of help from strange and alien gods. . . . A wave of continental learning swept over England, leaving a thick deposit of its obscurant abstractions, and much of it still remains.

—Herman Oliphant²⁸⁴

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279. 347 U.S. 483 (1954).

280. See RICHARD KLUGER, *SIMPLE JUSTICE* (1976); Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987). But see Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938 (1987) (contending that Elman's account of the *Brown* litigation is inaccurate and misleading). See also Philip Elman, *Response*, 100 HARV. L. REV. 1949 (1987) (defending his memoirs).

281. 410 U.S. 113 (1973).

282. On *Plessy*, see Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 748-50, 752, 755-56 (1982) (making clear that *Plessy*'s authority is merely institutional); on *Brown*, see Wechsler, *supra* note 236; on *Roe*, see John H. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

283. As Hegel more elegantly put it in German, "Wesen ist was gewesen ist." ("Essence is what has been."), quoted in JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 120 (Hazel E. Barnes trans., 1956). See HEGEL'S LOGIC 163 (William Wallace trans., 3d ed. 1975); 2 GEORG W.F. HEGEL, *WISSENSCHAFT DER LOGIK* 3 (Georg Lasson ed., 1934).

284. Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 74 (1928).

In this Part, I consider some prominent examples of contemporary legal scholarship in light of the analysis developed in this Article.

A. *Drama at the High Court*

Robert Weisberg's *Deregulating Death*²⁸⁵ is an excellent example of the new legal scholarship and of what may be termed the "dramatic" approach to judicial decisionmaking. Weisberg brings to his subject the heightened literary sensibilities that one would expect of a former professor of English literature. And indeed his subject is perhaps the most inherently dramatic in the entire legal repertoire: capital punishment.

Deregulating Death is an elaborate study—part doctrinal history, part documentary history, part rhetorical analysis,²⁸⁶ and part philosophical speculation²⁸⁷—of the modern Supreme Court's efforts to contain capital punishment within the rule of law. Weisberg focuses on the penalty phase, as opposed to the guilt phase, of capital murder trials. Since *Furman v. Georgia*,²⁸⁸ which (whatever else it did) condemned the "arbitrary" or "standardless" imposition of the death penalty, the Supreme Court has increasingly required state courts and legislatures to invest the so-called "penalty trial" with greater formal rationality.²⁸⁹ But in an abrupt about-face at the end of the 1982 Term, the Court seemed to have despaired of carrying out its decade-long enterprise. It apparently decided to "deregulate" the penalty trial and essentially let the states decide what substantive and procedural protections—beyond a bare minimum—to provide.²⁹⁰

As Weisberg sees it, the legal history of death penalty doctrine traces out a grand intellectual struggle between a "romantic" and a "classical" view of law. Prior to *Furman*, Justice Harlan had warned: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond

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285. Weisberg, *supra* note 238.

286. See, e.g., *id.* at 310 (discussing "tone" of *McGautha* opinion); *id.* at 319 (discussing the "rhetoric of lament and exhortation" of *Furman* and the "rhetoric of subtle observation and approval" of *Gregg*); *id.* at 317 (extracting "unifying 'themes,'" "[i]n the manner of literary criticism," from *Furman*); *id.* at 339 ("I am less concerned with specific issues than with the doctrinal rhetoric the courts have used."); *id.* at 342-43 (analyzing "metaphor" of the trial and "[t]he rhetoric of defense argument"); *id.* at 355 ("The *Barclay* case is as much a literary as a legal phenomenon. . .").

287. See *id.* at 383-95.

288. 408 U.S. 238 (1972).

289. See, e.g., *Bullington v. Missouri*, 451 U.S. 430 (1981); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

290. See *Barclay v. Florida*, 463 U.S. 939 (1983); *Zant v. Stephens*, 462 U.S. 862 (1983).

present human ability.”²⁹¹ The “romantics” set out, with “good old American know-how,” to prove Justice Harlan wrong.²⁹² They relied on a separate penalty trial, rigorous appellate review to guard against inequality among sentences, and “a disciplined rational procedure to guide the sentencer in examining evidence . . . and applying it to a logical choice of sentence.”²⁹³ Presumably Weisberg terms this view “romantic” because it reflects an almost naive or sentimental faith in the power of formal legal rules to guide and limit discretion. More generally, it suggests an unreconstructed optimism that basic social and political problems can be solved by the progressive refinement of legal doctrine.

The competing “classical” account of capital punishment offers a more mature, austere legal vision. It frankly acknowledges the practical limits and administrative costs of judicial doctrine-building,²⁹⁴ stresses the inapplicability of the trial metaphor at the sentencing phase,²⁹⁵ and patiently explains the logical irreconcilability of horizontal equity and individualized sentencing.²⁹⁶ In the companion case to *McGautha*, for example, “Harlan seems perfectly willing to concede that Crampton’s dilemma was unfair and even ‘cruel.’ But he insists that a bit of reflection shows that all trials are in some ways unfair. The tone of the opinion is that life generally is unfair, and the law need be no fairer.”²⁹⁷ Philosophical skepticism and a certain “wizened pessimism” (if not cynicism) about death penalty doctrine-making are thus hallmarks of the classical view.²⁹⁸

Weisberg’s perspective on individual Justices and their legal opinions is an extraordinarily broad one. In his account, the Justices loom larger than life—larger than mere judges, certainly, and *a fortiori* larger than mere mortals. From this commanding height they represent and embody definite philosophical positions and attempt to implement sweeping—often extra-legal—philosophical agendas. Justice Harlan, for example, “does not simply rely on the conventional tools of precedent and analogy. He seems also to want to write a Burkean essay condemning the due process argument as romantic utopianism, a failure to achieve tragic wisdom.”²⁹⁹ And Justice Douglas’s opinion in *Furman* “is

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291. *McGautha v. California*, 402 U.S. 183, 204 (1971).

292. Weisberg, *supra* note 238, at 318.

293. *Id.* at 319.

294. *See id.* at 307, 322, 346, 352-53.

295. *See id.* at 342, 346, 349-52.

296. *See id.* at 323-24, 327.

297. *Id.* at 310 (footnote omitted).

298. *See id.* at 314.

299. *Id.* at 310; *see also id.* at 309 (“[T]he *McGautha* opinion is now due for a bit of restorative interpretation, having proved partly prophetic in its technical holding, and generally prophetic in its

not so much a legal opinion as a cultural document, an emotive internal monologue of American political liberalism engaged publicly in moral self-criticism during the middle of the Vietnam era. It is a catalog of cultural embarrassments, not an analysis of legal error."³⁰⁰

When the Justices square off against each other, moreover, it is a battle of intellectual titans we are observing, a struggle over immortal philosophical principles, not simply the petty, personal quarrels of mere judges over disputed points of law. In the *McGautha* opinions, for example:

Harlan's posture of Burkean skepticism is even more apparent in the second holding—that standardless jury sentencing does not violate due process. On that issue, Justice Brennan provides the perfect antagonist in the role of pedantic idealist—the Tom Paine to Harlan's Burke—so that the two can conduct a rhetorical debate on legal philosophy.³⁰¹

And in *Zant v. Stephens*:

Rehnquist is discovering and asserting Justice Powell's view in *Bullington*: The penalty trial is an existential moment of moral perception, neither right nor wrong, and therefore largely unreviewable.

Justice Marshall's dissent in *Zant* is full of the outrage of one who has been cheated and lied to. He speaks in disbelief . . . as one who has accepted the romantic due process account and now is bewildered as the Court reads it out of its own historical memory.³⁰²

Similarly, in *Barclay v. Florida*:

[Justice Rehnquist] makes a few specific legal points, but the opinion reads mostly like a laconic expression of annoyance that anyone could seriously imagine the Court's being concerned with violations of the procedural niceties of Florida law. . . .

Justice Stevens expresses distress over Rehnquist's repeated casual nihilism. But the disagreement is again one of attitude rather than of law. . . . Ultimately, Stevens, like Rehnquist, relies on the strong if Delphic authority of *Zant* to declare Barclay's claims worthless.³⁰³

Weisberg's study may be termed a "first-order" account in that his descriptions, though creative, probably do roughly approximate the Justices' and the Court's own self-understanding. The Justices probably do, in some sense, think of themselves as leading actors in an epic legal

skeptical philosophy."); *id.* at 311 (discussing Justice Harlan's "broader philosophical agenda"); *id.* at 312 ("[M]ore broadly, Harlan's opinion is an essay on the inevitable limits of legal doctrine-making and the pretenses of legal language."); *id.* at 347 (Justice Stevens "takes on a far bigger matter than the case originally seemed to raise. He has to revoke the romantic due process view of the penalty phase as a criminal trial.").

300. *Id.* at 316.

301. *Id.* at 311. In a footnote to this passage Weisberg asks the reader to compare Paine's *The Rights of Man* to Burke's *Reflections on the Revolution in France*. See *id.* at 311 n.25.

