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THE SUPREME COURT 1997 TERM

FOREWORD: THE LIMITS OF SOCRATIC DELIBERATION

Michael C. Dorf*

When the Justices divide over interpretive methodology, they usually do so along a fault line between textualists and purposivists. The Court's textualists aim to discover the original public meaning of federal statutes and the Constitution, while purposivists treat authoritative text as a starting point for the inference of legislative purposes that can be applied to concrete questions not expressly addressed by the text. Because textualism as practiced by its proponents on the Court is backward-looking, it is particularly ill-suited to the problems of a rapidly changing world to which the Court must constantly apply statutory and constitutional text. In principle, purposivism ought to be more dynamic, but in practice, purposivism and textualism share limitations that may be associated with the common law method of case-by-case development: like the Socratic method, the common law method as traditionally practiced exhibits a preference for speculation over experimentation. Increased reliance on social science would likely have only a small impact on the Court's work because of the judiciary's limited ability to gather and digest social science data. To better effect would be doctrines that channel learning by other political and social actors. Relying on a starkly instrumental conception of federalism and implementing other reforms, the Court could construct a model of "provisional adjudication," in which it worried less about finding the "true" meaning of authoritative texts — whether by textualist, purposivist, or common law methods — and instead focused on finding provisional, workable solutions to the complex and rapidly changing legal problems of our age.

During the final week of the 1997 Term, the Supreme Court invalidated the Line Item Veto Act,¹ upheld a requirement that the National Endowment for the Arts consider "standards of decency" in its awards,² declared that HIV infection is a disability under the Americans with Disabilities Act,³ and issued three rulings on the contentious issue of sexual harassment.⁴ This flurry of activity gave the impres-

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¹ See *Clinton v. City of New York*, 118 S. Ct. 2091, 2095 (1998).

² *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2171-72 (1998).

³ See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998).

⁴ See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2280 (1998) (holding "that an employer is vicariously liable for actionable [sexual harassment] caused by a supervisor, but subject to an

sion of a Court at the center of the nation's most pressing controversies. This impression is largely false — an artifact of a Court schedule that typically leaves the most difficult or divisive cases for last. For most of the 1997 Term, fundamental questions of liberty and equality were almost invisible.⁵ Even matters of federalism, so prominent in recent Terms, receded from view. Instead, the docket was crammed with technical questions of “lawyer’s law.” Such issues are an essential ingredient of every Term’s caseload, but this year they were especially dominant, as the Court turned its attention to filling relatively small gaps in acts of Congress and the Court’s own precedents.

The relative quiescence of the 1997 Term provides an opportunity to consider the interpretive issues the Court faces in its routine cases no less than in its momentous ones; although the Term produced few major *substantive* battles,⁶ there were a number of interesting *methodological* skirmishes. Given the docket’s composition, the principal disagreements concerned how to read statutes. How dispositive is statutory text? Should the Court attempt to discern the intent of the Congress that enacted a statute, and if so, using what tools? Is the meaning of a statute fixed at its adoption or does it evolve?

affirmative defense looking to the reasonableness of the employer’s conduct as well as that of a plaintiff victim”); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2261 (1998) (same); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1993 (1998) (holding that a school district is not liable under Title IX for sexual harassment of a student by a teacher absent actual notice to, and deliberate indifference by, the school authorities). Earlier in the Term, the Court decided a fourth sexual harassment case. See *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1002 (1998) (holding that Title VII does not bar same-sex sexual harassment claims).

⁵ One of the most interesting cases on the Court’s docket when the Term began was dismissed upon the parties’ request. See *Piscataway Township Bd. of Educ. v. Taxman*, 118 S. Ct. 595 (1997), *cert. granted sub. nom. Piscataway Bd. of Educ. v. Taxman*, 117 S. Ct. 2506 (1997), and *cert. dismissed*, 118 S. Ct. 595 (1997). The case involved the use of race as a tie-breaker in employee layoffs. See *Taxman v. Board of Educ.*, 91 F.3d 1547, 1549 (3d Cir. 1996).

⁶ As in the previous Term, see *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997), the sharpest disagreement of the 1997 Term occurred in a case in which the Justices were unanimous about the result. In *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), the Court held “that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.” *Id.* at 1720. En route to that unanimous conclusion, the Court invoked the “shocks-the-conscience” test derived from *Rochin v. California*, 342 U.S. 165 (1952). *Lewis*, 118 S. Ct. at 1717. This was too much for Justice Scalia to stomach. He wrote separately to decry what he saw as the Court’s abandonment of the “objective” approach to substantive due process that he believed had been endorsed in the previous Term’s decision in *Glucksberg*, 117 S. Ct. at 2268. See *Lewis*, 118 S. Ct. at 1723–24 (Scalia, J., joined by Thomas, J., concurring in the judgment). The majority fired back, contending that the shocks-the-conscience standard is a threshold for the statement of a claim that executive action violates substantive due process. See *Lewis*, 118 S. Ct. at 1717 & n.8. In addition, Justice Kennedy explained that the seemingly subjective shocks-the-conscience test marks the beginning of an inquiry into objective, albeit evolving, traditions. See *id.* at 1722–23 (Kennedy, J., joined by O’Connor, J., concurring). Unlike *Glucksberg*, in which the Court’s unanimous result masked serious disagreements about how future cases should be handled, *Lewis* was a strange case to provoke debate over judicial subjectivity, because the shocks-the-conscience standard seemed to be no more than an intermediate step in a decision that, far from granting courts discretion, announced a per se rule.

When the Justices divided over questions such as these, they usually did so along a fault line between *purposivists* and *textualists*. Acknowledging that legislation cannot be drafted to anticipate every eventuality, purposivists treat authoritative text as a starting point for the inference of reasonable legislative purposes that can be applied to concrete questions not expressly addressed by the text. Fearing that purposivism allows too much room for subjective value judgments by unelected, unaccountable judges, the Court's textualists aim to discover and apply the original public meaning of federal statutes and the Constitution.⁷

However, just as the rush of "big" cases at the end of the Term provides a misleading picture of the *substance* of the Court's workload, the debate between purposivists and textualists that appears throughout Volume 118 of the *Supreme Court Reporter* provides a misleading picture of the Court's *methodologies*. The differences between purposivists and textualists are not nearly so sharp as the disputants often claim. Purposivists sometimes write opinions that could have been written by textualists,⁸ and (somewhat less frequently) vice-versa.⁹ Overall, the Court is eclectic in the sources to which it turns

⁷ See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 16–18, 37–41 (Amy Gutmann ed., 1997).

⁸ For example, Justices Breyer and Souter appear to be the leaders of the purposivist camp. Yet the former's opinion for the Court in *Muscarello v. United States*, 118 S. Ct. 1911 (1998), was devoted to discerning the plain meaning of the expression "carries a firearm," as used in 18 U.S.C. § 924(c)(1). Only after resolving the case on textual grounds did the opinion consider congressional intent, "the statute's basic purpose," and "its legislative history." *Muscarello*, 118 S. Ct. at 1915–19. Similarly, Justice Souter's opinion for the unanimous Court in *Geissal v. Moore Medical Corp.*, 118 S. Ct. 1869 (1998), consisted almost entirely of a close parsing of the text of the Consolidated Omnibus Budget Reconciliation Act of 1985; the Court rejected the respondent's proposed reading principally because it "will not square with the text." *Id.* at 1874; see also *Forney v. Apfel*, 118 S. Ct. 1984, 1986 (1998) (Breyer, J., for a unanimous Court) (holding that a district court decision remanding a social security claim to the Social Security Administration for further proceedings was an appealable final decision because 42 U.S.C. § 405(g) "means what it says").

⁹ *Cass County v. Leech Lake Band of Chippewa Indians*, 118 S. Ct. 1904 (1998), is arguably an example of a purposivist opinion written by a Justice with strong textualist leanings. In that case, Justice Thomas's opinion for a unanimous Court found an "unmistakably clear" congressional intent to permit state and local taxation of freely alienable Indian land by inquiring what purpose would be reasonable to attribute to Congress. *Id.* at 1909; see also *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956, 1963 (1998) (Scalia, J., for the Court) ("If discrimination in charges does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge." (emphasis added) (quoting *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993)) (internal quotation marks omitted)); *Bryan v. United States*, 118 S. Ct. 1939, 1951 (1998) (Scalia, J., dissenting) (arguing that the majority approach leads to "strange results," and suggesting an alternative congressional purpose).

for guidance in both statutory¹⁰ and constitutional¹¹ cases. More fundamentally, the textualism-versus-purposivism debate masks the degree to which the Justices all proceed from the same methodological starting point: textualists and purposivists alike respect precedent, and for this reason, the Court's interpretation of statutory and constitutional provisions has strong affinities with the common law method in which courts reason by analogy to develop legal principles on a case-by-case basis.

Therefore, any cogent description of Supreme Court jurisprudence must include an account of the common law method. In the leading such account, Holmes claimed that the common law's genius is its adaptability; as social circumstances change, common law doctrines gradually change with them.¹² Indeed, this very flexibility leads formalists to worry that judges who use the common law method will subordinate authoritative text to their own subjective normative views.¹³ Thus, both friends and foes of the common law method see it as a dynamic process.

This Foreword challenges the conventional wisdom that the common law method — as traditionally understood and as currently prac-

¹⁰ Any number of examples could be adduced. I choose one almost at random. In *Caron v. United States*, 118 S. Ct. 2007 (1998), the Court stated, in textualist fashion: "While we do not dispute the common sense of [the] approach [urged by the petitioner], the words of the statute do not permit it." *Id.* at 2011. Just three paragraphs later, the Court stated, now in purposivist fashion, that "petitioner's approach yields results contrary to a likely, and rational, congressional policy." *Id.* at 2012.

¹¹ For example, Justice Souter's opinion for the Court in *United States v. Balsys*, 118 S. Ct. 2218 (1998), invoked arguments based on constitutional text, the Framers' understanding, historical practice, the Court's precedents, the overriding purpose of the Bill of Rights, and policy considerations to conclude that the Fifth Amendment privilege against self-incrimination does not protect a witness who fears only foreign prosecution. *See id.* at 2222–36. *See generally* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787–96 (1997) (discussing eclecticism in constitutional adjudication and arguing that any method of constitutional interpretation that derives its legitimacy from a variety of sources will inevitably point in conflicting directions). Note also that the methodologies adopted by the Justices are not always predictable. In *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), for example, Justice Stevens's opinion for the Court invalidated the Line Item Veto Act on the ground that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Id.* at 2103. Joining this textualist — or even formalist — opinion were Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsburg. Justices Scalia and Breyer (each joined in part by the other and by Justice O'Connor) wrote separate opinions that mixed textualist and purposivist arguments, treating the Line Item Veto Act as the functional equivalent of a permissible delegation to the President. *See id.* at 2115–18 (Scalia, J., concurring in part and dissenting in part); *id.* at 2120–31 (Breyer, J., dissenting). Who could have predicted this lineup based on jurisprudential, political, or any other factors?

¹² *See* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1–38 (Little Brown & Co. 1990) (1881).

¹³ *See* Scalia, *supra* note 7, at 17–18 (worrying that "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field").

ticed by the Supreme Court — provides adequate means for adjusting legal doctrine to accommodate changed circumstances. It argues that in a world of rapidly accelerating technological and social change, common law gradualism is an increasingly ineffective means of legal evolution. Common law gradualism does not enable the Court to learn from experience in any systematic fashion. The Court typically treats prior cases much like classroom hypothetical examples, which are useful for provoking intuitions but not especially informative about the operation of legal norms in the real world.

These shortcomings of the traditional common law method compound problems caused by institutional constraints generally understood to be rooted in Article III. The Justices live and work in relative isolation from major currents of American political, technological, and social life.¹⁴ Their principal sounding boards, their law clerks, do little to broaden the Justices' skills or perspectives: clerks have almost no practical experience as lawyers, much less as policymakers, and are drawn from the same legal culture as the Justices themselves.

The Court's isolation thus intensifies the same dilemmas that increasingly face the other branches of the national government. No institution of the central government — the Court, Congress, the Executive, or a centralized administrative bureaucracy — can effectively superintend the detailed application of the general norms it or some other institution propounds. But the extent of the Court's institutional and methodological limitations poses special problems.

What can the Court do to overcome its limited ability to adjust its doctrines to the rapidly changing world? Explicitly paying greater attention to the likely consequences of its decisions and to the empirical assumptions underlying its doctrines would be a step in the right direction,¹⁵ because even if one believes that courts are meant to be fora of principle rather than policy,¹⁶ any sound account of the role of courts should make real-world experience relevant to adjudication. However, we should not expect too much from a conscious judicial adoption of bureaucratic fact-finding and regulatory methods: even administrative agencies increasingly find that they cannot formulate regulations that adequately respond to diverse and rapidly changing social circum-

¹⁴ This is not a new observation. See Erwin N. Griswold, *The Supreme Court, 1959 Term — Foreword: Of Time and Attitudes — Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 81 (1960) (“In our situation and tradition, the Supreme Court is inevitably an isolated and remote body.”).

¹⁵ Thus, Judge Posner argues that the Court should make greater conscious use of social science research. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11–12 (1998).

¹⁶ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 69 (1985) (distinguishing principle from policy).

stances, and thus the most innovative forms of regulation depart from the model of the centralized problem solver exercising expertise.¹⁷

Ameliorative reforms — if not cures — are available. For example, the Court's recent preoccupation with federalism¹⁸ could be turned to effective use were the Court to treat federalism as a flexible principle that allows decentralized experimentation, rather than as a doctrine focused primarily on the "dignity" of states.¹⁹ By relying on this starkly instrumental conception of federalism and implementing other reforms, the Court could construct a model of *provisional adjudication*. It would worry less about finding the "true" meaning of authoritative texts,²⁰ and instead — while sensitive to its own institutional limitations — would focus on finding provisional, workable solutions to the complex and rapidly changing legal problems of our age.²¹

The Foreword proceeds in three parts. Part I describes the conflict between textualism and purposivism. Although the textualism-versus-purposivism debate has less significance than the disputants believe, it is hardly irrelevant. To the extent that important jurisprudential questions will, in the short run, continue to be framed within the terms of this debate, I would cast my lot with the purposivists. As espoused by its proponents on the Court, textualism is a form of originalism.²² It is

¹⁷ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing an emerging shift toward democratic experimentalism and decentralization).

¹⁸ See, e.g., *Printz v. United States*, 117 S. Ct. 2365 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁹ This would require a shift in the dominant understanding of federalism. See Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L.J. 825 (1998); Dorf & Sabel, *supra* note 17, at 419–38; Henry Paul Monaghan, *The Supreme Court, 1995 Term — Comment: The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102, 132 (1996).

²⁰ Cf. Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 146–52 (1997) (arguing that Ronald Dworkin's hypothesis that right answers exist in hard cases is irrelevant to the work of the courts because there are no objective measures of legal truth).

²¹ Richard Fallon's Foreword of a year ago provides a useful point of comparison and contrast. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997). I agree with Fallon that "[i]dentifying the 'meaning' of the Constitution is not the Court's only function. A crucial mission of the Court is to implement the Constitution successfully." *Id.* at 57. (I would also include interpretation of federal statutes in this mission.) Fallon approves of the use of detailed doctrinal tests that subordinate individual Justices' normative views, on the ground that doctrine promotes stability. Thus, except in extraordinary cases, he favors fairly strong adherence to stare decisis, even in constitutional law. See *id.* at 106–26. I am more skeptical of the power of doctrinal tests to determine outcomes than Fallon appears to be. I also see detailed doctrine as an effort at the sort of centralized decisionmaking that the accelerating pace of technological and social change in recent decades has destabilized in private and public administration. See generally Dorf & Sabel, *supra* note 17 (discussing democratic experimentalism and decentralization). Thus, among other differences between Fallon's view and my own, I would prefer to see stare decisis play a less important role in the Court's work than Fallon would.

²² If originalism connotes deference to the subjective views of the enactors of statutory or constitutional text, then it clearly differs from textualism. See Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1084–88

backward-looking²³ and, for that reason, particularly ill-suited to the problems of a rapidly changing world to which the Court must constantly apply statutory and constitutional text. In contrast, in its reliance on principles that leave the decisionmaker greater room to maneuver in subsequent cases, purposivism's advantages over textualism mirror the advantages of standards over rules.²⁴ I am thus mildly encouraged that during the 1997 Term, the purposivists won most of the battles in which interpretive methodology appeared to make a difference.²⁵

Part II moves beyond the textualism-versus-purposivism debate by noting the ubiquity of the common law method in the Court's work. The Part explains the limitations of the traditional common law method by exploring its connections with the Socratic method, which in turn exhibits the preference for speculation over experimentation found in the philosophy of Plato. Of course, I do not claim that judges who employ the common law method are unwitting Platonists. Instead, I contend that the connection to Plato stems from the style of thought that dominated law school education when the current Justices were trained, and that, in substantial measure, continues to epitomize "thinking like a lawyer."

Part III locates building blocks for a model of provisional adjudication in some of the Court's existing doctrines and practices. I argue, among other things, that the Court ought to give greater deference to state policies that arguably infringe constitutional rights than to equivalent uniform national policies infringing such rights;²⁶ permit some doctrinal disagreements among the lower courts to go unresolved in order to discern the practical consequences of different legal re-

(1992). Originalism, however, can connote original meaning rather than original intent, and I use the term in the former sense.

²³ In characterizing originalism (and the form of textualism endorsed by Justice Scalia) as backward-looking, I do not deny that originalist arguments are often invoked as a means of breaking with established precedent. See Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (forthcoming 1998) (manuscript at 25-29, on file with the Harvard Law School Library) (describing the practices of the Warren Court). However, the persuasiveness of originalist arguments usually rests on their ability to connect a given principle of law with the past rather than with the present or future.

²⁴ See Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-69 (1992). The textualist would undoubtedly reply that by constraining judicial discretion, textualism's advantages over purposivism mirror the advantages of rules over standards.

²⁵ The victory may, of course, prove ephemeral. It was, after all, only a few years ago that the textualists appeared to have the upper hand, see Peter L. Strauss, *On Resegregating the Worlds of Statute and Common Law*, 1994 SUP. CT. REV. 429, 436-47 (1995), and they may yet regain it.

²⁶ See *infra* pp. 62-65.

gimes;²⁷ and treat more of its precedents as provisional than is formally permitted under the doctrine of stare decisis.²⁸

Before coming to the details of my critical and constructive projects, I must consider a threshold objection and avert a potential confusion. First, the objection: one might complain that a critique of the Court's methods for being insufficiently plastic mistakenly assumes that adjudicatory flexibility is an unalloyed virtue. On the contrary, the objection continues, to further predictability, stability, evenhandedness, and the range of other values traditionally associated with the rule of law²⁹ typically requires *inflexibility* as a limit on arbitrary decisionmaking, so that what I identify in this Foreword as a weakness of textualism and (to a somewhat lesser extent) all of the Court's interpretive methods is actually a strength. To use ancient categories, there is a tradeoff between law and equity.³⁰

My response to this objection challenges its premise. Formalists assert that their method better honors the rule-of-law side of the tradeoff than do more dynamic methods.³¹ However, in constitutional interpretation, that claim has been repeatedly challenged on the ground that originalism (which is typically defended in formalist terms) does not deliver on its own promise.³² Instead of substituting objective criteria external to the decisionmaker for judicial subjectivity, formalism merely disguises the role of subjective value choice.³³ Textualism, originalism, and other brands of formalism do not trade flexibility for

²⁷ See *infra* pp. 65–66.

²⁸ See *infra* p. 73.

²⁹ See Richard H. Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–9 (1997).

³⁰ See Allen Dillard Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review, 39 B.C. L. REV. 43, 72–80 (1997); John P. Dawson, *Coke and Ellesmere Disinterred: The Attack on the Chancery in 1616*, 36 ILL. L. REV. NW. U. 127, 146–52 (1941); David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 573–83 (1986).

³¹ See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

³² See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 106 (1991); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 4 (1985) (describing originalism as "arrogance cloaked as humility"); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221–31 (1980); Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 7, at 65, 74.

³³ Moreover, the Court's self-described originalists lack the courage of their convictions. For example, Justices Scalia and Thomas are both deeply committed to the notion that the Equal Protection Clause commands "color-blindness." See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring); *id.* at 240 (Thomas, J., concurring). Yet they make no serious effort to derive that principle from the original understanding of the Clause, nor do they confront the substantial body of evidence indicating that in 1868, equal protection was generally understood to be consistent with government assistance programs granting benefits on expressly racial grounds. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–33 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–83 (1985); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 556–65 (1998).

predictability, but for the false promise of predictability. To put the point provocatively, all methods of interpretation are dynamic,³⁴ if for no other reason than that there is no such thing as “adhering” to an old meaning in a new context.³⁵

This response to the formalist’s objection points the way to the heart of my argument about the limitations of the common law method of case-by-case legal evolution elaborated in Part II: the choice is not one between stasis and dynamism, but between different *kinds* of dynamism. Here, a parallel from the private sector may prove illuminating. In the old world, firms could expect to recoup investments in single-purpose machinery and large inventories over the course of long product cycles; in the emerging world, the race is to the flexible.³⁶ So too in law. In the old world — already fast vanishing by the turn of the last century if not much earlier — it seemed as though legal norms could emerge gradually out of generations of experience with their operation under relatively fixed social conditions. In the modern (not to mention postmodern) world, courts must apply seemingly fixed legal principles to contexts that change radically within a decade. Perhaps this phenomenon is a relatively new one, or perhaps it is just that we have only recently become aware of the problem, but in either case, we cannot put the genie back in the bottle.

Consider an important case from the last year, albeit not one decided by the Supreme Court. In *United States v. Microsoft*,³⁷ the D.C. Circuit overturned a preliminary injunction prohibiting Microsoft from requiring computer manufacturers that install its operating system, Windows 95, also to install its Internet browser, Explorer. The court was guided by the view that judges should not “embark on product design assessment.”³⁸ Although one could argue that the court was overly solicitous of Microsoft’s contention that the operating system and browser constitute an integrated product,³⁹ the court’s attitude was wholly understandable, given the tendency of computer technology to evolve more rapidly than legal doctrine formulated in the conventional way.

³⁴ See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 13–47 (1994).

³⁵ See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 398 (1995) (noting that originalists routinely acknowledge that changed facts justify applying the same text in new ways).

³⁶ See Dorf & Sabel, *supra* note 17, at 292–314.

³⁷ 147 F.3d 935 (D.C. Cir. 1998).

³⁸ *Id.* at 949.

³⁹ For example, the court accepted as evidence of integration the fact that “the operating system[']s use [of] the browser’s HTML reader . . . provide[s] a richer view of information on the computer’s hard drive.” *Id.* at 952. If such trivial enhancements are all that is required for two products to be considered integrated, firms can easily evade the antitrust laws by building such features into otherwise distinct products.

Now I come to the potential confusion. The D.C. Circuit's response to the Microsoft litigation was a judicial retreat. My sympathy for this approach should not be confused with a general endorsement of the "passive virtues."⁴⁰ Arguments for judicial minimalism often find roots in the longstanding obsession of constitutional law and scholarship with what Alexander Bickel termed the "countermajoritarian difficulty."⁴¹ Bickel's objection sounded in the legitimacy of judicial review, but whether the concern is legitimacy or, as is more typically true in statutory cases, expertise,⁴² the standard prescription is deference to decisions reached by the more accountable, better informed, elected branches.⁴³

In its prescriptive mode, this Foreword does not follow the Bickelian pattern. Although some of the doctrines I commend under the rubric of provisional adjudication would result in less judicial decision-making, I do not contend that judicial passivity is always a virtue. For example, in discussing the Court's resolution of the sexual harassment cases, I argue that the Court missed an opportunity to use its bully pulpit to articulate a broad moral vision.⁴⁴ A Bickelian could fairly disdain this and other of my prescriptions as unduly "activist," although I would argue that the term should not necessarily carry a pejorative connotation.

In any event, the principal goal of this Foreword is diagnosis rather than prescription. The proposals sketched below in Part III — and they are only sketched, not elaborated in detail — serve to check the overly negative tendencies of any primarily descriptive and critical project.⁴⁵ Further, my prescriptions serve only to ameliorate. The

⁴⁰ Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1961).

⁴¹ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). The obsession with the countermajoritarian difficulty is a relatively recent phenomenon. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship.")

⁴² See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844–45 (1984).

⁴³ Cass Sunstein has lately championed a Bickelian revival. See generally CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 175–78 (1996) (advocating rules of interpretation designed to minimize the risks of judicial discretion and promote judicial restraint); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1751–54 (1995) (stating that "a prime purpose of the rule of law is to rule off limits certain deep ideas of the right or the good"); Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (arguing that judicial minimalism appropriately allocates power in a democracy).

⁴⁴ See *infra* p. 78.

⁴⁵ Perhaps such prescriptions are not entirely obligatory. See Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255, 2332 (1997) ("There can be no conclusion if one means by that a recommendation of a policy or recipe for action superior to those I have critiqued.")

common law method that I identify in Part II as lying at the heart of the Court's approach to adjudication has extraordinarily deep roots in Anglo-American legal thought. Even if the Court were inclined to tear up those roots, it would be reckless to do so without some understanding of how the new regime would fit within the overall scheme of American government.

I have elsewhere explored the partial emergence of one such scheme and outlined the new roles the Court could play in it.⁴⁶ Here, in contrast, I provide an account of the methods the Court uses to play its current role. I shall come soon enough to the limitations shared by the competing methodologies the Justices employ, but first, we should do the Justices the honor of taking seriously the differences that they believe divide them.

I. TEXTUALISM VERSUS PURPOSIVISM

This Part describes the leading interpretive approaches expressly articulated by the Justices of the Supreme Court. As Part II explains in greater detail, the differences between the philosophies described in this Part — textualism and purposivism — mask the degree to which the Justices all proceed from similar assumptions. But this is not to say that the terms in which the Justices discuss their methodological differences are unimportant. At the very least, the textualism-versus-purposivism debate provides a window into what the Justices believe to be their points of disagreement, and thereby reveals the unspoken assumptions they all share.

The approach of this Part is primarily descriptive. Where it turns critical, textualism is the main target. I contend that, as practiced by the Supreme Court, textualism in statutory interpretation is a close relative of originalism in constitutional interpretation, and shares its main defects.⁴⁷

⁴⁶ See Dorf & Sabel, *supra* note 17, at 388–404, 459–64.

⁴⁷ In addressing statutory and constitutional interpretation together here and throughout this Foreword, I do not mean to suggest that there are no salient differences between these two enterprises. One might think that because our Constitution is written in broad terms and designed to endure for generations, greater flexibility is warranted in interpreting it than in interpreting statutes aimed at relatively narrow problems. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 90–92 (1991). Alternatively, one might think that because an erroneous interpretation of a statute can be “corrected” by the democratic process more readily than an erroneous constitutional interpretation can be, the Court should be more willing to give expansive interpretations to statutory text than to constitutional limits. (Proponents of this view could also cite *McCulloch*, emphasizing that the Court's flexible approach there was one that allowed Congress broad interpretive latitude.) Finally, not all constitutional provisions speak in majestic generalities, see J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 995 (1998) (noting that the canonical counterexample is the requirement that the President be at least thirty-five years old), nor do all statutes set forth detailed, technical requirements, see, e.g., Sherman Act, 15 U.S.C. § 1 (1994) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or com-

A. Defining Textualism and Purposivism

The term “textualism” implies that there is an alternative approach to statutory interpretation that does not much concern itself with statutory text. The chief candidate for such an approach is exemplified by the 1892 decision in *Church of the Holy Trinity v. United States*,⁴⁸ in which the Court stated that an act that falls within the general language of a statutory prohibition may nonetheless be considered outside the statute’s coverage if the contrary result would be absurd.⁴⁹ However, a method of interpretation that defines itself in opposition to *Holy Trinity* is grossly underdetermined; the case has not been cited favorably in a majority opinion of the Court in nearly a decade,⁵⁰ and even in the most recent case to cite it, the Court relied on a legislative purpose derived in significant part from the text of the statute itself.⁵¹

If textualism cannot be defined as the antithesis of *Holy Trinity*, how should it be defined? Justice Scalia, the Court’s leading textualist, would contrast textualism with intentionalism, the view that sees statutory interpretation as a quest for the legislature’s intent.⁵² But the rejection of subjective legislative intent as the ultimate goal of statutory interpretation — like the rejection of *Holy Trinity* — dramatically under-specifies the attitude of textualists because jurists of many stripes reject intentionalism.⁵³ In recent memory, the best-known sustained attack on the quest for subjective legislative intent is Ronald Dworkin’s argument in *Law’s Empire*.⁵⁴ Dworkin argues that even if one begins (naively, in his view) with the belief that

merce among the several States, or with foreign nations, is declared to be illegal.”); Communications Act of 1934, 47 U.S.C. § 309(a) (1994) (requiring that Federal Communications Commission licensing decisions serve the “public interest”). I do not deny the importance of these distinctions, nor do I contend that they somehow cancel each other out. I invoke constitutional interpretation because it provides a familiar reference point for the debate over statutory interpretation, and because there are important resonances between the Supreme Court’s methods of constitutional and statutory interpretation.

⁴⁸ 143 U.S. 457 (1892).

⁴⁹ See *id.* at 459.

⁵⁰ The last such citing was in *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 453–54 (1989). Although the Court’s opinion in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998), does not cite *Holy Trinity*, part of its discussion of standing might be said to partake of *Holy Trinity*’s spirit. See *id.* at 2098 (“Acceptance of the Government’s new-found reading of [a statutory provision governing standing] ‘would produce an absurd and unjust result which Congress could not have intended.’” (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982))).

⁵¹ See *Public Citizen*, 491 U.S. at 453.

⁵² See Scalia, *supra* note 7, at 16–17.

⁵³ See, e.g., Tribe, *Comment*, *supra* note 32, at 65 (“[W]e ought *not* to be inquiring (except perhaps very peripherally) into the ideas, intentions, or expectations subjectively held by whatever particular persons were, as a historical matter, involved in drafting, promulgating, or ratifying the text in question.”).

⁵⁴ See RONALD DWORIN, *LAW’S EMPIRE* 313–54 (1986).

statutes simply mean what the legislature intended them to mean, difficulties inherent in ascribing intent to a multimember body on a question it did not directly address will lead eventually to a quest for an "objective" intent.⁵⁵ At that point the game is up, so that one might as well admit that a judge must "construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force."⁵⁶

In rejecting the quest for subjective legislative intent, textualists do not follow Dworkin in asking "which combination of which principles and policies, with which assignments of relative importance when these compete, provides the best case for what the plain words of the statute plainly require."⁵⁷ Textualists contend that, in practice, the quest for the legislature's objective intent or purpose becomes the imposition of the judge's subjective preferences.⁵⁸ Textualists thus make a straightforward appeal to notions of democracy.⁵⁹ The Court's job is to apply the law as enacted by the politically accountable bodies.⁶⁰

⁵⁵ See *id.* at 317-33. For an earlier argument along these lines, see Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). See also Brest, *supra* note 32, at 216-22.

⁵⁶ DWORKIN, *supra* note 54, at 338.

⁵⁷ *Id.*

⁵⁸ Justice Scalia states:

When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.

Scalia, *supra* note 7, at 18.

⁵⁹ Public choice theory's depiction of the legislative process as one dominated by interest group bargaining appears to be at the heart of the textualist's vision of democracy. Because statutes invariably serve multiple, often conflicting purposes, public choice theorists claim that singling out a goal of one coalition of interest groups that supported the legislation as the purpose of a statute is arbitrary. See, e.g., *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154, 1159 (7th Cir. 1990) (Easterbrook, J.) ("We cannot divine the balance between objectives by pointing to their existence."); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990) ("The complex compromises endemic in the political process suggest that legislation is frequently a congeries of different and sometimes conflicting purposes."). See generally Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983) (suggesting that the conventional assumption that statutes "answer" questions posed by litigants is difficult to sustain); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3. For measured critiques of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 88-115 (1991), and JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 81-105 (1997).

⁶⁰ See Scalia, *supra* note 7, at 9-14. From a historical perspective, there is considerable irony in relying on democratic principles to reject purposivism in favor of textualism. It was precisely those antidemocratic opponents of statutes in derogation of the common law who, in the early part of this century, construed statutes narrowly, thereby defeating legislative objectives. See Strauss, *supra* note 25, at 430-31. There is still further irony in Justice Scalia's invocation of civil law interpretive methodology in support of his brand of textualism, see Scalia, "Common-Law Courts in a Civil-Law System," *supra* note 7 (emphasis added), because civil law jurisprudence accords a large role to principles that transcend the enacted legal rules. See George P. Fletcher,

For textualists in statutory interpretation, as for originalists in constitutional interpretation,⁶¹ this task entails applying the original public meaning of the text in question.⁶²

So much for defining textualism. What of purposivism? In defining purposivism, one might begin with the credo of the legal process school: that, regardless of the actual workings of the legislature, it should be presumed to comprise “reasonable persons pursuing reasonable purposes reasonably.”⁶³ The purposivist judge aims to infer these purposes and apply them. Beyond this goal, purposivism is somewhat more difficult to define than textualism. Although Justice Scalia has set forth the elements of his brand of textualism, no Justice has declared himself or herself a purposivist or described that philosophy to any extent. Most of the Justices tend not to be wedded to a single interpretive philosophy, instead choosing more eclectically from a range of methods.⁶⁴ For example, their statutory opinions routinely refer to Congress’s intent,⁶⁵ even though the Justices do not necessarily accept the view that the goal of statutory interpretation is to recover subjective legislative intent.

Two Modes of Legal Thought, 90 YALE L.J. 970, 980–93 (1981) (noting that under the principle of *Rechtsanalogie*, “several specific provisions [of the German Code] are taken to stand for a single underlying principle” that is itself enforceable, and that German courts have recognized entire lines of doctrine with no discernible roots in the Code); Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. (forthcoming 1998) (explaining that the “prevailing method of interpretation” of the French Code Civile “is purposive and dynamic” (quoting Letter from Peter Lindseth, Associate Director, European Legal Studies Center, Columbia Law School, to Peter L. Strauss, Betts Professor of Law, Columbia Law School (Apr. 14, 1998))).

⁶¹ Of course, on the Court, these are the same people: Justices Scalia and Thomas.

⁶² See, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–34 (1997). By referring to the “public” understanding of enacted text, textualists mean to disown approaches that rely on the intentions of an elite group, such as the text’s drafters. However, textualists accept that the “public” understanding may include terms of art or technical usage, if the publicly available material indicates that is how the text is best understood.

⁶³ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PRINCIPLES IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 8–10 (1940) (discussing the role of purpose in statutory interpretation for the legal process school); HART & SACKS, *supra*, at 148, 1374, 1377 (same). The leading figures of the legal process school were Felix Frankfurter, Henry Hart, Alexander Bickel, Lon Fuller, Albert Sacks, Harry Wellington, and Herbert Wechsler. See Gary Peller, *Neutral Principles in the 1950’s*, 21 U. MICH. J.L. REFORM 561, 566–67 (1988). Some of its leading texts are HART & SACKS, cited above; Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); and Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

⁶⁴ See, e.g., John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373 (1992) (offering five canons of statutory interpretation).

⁶⁵ See, e.g., *Caron v. United States*, 118 S. Ct. 2007, 2012 (1998) (Kennedy, J., for the Court); *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1997 (1998) (O’Connor, J., for the Court); *Muscarello v. United States*, 118 S. Ct. 1911, 1919 (1998) (Breyer, J., for the Court); *United States v. Estate of Romani*, 118 S. Ct. 1478, 1488 (1998) (Stevens, J., for the Court); *Beach v. Ocwen Fed. Bank*, 118 S. Ct. 1408, 1413 (1998) (Souter, J., for the Court).

Semantics aside, the principal practical difference between textualists on the one hand, and purposivists and eclectics on the other, concerns the relevance of legislative history to statutory interpretation. When statutory language is ambiguous, purposivists deem legislative history relevant to ascertaining the general aims of Congress — the kinds of problems at which they directed their enactment.⁶⁶ In contrast, textualists deem most legislative history irrelevant to statutory interpretation. Accordingly, Justice Scalia refuses to author or join opinions relying on legislative history on the ground that committee reports, floor statements, and the like do not accurately reflect the view of Congress and have not, in any event, gone through the formal process of adoption prescribed by Article I.⁶⁷ This refusal can sometimes lead to comical spectacles, as when a recent opinion was denominated as the “opinion of the Court, except as to footnote 6,” which Justice Scalia declined to join because it cited legislative history.⁶⁸

B. Difficulties with Textualism

Textualists' disdain for legislative history may seem to be in tension with their claim to democratic legitimacy. Legislative history is a source of guidance independent of the individual judge's beliefs, and in cutting off access to it, the textualist judge increases the relative im-

⁶⁶ Analogously, in constitutional interpretation, Jed Rubenfeld aptly refers to “paradigm cases” of the mischief a provision was enacted to address. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1169–71 (1995).

⁶⁷ See Scalia, *supra* note 7, at 29–37; see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 677 (1997) (“[T]extualists object to the use of legislative history as an authoritative determinant of ‘legislative intent.’”). The textualist faith does, however, permit citation of legislative history to show the context and background understanding of statutory words or phrases at the time of their enactment. Thus, there was no dissent from Justice Kennedy's opinion in *Salinas v. United States*, 118 S. Ct. 469 (1997), which cited the views of the Model Penal Code's drafters on the meaning of “conspiracy” as evidence of how that term was widely understood in legal circles when it was included in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(d) (1994). See *Salinas*, 118 S. Ct. at 477. The same day *Salinas* was decided, Justices Scalia, Thomas, and Kennedy (an occasional textualist fellow traveler) declined to join Part III of Justice Souter's otherwise unanimous opinion in *Foster v. Love*, 118 S. Ct. 464 (1997), because it inferred Congressional intent from the floor statement of the sponsor of the Act in question. See *id.* at 468. The textualists' stance in *Salinas* is thus consistent with their stance in *Love* because of the different uses to which legislative history was put in the two cases.

⁶⁸ *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 930 (1998). Justice Scalia even refuses to join portions of opinions that invoke legislative history *disparagingly*. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 958 (1998) (syllabus) (stating that opinion is “unanimous except insofar as Scalia, J., did not join Part II-C”). The portion of the opinion of the Court that Justice Scalia refused to join stated, “There is, finally, nothing left of Milberg's position beyond an appeal to legislative history, some of which turns out to ignore the question before us, and some of which may support Lexecon.” *Id.* at 964. Somewhat less extreme is the view expressed by Justice O'Connor (joined by Justices Scalia and Thomas) in *Atherton v. FDIC*, 117 S. Ct. 666, 676 (1997) (O'Connor, J., concurring in part and concurring in the judgment) (“I join all of the Court's opinion, except to the extent that it relies on . . . notably unhelpful legislative history . . .”).

portance of his own subjective views. For this and other reasons, the claim that textualism provides a greater check on judicial subjectivity than does intentionalism or purposivism — like the claim that originalism in constitutional interpretation is more determinate than rival approaches — will strike many as highly dubious,⁶⁹ although I shall not pursue those doubts here. Nor shall I devote more than a marginal comment to the observation that the textualist vision of democracy as simple majoritarianism — perhaps rooted in public choice theory — is not self-justifying in the way that textualists seem to think it is.⁷⁰ Students of constitutional law are familiar with an alternative conception of democracy in which courts play a vital role as partners with, rather than mere servants of, the legislature.⁷¹

Putting such questions aside, my critique of Justice Scalia's textualism focuses on the difficulty it has accommodating change. Before elaborating on this argument, however, I should note that I focus on textualism as espoused and practiced, rather than on some essential attribute of a text-centered approach to statutory or constitutional interpretation. Rejecting intentionalism and purposivism does not necessarily require a backward-looking — that is, originalist — textualism. One might instead emphasize statutory text over the legislature's specific intent and its objective purposes but permit that text to evolve over time in a forward-looking manner. This approach, dubbed "dynamic statutory interpretation" by William Eskridge,⁷² is, on its face, a

⁶⁹ See sources cited *supra* note 32. Moreover, textualism will often be in the eye of the beholder, as illustrated by *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998). In that case, Justice Stevens, on behalf of the majority, rejected the argument that in order to defeat a summary judgment motion, a prisoner bringing a constitutional claim that requires proof of a government official's illicit motive must offer proof of such motive by clear and convincing evidence. After finding that the clear-and-convincing-evidence standard was not justified by the Court's past qualified immunity decisions, *see id.* at 1594–95, the Court added a textualist argument: "Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing the clear and convincing burden of proof on plaintiffs . . ." *Id.* at 1595. In dissent, Justice Scalia did not deny this point, nor did he deny that the entire doctrine of qualified immunity was a judicial creation. *See id.* at 1603–04 (Scalia, J., dissenting). However, he would have justified an expansive interpretation of qualified immunity on the ground that the liability scheme to which qualified immunity is a defense was itself originally a judicial creation — one that was, in his view, unwarranted by the text or original understanding of § 1983. *See id.* at 1603 (criticizing *Monroe v. Pape*, 365 U.S. 167 (1961)).