302. *Id.* at 353 (footnotes omitted).

303. *Id.* at 357 (footnotes omitted).

drama (or as intellectual titans debating immortal philosophical principles). In Weisberg's "creative redescription," that is, the Justices would probably recognize themselves and what they have been doing and saying. Regardless of whether Justices do think of themselves in this way, however, the question still remains: Is it useful for *us* to think of them this way? As I have suggested throughout this Article, an uncritical adoption of the judiciary's own self-understanding cannot ordinarily be justified on the assumptions that prevail in a normal humanistic discipline, i.e., the assumption that the objects of its study and research are original texts and primary sources that deserve or have otherwise earned a degree of intellectual authority that warrants the extended intellectual attention that is lavished upon them. Weisberg's "dramatic" perspective involves such an assumption, although perhaps only in the most general sense.

The accounts to which I shall now turn, however, may be termed "second-order" accounts, because they impose more or less external paradigms upon what would be a more or less uncomprehending Court. These accounts go at least one step beyond the Court's own self-understanding; the Justices would probably *not* recognize themselves, or what they have been doing and saying, in these descriptions.

Frank Michelman, for example, offers a "version" of Supreme Court adjudication that is "largely an interpretation of the profound and extensive writings of one eminent historian of the republican tradition . . . leavened by some reading [of another]."³⁰⁴ It seems safe to assume that the Justices would not recognize themselves in Michelman's "version" of them, and it is probable that many others would not either. For Michelman, a case about an Orthodox Jew who wished to wear a yarmulke while on active duty in the Air Force involves, simultaneously, "themes of dialogue: conversation, inclusion, and recognition; themes of history: narration and continuation; themes of responsibility: contextuality and immediacy; and themes of identity: shared humanity (including difference) and common good (including confrontation with difference)."³⁰⁵ "Together," says Michelman, "these themes compose a loose unity of their own. . . . Happily for us, their conjunction is *strikingly exemplified* in Justice O'Connor's dissenting opinion in *Goldman v. Weinberger*."³⁰⁶ In that opinion, Justice O'Connor adopts a balancing test:

First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show

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304. Michelman, *supra* note 6, at 36 n.175.

305. *Id.* at 33.

306. *Id.* (emphasis added).

that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.³⁰⁷

Michelman asserts that adopting this balancing test is "a significant act of commitment on Justice O'Connor's part," and that in so doing she "displays both its reconciliatory spirit and its dialogic force."³⁰⁸ For those who missed these aspects of Justice O'Connor's balancing test, it is necessary to go through Michelman's analysis in more detail:

Justice O'Connor's particular choice of a test commits her . . . to a particular version of national normative history and, through it, of national normative identity. As narrator resuming *in medias res* a story of many threads—"this Court's precedents"—it is she who decides which threads to pick up, where, in what combination. The subplot she chooses is that of the social conflict of religion and regulation. To see the commitment in that choice, one need only compare it with Justice Rehnquist's for the Court. His subplot—no less fairly available than hers in the history—is that of separation of powers, of the articulation of government into agencies related by status. *These narrative choices express world views*: in her subplot, the setting is society, the protagonists are troubled persons, and the *agon* is social difference. In his, the setting is the state, the protagonists are abstract authorities, and the *agon* is institutional deference.³⁰⁹

It is probably safe to assume that neither Justice O'Connor nor Justice Rehnquist knew what an "*agon*" is, much less suspected that their "world views" included one, and even less dreamed, in their wildest dreams, that their disposition of the *Goldman* case could possibly turn on such a strange and obscure Greek word. For the uninitiated, Michelman patiently explains that "[a] drama's '*agon*' is its central field or argument of struggle. The Greek word literally describes an assemblage of people at a field of contest, perhaps initially and primarily an athletic field or race course."³¹⁰ And if Justices O'Connor and Rehnquist—those law school classmates, fellow law review editors, and long-time friends³¹¹—

307. *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986) (O'Connor, J., dissenting).

308. Michelman, *supra* note 6, at 34.

309. *Id.* at 35 (emphasis added) (footnotes omitted).

310. *Id.* at 35 n.172.

311. See WILLIAM REHNQUIST, *THE SUPREME COURT* (1987): "Sandra and I were classmates in law school, and my wife, Nan, and her husband, John, were undergraduate classmates there. We go back a long time, and I was overjoyed at her appointment to the Supreme Court." *Id.* at 258-59.

indeed have incompatible "world views," we presumably owe that discovery to Professor Michelman as well. As Michelman himself concedes, "[t]his sounds like a pathology of court-fetishism, and it may be that."³¹²

B. *A Map of Judicial Misreading*

David Cole's *Agon at Agora: Creative Misreadings in the First Amendment Tradition*³¹³ is one of the most elaborate "second-order" accounts of the judicial process that draws explicitly on a specific non-legal theory. Cole "appl[ies Harold Bloom's] critical model for reading poetry to Supreme Court adjudication."³¹⁴ To do justice to Cole's project it will be necessary to explicate Bloom's theory first.

1. *Bloom's Theory of Poetic Influence.* In *The Anxiety of Influence*,³¹⁵ *A Map of Misreading*,³¹⁶ and several later works,³¹⁷ Harold Bloom charts a perilous course between the idealized formalism of the 1950s New Critics and the despiritualized structuralism of the 1980s deconstructionists. I can think of no better way to present Bloom's theory than to explicate three key terms from his main titles: influence, anxiety, and misreading.

"Influence" is in a sense the central concept, and it can be explored at several levels. Bloom insists from the very beginning that the writer—and in particular the poet—must always be situated within the rich, overlapping contexts of language, thought, history, tradition, and literary culture. To this extent Bloom's theory is "relational" (or contextual); like Hegel, he defines things in terms of what they are *not*, in terms of what *distinguishes* them from other things.

And how do poets distinguish themselves? One is tempted to say that "they write new, original, intensely creative poems"; yet upon closer examination this proposition becomes problematic. Even when poets defy the conventions of poetry they are still writing *in reference to* (in "negative reference," perhaps) those conventions; even when poets use

312. Michelman, *supra* note 6, at 74.

313. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857 (1986).

314. *Id.* at 858.

315. BLOOM, *supra* note 7.

316. BLOOM, *supra* note 67.

317. See HAROLD BLOOM, *AGON: TOWARDS A THEORY OF REVISIONISM* (1982) [hereinafter BLOOM, *AGON*]; HAROLD BLOOM, *THE BREAKING OF THE VESSELS* (1982); HAROLD BLOOM, *POETRY AND REPRESSION: REVISIONISM FROM BLAKE TO STEVENS* (1976) [hereinafter BLOOM, *POETRY AND REPRESSION*].

language in new and unusual ways they are still using language (and linguistic and literary conventions).³¹⁸

One may grant that all poets are in some sense trying to be different; they "differentiate themselves into strength," says Bloom, by "turning from the presence of other poets."³¹⁹ It is necessary to *avoid* the influence of previous poems in order to write a truly new one. In this sense, what a poem is essentially "about" is *other poems*—they are conspicuous by their absence.³²⁰ "Precursor" poets and their poems loom so large, and cast such a profound and ominous pall over the creative world of later poets, that the hapless efforts of these "latecomers" to be original amount mainly to perpetual (and largely unsuccessful) efforts to avoid being influenced.³²¹

Bloom's second key concept is "anxiety." The "anxiety of influence" is the fear that there may be nothing new left to say, that the great thoughts have already been thought and the great poems already written.³²² The great poets of the past are *overwhelming*—they are too powerful, too influential, and too all-consuming to be faced directly and acknowledged fully.³²³ "The precursors flood us, and our imaginations can die by drowning in them . . ."³²⁴

What do later poets do when faced with this potentially overwhelming influence of the great dead poets? They do what we all do in such a situation: They put up defenses, and they evade the full force of the onslaught by turning aside. Defenses and evasion are necessary because "if any poet knows too well what causes his poem, then he cannot write it,

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318. See BLOOM, *supra* note 7, at 25 ("[I]ntensification and . . . self-realization alike are accomplished only through language, and no poet since Adam and Satan speaks a language free of the one wrought by his precursors."); BLOOM, *THE BREAKING OF THE VESSELS*, *supra* note 317, at 61 ("Poems . . . are verbal utterances that cannot be regarded as being simply linguistic entities, because they manifest their will to utter *within* traditions of uttering."). The poets might well interrupt at this point to assert that, even if they are in some sense "captives" of linguistic and literary conventions, they still have some original ideas, or some unique feelings to express about the "subjects" of their poems. Bloom carries his argument further by denying even this; in so doing he develops perhaps the most forceful theory of literary tradition ever articulated.

319. BLOOM, *supra* note 67, at 80.

320. See *id.* at 31 ("To do just the opposite is also a form of imitation, and the definition of imitation ought by rights to include both." (quotation omitted)).