⁷⁰ Even if the public choice account of the legislative process as interest group bargaining is descriptively accurate, it is hardly obvious that a theory of legislation should have any direct consequences for a theory of how courts should interpret legislation. "After all, many have argued that, in the interpretation of statutes, judges should proceed on the premise that Congress has enacted the legislation to foster the public interest and not simply to promote private interests." Henry P. Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 354 (1985) (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985)).

⁷¹ For an elaboration of this notion, which Ronald Dworkin terms "constitutional democracy," see RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996).

⁷² See ESKRIDGE, *supra* note 34, at 5.

plausible elaboration of textualism.⁷³ That the textualists currently on the Court prefer a static approach may say more about them than about inherent properties of textualism.⁷⁴

To illustrate the shortcomings of a backward-looking textualism, consider two 1997 Term cases. In *Brogan v. United States*,⁷⁵ the Court confronted the question whether a suspect who falsely denies wrongdoing when questioned by government agents, but who does so by means of a simple, nondiscursive "no," violates 18 U.S.C. § 1001, which prohibits making false statements to federal investigators.⁷⁶

⁷³ Eskridge himself contrasts textualism (as well as intentionalism and purposivism) with his own dynamic approach. *See id.* at 34-47; Eskridge & Frickey, *supra* note 59, at 324-45; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 690-91 (1990). However, in doing so, Eskridge draws a contrast with textualism as actually preached and practiced by its proponents rather than with inherent properties of textualism. *See id.* at 690 ("[T]he new textualism is not nearly as dynamic as functionalist theories of statutory interpretation. But it demonstrates that a 'conservative' formalist theory need not tie itself to the past.")

⁷⁴ Other customary associations of positions among various jurisprudential debates may be equally accidental. For example, my account of the textualism/purposivism debate will undoubtedly call to mind the related division of the Court into those Justices who favor formulating legal norms as rules and those who favor standards. *See Sullivan, supra* note 24. *See generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379-90 (1985) (distinguishing rules from standards). Other things being equal, proponents of textualism tend to favor rules over standards, while proponents of purposivism tend to prefer standards over rules. *See Sullivan, supra* note 24, at 69-95. However, the axis dividing textualists from purposivists and the axis dividing those who favor rules from those who favor standards are not linked as a matter of strict logic.

Consider, for example, a textualist approach to the Fourth Amendment, which, by its express terms, does not require a warrant as a precondition to a search or seizure. The Fourth Amendment's text merely recognizes a right against "unreasonable searches and seizures," and states that if warrants do issue, they must be supported by probable cause, an oath, and particularity. U.S. CONST. amend. IV. Moreover, wearing an originalist hat, the textualist might contend that at the time of the adoption of the Fourth Amendment, warrants were not generally required, but that if a warrant was issued, it immunized the officer executing the warrant from civil liability. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 774 (1994). *But see* Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 930 (1997) (relying on William J. Cuddihy's unpublished doctoral dissertation to impeach Amar's theories of the Fourth Amendment); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1829 (1997) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) (same). Thus, a textualist/originalist could interpret the Fourth Amendment to require that the legality of searches and seizures be measured by the general *standard* of reasonableness. *See* *California v. Acevedo*, 500 U.S. 565, 581-85 (1991) (Scalia, J., concurring in the judgment).

In contrast, a purposivist might argue that the central purpose of the Fourth Amendment is to control police power in the interest of protecting privacy. *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1464 (1996). Because of the reality that modern police work is an "often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), the purposivist could claim that police on the beat cannot be trusted to make their own judgments about what searches and seizures are reasonable. Thus, the purposivist will depart from the literal text and the arguable original understanding of the Fourth Amendment to infer a *rule* that, absent some specific exception, the Fourth Amendment requires a warrant as a precondition for a search or seizure. *See id.* at 13-14. We see that textualism sometimes leads to standards, while purposivism sometimes leads to rules.

⁷⁵ 118 S. Ct. 805 (1998).

⁷⁶ *See id.* at 808.

The petitioner argued for an “exculpatory no” exception to the statute because of the risk that law enforcement authorities would otherwise question suspects about minor offenses in the hope that these suspects would, understandably, initially deny wrongdoing and thus incur the very serious penalties for violating the statute.⁷⁷ In addition, a violation of the statute occurs at the time the false statement is made, thereby enabling prosecution of persons whose original misconduct could not be reached because the statute of limitations had run.⁷⁸ Because of these risks, a majority of the federal appeals courts had adopted one or another form of the “exculpatory no” exception.⁷⁹

The *Brogan* Court’s rejection of the “exculpatory no” exception proceeded in classic textualist fashion. Writing for the Court, Justice Scalia began by invoking Webster’s Dictionary as support for the proposition that saying “[t]he word ‘no’ in response to a question assuredly makes a ‘statement,’” within the meaning of the statute.⁸⁰ The Court then placed an impossible burden on the defendant by posing the question as whether “to depart from the literal text that Congress has enacted.”⁸¹ For good measure, the Court added a functional argument — “making the existence of th[e] crime turn upon the credulousness of the federal investigator (or the persuasiveness of the liar) would be exceedingly strange”⁸² — but the Court’s central line of analysis turned on distinguishing legislative intent and purpose on the one hand from statutory language on the other.⁸³

Note how the majority’s textualism in *Brogan* quickly moved from a rejection of intentionalism and purposivism to a rejection of conscious dynamism. In an opinion (reluctantly) concurring in the judgment, Justice Ginsburg noted that the risks of overzealous prosecution under the statute had in fact been realized.⁸⁴ The majority nonetheless dismissed these concerns as a mere “supposed danger” from “hypothetical prosecutors.”⁸⁵ Of course, the majority could not deny that the prosecutions cited by Justice Ginsburg had actually occurred, but for the textualist-cum-originalist, the meaning of the statute is fixed at the

⁷⁷ See *id.* at 810.

⁷⁸ See *id.* at 813 & n.3 (Ginsburg, J., concurring in the judgment).

⁷⁹ See *id.* at 812 & n.2.

⁸⁰ *Brogan*, 118 S. Ct. at 808 (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 2461 (2d ed. 1950)).

⁸¹ *Id.* at 808.

⁸² *Id.* at 809.

⁸³ See *id.* (“[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy — even assuming that it is possible to identify that evil from something other than the text of the statute itself.”).

⁸⁴ See *id.* at 812–13 & n.2 (Ginsburg, J., concurring in the judgment) (listing cases illustrating such abuses). Justice Ginsburg (joined by Justice Souter) nonetheless concurred in the result, partly because she believed — perhaps too optimistically — that the Court’s opinion left some room for acquittals based upon the exculpatory no defense in extreme cases. See *id.* at 815–16.

⁸⁵ *Brogan*, 118 S. Ct. at 810.

time of its adoption. Thus, later experience is irrelevant to the statute's interpretation. Accordingly, actual horrors (if that is what they are) were treated no differently from a hypothetical parade of horrors. *Brogan* illustrates that, as practiced by the current Court, textualism is a backward-looking interpretive approach to which real-world experience is largely immaterial.

The Court's unanimous decision, again per Justice Scalia, in *Oncale v. Sundowner Offshore Services, Inc.*⁸⁶ also illustrates the limitations of a backward-looking textualism. In that case, the Court reached the sensible conclusion that Title VII erects no per se bar to claims of sexual harassment in which the alleged harasser is of the same sex as the alleged harassee.⁸⁷ However, the Court refused to articulate a normative vision of the evils the statute addresses. The Court merely restated the requirement of the statute's text that to be actionable, harassment must constitute "discrimination 'because of . . . sex,'"⁸⁸ and urged lower court judges and juries to rely on "[c]ommon sense . . . and an appropriate sensitivity to social context"⁸⁹ to separate valid from invalid claims.

Common sense and sensitivity to social context are indeed essential, but absent some conception of what Title VII is about — some conception of "what's wrong with sexual harassment"⁹⁰ — they are hardly sufficient to distinguish between conduct that is and is not proscribed by Title VII. Must the plaintiff show that the harasser treated men and women differently? The Court suggested so,⁹¹ but offered no elaboration or argument, despite a substantial controversy among lower courts concerning immunity for so-called "equal-opportunity" harassers,⁹² not to mention feminist critiques of formal equality in a

⁸⁶ 118 S. Ct. 998 (1998).

⁸⁷ See *id.* at 1001-03.

⁸⁸ *Id.* at 1001 (quoting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994)) (omission in original).

⁸⁹ *Id.* at 1003.

⁹⁰ Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

⁹¹ See *Oncale*, 118 S. Ct. at 1002 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (quoting *Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted)).

⁹² A number of cases approve the "equal opportunity" or "bisexual harasser" defense. See, e.g., *Bundy v. Jackson*, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981); *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). But see *McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir. 1996); *Chiapuzio v. BLT Operating Corp.*, 826 F. Supp. 1334, 1337 (D. Wyo. 1993) ("[T]he equal harassment of both genders does not escape the purview of Title VII in the instant case."). The academic literature is largely critical of such a defense. See, e.g., John J. Donahue III, *Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610-11 (1992); Franke, *supra* note 90, at 719-20; Steven S. Locke, *The Equal Opportunity Harasser as a Paradigm for Recognizing Sexual Harassment of Homosexuals Under Title VII*, 27 RUTGERS L.J. 383 (1996). But see Charles R. Calleros, *The Meaning of "Sex": Homosexual and Bisexual Harassment under Title VII*, 20 VT. L. REV. 55, 70-78 (1995).

variety of contexts.⁹³ Of what relevance, if any, is it that in a particular case the harassment reinforces sex-role stereotypes, a concern evident in the Court's sex discrimination cases under the Equal Protection Clause?⁹⁴ If reinforcement of sex-role stereotypes is relevant, what becomes of the position of the Equal Employment Opportunity Commission ("EEOC") that Title VII does not proscribe discrimination based on sexual orientation?⁹⁵ Such discrimination usually reflects disapproval of, among other things, homosexuals' defiance of the social requirement that men select women as mates and vice versa.⁹⁶

The *Oncale* Court was probably wise not to attempt to give comprehensive answers to each of the above questions. Yet its determined textualism prevented it from even identifying relevant considerations. The Court declined to seek guidance from legislative intent⁹⁷ — which would have been unhelpful in any event, as the Congress that enacted Title VII was arguably not even concerned about male-on-female sexual harassment, much less male-on-male harassment.⁹⁸ Unable to find

⁹³ See, e.g., MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 20-22* (1991) (explaining that the ideal of formal equality does not lead to substantive equality when men and women are differently situated); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 19-23* (1990) (describing the "dilemma of difference" — how to take account of differences without stigmatizing — as the product of a tendency in American law and culture to categorize people by sex, race, and other traits).

⁹⁴ See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-26 (1982); see also Brief of Law Professors as Amici Curiae in Support of Petitioner at 19, *Oncale v. Sundowner Offshore Servs.* (No. 96-568) (arguing that Title VII prohibits conduct that reinforces sex stereotypes in the workplace).

⁹⁵ See Brief for the United States and EEOC as Amici Curiae Supporting Petitioner at 16, *Oncale* (No. 96-568) (citing EEOC Dec. 81-16 (Jan. 1981), reprinted in EEOC Dec. (CCH Employ. Prac. Guide) ¶ 6756, at 4796 (1983 ed.) [hereinafter EEOC Decision]).

⁹⁶ I say "usually" rather than "invariably" because discrimination against gays, lesbians, and bisexuals could reflect moral disapproval of conduct in which such persons typically engage. See, e.g., *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). Even in such cases, however, the moral disapproval is itself intertwined with the actor's defiance of sex stereotypes, because the conduct at issue need not be defined by reference to the sex of the actors. The discriminator decides to discriminate against gays, lesbians, and bisexuals rather than, say, all persons who engage in sodomy, thus including the defiance of the sex stereotype in the definition of the conduct. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503, 506 (1994) ("[S]exual orientation, no matter what causes it, acquires social and political meaning through the material and symbolic activities of living people"); cf. *Bowers v. Hardwick*, 478 U.S. 186, 188 n.2 (1986) (treating a facial challenge to a general prohibition of sodomy as though it raised the issue of the constitutionality of a prohibition on only homosexual sodomy). I do not insist on this point, however, because the EEOC does not draw a status/conduct distinction; hence, there is no reason to explore that distinction here. See Brief for the United States and EEOC as Amici Curiae, *supra* note 95, at 16 (citing EEOC Decision, *supra* note 95, at 4796).

⁹⁷ See *Oncale*, 118 S. Ct. at 1002 (stating that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

⁹⁸ See *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., joined by Scalia and Starr, JJ., dissenting from denial of rehearing en banc) (questioning whether Congress intended to prohibit any sexual harassment under Title VII). Indeed, there is some evidence that inclusion of a prohibition on sex discrimination in Title VII was offered as an amendment by one

an original public meaning that spoke at all to sexual harassment and unwilling to construct an objective purpose for its prohibition, the Court in its textualist mode could only fall back on the vague language of the statute.

C. *The Relative Influence of Textualism and Purposivism*

The foregoing example of a unanimous textualist opinion does not indicate that the Justices unanimously accept textualism. Thoroughgoing textualism remains the hobbyhorse of Justice Scalia, with support from Justice Thomas. However, whereas Justice Scalia usually dissents from opinions or parts of opinions that he considers inconsistent with textualism regardless of the substantive outcome, the Court's purposivists typically join textualist opinions if they agree with the bottom line.⁹⁹ Indeed, in an apparent effort to appeal to Justices Scalia and Thomas, the purposivists sometimes write textualist opinions.¹⁰⁰ As a result, textualism has become an influential methodology in statutory cases.

Nevertheless, in cases of actual conflict, purposivism more frequently triumphs over textualism than vice-versa. This trend should hardly be surprising, given purposivism's affinities with legal process theory: most of the Justices attended law school during the heyday of the legal process school,¹⁰¹ and the experience no doubt shaped their

of Title VII's opponents, in the hope of killing the bill. See *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257, 2271 n.1 (1998) (Thomas, J., dissenting) (citing *Barnes v. Costle*, 561 F.2d 983, 987 (D.C. Cir. 1977)). Of course, that circumstance no longer has much relevance, given Congress's apparent ratification of the application of Title VII to sexual harassment. See *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2286 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding." (citing Civil Rights Act of 1991 § 102, 42 U.S.C. § 1981a (1994))).

⁹⁹ See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 365 (1994). For a general account of the doctrinal complications that arise out of the Court's status as a multimember body, see Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986).

¹⁰⁰ See *supra* note 8.

¹⁰¹ Five of the current Justices (Scalia, Kennedy, Souter, Ginsburg, and Breyer) studied the legal process Ur-text as law students at Harvard. See HART & SACKS, *supra* note 63, at cxxv; William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword. Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994) ("[T]he legal process school has quietly attained what every Supreme Court litigator seeks: a majority on the Court."). Note that Eskridge and Frickey count Justice Scalia in the legal process school's majority, although he appears to have been less influenced by Hart and Sacks than the others. See generally George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303–20 (1990) (examining the roots of Justice Scalia's constitutional methodology). In terms of judicial temperament, we might substitute Justice O'Connor for Justice Scalia, notwithstanding the former's Stanford education.

later views.¹⁰² Thus, a majority of the Court happily engages in the construction of objective legislative purpose that the textualists eschew.

*Lewis v. United States*¹⁰³ is an example of the typical legal process approach to statutory interpretation. In that case, the Court held that the Assimilative Crimes Act (ACA)¹⁰⁴ does not make Louisiana's first-degree murder law applicable to the intentional killing of a young child on a federal army base.¹⁰⁵ The Court could have readily derived that result directly from the statute's text,¹⁰⁶ but the Court pointedly avoided a "literal reading" of the statute, because doing so "would dramatically separate the statute from its intended purpose,"¹⁰⁷ which was to borrow "state law to fill gaps in the federal criminal law that applies on federal enclaves."¹⁰⁸ Justice Scalia, joined by Justice Thomas, declined to join Justice Breyer's majority opinion in *Lewis* because of a methodological disagreement.¹⁰⁹ Objecting to the Court's effort to further the statute's purpose, Justice Scalia contended that the majority's approach "simply transform[s] the ACA into a mirror that reflects the judge's assessment of whether assimilation of a particular state law would be good federal policy."¹¹⁰

Justice Scalia undoubtedly meant this observation as an epithet. Yet if the authoritative language under construction is ambiguous, assessing whether a particular interpretation constitutes good federal policy is both inevitable¹¹¹ and consistent with the role of courts in a constitutional democracy.¹¹² The crucial question then becomes how courts should go about deciding what constitutes good federal policy,

¹⁰² Cf. Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 471 (1994-95) ("Many educators believe that intellectual 'formations' are relatively firmly set in the earliest years of education, and that appears to be true of approaches people have to questions of legal analysis." (citing JEROME S. BRUNER ET. AL, *STUDIES IN COGNITIVE GROWTH* (1966); JEROME S. BRUNER, *A STUDY OF THINKING* (1956))).

¹⁰³ 118 S. Ct. 1135 (1998).

¹⁰⁴ 18 U.S.C. § 13(a) (1994).

¹⁰⁵ See *Lewis*, 118 S. Ct. at 1145.

¹⁰⁶ The ACA provides as follows:

Whoever within or upon any [federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

18 U.S.C. § 13(a). The "act" in question (killing a child) was certainly "made punishable by any enactment of Congress," to wit, a separate federal statute classifying the killing as second degree murder. See 18 U.S.C. § 1111 (1994). Thus, one could argue, the Court did not need to look beyond the statute's text. See *Lewis*, 118 S. Ct. at 1139.

¹⁰⁷ *Lewis*, 118 S. Ct. at 1139.

¹⁰⁸ *Id.* (citing *Williams v. United States*, 327 U.S. 711, 718-19 (1946)).

¹⁰⁹ See *id.* at 1145-49 (Scalia, J., concurring in the judgment).

¹¹⁰ *Id.* at 1147.

¹¹¹ See ESKRIDGE, *supra* note 34, at 13-47.

¹¹² See *id.* at 111-40.

because with the exception of the caricatures of purposivists and evolutionists that appear in the works of textualists/originalists, no one advocates pure judicial subjectivity. In our legal system, judges typically turn to the common law method as the means of sorting out desirable from undesirable policies. That method, and its limitations, are the focus of the next Part.

II. THE UBIQUITY OF THE COMMON LAW METHOD — AND ITS LIMITS

The preceding Part contrasted textualism/originalism with purposivism and concluded that the backward-looking cast of the former limits its ability to adapt to changing circumstances. Purposivism might suffer from the same infirmity if purposivists sought to implement the *original* purpose of a statute or constitutional provision. As discussed, however, purposivism pays somewhat greater attention to the likely future consequences of decisions, while textualism/originalism often seems to celebrate its inattention to such matters.¹¹³ Purposivism thus becomes somewhat dynamic in practice.

Indeed, it is precisely this dynamism that leads textualists to distrust purposivism. For Justice Scalia, purposivism is indistinguishable from the common law method of case-by-case development of the law, in which judges assess the policy implications of various proposed rules of law, constrained only loosely by analogies to prior cases.¹¹⁴ However, the contrast between textualism on the one hand, and both purposivism and the common law method on the other, seems forced. Textualists and purposivists alike recognize a substantial role for precedent in adjudication, and therefore share a commitment to the common law method. Thus, even though textualists officially denounce common law methodology as another subjective approach, that methodology pervades all of the Court's work.¹¹⁵

From the perspective of one concerned about the Court's ability to adjust doctrine to changing circumstances, it would appear that the pervasiveness of the common law method in Supreme Court adjudication should be celebrated. After all, the common law method is cer-

¹¹³ Compare *Stewart v. Martinez-Villareal*, 118 S. Ct. 1618, 1621–22 (1998) (holding that a prisoner who files a habeas petition containing a claim that had previously been dismissed without prejudice as premature should not be treated as filing a prohibited “successive” petition, in part because such treatment would have “perverse” consequences), *with id.* at 1624 (Thomas, J., joined by Scalia, J., dissenting) (appealing to dictionary definitions of the statutory terms “application” and “present[]” to reject the majority’s view as inconsistent with the statute’s plain meaning).