321. See BLOOM, *supra* note 7, at 139 ("[T]he strong dead return, in poems as in our lives, and they do not come back without darkening the living.").

322. See *id.* at 148 ("[T]he covert subject of most poetry for the last three centuries has been the anxiety of influence, each poet's fear that no proper work remains for him to perform.").

323. See *id.* at 27 ("They engross our attention, and so prevent a due inspection of ourselves; they prejudice our judgment in favor of their abilities, and so lessen the sense of our own; and they intimidate us with this splendor of their renown.").

324. *Id.* at 154; see also BLOOM, *supra* note 67, at 52 ("Our poets' characteristic anxiety is not so much an expectation of being flooded by poetic ancestors, as already *having been* flooded before one could even begin.").

or at least will write it badly. He must repress the causes, including the precursor-poems . . . ."³²⁵

Bloom captures this process of defense and evasion with the concept of "misreading," the basic paradigm for which is Freud's so-called "family romance."³²⁶ "To live, the poet must *misinterpret* the father . . . ."³²⁷ For Virgil the overwhelming precursor is Homer, for Wordsworth it is Milton, for Wallace Stevens it is Whitman, and so on. In every case, later poets make literary history only by "misreading" their poetic forefathers, "so as to clear imaginative space for themselves."³²⁸

Bloom has developed a detailed "map of misreading" that can only be hinted at here. In a legal context, three aspects of the process of misreading are of particular significance: It is willful and pragmatic; it is personal and subjective; and it is falsification. These aspects all have important implications for the theory of legal interpretation that Cole develops on the basis of Bloom's ideas.

The poet's need to misinterpret a dominant predecessor arises out of anxieties about originality, autonomy, and ultimately identity. "We read to usurp, just as the poet writes to usurp," says Bloom. "Usurp what? . . . A place, a stance, a fullness, an illusion of identification or possession; something we can call our own or even ourselves."³²⁹ Partly deliberately, partly unconsciously, the poet comes to realize that the influence of the precursor must be resisted at all costs—at least if any worthwhile new poetry is to be possible. This realization is not a cognitive judgment that the predecessor is "unworthy" of respect or admiration; quite to the contrary, the predecessor is all too worthy. Misreading is simply a willful, pragmatic refusal to follow in an illustrious predecessor's more than ample footsteps. For the true poet, even striking out in a "wrong," but new, direction may be preferable to merely following another.

325. BLOOM, POETRY AND REPRESSION, *supra* note 317, at 5.

326. See SIGMUND FREUD, MOSES AND MONOTHEISM 9-13 (Katherine Jones trans., 1949); see also BLOOM, *supra* note 7, at 56-57 ("[T]he anxiety of influence, from which we all suffer, whether we are poets or not, has to be located first in its origins, in the fateful morasses of what Freud, with grandly desperate wit, called 'the family romance.'").

327. BLOOM, *supra* note 67, at 19; see also BLOOM, *supra* note 7:

[A] poet's stance, his Word, his imaginative identity, his whole being, *must* be unique to him, and remain unique, or he will perish, as a poet, if ever even he has managed his re-birth into poetic incarnation. But this fundamental stance is as much also his precursor's as any man's fundamental nature is also his father's, however transformed, however turned about.

Id. at 71.

328. BLOOM, *supra* note 7, at 5.

329. BLOOM, AGON, *supra* note 317, at 17; see also BLOOM, *supra* note 7, at 65 ("[T]he poet, in writing his poem, is forced to see the assertion against influence as being a ritualized quest for identity.").

For these reasons Bloom terms the process of misreading "perverse," in the root sense of "swerving" from a pre-established path.³³⁰ The latecomer poet's decision that "the great masterpieces of anterior art must be destroyed, if any great works are still to be performed"³³¹ has little to do with judgment, knowledge, and truth-seeking. It is, rather, an assertion of power that answers to practical, pragmatic, and emotional needs.³³² Instead of asking "Am I getting this poem [or text] right?" the strong misreader asks "[W]hat is it good for, what can I do with it, what can it do for me, what can I make it mean?"³³³ Misreading the precursor is for Bloom "willing error,"³³⁴ "falsification,"³³⁵ "a lie against the truth of time."³³⁶ The poet's (and critic's) agenda is "personal, agonistic and original,"³³⁷ so "[f]acts and arguments alike have little to do with" it.³³⁸ In this context, the only real requirement of a good reading is that it be *strong*.³³⁹ "For [poets], to be judicious is to be weak," says Bloom, "and to compare, exactly and fairly, is to be not elect."³⁴⁰ Indeed, Bloom approvingly cites Oscar Wilde's warning that "the critical imagination [must] never fall into careless habits of accuracy."³⁴¹

Complaints that Bloom's theory of poetic influence is itself "perverse" are, in a sense, beside the point. One must constantly keep in mind that different criteria of evaluation apply in different intellectual contexts. Bloom's elaboration of this theme provides a useful summary of his work:

Criticism is not a science, not even a "human science," and it is not a branch of philosophy. The theory of poetry need not meet the tests by

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330. See BLOOM, *supra* note 7, at 14 ("A poet swerves away from his precursor . . . This appears as a corrective movement in his own poem, which implies that the precursor poem went accurately up to a certain point, but then should have swerved, precisely in the direction that the new poem moves.").

331. BLOOM, *POETRY AND REPRESSION*, *supra* note 317, at 4.

332. See BLOOM, *supra* note 7, at 29 ("You have only to think of the strong emotional factors that make it hard for many people to fit themselves in with others or to subordinate themselves."); see also BLOOM, *supra* note 67, at 69-70 (viewing Nietzsche's "will to power" as "a paradigm for our understanding of intra-textual encounters").

333. BLOOM, *AGON*, *supra* note 317, at 19.

334. BLOOM, *supra* note 67, at 93.

335. *Id.* at 69.

336. BLOOM, *supra* note 7, at 130; see also BLOOM, *AGON*, *supra* note 317, at 41 ("[P]oetry and criticism . . . are closer to lies and self-deceptions than to any other fictions. If we ever get a vigorous philosophy of the lie, then we may be close to a useful philosophy of poetry.").

337. BLOOM, *THE BREAKING OF THE VESSELS*, *supra* note 317, at 37.

338. *Id.* at 26.

339. See *id.* at 25 ("with the strength of usurpation, of persistence, of eloquence").

340. BLOOM, *supra* note 7, at 19.

341. BLOOM, *AGON*, *supra* note 317, at 18 ("We must see the object, the poem, as in itself it really is not, because we must see not only what is missing in it, but why the poem had to exclude what is missing.").

which science and philosophy rate theory, or by which they decide what is or is not theory. The theory of poetry, like all criticism, is an art, a teachable and useful art, and its true criteria are poetic: it must be memorable, pragmatic where it is most visionary, and it must give pleasure, even if only to an elite. . . . By these criteria, most current theory can be given back to the empirical scientists, to the social scientists, and to the dialectical philosophers.³⁴²

2. *Judges as Poets.* As noted above, David Cole has developed an ambitious and imaginative application of Bloom's theories to Supreme Court adjudication.³⁴³ The first sentence of Cole's article, however, is a concession: "Supreme Court Justices are not often mistaken for poets."³⁴⁴ That observation seems almost to serve as a challenge for Cole—he proceeds to build his remarkable piece of misreading on the premise that Supreme Court Justices are very much like poets. Cole's thesis, in a nutshell, is that the Justices experience the "anxiety of influence" when confronted with the texts of their great legal precursors; consequently, their opinions are "misreadings" (in Bloom's sense) of those predecessors.

As Cole readily acknowledges, "seemingly fundamental" rationales underlie our expectation that the law will be ordered, principled, and predictable.³⁴⁵ Unlike the poet, who is presumptively free to create ideas out of thin air, the judge is expected to adhere to established rules and principles in construing and applying the law. "Indeed, the very legitimacy of judicial review seems to rest on the difference."³⁴⁶ Here, obviously, "legitimacy" is the key term: Adjudication derives legitimacy, and thereby authority, from its apparent fidelity to original texts (e.g., constitutions, statutes, regulations) and its adherence to precedent. A quick look at representative lawyers and poets makes the point well. Here is Blackstone on precedent:

[I]t is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments:

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342. BLOOM, *THE BREAKING OF THE VESSELS*, *supra* note 317, at 25-26.

343. Cole, *supra* note 313.

344. *Id.* at 858.