¹¹⁴ See Scalia, *supra* note 7.

¹¹⁵ See, e.g., HARRY H. WELLINGTON, INTERPRETING THE CONSTITUTION 127 (1990); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards*, 83 YALE L.J. 221, 265–311 (1973).

tainly no less dynamic than purposivism, which locates purposes in unchanging text. As Paul Brest wryly observed with respect to the role of text in constitutional adjudication, “[i]t is rather like having a remote ancestor who came over on the Mayflower.”¹¹⁶ Statutory interpretation is similar: the text recedes in importance as time passes between a statute’s enactment and judicial construction, or — in the case of new statutes — as unforeseen circumstances arise. Thus, notwithstanding the debate between textualists and purposivists chronicled in Part I, if the common law method pervades the Court’s work, the Court’s doctrines are likely to be dynamic in just the way that the textualists fear, and that I have suggested they need to be.

There is considerable truth to this account. Hence, Eskridge is justified in attaching the label “dynamic statutory interpretation” to an approach that takes its inspiration from the common law and from constitutional law’s adaptation of common law methods.¹¹⁷ A dynamic common law method takes account of not only the original meaning of authoritative text, “but also its subsequent interpretational history, related constitutional developments, and current societal facts.”¹¹⁸ Eskridge does not specify exactly *how* courts go about taking account of current societal facts. One possibility, consistent with his general theory, would be for courts to encourage experimentation and learning by other social and political actors.¹¹⁹ Part III maps such an approach.

I argue in this Part that, as practiced by the Court, the common law method takes account of changing social circumstances largely unconsciously, through intuition and speculation. I account for this phenomenon by positing a deep kinship between the traditional common law method and the Socratic method, concluding that some of the limitations of Plato’s elevation of contemplation over experimentation are also limitations of the traditional common law method.

This Part focuses on the limitations of the common law method. Because the notion of the “common law” carries a variety of connotations, the first section explains the sense in which I mean it — essentially as a system of elaboration of legal norms on a case-by-case basis. It then illustrates the pervasive use of the common law method in all of the Court’s work — including not only those decisions that might otherwise be regarded as purposivist, intentionalist, or eclectic, but

¹¹⁶ Brest, *supra* note 32, at 234.

¹¹⁷ William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (advancing the thesis that statutes should, “like the Constitution and the common law[,] be interpreted ‘dynamically,’ that is, in light of their present societal, political and legal context”).

¹¹⁸ *Id.*

¹¹⁹ If Eskridge’s model were made to encompass the sort of experimentalist attitude toward factual development that I favor, the model would be prescriptive rather than merely descriptive. *But cf.* Scalia, *supra* note 7, at 40 (arguing that Eskridge’s dynamic theory of statutory interpretation is not descriptive of current practice).

also those that might be regarded as textualist. The second section connects the common law method to the Socratic method and to the limitations of the latter. The third section considers some potential objections to my characterization of the common law method.

A. *The Common Law Method in Supreme Court Adjudication*

To say that common law methods inform the Supreme Court's interpretation of statutes and the Constitution is not to say that the Court creates much real common law, in the sense of judge-made law that does not at least nominally purport to be an interpretation of some authoritative text. Since the Court decided *Erie Railroad Co. v. Tompkins*,¹²⁰ there has been "no federal general common law,"¹²¹ but until fairly recently, at least, it was plausible to argue that the Supreme Court had an important role in creating specialized areas of common law.¹²² The Court has recently made clear, however, that it will only create true federal common law in the rarest of circumstances.¹²³

Nevertheless, the interpretation of texts can look very much like common law judging in two ways. First, to the extent that common law means judge-made law, in the aftermath of legal realism even textualists concede that in giving concrete content to relatively open-ended statutory or constitutional provisions, judges do not merely discover law; they make it.¹²⁴ For example, the Supreme Court's efforts over the last decade to restrict the ability of state prisoners to rely on "new rules" of constitutional law in habeas corpus proceedings¹²⁵ recognize that those rules of constitutional law were in a real sense cre-

¹²⁰ 304 U.S. 64 (1938).

¹²¹ *Id.* at 78.

¹²² See Henry J. Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-422 (1964).

¹²³ See *Atherton v. FDIC*, 117 S. Ct. 666, 669-74 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (characterizing as "few and restricted" "those cases in which judicial creation of a special federal rule would be justified" (citing *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963))). Specific statutory authorizations of federal common law fall outside of this principle. See, e.g., FED. R. EVID. 501.

¹²⁴ See, e.g., *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment) (acknowledging that judges make law).

¹²⁵ See, e.g., *Breard v. Greene*, 118 S. Ct. 1352, 1355 (1998) (rejecting the argument that a foreign national should be excused from litigating rights under the Vienna Convention on direct review, finding that the claim, if too novel to have been discovered by counsel, would have been a new rule under *Teague v. Lane*); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion) (announcing that, absent one of two narrow exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). In the Anti-Terrorism and Effective Death Penalty Act of 1996, Congress followed the Court's lead by restricting habeas relief to those cases in which the challenged state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States [or] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

ated by the Court, even if they found their ultimate warrant in the Constitution's text.¹²⁶

The second sense in which textual interpretation looks like common law judging is the main focus of inquiry here: the common law *method* refers to case-by-case development of the law, in which courts reason by analogy from prior cases rather than deciding each case by direct reference to the original text under interpretation.¹²⁷ The common law method builds on precedent, unlike our (largely false) picture of the civil law method of deciding each case according to the enacted Code alone.¹²⁸

The common law method, in the sense of case-by-case doctrinal development, plays an especially large role in the Court's constitutional rights jurisprudence.¹²⁹ For example, in deciding whether a public television station could, consistent with the First Amendment, exclude a third-party candidate for the House of Representatives from a televised debate on the ground that he lacked substantial popular support,¹³⁰ the Court applied its "public forum doctrine,"¹³¹ derived originally from cases involving public access to streets, sidewalks, and parks,¹³² and subsequently developed in cases involving all manner of government property.¹³³ Similarly, the Court derived a right to abor-

¹²⁶ One commentator argues that the tension between the philosophy of the common law and positivism in this area will ultimately prove destabilizing. See Linda Meyer, "Nothing We Say Matters": Teague and New Rules, 61 U. CHI. L. REV. 423 (1994).

¹²⁷ See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949); JOSEPH RAZ, THE AUTHORITY OF LAW 201-06 (1979) (describing the courts' analogical method and addressing its strengths and weaknesses); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993) (offering an account of analogical reasoning and describing its advantages over more systematic approaches).

¹²⁸ See Fletcher, *supra* note 60, at 994 ("The popular image of codified law is that the statutory scheme is not only precise, but also comprehensive. In fact, the French and German Civil Codes are exhaustive in neither sense . . ."); see also MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 36-38 (1986) (discussing the role of precedent in civil law systems).

¹²⁹ See Scalia, *supra* note 7, at 39 (observing that in constitutional law, "[t]he starting point of the analysis will be Supreme Court cases, and the new issue will presumptively be decided according to the logic that those cases expressed, with no regard for how far that logic, thus extended, has distanced us from the original text and understanding").

¹³⁰ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1637 (1998).

¹³¹ See *id.* at 1641-44 (finding that the debate was a nonpublic forum to which the minimal requirements of reasonableness and viewpoint-neutrality applied and were satisfied).

¹³² See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 986-87 (2d ed. 1988); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11-21.

¹³³ See, e.g., *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (airport); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985) (federal employee charity drive literature); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54-55 (1983) (public school teachers' school mailboxes). For an argument that the formal application of public forum doctrine in the Court's decision in *Forbes* played a less important part than did an analysis of the role of a public television station as a journalist, see Frederick Schauer, *The Supreme Court, 1997 Term — Comment: First Amendment Principles, Institutions, and the First Amendment: Arkansas Educational Television Commission v. Forbes and National Endowment for the Arts v. Finley*, 112 HARV. L. REV. 84, 87-92 (1998).

tion (in large part) from a right to contraception that was itself derived (in large part) from cases involving a right to educate one's children.¹³⁴ And when the Court, invoking textualism and judicial restraint, has refused to apply the principles announced in earlier cases, its decisions have, as a result, appeared arbitrary.¹³⁵

The use of the common law method is by no means limited to cases involving the derivation of constitutional rights from broad guarantees such as free speech and due process. Because of the centrality of precedent in Anglo-American law, even textualist opinions in statutory cases exhibit common law properties. Consider, for example, *Oncale*, discussed in the previous Part as an instance of textualism.¹³⁶ The text of Title VII prohibits "discriminat[ion] because of . . . sex."¹³⁷ If one were to look only to the statutory language, or even to the language plus the circumstances surrounding its enactment, it would not be obvious that male-on-male sexual harassment would be covered. However, in deciding *Oncale*, the Court made reference to its earlier cases, in which it had taken the smaller step of recognizing male-on-female sexual harassment as a violation of the statute.¹³⁸ In addition, the Court had previously indicated that, in a conventional discrimination case, a member of one group could be found to discriminate against a member of the same group.¹³⁹ Finally, the Court's Equal Protection cases stood as a barrier to a rule of law that would make the existence of a cause of action turn on the sex of the defendant or the defendant's agent.¹⁴⁰ Taken together, the cases establishing these principles served as a bridge from the text of Title VII to the result in *Oncale*. In other words, *Oncale* is an example of textualism only in the sense that text

¹³⁴ See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (citing *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

¹³⁵ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting) (criticizing the majority, which upheld the constitutionality of a Georgia statute that prohibits sodomy, for "distor[tin]g the question this case presents"); *TRIBE & DORF*, *supra* note 32, at 58 ("What emerges [from *Hardwick*] is a largely arbitrary fiat.")

¹³⁶ See *supra* pp. 22-24.

¹³⁷ 42 U.S.C. § 2000e-2(a) (1994).

¹³⁸ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986).

¹³⁹ See *Oncale v. Sundowner Offshore Servs.*, 118 S. Ct. 998, 1001 (1998) (citing *Castaneda v. Partida*, 430 U.S. 482, 499 (1977); *id.* at 514 n.6 (Powell, J., dissenting); and *Johnson v. Transportation Agency*, 480 U.S. 616, 624-625 (1987)).

¹⁴⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515, 524 (1996) (stating that "a party seeking to uphold government action based on sex must establish an 'exceedingly persuasive justification' for the classification") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

plays a relatively large role within a system that also gives substantial weight to previously decided cases.¹⁴¹

Before coming to the critical portions of this Part, I should avert a potential confusion. When I say that the common law method proceeds on a case-by-case basis, I do not mean to take a position on the question of how broad the principles announced in common law decisions are or should be. Case-by-case development is sometimes contrasted with an approach that seeks broad principles that unify the various decided cases. Cass Sunstein draws such a contrast when he distinguishes his minimalist account of judging from Ronald Dworkin's view that Anglo-American judges decide cases in a way that will put the entire legal system in its best light.¹⁴² According to Sunstein's view, the practitioner of the common law method is content to make small moves — to say that a public television debate is more like government property devoted to a limited purpose¹⁴³ than it is like a public park or a state university that has been opened wide to public debate.¹⁴⁴ In contrast, the theoretician as imagined by Sunstein (or for that matter, Judge Posner¹⁴⁵) would, in each case, seek an interpretation of the principle of free speech that best effectuates a system of constitutional government that treats all persons as deserving of equal respect.¹⁴⁶

However, whether Dworkin or anyone else holds the view of theory that Sunstein, Judge Posner, and others attribute to him (and to those with similar views) is doubtful.¹⁴⁷ For his part, Dworkin has been careful to recognize our legal system's presumptive commitment to what he calls "local priority," suggesting that a judge turns to principles of the legal system as a whole only when the boundaries between

¹⁴¹ This phenomenon also shows why the differences between textualists and purposivists are not very pronounced. For example, in *Forney v. Apfel*, 118 S. Ct. 1984 (1998), a unanimous opinion written by Justice Breyer that could as easily have been written by Justice Scalia, the Court's close analysis of the text of 28 U.S.C. § 1291 (1994) and 42 U.S.C. § 405(g) (1994) is intertwined with its analysis of an earlier decision, *Sullivan v. Finkelstein*, 496 U.S. 617 (1990). See *Forney*, 118 S. Ct. at 1987 (finding that "[n]othing in the language, either of the statute or the Court's opinion" in *Finkelstein*, supported the respondent's position).

¹⁴² See sources cited *supra* note 43; see also DWORKIN, *supra* note 54, at 225–26 ("According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.")

¹⁴³ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1641–43 (1998).

¹⁴⁴ See *id.* at 1642 (citing *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

¹⁴⁵ See Posner, *supra* note 15, at 7.

¹⁴⁶ See DWORKIN, *supra* note 71, at 237.

¹⁴⁷ For an example of a scholar attributing such a view to Dworkin and me, see Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1844 (1997) (Dworkin); *id.* at 1847 (me). For my response, see Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1864–68 (1997).

distinct doctrinal categories have become mere wooden formalities.¹⁴⁸ Furthermore, common law reasoning contains considerably more theory than Sunstein and other minimalists seem to admit. The pattern of decided cases crystallizes in doctrines that both exemplify and justify the underlying pattern. In defining the contours of the public forum doctrine, the Court did not simply *state* that a public television debate is more like one forum or another: it explained why this was so by reference to the principles, values, and policies the public forum doctrine purports to serve.¹⁴⁹ Thus, there may not be that much distance between Sunstein's minimalism on the one hand and Dworkin's theories on the other hand.¹⁵⁰

Sunstein's critique of Dworkin does, however, suggest an important distinction between true common law — as created and interpreted by a state court of last resort — and the common law methodology of statutory or constitutional interpretation as practiced by the United States Supreme Court. As the Chief Judge of the New York State Court of Appeals remarked not long ago, “[e]ven in today’s legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking.”¹⁵¹ When positive law appears to be silent with respect to some novel question, a state court can fashion a common law solution, perhaps guided by principles and policies found in related statutes and constitutional provisions. A federal court that could not find an answer in positive law, however, would leave such a matter to private ordering or to the political branches.¹⁵²

Given the wealth of federal statutes and the open-endedness of important constitutional provisions, this limit may not seem significant. A determined, “activist” Court could usually connect its ruling to some authoritative text, could it not? Undoubtedly it could, if it were so inclined, but the current Court is not. For the textualists, this disinclination toward activism is an article of faith, and the purposivists, even if they recognize a greater role for the Court in gap-filling, believe strongly in the legal process principle of institutional settlement;¹⁵³ thus, they too are unlikely to take the lead in the way that a state court

¹⁴⁸ DWORKIN, *supra* note 54, at 250–54.

¹⁴⁹ See *Arkansas Educ. Television Comm'n v. Forbes*, 118 S. Ct. 1633, 1641–44 (1998).

¹⁵⁰ Cf. Dorf, *supra* note 20, at 166 (arguing that Dworkin's theory of law as integrity does not significantly differ from so-called “postmodern” approaches that emphasize practice rather than interpretive theory). For his part, Dworkin foreswears any sharp distinction between “reasoning” and “theory.” Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1723–24 (1998).

¹⁵¹ Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995).

¹⁵² Cf. *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 1999 (1998) (“It would be unsound, we think, for a statute’s *express* system of enforcement to require notice to the recipient [of federal funds] and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.”).

¹⁵³ See HART & SACKS, *supra* note 63, at 4.

might. To the extent that Sunstein describes a cautious attitude on the part of judges, his description seems an apt one for the current United States Supreme Court, while Dworkin's image of the judge weaving together the entire fabric of the law seems a better description of some judges serving on state courts of last resort.¹⁵⁴

The foregoing account of the theory/anti-theory debate reveals that the common law method as currently practiced by the Supreme Court is somewhat more timid than true common law judging. More generally, it shows that the common law method, understood in this way, is ubiquitous in the interpretive work of the Court.

B. Socrates and the Common Law Method

To understand the strengths and the limitations of the Court's decisionmaking processes thus requires an understanding of the strengths and limitations of the common law method. I explore these by noting an affinity between the common law method and the Socratic method.

The common law method is a means by which courts decide cases, the Socratic method a means by which teachers instruct students in critical thinking.¹⁵⁵ Although they therefore serve distinct purposes, the two are closely linked, as a master of the Socratic method, Philip Areeda,¹⁵⁶ observed.¹⁵⁷ Areeda explained: "The [Socratic method] as applied to the case method forces the student — and helps him — to decipher those materials, to reconcile (when possible) what may first appear to be inconsistent, to apply and appreciate the limits of apparently general principles, and to use analogies, judging better and worse ones."¹⁵⁸ The Socratic method conveys substantive doctrine (most commonly in such first-year private law subjects as torts and contracts), but its principal function is to convey a skill — the ability to apply the common law method to derive from decided cases sensible principles of law that can be applied to new cases.¹⁵⁹

How exactly is this done? To derive the "best rule," law students in the Socratic classroom first consider a variety of hypothetical questions

¹⁵⁴ See Dorf, *supra* note 20, at 176 ("Dworkin's vision of law as integrity has always been a better description of common law adjudication than of statutory or constitutional interpretation.")

¹⁵⁵ See MARTHA NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* 15-49 (1997).

¹⁵⁶ For the proposition that Philip Areeda was a master practitioner of the Socratic method, I invoke my own experience as a student in his Contracts course, as well as the appraisal of his colleague Clark Byse. See Clark Byse, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 894, 896 (1996).

¹⁵⁷ See Phillip E. Areeda, *The Socratic Method*, 109 HARV. L. REV. 911, 911 (1996) ("[The Socratic method] and so-called case method are well suited to each other.")

¹⁵⁸ *Id.* at 915.

¹⁵⁹ The case method as originally conceived by Christopher Columbus Langdell principally aimed to convey doctrine, but by early in this century its main purpose was understood to be to teach a methodology. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 21-22 (1995).

designed to elicit different intuitions and then attempt to formulate principles that consistently explain their differing intuitions in different cases.¹⁶⁰ In subject areas in which there is a fixed starting point, such as a statutory or constitutional provision or a decided case that is taken to be beyond question, intuitions regarding different hypothetical fact patterns are considered in relation to the principles of the fixed starting point. In a constitutional law course, for example, a professor might explore whether there is a right to same-sex marriage by asking whether prohibitions of the practice discriminate on the basis of sex in the same way that anti-miscegenation laws discriminate on the basis of race.¹⁶¹

Note the similarities between this process and the way in which the Supreme Court decides its cases. Oral argument in the Court often resembles a Socratic classroom, as the Justices test the rules of law proffered by counsel with hypothetical questions.¹⁶² And of course, the Justices routinely devote large portions of their written opinions to matters of precedent, while considering hypothetical cases not directly before the Court.¹⁶³

Note too the connection between the Socratic classroom and the philosophy of Socrates, as presented by Plato.¹⁶⁴ Throughout the dialogues, Socrates interrogates his students' intuitions. Sometimes the interrogation leads only to the students becoming aware of their ignorance,¹⁶⁵ but often the process leads to general agreement about truth.

¹⁶⁰ See Max Radin, *The Education of a Lawyer*, 25 CAL. L. REV. 676, 679 (1937) (observing that, starting from a decided case, "[t]he Langdellian Socrates may then proceed to determine the value of the judgment by slight or great variations in the facts, until he has got what is an apparently satisfactory general proposition which will cover this case and a great many others").

¹⁶¹ See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding a state prohibition on interracial marriage unconstitutional).

¹⁶² See, e.g., Transcript of Oral Argument, *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998) (No. 97-569), available in 1998 WL 202275, at *8 (Apr. 22, 1998) ("[S]uppose a supervisor says, I'm not going to promote you because you're Asian, Hispanic, whatever, and a week later does promote the person. And the person is no longer even working for that supervisor — promoted out of the department. Is there a violation there?"); Transcript of Oral Argument, *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998) (No. 97-156), available in 1998 WL 141165, at *33 (Mar. 30, 1998) ("Would it be a disability under the Act if — if I know that — that there is in my family a gene that causes manic depression, and — and I choose, therefore, not to have children?").

¹⁶³ See, e.g., *Clinton v. City of New York*, 118 S. Ct. 2091, 2120-21 (1998) (Breyer, J., dissenting) (comparing the legal effect of the Line Item Veto Act to that of an imaginary health care tax provision); *United States v. Bajakajian*, 118 S. Ct. 2028, 2039 (1998) (comparing the harm caused by respondent to "that caused by a hypothetical drug dealer who willfully fails to report taking \$12,000 out of the country in order to purchase drugs"); *FEC v. Akins*, 118 S. Ct. 1777, 1786 (1998) (comparing the injury suffered by the respondent to "a hypothetical example").