345. *See id.*

346. *Id.*; *see also id.* at 867 ("A legal order that was subject only to the whim and caprice of a few men in black robes who considered themselves divinely inspired would be little more than despotism; its legitimacy would likely rest on the threat of physical force rather than on the consent of the people.").

he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land . . . .³⁴⁷

And here is Emerson on self-reliance:

To believe your own thought, to believe that what is true for you in your private heart, is true for all men,—that is genius. Speak your latent conviction and it shall be the universal sense . . . . Familiar as the voice of the mind is to each, the highest merit we ascribe to Moses, Plato, and Milton, is that they set at naught books and traditions, and spoke not what men but what they thought. . . . They teach us to abide by our spontaneous impression with good-humored inflexibility then most when the whole cry of voices is on the other side.³⁴⁸

Cole nevertheless advances two reasons for treating Supreme Court Justices and poets alike: (1) Poets are not as “creative” as is commonly assumed; and (2) the Justices are *more* creative than is commonly assumed.³⁴⁹ As for the poets, their apparently creative acts are always breaks *from* a past tradition and are defined and understood in terms of their relation to that tradition.³⁵⁰ This is basically the Bloomian theory, as described above.³⁵¹ As for the Justices, Cole observes that they inevitably engage in some degree of interpretation, because legal texts and precedents do not otherwise yield any meaning.³⁵² “Supreme Court Justices are creative . . . insofar as the situations they face demand that a standing body of law be consistently reinterpreted and tailored to novel facts.”³⁵³ This is essentially the modern theory of meaning, as applied to legal method.

The picture that emerges is of a continuum. At one end are the poets; at the other end are those Justices who simply follow precedent. These Justices find legitimacy “in a kind of plodding belatedness.”³⁵⁴ Toward the middle are the “great” Justices who break sharply and creatively from precedent and tradition. Their greatness consists precisely in having abandoned mere legitimacy in favor of strong, constructive “misreadings” of important legal predecessors. “[A]s in poetry, those who ultimately succeed in the struggle and are viewed as great are not

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347. 1 BLACKSTONE, *supra* note 132, at 69.

348. RALPH W. EMERSON, *Self-Reliance*, in 2 THE COLLECTED WORKS OF RALPH WALDO EMERSON 27 (Joseph Slater et al. eds., 1979).

349. See Cole, *supra* note 313, at 858.

350. See *id.*

351. See *supra* text accompanying notes 315-42.

352. See Cole, *supra* note 313, at 858. Some rather unremarkable consequences follow: “[T]he meaning of a text is . . . always open to question. . . . A particular precedent may therefore appear to support several interpretations . . . .” *Id.*

353. *Id.*

354. *Id.* at 866.

those who follow precedent, but those who break radically from tradition by acts of 'misreading.'"³⁵⁵

According to Cole, the great "poets" of First Amendment law (the area he treats) are Justices Holmes, Brandeis, and Brennan.³⁵⁶ One might remark, in Bloom's terms, that they indeed share a certain "blindness towards the canonical authorities they sought to invert or subvert."³⁵⁷ But in Holmes's case, according to Cole, the "canonical authority" is Holmes's own opinion for the Court in *Schenck v. United States*.³⁵⁸

Schenck was convicted under the Espionage Act of 1917 for supervising the printing of an anti-war circular that exhorted: "[M]aintain, support and uphold" the "right to assert your opposition to the draft."³⁵⁹ In affirming Schenck's conviction, Holmes's opinion for a unanimous Court disposed of the free speech issue in a single paragraph, which included the so-called "clear and present danger" test:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.³⁶⁰

Eight months later, the Court was presented with the similar case of *Abrams v. United States*,³⁶¹ which involved the distribution of leaflets encouraging resistance to the United States and calling for a general strike in time of war.³⁶² A majority of the Court dismissed the petitioner's First Amendment claims summarily, as "definitely negated" by *Schenck*.³⁶³ This time, however, Holmes (joined by Brandeis) dissented, and in so doing he penned a ringing endorsement of First Amendment principles that hardly seems to have been written by the author of *Schenck*:

In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants

355. *Id.* at 859.

356. *See id.* at 866. Cole states that "nearly every free speech case since 1927 involves either an explicit or implicit misreading of [Holmes's and Brandeis's] theories." *Id.* at 892.

357. BLOOM, *supra* note 67, at 62.

358. 249 U.S. 47 (1919).

359. *Id.* at 51.

360. *Id.* at 52.

361. 250 U.S. 616 (1919).

362. *See id.* at 617.

363. *See id.* at 619.

had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper . . . the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.³⁶⁴

Cole explains this reversal as a classic manifestation of the "anxiety of influence": "In *Abrams*, Holmes strongly misread not only binding legal precedent, but precedent that he himself had very recently authored. In thus dissenting from himself, Holmes battled an authority more immediate and perhaps more powerful than any other precursor."³⁶⁵ Yet the invocation of Bloom's theories does not seem to add any special or additional explanatory power to Cole's discussion. He notes, for example:

The lasting power of the *Abrams* dissent lies in its restatement of the "clear and present" danger test . . . . Holmes revised the test he had enunciated in *Schenck* by elaborating on the elements of proximity and degree. The danger must be "immediate" and of virtually revolutionary proportions, so that "an immediate check is required to save the country." The immediacy must also be tangible . . . .³⁶⁶

A standard commentary, however, makes the same point just as well:

[I]n *Abrams*, Holmes infused into his restatement of "clear and present danger" new elements that afforded greater protection for speech. Most strikingly, he now maintained that the proximity of the danger from speech must be "clear and imminent," not just "clear and present." He used variations of "immediate" and "imminent" with remarkable frequency throughout his dissent, and even appended "forthwith" and "pressing" for additional emphasis.³⁶⁷

364. *Id.* at 629-30 (Holmes, J., dissenting).

365. Cole, *supra* note 313, at 882-83.

366. *Id.* at 884 (footnote omitted).

367. David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1308 (1983) (footnote omitted); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 843 (2d ed. 1988) ("Justice Holmes' . . . doctrinal approach was to infuse more immediacy into the *Schenck* formulation of the clear and present danger test and thereby sharply distinguish it from the loose predictions of remote consequence which had been sufficient to sustain criminal convictions in the previous cases.").

Cole observes further that "[t]hese elaborations give concrete meaning to the formal outlines of 'clear and present danger.' It seems probable that had Holmes suggested these specific thresholds in his original formulation, he would not have enjoyed majority support, nor could he have upheld Schenck's conviction."³⁶⁸ Yet a standard casebook raises similar concerns, without benefit of Bloom's theories:

Did the Abrams dissent simply apply the Schenck standard, or did it give a new meaning to clear and present danger? . . .

. . . .

. . . Does Abrams give new content to "clear and present danger"? Can it be said that the Schenck phrase was not turned into an effective safeguard of speech until the Abrams dissent?³⁶⁹

Cole's final triumph is to explain Holmes's doctrinal transformation in "antithetical" terms:

[Holmes's] elaboration in *Abrams* reads as if it is only a clarification, rather than a revision, of the earlier test. Thus, he exploits the precedential weight of the *Schenck* formulation while *infusing it with new meaning* by an antithetical reading. So revised, the clear and present danger test had the potential to offer substantial protection for speech.³⁷⁰

Yet, again, other commentators have reached the same conclusions (sometimes even formulated in the same words), albeit by more direct, pedestrian routes:

With the advent of the Holmes eloquence in *Abrams*, *Schenck* is *infused with new vitality* and *Debs* is conveniently forgotten. . . .

. . . .

The strategy is . . . to read the burst of eloquence at the end of the *Abrams* dissent into the casual *Schenck* dictum and then to claim that it was there all the time, that it was this intense commitment to a stringent test for freedom of speech that the whole Court underwrote in *Schenck*. And in a curious extra-precedential way it works.³⁷¹

The main premise of Cole's "antithetical" reading is that Holmes's own eight-month old *Schenck* opinion created in him the "anxiety of

368. Cole, *supra* note 313, at 884-85.

369. GERALD GUNTHER, CONSTITUTIONAL LAW 986, 995 (11th ed. 1985).

370. Cole, *supra* note 313, at 885 (emphasis added).

371. HARRY KALVEN, JR., A WORTHY TRADITION 138, 146 (1988) (emphasis added); cf. TRIBE, *supra* note 367, at 843 (Holmes's approach was "to *infuse more immediacy* into the *Schenck* formulation of the clear and present danger test.") (emphasis added); KALVEN, *supra*:

Drawing on his opinion for the Court in *Schenck*, [Holmes] seeks to capitalize on the casual language about clear and present danger. Chafee sees in this a retrospective explanation of *Schenck*, and he joins with Holmes and Brandeis in an effort to alchemize clear and present danger into *the* test, a test ratified by a unanimous Court.

Id. at 138; see also Yosaf Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases*, 36 STAN. L. REV. 1349, 1383 (1984) (In *Abrams*, Holmes "argued that his clear and present danger dictum in *Schenck* should be taken seriously and promoted to a legal principle.").

influence."³⁷² But it is highly questionable whether a Bloomian analysis even applies in this situation, where the misreader and the misread would be identical.³⁷³ In any event, much simpler and more plausible explanations of Holmes's transformation readily suggest themselves:

Holmes's concluding paragraph in his *Abrams* dissent . . . suggests that he himself recognized the vast change in his views on free speech during the eight months since he wrote *Schenck*, *Frohwerk*, and *Debs* . . . . The text . . . seems as much a confession of personal conversion as a statement of constitutional law. Holmes, perhaps unselfconsciously, appears to be commenting on himself and those of his contemporaries who came to a belated appreciation of the value of free speech.³⁷⁴

In effect, the great Justice changed his mind, as all people do from time to time.³⁷⁵ The law, however, is not supposed to change (at least not that much, that fast). So Holmes did what judges typically do when faced with "a conviction so clearly wrong"³⁷⁶ as to require a departure from past precedents. He distinguished the new case from the old, by "investing [the] facts with a tone helpful to his result"³⁷⁷—and insisted all the while that the old cases had been correctly decided and that the new decision represented not the slightest departure from them.³⁷⁸ The whole episode is easily understood as an example of standard judicial technique

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372. See Cole, *supra* note 313, at 882-83.

373. See *supra* text accompanying notes 365-71.

374. Rabban, *supra* note 367, at 1309-10.

375. For discussions of the various considerations that may have been on Holmes's mind (none of which involved the "anxiety of influence"), see *id.* at 1311-17; Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

376. ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 86 (1941); see also KALVEN, *supra* note 371, at 146 ("Justice Holmes's splendid indignation over the shabby draconian treatment of the radicals in *Abrams*, whom he saw as distributors of 'these poor and puny anonymities,' supplies a blood transfusion for the *Schenck* dictum.").

377. G. Edward White, *Looking at Holmes in the Mirror*, 4 LAW & HIST. REV. 439, 458 (1986); see also Rogat & O'Fallon, *supra* note 371, at 1387-89.

378. See *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) ("I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck*, *Frohwerk*, and *Debs* . . . were rightly decided.") (citations omitted); TRIBE, *supra* note 367, at 843 ("Holmes' dissent in *Abrams* is marred by ambiguity and by his insistence [that] *Schenck*, *Frohwerk*, and especially *Debs* had been rightly decided. One cynical interpretation of Holmes' handiwork might be that speech is protected only as long as it is ineffective.") (footnotes omitted).

in a case law regime.³⁷⁹ One has to look much farther afield to see the "anxiety of influence" at work here.³⁸⁰

3. *Judges as Philosophers.* Philosophy is another prime discipline to scavenge for non-legal sources of legal theory, and there is no shortage of attempts to view judges and Justices as if they were philosophers.³⁸¹ A recent article on *City of Richmond v. J.A. Croson Co.*³⁸² by Michel Rosenfeld is a good example of this phenomenon.³⁸³ Rosenfeld has a definite philosophical theory in mind, and the Justices generally fail to measure up to it.

After criticizing process-based constitutional theories, Rosenfeld states that "a principled assessment of the constitutionality of affirmative

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379. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970) (eliminating common law rules that had favored landlords); *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939) (eliminating the common law principle that a plaintiff who violates a statute designed to prevent the harm sustained is barred from recovery).

380. For discussions of how common this sort of "misreading" is (although usually without being called precisely that), see Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 228-34 (1980); Harry W. Jones, *Precedent and Policy in Constitutional Law*, 4 PACE L. REV. 11, 12-14 (1983); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 770-72 (1988); Weisberg, *supra* note 238, at 313-14.

381. See, e.g., Drucilla L. Coruell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988) (analyzing legal interpretation from a social philosophy perspective); David A.J. Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319 (1981) (analyzing the role of moral philosophy in determining fundamental constitutional values). But see Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) (arguing that law is a subject separate from both economics and moral philosophy); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990) (arguing that the law's deference to precedent conflicts with the independent spirit of philosophy); David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1040-60 (1991) (arguing that the law is moving away from philosophical interpretations toward more traditional legal analysis); M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67 (1990) (arguing that lawyers should not seek assistance from philosophers on practical moral problems); Philip Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution*, 79 COLUM. L. REV. 44 (1979) (criticizing the use of philosophy in constitutional takings cases); Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 MICH. L. REV. 123 (1987) (constructing "a theory of the problems likely to be encountered in the application of political philosophies to legal practice"); Book Note, 82 MICH. L. REV. 1144, 1145 (1984) (reviewing *ETHICS, PUBLIC POLICY AND CRIMINAL JUSTICE* (Frederick Elliston & Norman Bowie eds., 1982)) ("To the extent that applied philosophy approaches the purely philosophical end, it is not truly applied. To the extent it approaches the other end of the continuum, it is not philosophy."); see also Luban, *supra*:

[T]he pendulum among both legal academics and law students is swinging rapidly away from the past decade's infatuation with theory drawn from other disciplines, back in the direction of law's aboriginal grand tradition. . . . [T]he backlash against philosophy, and more generally against "fancy theory," is a predictable and symptomatic response to the dislocations of modernity.

Id. at 1040.

382. 488 U.S. 469 (1989).

383. Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989).

action can be made *only* by reference to a sufficiently developed conception of substantive equality"; indeed, "*explicit reference*" to such a conception is "*essential* to a coherent analysis of affirmative action."³⁸⁴ We can see already where Rosenfeld is heading: The judicial analysis will be wrong if it is incoherent, and the "*only*" way it can be coherent is to "refer explicitly" to "a sufficiently developed" philosophical theory of equality. Some of the philosophers next invoked to explain this theory are Nicholas Rescher,³⁸⁵ John Rawls,³⁸⁶ Robert Nozick,³⁸⁷ and Michael Bayles.³⁸⁸

Not surprisingly, those Justices who adopt the "correct" or "preferred" philosophical theory of equality turn out to have made the right decision in *Croson*: "This analysis suggests that there is sound support for Justice Marshall's position in *Croson* [because] a *systematic and comprehensive* justification for Justice Marshall's position *could be formed around a theory of substantive equality* that promotes equal opportunity and that possesses a *sufficiently developed conception* of it."³⁸⁹ This raises the ante somewhat, as now the Justices must not only choose and "refer explicitly" to the correct philosophical theory—and do so "coherently"—but also the theory itself must be "sufficiently developed" to permit of a "systematic and comprehensive" justification for the position taken. Needless to say, this is a tough standard to meet: "[W]hen closely examined in light of a *sufficiently elaborated conception* of substantive equality . . . the respective positions articulated by Justices O'Connor and Scalia seem not only inadequate but, in fundamental respects, squarely at odds with that principle."³⁹⁰

In other words, the *Croson* opinions of Justices O'Connor and Scalia are not merely "inadequate," they are dead wrong—or "not even close" to the mark, so to speak—which is somewhat surprising since they are on the prevailing side of a solid six-to-three majority in an area where the Court has rarely been able to summon up even a majority, and because "[n]otwithstanding their disagreements on several other matters, all nine

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384. *Id.* at 1777 (emphasis added).

385. NICHOLAS RESCHER, *DISTRIBUTIVE JUSTICE: A CONSTRUCTIVE CRITIQUE OF THE UTILITARIAN THEORY OF DISTRIBUTION* (1966).

386. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

387. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

388. Michael Bayles, *Reparations to Wronged Groups*, in *REVERSE DISCRIMINATION* (Barry R. Gross ed., 1977).

389. Rosenfeld, *supra* note 383, at 1790-91 (emphasis added).

390. *Id.* at 1791 (emphasis added); see also *id.* at 1793 ("Assuming the enshrinement of equal opportunity as the Constitution's accepted conception of substantive equality . . . Justice Marshall's opinion can be systematically rooted and justified, while those of Justices O'Connor and Scalia cannot.") (emphasis added).

Justices seem to agree in *Croson* on the proper conception of constitutional equality at the highest levels of abstraction."³⁹¹ Nevertheless, viewed in light of the correct or preferred philosophical theory of equality, the disagreements concerning the standard of review "evinced a failure on the part of *all* the Justices to make necessary connections between different levels of abstraction . . . ."³⁹² Evidently, sorting out "levels of abstraction" is not the strong suit of Supreme Court Justices, even those who have somehow arrived at the right result, but this should not be surprising. As explained in Part III,³⁹³ judges are not *supposed* to decide abstract questions or purely theoretical issues.

Rosenfeld concludes with perhaps the most amazing proclamation of all: "Under the . . . approach suggested here . . . *Croson* appears to be an *easy* case"³⁹⁴—an easy case, that is, for *upholding* the affirmative action plan, despite the fact that it was decisively invalidated by six justices, five of whom had just agreed for the very first time on the applicable standard of review. "Easy" in relation to what? Evidently, not anything having to do with constitutional law or the past decade of affirmative action jurisprudence or the actual judicial practice of the U.S. Supreme Court.³⁹⁵ It can be "easy" only as a test case of cherished philosophical theories, and nothing more.