¹⁶⁴ In his numerous dialogues, Plato depicts Socrates and various students investigating philosophical questions. Whether the dialogues present the historical Socrates, display the evolution of Plato's thought, or elaborate a coherent philosophy of Plato need not concern us here. See CHARLES H. KAHN, *PLATO AND THE SOCRATIC DIALOGUE* 38-42 (1996) (summarizing the academic debate regarding the interpretation of the dialogues).

¹⁶⁵ See, e.g., PLATO, *Theaetetus*, in 2 *THE DIALOGUES OF PLATO* 141, 216-17 (B. Jowett trans., Random House 1937 (1892)).

With Socrates posing suggestive questions, the students come to discard preliminarily held beliefs that turn out to be inconsistent with more deeply held ones.¹⁶⁶ In the *Meno* and the *Phaedo*, Plato contends that the success of Socratic dialogue (*elenchus*) in eliciting truth indicates that all persons know everything there is to know prior to birth, but they forget; Socratic dialogue enables them to remember all truth.¹⁶⁷ Although this is a strikingly odd view, it appears somewhat less so when one appreciates that “by ‘all truth’ Socrates must mean, not every true statement, but all the truths of philosophy, mathematics and so on, in fact all necessary truths.”¹⁶⁸ In any event, the validity of the theory of learning as recollection (*anamnēsis*) is not in any sense critical to the utility of the Socratic method.¹⁶⁹

For present purposes, the most salient feature of Socratic dialogue is the predominant role of abstract reflection as opposed to experiment.¹⁷⁰ To be sure, “[t]he absurd view that we should all be wonderful philosophers if we had no sense-organs should not be imputed to Plato, though his language sometimes asks for it.”¹⁷¹ Sensory data do play a role in the Platonic discovery of knowledge, but only as a starting point for contemplation about the more perfect realm of ideas.¹⁷² And of course, it is the realm of ideas that, for Plato, constitutes the principal object of philosophical inquiry.¹⁷³

¹⁶⁶ See Gail Fine, *Inquiry in the Meno*, in *THE CAMBRIDGE COMPANION TO PLATO* 200, 208–09 (Richard Kraut ed., 1992).

¹⁶⁷ See PLATO, *Meno* 80d–86b, in *THE DIALOGUES OF PLATO* 277–85 (B. Jowett trans., 4th ed. 1953); PLATO, *Phaedo* 73–77b, in *THE DIALOGUES OF PLATO*, *supra*, at 425–31 (attributing to Socrates the view that conceptual knowledge is actually reminiscence).

¹⁶⁸ I.M. CROMBIE, *AN EXAMINATION OF PLATO'S DOCTRINES* 138 (1963).

¹⁶⁹ See Fine, *supra* note 166, at 214 (noting that even skeptics of *anamnēsis* “can accept Plato’s claim that one can inquire in the absence of knowledge, because of one’s capacity for reflection and because of one’s true beliefs”).

¹⁷⁰ It has been suggested that the method of instruction in the *Meno* — in which, through suggestive questioning, Socrates induces a slave boy to “remember” the correct answer to a question of geometry — is empirical. See DAVID ROSS, *PLATO'S THEORY OF IDEAS* 18 (1951) (“[T]he method by which the slave-boy is got to discover what square has twice the area of that of a given square is a purely empirical one; it is on the evidence of his eyesight . . .”). Most Plato scholars disagree, and for good reason. See, e.g., CROMBIE, *supra* note 168, at 138 (“It is not true, as it is sometimes said, that Socrates’ methods are empirical.”); Julius Moravcsik, *Learning as Recollection*, in *1 PLATO: A COLLECTION OF CRITICAL ESSAYS* 53, 56 & n.1 (Gregory Vlastos ed., 1970) (citing Gregory Vlastos, *Anamnēsis in the Meno*, 4 *DIALOGUE* 143 (1965)). Although Socrates presents his argument pictorially, he could just as easily have given a rigorous formal proof. “His proof works as mathematical proofs should work, by extracting the consequences of things previously agreed to, though some of the steps are omitted.” CROMBIE, *supra* note 168, at 138.

¹⁷¹ CROMBIE, *supra* note 168, at 564.

¹⁷² See ROSS, *supra* note 170, at 24–25.

¹⁷³ The allegory of the cave provides the classic illustration. See PLATO, *THE REPUBLIC* 123–28 (J.A. Richards ed. & trans., 1966). The allegory has been summarized as follows:

Ordinary human beings, untouched by philosophical education, are likened to prisoners in a cave who are forced to gaze on shadows created by artificial light and cast by artifacts paraded by unseen manipulators. Their conception of what exists and of what is worth having is so severely limited and the deception by which they are victimized is so systematic that they cannot even recognize that they are confined, and would not immediately re-

Modern practitioners of the Socratic method certainly do not believe that they are helping students to remember forgotten knowledge, nor do many of them subscribe to Plato's broader views about knowledge and truth. Yet they do seem to share Plato's preference for interrogation of intuition, rather than empirical observation, as the principal means of deriving knowledge.¹⁷⁴

In the modern era, experiment has overthrown the Greek preference for intuition in the natural sciences. However, the organization of our intuitions into what John Rawls calls "reflective equilibrium"¹⁷⁵ continues to be one of the principal means by which courts resolve hard cases. Justice Charles Fried, who currently sits on a state court of last resort and has been for most of his career a Harvard Law School professor, expressly connects this method with law school pedagogy and appellate court decisionmaking: he describes reflective equilibrium as "very much the method with which we are all familiar in legal argument. It is what we see in our classrooms and in our courtrooms."¹⁷⁶

The justification for employing something very much like the Socratic method (or reflective equilibrium, if you prefer) in legal decisionmaking seems straightforward enough. Law is not a natural or even a social science.¹⁷⁷ Law deals chiefly in *normative* propositions, and at least since Hume, it has been generally accepted that descriptive propositions cannot entail normative ones.¹⁷⁸ This latter notion differs from the view of the Greeks — especially Plato's student Aristotle — who believed in a harmony of the laws of nature and natural

gard an interruption in their routine ways of thought as a liberation. Here Plato is of course thinking of the psychological resistance Socrates encountered to his questioning; but he is also making a far more audacious claim, because he means somehow to downgrade the reality of the ordinary world of sensible objects. The shadows cast on the wall of the cave are less real than the objects of which they are images; and in the same way, when the prisoners make progress . . . and learn to understand the Forms, they recognize the existence of a realm of objects that are more real than anything they saw in the cave.

Richard Kraut, *Introduction to the Study of Plato*, in *THE CAMBRIDGE COMPANION TO PLATO*, *supra* note 166, at 1, 10–11 (citations omitted).

¹⁷⁴ Cf. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 43 (1979) ("There are few believers in Platonic Ideas today, nor even many who make a distinction between the sensitive and the intellectual soul. But the image of [the mind as mirror] remains with us . . .").

¹⁷⁵ JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971) (describing reflective equilibrium as the state "reached after a person has weighed various proposed conceptions and has either revised his judgments to accord with one of them or held fast to his initial convictions").

¹⁷⁶ Charles Fried, *Philosophy Matters*, 111 *HARV. L. REV.* 1739, 1748 (1998).

¹⁷⁷ *But see* DUXBURY, *supra* note 159, at 14–16 (describing Langdell's view of law as a science).

¹⁷⁸ See DAVID HUME, *A TREATISE OF HUMAN NATURE* 469–70 (Lewis A. Selby-Bigge ed., Oxford 2d ed. 1978) (1739). If one accepts a teleological account of morality, then descriptive statements can entail normative ones. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 57–59 (2d ed. 1984). However, modern — and certainly postmodern — sensibilities tend to reject teleology. See generally *id.* at 59–61.

(moral) law.¹⁷⁹ Having cut this link, we cannot now turn to nature for normative propositions; nor can a secular court appeal to expressly religious conceptions. Our courts are left, it seems, to search for normativity among propositions that can garner rational consensus — that is, those that can withstand Socratic interrogation. The transition from the ancient to the modern age would appear to make the Socratic method the principal, if not the only, means by which we may conduct normative discourse.¹⁸⁰

Nonetheless, without disparaging the efficacy of Socratic dialogue in fostering critical thinking or sorting out moral views, we should recognize its limitations.¹⁸¹ To say that empirical propositions cannot logically entail normative ones is not to say that empirical facts are irrelevant to normative questions. For example, whether the benefits of affirmative action justify stigmatizing its beneficiaries is a normative

¹⁷⁹ See, e.g., Ernest Barker, *Introduction to ARISTOTLE, POLITICS* xi, xlix (Ernest Barker ed. & trans., 1946) (“What makes the State natural, in [Aristotle’s] view, is the fact that, however it came into existence, it is as it stands the satisfaction of an immanent impulse in human nature towards moral perfection . . .”).

¹⁸⁰ Cf. Anthony T. Kronman, *The Value of Moral Philosophy*, 111 HARV. L. REV. 1751, 1763–64 (1998) (arguing that the relative moral heterogeneity of our society renders Socratic reasoning more important for us). Some scholars are more pessimistic regarding the value of Socratic reasoning in the modern era. See, e.g., STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* (1998) (arguing that our attempt to promote a discourse of reason within government has resulted in self-deception and sophistry); Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1640–42 (1998) [hereinafter Posner, *Problematics*] (asserting that reason is powerless to direct moral life and that today’s professional moralists are without standing to produce useful normative judgments). Judge Posner purports to limit his critique to academic moral philosophy, as opposed to normative reasoning more generally. See Posner, *Problematics*, *supra*, at 1649–50; Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1796, 1802–03 (1998) [hereinafter Posner, *Reply to Critics*]. The target of his argument is moral reasoning about ends, as opposed to means, in contested cases. See *id.* at 1803; see also Kronman, *supra*, at 1751–52 (noting Posner’s claim that economics provides a better normative philosophy than rational argument because it can supply “sound if humble help in the choice of means — something moral philosophy cannot do”).

¹⁸¹ I do not address the question whether the Socratic method systematically disadvantages women. See, e.g., Lani Guinier, Michelle Fine & Jane Balin, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 3 (“[M]any women are alienated by the way the Socratic method is used in large classroom instruction, which is the dominant pedagogy for almost all first-year instruction.”); Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1242 (1988) (finding that male graduates were more likely to prefer Socratic instructors, and suggesting a cultural feminist explanation). The most comprehensive empirical study of the subject to date found that “[i]nformation about the effects of different kinds of discourse (for example, the effects of extended Socratic dialog versus other kinds of dialog) was mixed and complicated.” Elizabeth Mertz with Wamucii Njogu & Susan Gooding, *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 4 (1998). See generally Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2D 199, 203 (1998) (reviewing LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, & INSTITUTIONAL CHANGE* (1997)) (arguing that the Socratic method, applied with sensitivity, does not discriminate against women).

question,¹⁸² but whether affirmative action in fact stigmatizes its beneficiaries is at least partly an empirical one. Even those who believe strongly in the fact/value distinction¹⁸³ should recognize that legal questions almost invariably call for some mixture of normative and empirical analysis.¹⁸⁴

Although the Socratic method can be used to lay bare the empirical assumptions associated with various normative claims, it provides no tools for testing those assumptions. Students in the Socratic classroom do not conduct social science experiments, nor do they read of the results of such experiments. Despite legal realism's successful critique of the conception of the legal enterprise as a search for "the one true rule of law which, being discovered, will endure, without change, forever,"¹⁸⁵ to a significant degree, American legal education and American legal reasoning continue to proceed from Langdell's premise that the answers to difficult legal questions are to be found in the reports of judicial decisions.¹⁸⁶

That premise also suffices the Supreme Court's work. The Court conducts no evidentiary hearings, even though many of the cases it decides turn on either legislative facts that are not readily susceptible to judicial notice or adjudicative facts that were not developed in the trial court. Further, the typical Supreme Court opinion cites dozens of other Supreme Court cases, but scarcely any empirical data,¹⁸⁷ al-

¹⁸² For an argument that this sort of cost-benefit analysis is improper in equal protection cases, see Rubinfeld, cited above in note 33, at pages 440-43.

¹⁸³ There is a "vast philosophical literature questioning the coherence of the fact/value distinction." Jeffrey Rosen, *Overcoming Posner*, 105 YALE L.J. 581, 592 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)); see also *id.* at 592 n.59 (citing HILARY PUTNAM, *THE MANY FACES OF REALISM* 62-71 (1987)); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* xvi (1982); and RORTY, *supra* note 174, at 363-65, 387).

¹⁸⁴ One need not (and I do not) accept Judge Posner's claim that moral reasoning about contested ultimate ends — as opposed to instrumental reasoning about appropriate means to commonly accepted ends — plays virtually no role in adjudication, see Posner, *Problematics*, *supra* note 180, at 1697-98, to recognize that there remains an important role for instrumental reasoning. More generally, ends and means often cannot be separated neatly. See Dorf & Sabel, *supra* note 17, at 390-95; John T. Noonan, Jr., *Posner's Problematics*, 111 HARV. L. REV. 1768, 1772-73 (1998).

¹⁸⁵ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 43 (1977).

¹⁸⁶ Robert Gordon remarks that the legal realist project failed at substituting social science education for the standard "cases and materials" approach, but also observes that such a substitution was not the legal realists' aim. See Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2223-24 (1996) (reviewing DUXBURY, *supra* note 159). Note, however, that the movement from law textbooks containing only cases to those with both cases and materials may be attributed to the realists. See LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, at 78-97 (1986).

¹⁸⁷ Indeed, one study of the 92 Supreme Court cases involving rules of evidence and trial procedure from 1970-1988 found that despite readily accessible academic literature, not one of the Court's majority opinions relied on available data concerning jury behavior. See J. Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L.J. 137, 138-39 (1990).

though there are some encouraging indications that the situation may be changing.¹⁸⁸

The congruence between American legal education and Supreme Court decisionmaking should not be surprising.¹⁸⁹ All of the Justices of the Supreme Court attended American law schools during an era in which Socratic instruction was the almost universal practice, at least in the formative first year. In addition, before joining the Court, five of them had substantial experience as teachers in American law schools.¹⁹⁰ Furthermore, the Justices select law clerks who perform at the top of their classes, with special emphasis on top performance in the first, most Socratic year: first-year performance is critical to obtaining an initial clerkship with a “feeder” judge and to developing relationships with professors who can provide recommendations. The Justices are, in other words, steeped in a Socratic legal culture and surrounded by a staff drawn from a more recent version of that same culture.

But is it fair to characterize the Socratic method as introspective? According to a different view, “[t]he [Socratic method] is cooperative. It is the varied viewpoints — sound as well as those that prove unsound — that makes the classroom interchange an effective teaching vehicle for all.”¹⁹¹ In this view, the Socratic method is fundamentally about dialogue and interaction, and is thus not at all introspective.

The classical Socratic method, however, often produces sham dialogue. Socrates deftly leads his students where he wants to take them, much in the style of a skilled attorney conducting cross-examination entirely through leading questions. Although contemporary defenders of the Socratic method in higher education would not characterize So-

¹⁸⁸ See Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1105–10 (1997) (compiling data indicating increased citation by lawyers and judges of nonlegal sources since 1990, and hypothesizing that computer databases making nonlegal sources more readily accessible to lawyers account for the change).

¹⁸⁹ See Ruth Bader Ginsburg, *On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829, 831 (1997) (agreeing with Judge Carl McGowan’s observation “that law teaching and appellate judging are more alike than any two other ways of working in the law”). I pass over the question of the relation between the Court’s decisionmaking methods and the *scholarship* produced by the legal academy. Compare Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (arguing that “judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy”), with Sanford Levinson, *Judge Edwards’ Indictment of “Impractical” Scholars: The Need for a Bill of Particulars*, 91 MICH. L. REV. 2010, 2014–16 (1993) (rejecting the distinction between “practical” and “impractical” scholarship).

¹⁹⁰ Three — Justices Scalia, Ginsburg, and Breyer — were full-time tenured professors before their appointments to the Courts of Appeal. Justices Stevens and Kennedy served as adjunct law professors.

¹⁹¹ Areeda, *supra* note 157, at 917; see also NUSSBAUM, *supra* note 155, at 19 (“Socratic argument is not undemocratic.”); *id.* at 32 (“Socratic education should be pluralistic . . .” (emphasis omitted)).

cratic dialogue as a sham, they do insist on giving the instructor the leading role in setting the agenda.¹⁹²

Regardless of what occurs in the law school classroom, within the Supreme Court, the Justices, in principle, deliberate as equals in true dialogue. Yet in practice, the Justices do not deliberate very much at all. True, the Justices do seek the opinions of one another: they ask questions of counsel that sometimes seem aimed more at their colleagues;¹⁹³ they circulate draft opinions, concurrences, and dissents, as well as memoranda commenting on these drafts; and occasionally several Justices will meet to discuss a case. But at the conferences during which cases are actually decided, there is virtually no sustained discussion by the Justices as a group.¹⁹⁴ Even were such deliberation to occur, it would not overcome the limitations of the Socratic method, for as noted above, the Justices do not represent a wide variety of viewpoints and experiences. They are all lawyers, and given the nature of their work, necessarily so. The quality of the Court's work product would almost certainly decline substantially if legal acumen were no longer a qualification for becoming a Justice.¹⁹⁵

Consider a second possible defense of the Court's methods. One might grant that Socratic deliberation cannot solve the Court's frequent difficulties in anticipating the consequences of its decisions. However, this defense goes, the Court's methods are not entirely Socratic.

¹⁹² See NUSSBAUM, *supra* note 155, at 41 ("The most important ingredient of a Socratic classroom is obviously the instructor."); AREEDA, *supra* note 157, at 921 ("To have a successful socratic discussion, the instructor must maintain control in order to keep the development clear, orderly, and moving.").

¹⁹³ For examples of oral arguments in which the attorney appears to be cast in the role of ventriloquist's dummy, see Transcript of Oral Argument, Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047 (1998) (No. 97-461), available in 1997 WL 878311, at *30-*50 (Apr. 20, 1998), and Transcript of Oral Argument, United States v. Cabrales, 118 S. Ct. 1772 (1998) (No. 97-643), available in 1998 WL 221362, at *15-*19 (Apr. 29, 1998).

¹⁹⁴ See Stephen Wermiel, *Scrappy Jurist: Justice Antonin Scalia, On the Court Two Years, Points Way to Future*, WALL ST. J., July 1, 1988, at A1 (reporting Justice Scalia's statement that "[n]ot much conferencing goes on" (internal quotation marks omitted)). The scarcity of deliberation on the Court has been a longstanding problem. For example, Justice Powell described the Court as "nine small, independent law firms." Justice Lewis F. Powell, Jr., Address at the American Bar Association Annual Meeting (1976), quoted in Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 18-19 (1979); see also *id.* at 15 ("[T]he Reconstruction Court opinions cannot be meaningfully characterized as the end products of a process designed to achieve a 'maturing of collective thought.'" (citations omitted)).

¹⁹⁵ *But cf.* JOHN P. FRANK, CLEMENT HAYNSWORTH, THE SENATE, AND THE SUPREME COURT 112 (1991) ("[T]here are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they, and a little chance? We can't have all Brandeises and Frankfurters and Cardozos and stuff like that there." (quoting Senator Hruska's remarks supporting President Nixon's choice of Judge Harold Carswell for a seat on the Supreme Court) (internal quotation marks omitted)).

For example, in *Arkansas Educational Television Commission v. Forbes*,¹⁹⁶ discussed briefly above and extensively elsewhere in this issue,¹⁹⁷ the Court rejected the claim that the organizers of a public television debate were required by the First Amendment to include all candidates whose names appeared on the ballot.¹⁹⁸ The Court noted that in response to the Eighth Circuit's acceptance of the claim, a Nebraska public television station had canceled a scheduled debate.¹⁹⁹ Pointing to the logistical difficulties of holding debates with ten or more candidates, the Court concluded that ruling for the plaintiff "would result in less speech, not more."²⁰⁰ In other words, the Court treated the period between the Eighth Circuit's decision and its own as a miniature experiment. This approach was entirely sensible, but given the Court's usual decisionmaking methods, not readily generalizable.²⁰¹ Cases like *Forbes* — in which the litigation itself produces valuable data prior to the case's final resolution — are unusual.

Still, the defense continues, the Court has means to avail itself of expert opinion. The "Brandeis brief" was pioneered nearly a century ago,²⁰² and today, the Court receives numerous briefs forecasting the likely undesirable consequences of potential decisions.