Rosenfeld believes that "*shifting the debate* over the constitutionality of affirmative action to the terrain of substantive equality . . . permits *a more systematic assessment* of the various positions thus far *advanced in the debate*."³⁹⁶ Thus, "if one is *forced out into the open* to defend one's substantive values, it seems most unlikely that the respective positions of Justices O'Connor and Scalia in *Croson* . . . could be reconciled with a

391. *Id.* at 1749.

392. *Id.* (emphasis added).

393. See *supra* text accompanying notes 212-35.

394. Rosenfeld, *supra* note 383, at 1792 (emphasis added).

395. In fact, Richmond's affirmative action plan presented some rather obvious difficulties. It was promulgated in a city with a black population of about 50% and a black majority on the governing city council, included preferences for groups—such as Hispanics and Aleuts—that were unaffected by discrimination in Richmond and that might actually constitute majorities elsewhere in the country, and called for a 30% minority participation in subcontracting, as compared to the 10% figure approved by Congress (in the exercise of its explicit enforcement powers under Section 5 of the Fourteenth Amendment) and upheld by the Court in *Fullilove*. "In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3009 (1990). If this is an "easy" ease, what would a "hard" one look like?

396. Rosenfeld, *supra* note 383, at 1792 (emphasis added). I earlier analyzed and criticized the metaphor of "adjudication as a debate" in Part III(B)(2). See *supra* text accompanying notes 236-46.

genuine commitment to equal opportunity.”³⁹⁷ And when is the last time a Supreme Court Justice was “forced out into the open” to “defend”—or, even more implausibly, “debate”—his or her “substantive values”? In fact, the institution of the judiciary and the practice of adjudication are structured precisely to ensure that this does not and cannot happen (as explained in Part III³⁹⁸). But in Rosenfeld’s scenario, once the errant Justices are “forced into the terrain of substantive equality”—presumably by the theory’s inherent “intellectual authority” (which judges by training and inclination are free to ignore and from time immemorial have been spectacularly successful in ignoring):

[T]he proponents of these positions would either *have to* invoke a conception of substantive equality that does not rely on equal opportunity—a *risky proposition*, given the special place held by the principle of equal opportunity in the American ethos—or open themselves to the charge of betraying their own professed values.³⁹⁹

A third possibility seems not to have occurred to Rosenfeld: The Justices might say nothing and, with bemused smiles, retire silently to their chambers to resume work on actual questions of law. In other words, the Justices might simply decline to participate in the imaginary “debate” over philosophical theories that Rosenfeld has concocted.

A distinctly different approach to the *Croson* case, one that “is not a traditional defense or critique of the decision,” has been offered by Thomas Ross, who is simply “interested in talking about what the Justices, as storytellers, and what we, as story readers, ought to do in this special and wrenching discourse about affirmative action.”⁴⁰⁰ It turns out that Ross will be talking in the distinctive cadences of abstract theory. For those willing to listen, the discourse is special and wrenching indeed.

Consider, for example, the final sentence of Justice Scalia’s *Croson* opinion: “Since I believe that the appellee here had a constitutional right to have its bid succeed or fail under a decisionmaking process uninfected with racial bias, I concur in the judgment of the Court.”⁴⁰¹ Upon first glance, this might seem merely to be the Justice’s boilerplate conclusion summarizing his concurrence. As usual, Justice Scalia cannot agree with anyone, so he grudgingly concurs in the judgment alone. At worst, the sentence seems a bit awkward, with “the appellee” having been made into an “it” that has constitutional rights, which are usually reserved for persons (real or corporate); but this does not seem to portend anything

397. Rosenfeld, *supra* note 383, at 1793 (emphasis added).

398. See *supra* text accompanying notes 236-46.

399. Rosenfeld, *supra* note 383, at 1793 (emphasis added) (footnote omitted).

400. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 381 (1989).

401. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Scalia, J., concurring).

that a crash course for the Justice (or his law clerk) on, say, Strunk and White's *Elements of Style*⁴⁰² (or, if more time is available, Fowler's *Modern English Usage*⁴⁰³) would not solve. In any event, there is little to suggest that Justice Scalia is really trying to communicate anything here, other than to wrap up the opinion with a restatement of the obvious and perhaps get in one last dig at the idea of affirmative action.

For Ross, however, Justice Scalia's sentence is "a perfect composite of the abstract and vivid." To do justice to Ross's analysis and to convey its full flavor I must quote in full:

This sentence is abstract in several senses. First, it speaks of no names or places. It is universal in its ostensible implications. Second, the central and implicit assumption in this declaration is that once the bias of the ordinance is removed no other racial bias will exist. This assumption has compelling plausibility in an abstract conception of place and time. It becomes problematic in its real place and time. We would not realistically suppose that the public contracting process in Richmond, Virginia, or anywhere in America, would be wholly uninfected by racial bias once it is cleansed of the taint of affirmative action.

The last sentence of the Scalia opinion is also vivid and concrete in its final invocation of the metaphor of affirmative action as a societal cancer. The last sentence's proclamation of the "infection" of racial bias connects the white reader to the metaphor of affirmative action as the seed of our destruction. That metaphor, in turn, can take us again to the imaginings of oppression and revenge at the hands of black citizens. By this concluding sentence, Scalia has beautifully tied together his narrative. Scalia's narrative is one which, through its abstractions and metaphors, invites the reader to tell his own narratives and thereby make the abstract vivid and concrete. The individual pictorial imagination and the nonpictorial imaginings of the cultural influences are triggered again and again by Scalia's abstractions and metaphors. Scalia demands of his readers that they become more than mere readers—he demands that they become storytellers as well—and we do.⁴⁰⁴

For Ross, it seems, there is no such thing as overexplaining the obvious. If this single, rather unremarkable sentence of Justice Scalia is worthy of such extended intellectual analysis and exegesis, then we should probably consider publishing critical editions of the Justices' table talk.

4. *Judges as Hermeneuticians.* In recent years, legal scholars have frequently and increasingly turned their attention to the philosophical literature on "hermeneutics"—the general theory of interpretation.⁴⁰⁵

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402. WILLIAM STRUNK JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (1979).

403. H.W. FOWLER, *A DICTIONARY OF MODERN ENGLISH USAGE* (1965).

404. Ross, *supra* note 400, at 404-05 (footnotes omitted).

405. See, e.g., William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 620-21 & n.54 (1990) (discussing Hans-Georg Gadamer's view of hermeneutics); David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV.

A burgeoning legal literature has developed numerous connections to *legal interpretation*.⁴⁰⁶ In constitutional law, for example, the debate over "interpretivism" and "non-interpretivism" is an indirect manifestation of such interest.⁴⁰⁷ Statutory interpretation is another area in which legal scholars have begun making connections to hermeneutic theory.⁴⁰⁸ Finally, and perhaps most obviously, the law and literature movement may be considered an essentially "interpretive" enterprise. According to one critic:

"[t]hese works attempt to distance their readers from the law by minimising the coercive element in law, and then implicate the readers in the law by treating law as a literary expression of a community consisting of law's 'writers' and its 'readers,' including the readers of this sort of scholarship."⁴⁰⁹

209, 229 n.51 (1985-1986); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 920 & nn.202-03, 923-27 & nn.226-48 (1989) (critiquing the use of philosophical hermeneutics as a practical interpretive method); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 369 n.109 (1988) (discussing Hirsch's critique of Gadamer's hermeneutics).

406. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 n.2 (1986); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861 nn.2-3 (1987).

407. See GUNTHER, *supra* note 369, at 20 n.9, 528-29 nn.10-11; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 759-68 (2d ed. 1991); Brest, *supra* note 380; Moore, *supra* note 405, at 873 & n.5.

408. See, e.g., Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1050-52 & nn.14-16 (1991) (citing examples of recent works on judicial interpretation of statutes based on established theories of interpretation); Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965) (observing that notwithstanding the Parol Evidence rule, judges interpreting language always use extrinsic evidence in the form of their own experiences and views); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950) (arguing that legislative history is of limited value compared with traditional canons of statutory interpretation); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) (endorsing dynamic statutory interpretation in which the interpreter weighs current policy considerations more heavily than legislative history); Eskridge, *supra* note 405 (applying Hans-Georg Gadamer's hermeneutic theory of interpretation to statutory material); Walter B. Michaels, *Against Formalism: The Autonomous Text in Legal and Literary Interpretation*, 1 POETICS TODAY 23 (1979) (arguing that pure formalism does not exist because the process of reading itself involves use of extrinsic evidence in the form of the reader's preconceptions concerning the meaning of language); Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179 (examining the continued utility of historical and linguistic principles of interpretation in judicial analysis of statutes); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CAL. L. REV. 919, 928-29 & nn.50-61 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988)) (describing statutory interpretation within the authors' New Legal Process theory and criticizing the authors' dynamic statutory interpretation as disjunctive).

409. Tushnet, *supra* note 8, at 815; see also Robert M. Cover, *supra* note 406, at 1602 n.2 ("The violent side of law and its connection to interpretation and rhetoric is systematically ignored or underplayed."); Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1 (1988) ("[M]uch of the law-literature scholarship has produced skinny intellectual results because it combines overly conventional readings of literature with a complacent understanding of law.").

Robert Cover's *Nomos and Narrative* is a justly celebrated meditation on "the problem of 'meaning' in law—of legal hermeneutics or interpretation."⁴¹⁰ Cover's analysis brings him to a "simple and very disturbing" conclusion: "[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning."⁴¹¹ In his own way, Cover keenly recognizes what I have analyzed as the displacement of intellectual authority by institutional authority: "The position that only the state creates law . . . confuses the status of interpretation with the status of political domination."⁴¹² In fact, "from a position that starts as neutral . . . in its understanding of law, the interpretations offered by judges are not necessarily superior,"⁴¹³ because "the commitment of judges [is] to the hierarchical ordering of authority first, and to interpretive integrity only later."⁴¹⁴

Cover acknowledges that he has "played out a fantasy to some extent" in focusing on "an imaginary world in which violence played no part in life [and] law would indeed grow exclusively from the hermeneutic impulse—the human need to create and interpret texts."⁴¹⁵ He nevertheless holds out hope in the real world—precisely where I have seen none: "The challenge presented by the absence of a single, 'objective' interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another."⁴¹⁶ Cover seeks to meet this challenge by encouraging courts to articulate in greater depth and detail their "interpretive stance" and hermeneutic principles; that is, to "elaborat[e] the institutional privilege of force,"⁴¹⁷ "articulat[e] the constitutional mandate,"⁴¹⁸ and "express . . . judicial commitment to principle."⁴¹⁹

A similar but rather more extreme proposal has been advanced by William Eskridge.⁴²⁰ Eskridge seems to suggest not merely that judges should express or articulate their underlying hermeneutical principles, but also that they should *adopt and apply* those hermeneutic principles

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410. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6 (1983); see also Cover, *supra* note 406; Robert Garet, *Meaning and Ending*, 96 YALE L.J. 1801 (1987); Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative*, 96 YALE L.J. 1836 (1987).

411. Cover, *supra* note 410, at 18.

412. *Id.* at 43.

413. *Id.* at 29.

414. *Id.* at 58.

415. *Id.* at 40.

416. *Id.* at 44.

417. *Id.* at 63.

418. *Id.* at 54.

419. *Id.* at 66-67.

420. Eskridge, *supra* note 405.

that Eskridge endorses, namely, those of the German philosopher Hans-Georg Gadamer. As a former student of Professor Gadamer, I should be more than happy to see his ideas fruitfully applied to the study of legal interpretation. "The trouble is, as so often in philosophy, it is hard to improve intelligibility while retaining the excitement."⁴²¹

Eskridge concedes at the outset that Gadamer's main work, *Truth and Method*, "may seem a very strange book to many American lawyers. Although interested in legal hermeneutics, Gadamer is very much a philosopher and historian and very much not a lawyer."⁴²² Nevertheless, after a lengthy analysis, Eskridge concludes that it is safe to "[a]ssun[e] that Gadamer's hermeneutics represents a robust theory of interpretation and that his hermeneutics is applicable to statutory interpretation"⁴²³ (which sounds like a lot to assume). On this basis Eskridge proceeds to elaborate "implications . . . for theories of statutory interpretation."⁴²⁴

For Eskridge, various judges and Justices espouse and represent hermeneutical "theories" much as scholars and other theorists do. For example, there is "a 'textualist' approach, associated with Justice Scalia . . . an 'archaeological' [approach] recently associated with Judge Posner, [and a] 'present-minded' approach . . . developed by Professor Aleinikoff."⁴²⁵ In fact, when they are not busy judging, judges and Justices are arguing and debating "general theories" of statutory interpretation:

Most of the *general theorizing* about statutory interpretation is an effort to assert the primacy of one method or another for interpreting statutes. *The debate in the 1980s* saw Justice Scalia argue for textualism, as the only method consistent with the formal structures of the legislative process; Judge Posner argue for imaginative reconstruction, as the most uncontroversial evidence of what a directive utterance means; and Aleinikoff argue for a present-minded approach, as leading to the most sensible policy results. . . . [A] careful reading of *these apparently foundationalist theorists* indicates that they ought to be, and probably are, amenable to Gadamerian analysis of their theories.⁴²⁶

In Justice Scalia's case, for example, "Gadamer would find such a 'textualist' approach curious,"⁴²⁷ because "Gadamer's hermeneutics suggests that even the most avid textualist will not be able to avoid the influence

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421. Donald Davidson, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183 (1986).

422. Eskridge, *supra* note 405, at 615.

423. *Id.* at 637.

424. *Id.* at 638.

425. *Id.* at 610-11.

426. *Id.* at 638 (emphasis added).

427. *Id.*

of contextual considerations Justice Scalia denounces."⁴²⁸ In light of the proven philosophical superiority of Gadamerian hermeneutics, it is highly recommended that Justice Scalia change his ways: "In short, textualism alone cannot provide the interpretive closure usually expected of foundationalist theories, and it is to be hoped that even Justice Scalia would recognize that."⁴²⁹ Eskridge's guiding assumption seems to be that Justice Scalia would be a better Justice if he had a better "general theory" of hermeneutics. As I have argued in detail above,⁴³⁰ this assumption and its underlying premise of intellectual authority for the judiciary are highly questionable.

What the judicial articulation of hermeneutic principles means may best be seen in the context of a specific case. In *Bob Jones University v. United States*,⁴³¹ the Court held that a religious but racially discriminatory university did not qualify as a tax-exempt organization under the Internal Revenue Code, and that contributions to such a university were not deductible as charitable contributions.⁴³² Cover acknowledges in his Foreword that "[n]either the text of the Code nor the legislative history . . . seemed to compel [that] interpretation."⁴³³ Justice Rehnquist, writing in dissent, criticized the Court for holding as it did in the absence of congressional legislation.⁴³⁴ Cover, however, criticizes the Court for "avoid[ing] the question whether Congress could constitutionally grant tax exemption to a school that discriminates on the basis of race."⁴³⁵ (So much for "judicial restraint.")

As for the issues the Court did reach, Chief Justice Burger wrote:

Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," or should be encouraged by having all taxpayers share in their support by way of special tax status.⁴³⁶

According to Cover, "the force of the Court's interpretation . . . is very weak," because "the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an

428. *Id.* at 639.

429. *Id.* at 641.

430. See *supra* text accompanying notes 420-26.

431. 461 U.S. 574 (1983).

432. *Id.* at 598-99.

433. Cover, *supra* note 410, at 63-64 (footnote omitted).

434. *Bob Jones University*, 461 U.S. at 612 (Rehnquist, J., dissenting).

435. Cover, *supra* note 410, at 66.

436. *Bob Jones University*, 461 U.S. at 595 (citation omitted).

exercise of political authority was not unconstitutional."⁴³⁷ But, contrary to Cover's suggestions, the Court canvassed some twenty-five cases, legislative enactments, and executive orders before reaching the conclusion quoted above. The Court specifically cites and discusses *Plessy v. Ferguson*,⁴³⁸ *Brown v. Board of Education*,⁴³⁹ *Cooper v. Aaron*,⁴⁴⁰ and other cases to support its conclusion:

Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.⁴⁴¹

The Court cites and discusses the Civil Rights Act of 1964⁴⁴² and numerous other acts of Congress to support its conclusion that Congress has "clearly expressed its agreement that racial discrimination in education violates a fundamental public policy."⁴⁴³ The Court also cites and discusses executive orders dating back to the Truman, Eisenhower, and Kennedy administrations, as "but a few of numerous Executive Orders over the past three decades demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination."⁴⁴⁴ Yet, according to Cover, "[t]he grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong."⁴⁴⁵

Surprisingly, for Cover, *both* sides in the *Bob Jones University* case "are right to be dissatisfied" with the Court's opinion.⁴⁴⁶ "The Amish, the Mennonites, and all insular communities, *whatever their stand on race*," and regardless of whether they were involved in the case, "deserved a constitutional hedge against mere administration."⁴⁴⁷ Similarly, the "winners" in the case, "the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of

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437. Cover, *supra* note 410, at 66.

438. 163 U.S. 537 (1896).

439. 347 U.S. 483 (1954).

440. 358 U.S. 1 (1958).

441. *Bob Jones University*, 461 U.S. at 593.

442. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

443. *Bob Jones University*, 461 U.S. at 594.

444. *Id.* at 595.