Although Brandeis briefs undoubtedly make a difference from time to time, the Court's dominant methodologies discourage their filing and reduce their impact when filed. Typically, detailed projections about consequences and social conditions appear, if at all, in amicus briefs rather than party briefs, which tend to be focused on doctrine.²⁰³ Good lawyers understand that they must allocate their limited number of pages to the arguments they believe will be most effective. The great majority of lawyers practicing before the Court understand that

¹⁹⁶ 118 S. Ct. 1633 (1998).

¹⁹⁷ See Schauer, *supra* note 133, at 87–92.

¹⁹⁸ See *Forbes*, 118 S. Ct. at 1644.

¹⁹⁹ See *id.* at 1643.

²⁰⁰ *Id.*

²⁰¹ Below I suggest an approach to the certiorari process that would enable the Court to take advantage of this sort of experience on a more regular basis. See *infra* Part III.B.

²⁰² Louis Brandeis's brief for the state in *Muller v. Oregon*, 208 U.S. 412 (1908), is the paradigm of a legal argument based on empirical data. See TRIBE, *supra* note 132, at 569 & n.2.

²⁰³ See, e.g., Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 598–99 (1993) (noting that the amicus briefs filed in the case "are markedly different from typical briefs, in that large parts of them do not deal with decided cases or statutory language — the sort of material we customarily interpret") (Rehnquist, C.J., dissenting). The Chief Justice's dissent also revealed the skepticism with which many justices view amicus briefs:

[The amicus briefs] deal with definitions of scientific knowledge, scientific method, scientific validity, and peer review — in short, matters far afield from the expertise of judges. This is not to say that such materials are not useful or even necessary in deciding how [the Federal Rule of Evidence governing expert testimony] should be applied; but it is to say that the unusual subject matter should cause us to proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.

Id. at 599.

conventional legal arguments have a substantially greater impact on the Court than social science data and projections.

For example, in *Pennsylvania Board of Probation and Parole v. Scott*,²⁰⁴ the Court eschewed empirical data in holding the Fourth Amendment exclusionary rule inapplicable to parole revocation hearings. The Court asserted, without any empirical support, that "the remote possibility that the subject [of an illegal search or seizure will be] a parolee and that the evidence may be admitted at a parole revocation proceeding surely has little, if any, effect on the officer's incentives."²⁰⁵ The dissenters likewise based their contrary conclusion on reason unencumbered by empirical evidence, concluding that "if the police need the deterrence of an exclusionary rule to offset the temptations to forget the Fourth Amendment, parole officers need it quite as much."²⁰⁶ To be sure, measuring the deterrent effect of the exclusionary rule entails methodological problems,²⁰⁷ especially given the difficulty of controlling for such factors as police perjury. Nevertheless, some instructive studies have been undertaken.²⁰⁸ Even if the studies do not completely resolve the question, they are hardly irrelevant. Indeed, the Court's abandonment of the view that the Fourth Amendment requires exclusion to restore the status quo ante²⁰⁹ would appear to have made such measurements of the exclusionary rule's effectiveness essential to the Court's search-and-seizure jurisprudence.²¹⁰ However, until the Court demonstrates a willingness to use empirical evidence, it will not receive much help from the bar.²¹¹

I have suggested that the common law method at work in most of the Court's decisions has strong affinities with the Socratic method, which in turn is linked to the Greeks' preference for contemplation

²⁰⁴ 118 S. Ct. 2014 (1998).

²⁰⁵ *Id.* at 2022.

²⁰⁶ *Id.* at 2026 (Souter, J., dissenting).

²⁰⁷ See *United States v. Janis*, 428 U.S. 433, 449-50 (1976) (noting that "although scholars have attempted to determine whether the exclusionary rule in fact does not have any deterrent effect, each empirical study on the subject, in its own way, appears flawed"); see also Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709-19 (1970) (discussing potential difficulties with techniques that aim to measure empirically the deterrent effect of the exclusionary rule).

²⁰⁸ See, e.g., William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311 (1991); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987).

²⁰⁹ See *Pennsylvania Bd. of Probation*, 118 S. Ct. at 2022-23 (Stevens, J., dissenting) (citing Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1983)).

²¹⁰ If one believes that the Fourth Amendment itself does not require exclusion, one might think the Court lacks the authority to impose it as a remedy because suppressing trustworthy evidence of one person's guilt does not clearly remedy an illegal search. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 151 (1997).

²¹¹ There are, however, some encouraging signs that the use of such evidence will increase. See *infra* p. 56.

over experimentation and experience. These affinities are part of the American legal culture, transmitted through American law schools and related institutions. To recognize that some of the Court's limitations originate in that culture is to recognize that they will be difficult, though not impossible, to change. In the next Part, I consider modest steps the Court could take to improve its ability to adapt doctrine to new or unforeseen circumstances. Before coming to these, however, I address several objections to my characterization of the common law method as practiced by the Court.

C. Objections

At the beginning of this Part, I acknowledged the common law method's dynamism, but stated (without supplying an argument) that evolution by the common law method is largely unconscious.²¹² I shall now support this point by responding to the objection that the very genius of the common law method is its adaptability. Holmes was one proponent of this view. In reference to the common law, he famously observed: "The life of the law has not been logic: it has been experience."²¹³ Holmes implies that as each new case presents new facts and circumstances, the common law judge adapts established principles to fit.

Moreover, the Holmesian objection continues, the great common law judge understands his task as permitting him on occasion to reconceptualize and thereby change the law. Thus, in holding a manufacturer liable for damages resulting from its failure to detect a defective component part notwithstanding the contract rule of privity, Judge Cardozo, in *MacPherson v. Buick Motor Co.*,²¹⁴ stated that "[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day."²¹⁵ He thereby laid the groundwork for modern products liability law. Similarly, in his well-known concurrence in *Escola v. Coca-Cola Bottling Co.*,²¹⁶ Justice Traynor proposed shifting the standard of care in products liability cases from negligence to strict liability.²¹⁷

I would respond that *MacPherson* and *Escola* are great cases decided by great judges, and for just that reason they stand as exceptions to, rather than examples of, the usual common law method. To borrow a much abused analogy, *MacPherson* and *Escola* are paradigm

²¹² See *supra* p. 27.

²¹³ HOLMES, *supra* note 12, at 1.

²¹⁴ 111 N.E. 1050 (N.Y. 1916).

²¹⁵ *Id.* at 1053.

²¹⁶ 150 P.2d 436 (Cal. 1944).

²¹⁷ See *id.* at 440.

shifts.²¹⁸ Moreover, even these paradigm-shifting cases may be seen more accurately in gradualist terms. Justice Traynor's *Escola* concurrence built on *MacPherson*,²¹⁹ and *MacPherson* itself was hardly unprecedented; in *MacPherson*, the New York Court of Appeals affirmed a unanimous decision of the intermediate appellate court.²²⁰ In general, the great common law opinions such as Cardozo's in *Palsgraf v. Long Island Railroad*,²²¹ or Hand's in *United States v. Carroll Towing Co.*,²²² are known for their elegant synthesis of existing precedent, rather than for doctrinal innovation.²²³

The great common law cases are also extraordinary in their recourse to first principles and direct considerations of public policy. As Holmes elaborated in describing the common law's typical relation to practical experience, "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."²²⁴ Notably, in this passage, Holmes was speaking as a proto-legal realist,²²⁵ providing an account of what the courts actually do, rather than of the methods they understand themselves to be applying.²²⁶ Cases like *MacPherson*, *Escola*, *Palsgraf*, and *Carroll Towing* are extraordinary in their conscious consideration of public policy;²²⁷ Holmes acknowledges that, more commonly, considerations of public policy are at best unconscious, as doctrinal analysis dominates.

A zealous legal realist might counter that it makes no difference whether courts embrace policy considerations openly or surreptitiously, because the result will be the same, but this response seems more an expression of faith than a realist(ic) analysis of the world as it is. Tex-

²¹⁸ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 47-48 (3d ed. 1996).

²¹⁹ See *Escola*, 150 P.2d at 440 (citing *MacPherson*).

²²⁰ See *MacPherson v. Buick Motor Co.*, 145 N.Y.S. 462, 465 (App. Div. 1914).

²²¹ 162 N.E. 99 (N.Y. 1928).

²²² 159 F.2d 169 (2d Cir. 1947).

²²³ See *id.* at 172-73.

²²⁴ HOLMES, *supra* note 12, at 1.

²²⁵ See Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1236 (1987); Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 653 & n.6 (1995).

²²⁶ See OLIVER W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 173 (1920) (describing the law as "[t]he prophecies of what the courts will do in fact").

²²⁷ Linda Meyer characterizes *MacPherson* as one of the "great works of the common law." Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 664 (1998). However, I do not read her to imply that all common law decisions would look like *MacPherson*, even if they were decided by judges who shared Cardozo's gifts. See *id.* at 665 ("[L]ooking past the doctrine does not mean that one must look past all the doctrine all the time."); cf. Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 849-50 (1993) (describing the propensity of lower federal courts to focus on doctrine).

tualism, purposivism, the common law method, and the like are cognitive structures for processing legal problems. The legal realist is undoubtedly correct that the cognitive structures do not completely determine decisions, but that hardly shows that they are irrelevant. Given the importance of cognitive structures to human behavior generally,²²⁸ it would be remarkable if they did not play a significant role in judicial decisionmaking. Indeed, it has long been a commonplace that judges feel themselves constrained by doctrine, even when they wish they were not.²²⁹ Yet our hypothetical legal realist offers little more than professions of faith in favor of his contrary view.

Perhaps then, the defender of the common law method need only reformulate his argument to say that the forms and methods of legal decisionmaking make no substantial difference *in the long run*, because, particularly in a common law system, the law will eventually transform itself in both substance and form.²³⁰ Maybe so, but life and law occur in the short run.²³¹ Gradualist common law evolution takes place over the course of generations. As the pace of technological and social change continues to accelerate, the claim that rules of law formulated through this gradual process will *eventually* respond to the demands of new social problems increasingly amounts to the claim that the law will adapt to conditions that no longer exist.²³²

The defender of the modern common law method may nonetheless attempt to salvage the objection by arguing that my characterization of the common law method, even if accurate of the age of formalism, is now anachronistic. In Holmes's time, most judges may have disguised their policy judgments, but today's judges do not, the defender asserts. He points to the rise of an expressly consequentialist approach to jurisprudence — law and economics. Moreover, legal realism itself has left an indelible mark, so that the element of policy choice inherent in adjudication is now widely acknowledged. Indeed, the very goal of one important strand of legal realism was to displace the speculation and intuition of the traditional common law method with a conscious reliance on empirical methods.²³³

Yet the intellectual developments identified above have not changed the basic character of the common law method as practiced

²²⁸ See GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS* 153 (1987); J.M. Balkin, *Ideology as Cultural Software*, 16 *CARDOZO L. REV.* 1221, 1224–25 (1995).

²²⁹ See, e.g., Benjamin N. Cardozo, *A Ministry of Justice*, 35 *HARV. L. REV.* 113, 117–18 (1921).

²³⁰ See, e.g., HOLMES, *supra* note 12, at 35–38.

²³¹ Cf. JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1924) (“In the long run we are all dead.”).

²³² See, e.g., *supra* p. 12.

²³³ See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 833–34 (1935); Jerome Frank, *Are Judges Human?*, 80 *U. PA. L. REV.* 233, 253–54 (1931); see also DUXBURY, *supra* note 159, at 79–97 (describing the development of realism and its attitude toward the social sciences).

by the Supreme Court. Consider law and economics. Outside the context of business cases, judges often invoke economic analysis merely as a means of translating into the language of social science their choice of utilitarian visions of justice rather than deontological ones. Even were the vocabulary of economics not available, one imagines the assessments would be much the same. Indeed, one need not even point out the difficulty economists face quantifying noneconomic values, because one rarely sees an effort to assign numerical values to those that can be quantified.²³⁴ This should not be surprising, because for the most part, economics is not an empirical social science,²³⁵ despite the claims of some of its proponents.²³⁶

This is hardly to say that economics is useless in predicting the consequences of various legal regimes. There are many economic predictions that are beyond doubt. For legal actors, perhaps the most useful general proposition is that the potential of liability for an activity or product will make the activity or product more expensive and thus decrease demand for it.²³⁷ But whatever the utility of law and economics, it has had only a small influence on the Supreme Court. Liberals distrust law and economics because it undervalues "soft" variables,²³⁸ while conservatives who sing the praises of judicial restraint cannot embrace its open celebration of judicial policymaking.²³⁹ As a result, the leading judicial proponents of law and economics seem unlikely to be elevated to the Supreme Court.

²³⁴ For example, after providing his algebraic formula for negligence, Judge Hand did not purport to replace any of the variables with actual or even imagined figures. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

²³⁵ See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1500 (1998); Wassily Leontief, *Academic Economics*, 217 SCIENCE 104, 107 (letter to the editor).

²³⁶ See, e.g., Posner, *Problematics*, *supra* note 180, at 1647 ("[T]here have been a fair number of 'natural' experiments in economics . . . that cumulatively provide impressive evidence for central predictions of economics . . .").

²³⁷ See Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 12 (1984). Making an activity more expensive to undertake will often be the point of liability. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 103-07 (1970).

²³⁸ See Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. L. REV. 267, 275-77 (1993); Peter J. Hammer, *Free Speech and the "Acid Bath": An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment*, 87 MICH. L. REV. 499, 515-16 (1988) (noting that law and economics has difficulty accounting for the value of "process"); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 596 (1985) (arguing that the difficulty with law and economics "is not only that 'soft' variables — such as the value of vindicating a fundamental right or preserving human dignity — tend to be ignored or understated, but also that entire problems are reduced to terms that misstate their structure and that ignore the nuances that give these problems their full character").

²³⁹ See Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 829-32 (1986).

Next, consider the impact of legal realism on the Court. The legal realist erosion of the division between law and policy has certainly played a substantial role in shaping the Supreme Court's docket. As I discuss below, however, even legal realism has had only a limited impact on the way the Court decides the cases it hears.

Admittedly, the three dramatic doctrinal reversals accomplished in the late 1930s were all in large measure responses to legal realist insights: in abandoning a restrictive interpretation of the Commerce Clause, the Court acknowledged that locating the line between local and interstate transactions was more a policy judgment than an interpretive one, and thus best left to Congress;²⁴⁰ similarly, in repudiating the *Lochner* era's protection of property and contract, the Court initiated a period of deference to federal and state legislative judgments;²⁴¹ and in taking the federal courts out of the business of announcing general principles of common law in diversity suits, the Court expressly relied on the realist critique of its earlier practice.²⁴² Furthermore, in a more recent, but related development, the understanding of legal interpretation as a political enterprise accounts in large measure for the Court's willingness to defer to administrative agencies' reasonable interpretations of ambiguous statutory texts.²⁴³

The triumph of legal realism thus accounts for the Supreme Court's default of deference to political actors. One could understand this practice of deference as a means of adapting to changing circumstances: other things being equal, elected officials are more responsive to changing public values and attitudes than are courts. To the extent that administrative agencies are understood as independent experts, they are better able to keep up with the details of a changing world than are the courts; to the extent that they are understood as agents of the Executive branch, they share in the democratic nature of that branch and receive deference on that basis.²⁴⁴ By reducing the Court's overall share of responsibility in the elaboration of legal norms, the deference default of the modern era responds to the Court's understanding of the limits of its own abilities and legitimacy.

²⁴⁰ See *United States v. Darby*, 312 U.S. 100, 114 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29-30 (1937).

²⁴¹ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937).

²⁴² See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 & n.23 (1938) (citing *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910) (Holmes, J., dissenting); *Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*, 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting)). Although I have argued that *Erie* is best justified on federalism grounds, see Dorf, *supra* note 225, at 709, I do not deny that the *Erie* Court itself relied largely on legal realist notions.

²⁴³ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

²⁴⁴ See generally Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 760-77 (1996) (describing the development of greater political control over administrative agencies that roughly coincided with the beginning of the Carter Administration).

Lawrence Lessig's theory of "fidelity in translation" nicely captures the leading place of deference in the modern constitutional order.²⁴⁵ As a general matter, Lessig's theory addresses the same broad issue addressed in this Foreword — how courts can faithfully apply authoritative text to circumstances dramatically different from those that prevailed when the text was adopted. His answer emphasizes dynamism, suggesting that preservation of meaning sometimes entails giving a changed reading to an unchanged text in light of social context.²⁴⁶ Thus, he invokes the "Erie-effect" to explain the emergence of deference in post-1937 Supreme Court jurisprudence: as courts came to accept the legal realist insight that interpretation is a political activity, they engaged in less interpretation, preferring to allocate decisional authority to other, usually more accountable, actors.²⁴⁷

However, the limitations of Lessig's theory reveal why legal realism has had only a modest impact on the way the Court decides the cases it hears. Although Lessig's theory provides a plausible account of the default settings of existing doctrine, it has relatively little to say about most of the issues the Court confronts in the cases that are actually litigated. After all, the Court does not follow the approach of James Bradley Thayer, who argued that, regardless of the nature of the claims involved, the Court should invalidate decisions taken by majoritarian institutions only when those decisions very clearly violate the Constitution.²⁴⁸ To be sure, one sees something of Thayer's view

²⁴⁵ See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (accounting for changed interpretations of constitutional text by noting the changed contexts to which the text was to be applied).

²⁴⁶ See *id.* at 402-03.

²⁴⁷ See Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795 (1997); Lessig, *supra* note 245, at 432-38. I refer to these other actors as only "usually" more accountable because modern federal jurisprudence accords deference to actors who are not directly accountable. First, federal courts defer to state judges under the *Erie* doctrine, regardless whether these judges are elected or appointed. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after Erie*, 145 U. PA. L. REV. 1459, 1495-1517 (1997) (questioning the relevance of legal realism and legal positivism to *Erie* doctrine); Dorf, *supra* note 225, at 695-715 (same). Second, even though administrative agencies can be more democratically accountable than courts, see Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 550-55 (1997) (book review), judicial review of agency decisions does not invariably present the same legitimacy questions as judicial review of statutes. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 764 (1997) ("[A]rguments for judicial restraint, effective with respect to the judicial practice of invalidating statutes, might have little or no force with respect to the practice of invalidating agency rules, orders and actions . . ."). For an account that emphasizes the importance of the popular rejection of pre-1937 doctrine rather than legal realism, see BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 279-382 (1998).

²⁴⁸ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893).

in the Court's willingness to presume most statutes constitutional,²⁴⁹ but even as the Court was adopting a *general* policy of deference in the late 1930s, it marked out special areas in which the presumption of constitutionality does not apply.²⁵⁰ Since the rights revolution of the Warren Court, and to a lesser degree the Burger Court,²⁵¹ those special areas — infringements of specific provisions of the Bill of Rights, laws restricting the political process, and laws burdening the rights of minority groups — have come to dominate constitutional law, so that the default of deference often plays no substantial role in constitutional adjudication.²⁵² Indeed, in recent years, the Court has shown a willingness to suspend the presumption of constitutionality in other areas, such as federalism and separation of powers, as well.²⁵³

Deference continues to play an important role in challenges to administrative interpretations of federal statutes, but two phenomena limit the impact of the deference default here as well. First, many of the Court's statutory interpretation cases do not involve review of an agency interpretation,²⁵⁴ so deference is not an option. Second, the Court will only defer to agency interpretations of *ambiguous* statutory texts, and the influence of textualism has meant a greater willingness

²⁴⁹ See, e.g., *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2158 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (noting that prospective economic legislation carries a presumption of constitutionality); *Hudson v. United States*, 118 S. Ct. 488, 501 (1997) (Souter, J., concurring in the judgment) (referring to "the presumption of constitutionality enjoyed by an ostensibly civil statute making no provision for the safeguards guaranteed to criminal defendants").

²⁵⁰ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). One such demarcation occurs in the Court's treatment of legislative facts. Under rational basis review, the Court will presume the existence of facts that would make the challenged legislation rational. See *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955) (speculating about what "[t]he legislature might have concluded"). When specially protected rights are at stake, the Court will sometimes call for judicial factfinding. See *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 667–68 (1994). See also Note, *Deference to Legislative Fact Determinations in First Amendment Cases after Turner Broadcasting*, 111 HARV. L. REV. 2313, 2313–29 (1998) (observing the Court's somewhat inconsistent approach to legislative facts and proposing an alternative).

²⁵¹ See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24–31 (1990).

²⁵² The principal exceptions to this proposition are cases in which a party seeks recognition of an unenumerated right under the rubric of substantive due process. In recent years, the Court has expressly invoked principles of deference to justify its unwillingness to recognize such "new" rights, see *Washington v. Glucksberg*, 117 S. Ct. 2258, 2260 (1997), although it also appears unwilling to cut back substantially on rights previously recognized, see *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (1992), or even to abandon apparently subjective substantive due process tests, such as whether government conduct "shocks the conscience," see *supra* note 6.

²⁵³ See, e.g., *Clinton v. New York*, 118 S. Ct. 2091 (1998) (holding that the Line Item Veto Act violates the lawmaking procedure of Article I); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun-Free School Zones Act exceeds Congress's powers under the Commerce Clause).

²⁵⁴ See, e.g., *Hohn v. United States*, 118 S. Ct. 1969 (1998); *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956 (1998).

in recent years to find that an administrative interpretation conflicts with a statute's clear text.²⁵⁵

The Court decides cases in which a plausible argument can be made for a range of results, and lawyers will therefore bring cases characterizing their clients' claims as fitting within the windows left open — that is, cases in which the deference default does not apply.²⁵⁶ Thus, lawyers do not bring cases challenging minimum wage or maximum hour legislation as violating the economic rights of employers and employees, and if they do bring them, the claims are dismissed before reaching the Supreme Court. In other words, legal realism, through the deference default, plays a large role in shaping the Court's docket, but only a limited one in resolving cases.²⁵⁷ In the cases that do reach the Court, the Justices continue to apply the traditional common law method — with its preference for intuition and speculation rather than systematic experimentation.²⁵⁸

²⁵⁵ See, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 990–91 (1992); Merrill, *supra* note 99, at 354 (“[T]he general pattern in the Court appears to suggest something of an inverse relationship between textualism and use of the *Chevron* doctrine.”).

²⁵⁶ Hence, because substantive due process provides a weak basis for economic claims, shrewd lawyers will rely on provisions such as the Excessive Fines Clause, see *United States v. Bajakajian*, 118 S. Ct. 2028, 2038 (1998) (invalidating as an excessive fine a \$357,144 forfeiture for failure to report transportation of currency), and the Takings Clause, see *Eastern Enters. v. Apfel*, 118 S. Ct. 2131, 2149–2153 (1998) (plurality opinion) (finding that retroactive civil liability was an unconstitutional taking). Note, however, that five Justices in *Eastern Enterprises* — the four dissenters, see *id.* at 2163–64 (Breyer, J., dissenting), plus Justice Kennedy concurring in the judgment, see *id.* at 2158 (Kennedy, J., concurring in the judgment and dissenting in part) — were prepared to recognize a valid substantive due process claim in some cases of purely economic injury resulting from retroactive legislation. Difficulties inherent in distinguishing prospective from retroactive liability, see Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1056, 1067–73 (1997), were left for another day.

²⁵⁷ In fairness to Lessig, whose theory I used above as a foil, I should note that he attempts to explain the absence of the deference default rule in constitutional cases by sharply distinguishing between government powers and individual rights. Politicization of the grounds for government action, Lessig posits, warrants judicial deference, while politicization of “the defense against judicial action” warrants judicial activism. Lessig, *supra* note 147, at 1842; see also Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1414 (1997) (distinguishing between cases involving government powers and those involving individual rights). I find the distinction between powers and rights unavailing. As I have previously noted:

In rights cases, the default is set against government power only after a right is found. Yet in the most controversial cases, the very question is whether there is a right. Unless there is a general right to liberty (which, constitutionally speaking, there is not), the mere assertion of a constitutional right should not alter the default. Discerning whether a right exists in the first place would still seem to require a thicker normative theory than Lessig provides.

Dorf, *supra* note 11, at 1786 n.116. Lessig's favorite examples involve equality rather than liberty, see Lessig, *supra* note 147, at 1843–46, but he faces the same problem, because just as there is no general right to liberty, so most government classifications receive only minimal scrutiny.

²⁵⁸ Again, I do not claim that the Justices do not consider the likely consequences of various possible decisions. They do, see Zeppos, *supra* note 22, at 1107–13, but by relying principally on intuition and speculation rather than on empirical data.

III. A MODEST REFORM AGENDA

The Court's institutional posture and adjudicatory methods constrain its ability to learn about the world in which its doctrines operate. Within the existing framework of American democracy, little can be done about the institutional constraints, but some modest changes could be made to the Court's adjudicatory method to improve its knowledge base. This Part proposes reforms that would enable the Court to do a better job of adjusting its interpretations of authoritative text to new, unforeseen, and changing circumstances. The first section considers methods by which the Court may expressly take into account the social consequences of its decisions, and finds that these methods may result in marginal improvements. The second section offers a number of doctrinal modifications that would improve the Court's ability to learn from experience. The third section briefly explains how these doctrinal modifications would work in practice. The final section argues that, notwithstanding the need for better mechanisms by which the Court can inform itself of practical realities, there remains an important place in its jurisprudence for the articulation of values.

A. *Consequences, Principles, and Social Science*

This Foreword has criticized the Court's interpretive methods for paying insufficient explicit attention to the empirical assumptions underlying, and the practical consequences of, its decisions. Judge Posner has recently leveled similar charges, arguing that the Court ought to make greater use of social science research.²⁵⁹ This section elaborates on how the Court might improve its ability to gather information. It cautions, however, that such efforts — welcome as they may be — will not greatly improve the Court's situation.

Before offering concrete proposals, however, I must address the objection that it is unfair to criticize the Court for its policymaking because courts are meant to be fora of principle rather than policy.²⁶⁰ Taking account of consequences requires some metric by which competing interests are compared; but in many of the most important cases, one party will claim a right not to have her interests thrown into the hopper to be balanced along with all other potential claims. She will, in other words, argue that her right acts as a trump that precludes balancing.²⁶¹

²⁵⁹ See Posner, *supra* note 15, at 12.

²⁶⁰ See DWORKIN, *supra* note 16, at 69 (distinguishing principle from policy); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 82 (1977) (same).

²⁶¹ The leading proponent of this view is Ronald Dworkin. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 260, at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for

We might initially respond that rights do not in fact function as trumps. Under existing constitutional doctrine, for example, rights can typically be overridden if the government shows that a challenged regulation is the least restrictive means of furthering some compelling interest.²⁶² This possibility of balancing away rights makes good sense, at least in some cases. Who among us would be willing to preserve the right to free speech at the cost of, say, thermonuclear war²⁶³ or even a riot?²⁶⁴ Rights, in other words, are not trumps in the sense that they exclude all consideration of consequences. Instead, they are at most "shields"²⁶⁵ against weak or unacceptable reasons for government action.²⁶⁶

Moreover, even non-consequentialists care about consequences, at least in the absence of a rights-based or other deontological reason to ignore them. For example, Ronald Dworkin has expressed sympathy for the view that the rule prescribed in *New York Times v. Sullivan*²⁶⁷ — which announced a "reckless disregard" standard for state libel actions for damages brought by public officials²⁶⁸ (and which was later extended to public figures)²⁶⁹ — should be extended to suits by ordinary citizens, as long as all plaintiffs may sue for a judicial declaration

denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them").

²⁶² See, e.g., *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990) (holding that the state interest in the integrity of the political process justifies overriding a corporation's right to use general treasury funds for independent expenditures on behalf of political candidates); *Roe v. Wade*, 410 U.S. 113, 163-65 (1973) (stating that the state interest in the potential life of a viable fetus justifies overriding a pregnant woman's right to abortion, absent a threat to her health or life).

²⁶³ Cf. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 991 (W.D. Wis. 1979) (enjoining publication of an article titled, "The H-Bomb Secret: How We Got It, Why We're Telling It").

²⁶⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 449 & n.4 (1969) (recognizing "incitement to imminent lawlessness" as a basis for government to proscribe speech).

²⁶⁵ See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429-31 (1993).

²⁶⁶ See Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998) ("Rights are not general trumps against appeals to the common good or anything else; instead, they are better understood as channeling the kinds of reasons government can invoke when it acts in certain arenas."); cf. RAZ, *supra* note 127, at 28-33 (explaining that devices such as rights act to exclude some kinds of reasons from the decisional calculus). Judge Posner's view does not appear to acknowledge even this much. For example, in discussing the Supreme Court's decision in *United States v. Virginia*, 518 U.S. 515 (1996), he posits that the critical question in the case should have been "whether excluding women from [the Virginia Military Institute] is likely to do more harm to women . . . than including them would do to the mission of training citizen-soldiers." Posner, *supra* note 15, at 16. This unabashedly utilitarian formulation gives no weight at all to the right of women to be free from sex discrimination. Taking that right seriously does not mean that other interests can never outweigh the right, but it should mean that overriding the right requires something more than a showing that doing so would increase aggregate social utility.

²⁶⁷ 376 U.S. 254 (1964).

²⁶⁸ *Id.* at 279-80.

²⁶⁹ See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967).

that a statement was false without having to satisfy the *Sullivan* criteria.²⁷⁰ The apparent basis for Dworkin's proposal is that such a rule would do a better job than the *Sullivan* regime at securing the values of the First Amendment. Whether the proposal would in fact better serve that goal is essentially an empirical question about the consequences of the two approaches.²⁷¹

Considerations of consequences do not merely figure into the decision about how to implement rights; they often play a substantial role in deciding whether a right exists or how far it extends.²⁷² More fundamentally, if one rejects both moral realism (the belief in the existence of objective moral truths)²⁷³ and thoroughgoing moral skepticism (the belief in the unprovability or even incoherence of all moral claims) — and I read our legal culture to be uncomfortable with both of these belief structures — she will recognize that the specification of rights can only proceed in concrete contexts within which particulars matter.²⁷⁴ Also, much adjudication — especially in statutory interpretation cases — does not involve rights at all, except in the conclusory sense that the winner of the case can be said to have a purely legal right to whatever she has won.

Thus, the adjudicatory domain in which consequences matter is substantial. What can the Court do to improve its empirical understanding within this domain? Judge Posner's answer is that the Justices should make greater use of social science (and that the legal academy should turn its attention to producing more such work and less work like, say, this Foreword).²⁷⁵ Judge Posner acknowledges that "[t]he capability of the courts to conduct scientific or social scientific research is extremely limited, and perhaps nil."²⁷⁶ Nonetheless, he contends, "their assimilative powers are great[]." ²⁷⁷ This seems a considerable overstatement, based perhaps on Judge Posner's projection of his own eclectic intellectual appetite onto his colleagues on the federal bench. In this age of specialization, generalist judges simply cannot keep up with the latest developments in all of the fields relevant to their work.²⁷⁸

²⁷⁰ See DWORKIN, *supra* note 71, at 212–13.

²⁷¹ For another alternative to the *Sullivan* rule, see Paul A. Freund, *The Judicial Process in Civil Liberties Cases*, 1975 U. ILL. L. F. 493, 498.

²⁷² See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1227 (1996).

²⁷³ See Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424, 2425 (1992).

²⁷⁴ See Dorf & Sabel, *supra* note 17, at 446–52.

²⁷⁵ See Posner, *supra* note 15, at 11–22.

²⁷⁶ *Id.* at 12; accord Richard Lempert, "Between Cup and Lip": *Social Science Influences on Law and Policy*, 10 LAW & POL. 167, 191 (1988) (arguing that judges have limited access to social science information).

²⁷⁷ Posner, *supra* note 15, at 12.

²⁷⁸ On the limits of nonspecialist judges, see Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998). Judge Posner, who is familiar with the spe-

How might the Court improve its ability to assimilate information? One obvious starting point would be the composition of its staff. A recent kiss-and-tell account of the Court asserts that the Justices delegate an alarmingly large share of their work to their law clerks.²⁷⁹ Based upon my own experience, the claim appears to be quite exaggerated,²⁸⁰ but even if one were to accept at face value the reports about influential law clerks, the Justices would still be left doing much more of their own work than officials at comparable levels in other branches of the

cialized literature of numerous academic fields, appears to be a counterexample, although even he has been accused of dilettantism. See Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1782 (1998) (contending that Posner's Holmes Lectures inaccurately portray academic philosophy). The accusation is at least somewhat apt. For example, in the same lecture Nussbaum critiques for its philosophical errors, Judge Posner erroneously refers to bonobos as "a species of monkey." Posner, *Problematics*, *supra* note 180, at 1661. See also Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1565 (1998) (referring to "chimpanzees and other monkeys"). Chimpanzees and bonobos (sometimes called pygmy chimpanzees) are not monkeys. They are hominoid apes. See FRANS DE WAAL, *BONOBO: THE FORGOTTEN APE*, at vi (1997). Judge Posner further asserts that feminists admire bonobos because females are dominant, adding that "[i]t would make as much sense to admire sharks, vultures, or leeches." Posner, *Problematics*, *supra* note 180, at 1661; see *id.* at 1661 n.40 (quoting DE WAAL, *supra*). Yet behavioral patterns of bonobos and chimpanzees — species more closely related to humans than they or we are to any other extant species, see DE WAAL, *supra*, at 3 — are obviously more relevant to claims about human behavior than behavioral patterns of non-mammals, see generally ROGER FOUTS WITH STEPHEN TUKEL MILLS, *NEXT OF KIN* (1997) (describing the numerous ways in which chimpanzees resemble humans, including their ability to learn and use human language and transmit it to their children). De Waal strikes a careful balance in recognizing that sex roles in bonobos reflect adaptations to environmental factors different from those facing humans (and chimpanzees), see DE WAAL, *supra*, at 135, while acknowledging, as Posner does not, that "the bonobo, by virtue of its close relation to us, is a critical piece in the puzzle of human evolution," *id.* at 143. Judge Posner's errors concerning the hominoid lineage could be easily overlooked, except that they occur in the middle of an argument that relies heavily on evolutionary biology as the basis for calling into question humans' ability to engage in moral reasoning. See Posner, *Problematics*, *supra* note 180, at 1657–62; see also Dworkin, *supra* note 150, at 1734–38 (observing that evolutionary biology appears to be at the heart of Judge Posner's normative views).

If so extraordinary a judge as Posner cannot avoid misapprehending important details of the specialized fields with which he grapples, his claim that courts generally have great assimilative powers must be an overstatement. For example, courts must from time to time address legal issues involving human sexuality, but as Judge Posner notes, "judges know next to nothing about [sex] beyond their own personal experience." RICHARD A. POSNER, *SEX AND REASON* 1 (1992). To remedy the matter in his own case, Judge Posner acquainted himself with "a vast multidisciplinary literature on sex, a literature to which medicine, biology, sociobiology, psychiatry, psychology, sociology, economics, jurisprudence, theology, philosophy, history, classics, anthropology, demography — even geography and literary criticism — have all contributed." *Id.* at 2. I am not qualified to judge whether Judge Posner has mastered this literature, but I dare say that most judges and academics would fail at this or similar tasks. Cf. Brian Leiter, *Intellectual Voyeurism in Legal Scholarship*, 4 YALE J.L. & HUMAN. 79 (1992) (arguing that legal scholars are often not qualified to engage in useful interdisciplinary work).

²⁷⁹ See EDWARD LAZARUS, *CLOSED CHAMBERS* 263 (1998); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102–19 (1985).

²⁸⁰ During the 1991 Term, I was a law clerk to Justice Kennedy, whom Lazarus describes (along with Justice O'Connor) as "susceptible to clerks' arguments," LAZARUS, *supra* note 279, at 274, by which he presumably means *unduly* susceptible. That was not my perception.

government.²⁸¹ The Justices' self-sufficiency is not, however, an entirely good thing.

Even if one understands administrative agencies within the executive branch as performing a fundamentally political role,²⁸² they still make extensive use of civil servant experts. Similarly, with the growth in the role of the administrative state over the last century, Congress has increasingly come to rely upon experts of its own to monitor the agencies. Under the auspices of the Comptroller General, the United States General Accounting Office (GAO) "conducts audits, surveys, investigations, and evaluations of federal programs . . . at the request of congressional committees or members, or to fulfill GAO specifically mandated or basic legislative requirements. GAO's findings and recommendations are published as reports to congressional members or delivered as testimony to congressional committees."²⁸³

The Court has nothing comparable to the expert staff used by the executive and legislative branches to inform its decisions. Each Justice is entitled to the assistance of four law clerks who help draft opinions and select cases for review.²⁸⁴ In addition, the Court employs a small professional staff of lawyers and other individuals who work in the offices of the Clerk of Court, the Marshal, and in the Court library, as well as other miscellaneous personnel,²⁸⁵ but no staff charged with finding facts.

It is unrealistic to suppose that the Court could or should utilize the sort of bureaucratic factfinders and researchers associated with the other branches of government. However, the Court could take some small steps to improve its own access to empirical data. Much of the Court's aversion to the use of empirical data stems from the reaction to its opinion in *Brown v. Board of Education*.²⁸⁶ In *Brown*, the Court supplemented its basic argument with a footnote citing studies on the psychological effects of racially segregated schools.²⁸⁷ Even though the footnote appeared to play a negligible role in the Court's decision,²⁸⁸ a storm of protest over the study's methodology ensued,²⁸⁹ and the

²⁸¹ Even if the Justices do less of their "own work" now than when Justice Brandeis attributed public respect for the Court to this fact, see Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2110 (1992), they remain more involved in the details of their work than, for example, a typical member of Congress.

²⁸² See Strauss, *supra* note 244, at 760-77.

²⁸³ GAO *Frequently Asked Questions* (last modified June 26, 1998) <<http://www.gao.gov/faq/faq.htm#5.3>>.

²⁸⁴ See 28 U.S.C. § 675 (1994); ELLEN GREENBERG, *THE SUPREME COURT EXPLAINED* 9 (1997).

²⁸⁵ See GREENBERG, *supra* note 284, at 7-12.

²⁸⁶ 347 U.S. 483 (1954).

²⁸⁷ See *id.* at 494 n.11.

²⁸⁸ See Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 157-67 (1955).

²⁸⁹ See Ernest van den Haag, *Social Science Testimony in the Desegregation Cases — A Reply to Professor Kenneth Clark*, 6 VILL. L. REV. 69 (1960). See generally MICHAEL J. SAKS &

Court has been exceedingly reluctant to utilize social science data ever since.²⁹⁰ The Court needs to move beyond this overreaction.

How so? To begin, the Court could rely to a greater extent on empirical and policy analysis in its written opinions. Doing so would then encourage lead counsel and amici to include more such material in their own presentations to the Court. In this respect, Chief Justice Rehnquist's opinion for the Court in *Swidler & Berlin v. United States*²⁹¹ is encouraging; it expressly signals the Court's willingness to consider empirical evidence.²⁹² The Court needs to follow up on such general invitations by citing empirical data submitted in party and amicus briefs. In addition, the Court might profit from taking a less passive role in directing the proceedings once it has granted a petition for a writ of certiorari. Just as it sometimes requests that counsel brief and argue particular legal questions,²⁹³ the Court could invite counsel to address specific factual questions.

The Court could also increase its reliance on the sort of adjunct fact gatherers familiar to other courts. Special masters are one example.²⁹⁴ Under the Court's current practice, special masters are typically appointed for cases within the Court's original jurisdiction,²⁹⁵ but the Court does not use special masters or other neutral experts to assist with the complex factual questions that arise in the exercise of its ap-

CHARLES H. BARON, *THE USE/NONUSE/MISUSE OF APPLIED SOCIAL RESEARCH IN THE COURTS* (1980) (discussing the ways in which social science research has been used and misused by the courts); Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75 (explaining the role of facts in constitutional lawmaking). Paul Rosen has offered a defense of the *Brown* Court's social science claims. See PAUL L. ROSEN, *THE SUPREME COURT AND SOCIAL SCIENCE* 134-72 (1972) (associating the *Brown* Court's use of social science with the sociological jurisprudence urged by Brandeis, Cardozo, and Pound).

²⁹⁰ See *Missouri v. Jenkins*, 515 U.S. 70, 119-20 & n.2 (1995) (Thomas, J., concurring) (criticizing the *Brown* Court's reliance on social science data).

²⁹¹ 118 S. Ct. 2081, 2088 (1998) (holding that the attorney-client privilege survives the death of the client (except in testamentary cases)).

²⁹² The Court stated:

While the arguments against the survival of the privilege are by no means frivolous, they are based in large part on speculation — thoughtful speculation, but speculation nonetheless — as to whether posthumous termination of the privilege would diminish a client's willingness to confide in an attorney. In an area where empirical information would be useful, it is scant and inconclusive.