445. Cover, *supra* note 410, at 66.

446. *Id.*

447. *Id.* at 66-67 (emphasis added).

racism.”⁴⁴⁸ Cover fails to explain how these apparently conflicting demands are to be satisfied, but he does hint that it would involve an “interpretive gesture,”⁴⁴⁹ “the articulation of the constitutional mandate,”⁴⁵⁰ and “the expression of judicial commitment to principle that is embodied in constitutional decision.”⁴⁵¹ Apparently, by elaborating its interpretive principles in more compelling ways, the Court would make both sides in the case more satisfied—simultaneously! The losers would have a more edifying explanation of why they should indeed have lost, and the winners would have more of a commitment from the Court to celebrate.

In a final footnote to *Nomos and Narrative*, Cover divulges that “[s]uch a commitment would necessarily have invited a host of problems” and would entail “massive potential change.”⁴⁵² “But,” he cheerily adds, “that is as it should be.”⁴⁵³ With the proper interpretive commitment from the Court, “we would soon be asking [questions involving] distinctions that can plausibly be drawn among the various cases” Cover has put, as well as “hundreds of others that might be put.”⁴⁵⁴ But not to worry: “The Court could not and would not have had to decide all those cases now,”⁴⁵⁵ although a Coverian approach to *Bob Jones University* “would certainly have invited an early encounter with them.”⁴⁵⁶

Cover has very high hopes for the quality of judicial and legal dialogue—hopes that, as I have demonstrated throughout this Article, are not justified by the current practice of adjudication or by any suggestions of intellectual authority on the part of the judiciary. But even if the judicial elaboration of interpretive principles he envisages were somehow to emerge, it is not at all clear that it would not bring with it far more problems than it solves. I have alluded to some of the more obvious difficulties above,⁴⁵⁷ and I previously discussed the divergence of legal theory and judicial practice as equally untenable gravitations toward the worst possible extremes of an opposition, with legal theorists taking an impossibly high road and judicial practice firmly in control of the low ground. Robert Cover’s vision, rich and evocative though it was, left the

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448. *Id.* at 67.

449. *Id.* at 66.

450. *Id.*

451. *Id.* at 66-67.

452. *Id.* at 67 n.195.

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.*

457. See *supra* text accompanying notes 431-56.

basic opposition between intellectual authority and institutional authority unresolved. And since his time, there is every reason to think that it has grown even more intractable.

V. CONCLUSION: THE "ANXIETY OF INFLUENCE" IN LEGAL SCHOLARSHIP

There is a real "anxiety of influence" in the law, but it is an anxiety not of judges or judicial decisionmaking or opinion-writing, but of *legal scholars*. These are the true "poets" of our profession—to the extent that it has any at all—and they are, like me, anxious to propound bold new theories, to cast off the smothering mantle of their predecessors, and to make a name for themselves in the larger world of the law. The plodding, stodgy analyses of judges and doctrinal scholars make the perfect foil for critical, creative legal scholars; but it is scholars from *other disciplines* who induce the anxiety.

It is the imperfectly assimilated methodology of the humanities that suggests judicial opinions can be made to yield up a rich, romantic, and evocative ore of systematic primary learning and original, theoretical wisdom. In seeking to make that humanistic connection, legal scholars seek the legitimizing aura of established intellectual authority to grace their efforts. No doubt, if judicial opinions had been written by poets and philosophers, they would merit critical comparison with the primary sources of those disciplines. Unfortunately, they are written under the severe pragmatic constraints of a most unusual social and historical institution that necessarily values institutional authority over true intellectual authority. Humanistic-style legal theorizing, which takes judicial opinions as its underlying basis, is thus limited by the inherently modest and rapidly dwindling claims that the work-product of the judiciary can make on our intellect. The willful disregard of these inherent limitations of legal method can be explained by an "anxiety of influence" notion, but it cannot be so justified.

These limitations do not, however, necessarily affect the discipline that is pointing them out. The true realm and *métier* of legal scholarship, like that of all scholarship, is the world of ideas. It bears approximately the same relationship to adjudication that poetry bears to nursery rhymes. The real, empirical world falls under the stern rule of physical causality and various forms of psychic determinism. Its dumbfounding array of unpleasanties includes incomprehensibly petty politics, intractable social and institutional structures that apparently bear no necessary relationship to anything, and all the old, familiar, immutable patterns of human development and behavior. Here it seems awkward and difficult to speak of being "free" in any important sense.

In the world of ideas, by contrast, everything appears bright, clean, pure, and potentially perfect. It is the world of Euclid's geometry at the dawn of creation, and everything serenely awaits the discovering, revealing, and redeeming articulation of a powerful mind.⁴⁵⁸ Within this realm, the scholar is free to soar as high and as far as native intelligence and imagination permit, for these alone are the coin of the realm. Intellectual merit is always immediately recognized in the world of ideas; time, and the often interminable delays that separate greatness from its recognition, exist only in the real world and are therefore not calculated. "[T]he voices in the Great Conversation tend more and more to speak in the present tense, as if all the authors were contemporaneous with one another, responding directly to each other's thought."⁴⁵⁹ Institutional authority carries no weight at all here; the only "laws" to speak of are the laws of logic and reason. Notions like "compulsion" and "authority" have meaning only in the context of more or less "compelling" or "powerful" arguments,⁴⁶⁰ "[f]or liberty of action and thought alone is capable of producing great things."⁴⁶¹

If things seem palpably otherwise it is because we are, despite ourselves, really unable to conceive of such a world. We are constantly importing into that realm obstacles and extraneous factors derived from the real world. But the "world of ideas" and true intellectual authority—as ideals—serve as indispensable *desiderata* for the scholar and provide the common measure that unites such apparently diverse enterprises as poetry, philosophy, and legal scholarship.⁴⁶²

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458. See KOYRÉ, *supra* note 107:

Nothing illustrates better Descartes' lack of concern for the traditional theories than the fact that he gives *The World* the form of a fiction: he is not undertaking to describe our own world, he explains, but a quite different one, a world created by God, infinitely remote from ours, somewhere in imaginary space; and created, one might say, with the means to hand. Therefore Descartes does not undertake to explain the laws of our world; quite the contrary, he intends to deduce the laws of that other world, the laws which God imposes on nature and by means of which he will create all the variety and multiplicity of objects which will be found in that other world.

We said that this is a fiction, a joke. So it is, because in fact it is our own world that Descartes is planning to reconstruct. But this device reveals an attitude which is typical of Descartes; for he does not actually ask questions about our own world. He does not ask, as Galileo had done, what nature's way of acting actually is. What Descartes asks is something different: it is, one could say, what way of acting *must* nature adopt?

Id. at 251-52 (footnote omitted); see also *Bork Hearings*, *supra* note 12, at 2441-42 (statement of George L. Priest).

459. HUTCHINS, *supra* note 86, at 79.

460. Cf. FRANCIS BACON, *THE NEW ORGANON* 41 (Fulton H. Anderson ed., 1960) ("The syllogism . . . commands assent . . . to the proposition, but does not take hold of the thing.").

461. JEAN L. D'ALEMBERT, *PRELIMINARY DISCOURSE TO THE ENCYCLOPEDIA OF DIDEROT* 62 (Richard Schwab trans., 1963).

462. See STANLEY FISH, *Profession Despise Thyself: Fear and Self-Loathing in Literary Studies*, in *DOING WHAT COMES NATURALLY* 197 (1989):

[W]hat is being demanded is a procedural purity that matches, in the sense of being answerable to, the presumed purity of the enterprise. That is, if literary works are produced in a realm far removed from the pressures and temptations of the everyday world—the world of commerce, competition, and politics—the business (not really a business at all) of honoring and explicating those works should be similarly removed, at least insofar as is possible.

Id. at 198. I use this quotation advisedly; of course, Fish wants to caricature the notion that literary works are produced “in a realm far removed from the pressures and temptations of the everyday world.” But, in some deep sense, that is *precisely* where great works of the literary and legal imagination originate. See, e.g., Philippe Nonet, *Reply*, 100 YALE L.J. 723 (1990). This is not to deny that the subjects of literary or legal interest may be found in the most lowly, ordinary, grimy settings imaginable. Nevertheless, intellectual greatness may be understood precisely as the ability to rise somehow above the grimy details and see them from a universal perspective, or to set them in relation to enduring (if not eternal) human concerns. See, e.g., HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1964); FYODOR DOSTOEVSKY, *CRIME AND PUNISHMENT* (1866); ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959); VICTOR HUGO, *LES MISÉRABLES* (1862); FRANZ KAFKA, *THE TRIAL* (1925); JOHN STEINBECK, *THE GRAPES OF WRATH* (1939). The fact that this is so difficult merely explains why it is so rare. In that sense, the critical, intellectual, and scholarly enterprise does have the redeeming “purity” Fish disparages. For further discussion of these issues, see Charles W. Collier, *Intellectual Authority and Institutional Authority*, 42 J. LEGAL EDUC. (forthcoming 1992).