Id. at 2088; see also *id.* at 2087 n.4 (noting that "[e]mpirical evidence on the privilege is limited. Three studies do not reach firm conclusions on whether limiting the privilege would discourage full and frank communication" (citing Vincent C. Alexander, *The Corporate Attorney Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 352 (1989); and Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962))).

²⁹³ See, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 30 (1997); *Bogan v. Scott-Harris*, 117 S. Ct. 2430 (1997).

²⁹⁴ See *General Elec. Co. v. Joiner*, 118 S. Ct. 512, 520-21 (1997) (Breyer, J., concurring) (noting the utility of special masters and other experts to trial courts).

²⁹⁵ See, e.g., *New Jersey v. New York*, 118 S. Ct. 1726, 1731 (1998).

pellate jurisdiction, even when the trial court has not addressed the relevant question.²⁹⁶

Changes of this sort could be beneficial, but conceptual, institutional, and practical difficulties are likely to limit the Court's ability to narrow its information-gathering deficit. To put the matter in what may seem tendentiously postmodern terms, at a conceptual level "facts" are slippery; the kinds of facts that interest courts are intertwined with the reasons we care about them and the conceptual apparatus we use to process them. Recall the Microsoft litigation discussed briefly in the Introduction.²⁹⁷ A court without computer expertise cannot hope to give an intelligent answer to the question whether an operating system and an internet browser constitute an integrated product or two distinct ones. But even a computer-savvy court answering such a question must recognize that any resolution will necessarily be temporary. Operating systems and browsers are not natural kinds; their relation to one another depends upon the state of technology at any given moment,²⁹⁸ as well as upon the reasons we have for caring about product integration.

Thus, we come to the institutional difficulty: the Court cannot simply delegate the task of factfinding to special masters or other adjunct entities, because the resolution of factual questions in the sense that usually concerns us cannot be neatly separated from the articulation of norms. Moreover, frequent delegation of the factfinding function to special masters — or to expert bodies like science courts²⁹⁹ — would be likely to expose rather than solve the Court's dilemma. To the extent that these bodies perform the work ordinarily associated with administrative agencies, it is not clear why they should be located within

²⁹⁶ It is unclear whether the Court has the authority to appoint special masters in cases outside its original jurisdiction. Even in original cases, "the scope of the Masters' authority is not always clear," because "the Court's rules make no provision respecting the proceedings before a Master." ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO & KENNETH S. GELLER, *SUPREME COURT PRACTICE* 487 (7th ed. 1993). Supreme Court Rule 17.2 provides for the application of the Federal Rules of Civil Procedure and the Federal Rules of Evidence in original cases, *see id.* at 488 n.38, suggesting by negative implication that no evidence will be taken on factual questions arising in cases within the Court's appellate jurisdiction. Moreover, even as to original jurisdiction cases, the Court only takes evidence on questions of adjudicative rather than legislative fact.

²⁹⁷ *See supra* pp. 12–13.

²⁹⁸ Only four years ago, operating systems and graphical user interfaces for IBM-compatible personal computers were generally considered separate products. *Cf.* *United States v. Microsoft Corp.*, 147 F.3d 935, 945 (D.C. Cir. 1998) (noting that Windows 3.11 and MS-DOS were understood to be distinct products).

²⁹⁹ The possible use of such expert bodies was hotly debated in the 1970s, especially among judges of the D.C. Circuit, with its steady diet of complex scientific issues. *See, e.g.*, David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 826–29 (1977) (discussing science courts); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 546–54 (1974) (discussing scientific experts and other aids); Abraham D. Sofaer, *The Science Court: Unscientific and Unsound*, 9 ENVTL. L. 1 (1978).

the judicial branch,³⁰⁰ to the extent that they perform judicial work, they seem superfluous, if not illegitimate.³⁰¹ Hence, such adjunct fact-finding bodies could not be used in more than a small fraction of the Court's cases.

More fundamentally, courts should not attempt to remake themselves in the image of traditionally conceived administrative agencies, with armies of fact gatherers answering to centralized policymakers. That regulatory model is increasingly outdated because, as society has become more complex, interdependent, and rapidly evolving, centralized and hierarchical organizations have become less adept at responding to social needs. For example, in the analogous context of the private sector, firms have increasingly responded to the threat of economic competition by shifting from hierarchical to decentralized structures.³⁰² In place of vertical integration or fixed long-term contracts, the emerging organizational forms rely on continuous information exchange and collaboration among economic actors as the primary means of ensuring fidelity to common purposes.³⁰³ Although their ultimate triumph is hardly guaranteed, these decentralized private sector organizations possess considerable advantages that have led them to spread throughout the world.³⁰⁴

The organizing principles of the "new economy" are not confined to the private sector, partly because in an advanced economy no clear line can be drawn between the private and public sectors. Indeed, even during the heyday of mass production on the Taylorist model,³⁰⁵ government regulatory agencies quite naturally tended to adopt the same organizational structure as the entities they regulated.³⁰⁶ As the organization of economic and other social activity has changed, some of the most effective forms of government regulation of that activity have begun to change with them. In the new regulatory model, citizens and other interested constituencies participate directly in the formulation of policy, regulators participate in the activities they regulate,

³⁰⁰ In the 1920s, Cardozo proposed the creation of a Ministry of Justice to bridge the gap between courts and legislatures. It would have studied the law developed on a case-by-case basis for problems that could be best cured by legislation. See Cardozo, *supra* note 229, at 114. Notably, the proposed ministry would not have played any role in the resolution of concrete cases. See *id.* at 125.

³⁰¹ See Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 56-57 (1979).

³⁰² See Dorf & Sabel, *supra* note 17, at 292-314.

³⁰³ See *id.*

³⁰⁴ See *id.* at 306-07.

³⁰⁵ See generally FREDERICK W. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1967) (propounding a model of industrial organization in which managers require workers to perform standardized tasks with little room for discretion or creativity).

³⁰⁶ See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10-13 (1938) (comparing an administrative agency to an industry-wide board of directors); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 73-104 (1984).

and transparency serves to limit the opportunities for agency capture and self-dealing.³⁰⁷ For example, state and federal environmental regulation in the last decade has moved away from command-and-control strategies and toward flexible ones that combine the freedom to innovate with an obligation to collect and make available information that facilitates comparisons of the strengths and weaknesses of different approaches.³⁰⁸ Similar innovations in areas as diverse as family support services,³⁰⁹ community policing,³¹⁰ and nuclear power plant safety,³¹¹ as well as historical antecedents in forestry,³¹² military procurement,³¹³ and public health,³¹⁴ provide evidence of the widespread adaptability of regulation by loosely coordinated decentralization.

Thus, increasingly, agencies do not use social science in the way that Judge Posner and its other champions³¹⁵ suggest that courts should — to find definitive answers to empirical and policy questions. Instead, innovative regulators set temporary standards based upon the best practice to emerge from regulated actors in communication with one another. For example, rather than specifying a particular safe method of production (or shipment, or storage, or disposal) of a hazardous material, agencies using the new model require the use of a method as safe as some industry standard, which is itself subject to change with changing conditions and improving technology.³¹⁶

The emerging methods of regulation just described currently co-exist with more traditional means of command-and-control regulation at the state and federal level. Charles Sable and I have recently argued elsewhere that in order for the decentralized methods to take hold, they must operate as part of a national system that we call “democratic experimentalism.”³¹⁷ Within such a system, the courts would play the vital role of enforcing the rights of individuals to par-

³⁰⁷ See Dorf & Sabel, *supra* note 17, at 380 (describing a “peer inspectorate”).

³⁰⁸ See *id.* at 373–88 (describing, *inter alia*, the Massachusetts Toxics Use Reduction Act of 1989, Mass. Gen. Laws Ann. ch. 21 I, § 10 (West 1996) and the federal Environmental Protection Agency’s Common Sense Initiative and Project XL); see also DANIEL C. ESTY & MARIAN R. CHERTOW, *Thinking Ecologically: An Introduction*, in THINKING ECOLOGICALLY I, 11–13 (1997) (“The shift away from the polarities of the past several decades toward a policymaking model that attends to interconnectedness demands new tools and strategies.”).

³⁰⁹ See Dorf & Sabel, *supra* note 17, at 324–27.

³¹⁰ See *id.* at 327–32.

³¹¹ See *id.* at 371–73. Note, however, that the experience of the Institute of Nuclear Power Operations (INPO) differs from that of the entities involved in regulating the other fields mentioned in the text in that INPO is nominally private and “its reports are not directly available to the public.” *Id.* at 372–73.

³¹² See *id.* at 364–71.

³¹³ See *id.* at 332–36.

³¹⁴ See *id.* at 416–17 n.468.

³¹⁵ See, e.g., David L. Faigman, “Normative Constitutional Fact-Finding”: Exploring the Empirical Component of Constitutional Interpretation, 139 U. PA. L. REV. 541, 548–49 (1991).

³¹⁶ See Dorf & Sabel, *supra* note 17, at 350–54 (describing “rolling best-practice rule[making]”).

³¹⁷ *Id.* at 336–39 (describing the limitations of piecemeal efforts).

ticipate in state and local bodies that implement broad congressional mandates.³¹⁸ Courts would do so by weighing the reasons given by government for challenged conduct against information derived from experience in other jurisdictions.³¹⁹ The emerging pattern of administration therefore has the potential to bring about important changes in the Court's methodology.

However, for the time being, the new model of fact-gathering and policymaking is not readily assimilable to the questions the Supreme Court faces. To be sure, trial courts — particularly specialized ones — have the capability to act as coordinators of social learning and services, receiving input directly from the parties affected, and thereby operating in ways that are broadly similar to innovative agencies.³²⁰ However, the sheer number and variety of cases that come before the Supreme Court make a unilateral transformation of its method of interacting with society along these lines essentially impossible. The Court sits atop a hierarchical organization, or to be more precise, fifty-one hierarchical organizations — the lower federal courts and (with respect to their decisions on questions of federal law) the state courts. For it to benefit from the pooling of decentralized learning, therefore, the Court must enlist the aid of actors closer to the ground.

B. *Provisional Adjudication*

This Section discusses some doctrinal mechanisms for implementing decentralization in the absence of a large-scale reconceptualization of government and politics. Each of the proposed changes will undoubtedly raise a host of practical questions that I do not attempt to answer in any detail — although the next section briefly explains how what I call “provisional adjudication” can be considered an extension, rather than a rejection, of common understandings of adjudication.

Within existing frameworks, the constitutional doctrine of federalism is the most natural starting point for a model of decentralized learning. Justice Brandeis's metaphor of the states as experimental “laboratories”³²¹ captures the basic concept. Because states are smaller than the nation as a whole, the costs associated with a failed regulatory policy at the state level are smaller than they would be at the federal level.³²² Further, because states can experiment simultaneously

³¹⁸ See *id.* at 388–90.

³¹⁹ See *id.* at 395–404.

³²⁰ See *id.* at 401–02 (discussing drug courts). For a positive appraisal of the experience of non-specialist trial courts in supervising prison reform, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

³²¹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

³²² For arguments sympathetic to the “laboratory” model, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 85–88 (1995); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1499 (1994); and Michael W. McConnell, *Federalism: Evaluating the Founders' De-*

with many approaches to similar problems, learning proceeds more rapidly than when such approaches are attempted *seriatim*.³²³

Yet the Court's federalism doctrines implement the notion of states as experimental laboratories imperfectly at best. In its recent decisions protecting state sovereignty on the basis of the Commerce Clause,³²⁴ the Tenth Amendment,³²⁵ and the Eleventh Amendment,³²⁶ the Court appears to be much more concerned about preserving the dignity of the states — as if they were natural persons that could experience hurt feelings beyond those of their residents³²⁷ — than in pursuing decentralization and the other policy goals that federalism serves.³²⁸

Consider the Court's recently discovered "anticommandeering" principle, which prohibits the federal government from requiring a state legislature to enact legislation³²⁹ or ordering a state executive to enforce a federal regulatory program.³³⁰ At least one version of commandeering seems to take advantage of decentralized learning in just the ways envisioned by the experimental laboratories metaphor. In this approach, the federal government gives the states broadly defined mandates to implement within similarly broadly defined limits, and federal agencies serve primarily as a means of facilitating information exchange among states and localities. Yet the current doctrine's focus on the states' dignity³³¹ might render such mandates unconstitutional

sign, 54 U. CHI. L. REV. 1484, 1498–1500 (1987). For a more skeptical view, see Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980). For a response to Rose-Ackerman's skepticism, see Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997).

³²³ See SHAPIRO, *supra* note 322, at 85; Friedman, *supra* note 322, at 400.

³²⁴ See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

³²⁵ See *Printz v. United States*, 117 S. Ct. 2365 (1997).

³²⁶ See *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996). The Court has resisted the most expansive view of the limits placed on the jurisdiction of the federal courts by the Eleventh Amendment. See *Wisconsin Dep't of Corrections v. Schacht*, 118 S. Ct. 2047, 2054 (1998) (holding that an otherwise removable case can be removed to federal court notwithstanding the inclusion of claims subject to an Eleventh Amendment bar).

³²⁷ See Monaghan, *supra* note 19, at 132.

³²⁸ See Dorf, *supra* note 19, at 831–34. It has been argued that *all* of the goals of federalism could be accomplished by a unitary national government that decentralized decisionmaking as appropriate. See generally Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994) (arguing that federalism serves no policy objectives that are not equally or better served by decentralization). Although I am sympathetic to this perspective, it seems at most an ideal model rather than a blueprint, given the role states in fact play in our system of government. See Friedman, *supra* note 322, at 381–82; see also *id.* at 386–405 (describing values served better by federalism than by mere decentralization); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2217 (1998) ("Rubin and Feeley's analysis fails to appreciate the degree to which decentralization in the United States is a function of, and bound up with, federalism . . .").

³²⁹ See *New York v. United States*, 505 U.S. 144, 175 (1992).

³³⁰ See *Printz*, 117 S. Ct. at 2376–78.

³³¹ The Court does provide a functional justification for the anticommandeering doctrine: it claims that federal mandates to state legislatures will blur the lines of accountability. See *New York*, 505 U.S. at 169. On its own, the claim provides a weak basis for the Court's rule, and in

as long as state participation in the federal program is a formal requirement.³³² In this way, federalism doctrine not only fails to encourage experimentalism, but also stands as an affirmative obstacle to it.

Moreover, the Court's invocation of the states' role as experimental laboratories often appears to be a makeweight. Consider the Court's recent decisions denying recognition to an asserted constitutional right to physician-assisted suicide.³³³ Although the Chief Justice's opinion was nominally for the Court, five Justices suggested a willingness to consider recognizing in some future case that, as Justice O'Connor put it, a "mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."³³⁴ Justices Ginsburg and Breyer joined in Justice O'Connor's analysis.³³⁵ Justices Stevens and Souter would have gone even farther down the road toward recognizing the right.³³⁶

The Court's reasoning must, therefore, be read in light of Justice O'Connor's qualifications, and for her it was critical that the "laboratory of the States" be given the opportunity to create procedural safeguards for balancing "the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State's interests in protecting those who might seek to end life mistakenly or under pressure."³³⁷ The theme of federalism was prominent in all of the opinions. At the time the cases were decided, it appeared that no

any event, does not distinguish commandeering legislation from other programs of federal/state cooperation that have the same potential for undermining accountability. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1061-72 (1995); Friedman, *supra* note 322, at 396-97; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 824-30 (1998). Hills provides an alternative, functional justification for the Court's anticommandeering doctrine, arguing that commandeering is less efficient than voluntary intergovernmental undertakings. See *id.* at 871-901. I am dubious that such voluntary arrangements will always be sufficient to foster the kind of experimentalism that I advocate.

³³² See Dorf & Sabel, *supra* note 17, at 423-32.

³³³ See *Vacco v. Quill*, 117 S. Ct. 2293 (1997); *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997). I was one of two lawyers who filed the amicus brief on behalf of state legislators and also provided the lead counsel for the respondents with some assistance in the preparation of their briefs and oral arguments. See Brief *Amicus Curiae* of State Legislators in Support of Respondents, *Quill and Glucksberg* (Nos. 95-1858 and 96-110).

³³⁴ *Washington v. Glucksberg and Vacco v. Quill*, 117 S. Ct. 2302, 2303 (1997) (O'Connor, J., concurring).

³³⁵ Although Justice O'Connor concurred in the opinion of the Court, Justices Ginsburg and Breyer only concurred in the judgment, while nonetheless endorsing Justice O'Connor's views. See *id.* at 2310 (Ginsburg, J. concurring in the judgments); *id.* (Breyer, J., concurring in the judgments). This suggests that Justice O'Connor joined the opinion of the Court for the purpose of ensuring that the Court would speak with one voice, even though the effect appears to be rather the opposite.

³³⁶ See *id.* at 2304-10 (Stevens, J., concurring in the judgments); *Glucksberg*, 117 S. Ct. 2258, at 2275-93 (Souter, J., concurring in the judgment).

³³⁷ *Glucksberg and Quill*, 117 S. Ct. at 2303 (O'Connor, J., concurring).

American jurisdiction permitted physician-assisted suicide,³³⁸ and some of the Justices therefore believed they lacked the information necessary to resolve the issue. As Justice Souter explained, “[t]he day may come when we can say with some assurance which side is right, but for now it is the substantiality of the factual disagreement, and the alternatives for resolving it, that matter.”³³⁹ Even Chief Justice Rehnquist’s opinion found it significant that “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.”³⁴⁰

It is thus reasonable to suppose that the possibility of state experimentation was a critical factor in the Court’s rejection of the right asserted in the physician-assisted suicide cases.³⁴¹ What would be the doctrinal consequence if a *federal* statute were to impose a nationwide ban on physician-assisted suicide by lethal prescription, as various members of Congress have lately proposed?³⁴² Even though such a law would effectively eliminate the possibility of experimentation by the states, the law would be valid so long as it met the ordinary tests for constitutionality under Congress’s affirmative powers — here the Commerce Clause. This incongruity results from the near-complete separation between the jurisprudence of congressional power and the jurisprudence of individual rights.³⁴³

It was not always thus. As the Federalists argued, the original 1787 Constitution relied on the interrelationship between rights and powers as the principal means of protecting liberty; this, in their view, obviated the need for a bill of rights.³⁴⁴ Although the Federalists con-

³³⁸ Physician-assisted suicide was legal in Oregon, but the law authorizing it was, at the time, not in effect because of a court order. For an account of the Oregon ballot initiative and subsequent legal challenges, see Patrick M. Curran, Jr., *Regulating Death: Oregon’s Death with Dignity Act and the Legalization of Physician-Assisted Suicide*, 86 GEO. L.J. 725 (1998). See also *Lee v. Oregon*, 107 F.3d 1382, 1386–92 (9th Cir.), cert. denied, 118 S. Ct. 328 (1997).

³³⁹ *Glucksberg*, 117 S. Ct. at 2292 (Souter, J., concurring in the judgment).

³⁴⁰ *Glucksberg*, 117 S. Ct. at 2267.

³⁴¹ Even if one were to disagree with my analysis of these particular cases, the point could be assumed *arguendo*, because there certainly will be *some* case in which this argument makes a difference, and nothing turns on the subject matter of the case.

³⁴² Attorney General Janet Reno overruled a policy statement, issued in November 1997 by Thomas A. Constantine of the Drug Enforcement Administration, which asserted that existing federal drug trafficking laws barred physician-assisted suicide by lethal prescription. See Neil A. Lewis, *Reno Lifts Barrier to Oregon’s Law on Aided Suicide*, N.Y. TIMES, June 6, 1998, at A1. Some members of Congress have proposed legislation endorsing Mr. Constantine’s view. See S. 2151, 105th Cong. (1998); H.R. 4006, 105th Cong. (1998).

³⁴³ Of course, even without an express connection between structural and rights jurisprudence, “the actual allocation among various governmental actors of the power to restrict liberty is an important aspect of the overall dynamics of a system of civil liberties.” Henry P. Monaghan, Book Review, 94 HARV. L. REV. 296, 308–09 (1980).

³⁴⁴ See, e.g., THE FEDERALIST NO. 84, at 531 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in THE ORIGINS OF THE AMERICAN CONSTITUTION 367, 369 (Michael Kammen ed., 1986); James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787), in FEDERALISTS AND

ceded the argument over the Bill of Rights during the ratification struggle,³⁴⁵ early jurisprudence continued to recognize what today could be considered external limits on affirmative powers, as when the Court noted in *McCulloch v. Maryland*³⁴⁶ that although Congress's power to regulate interstate commerce is broad, it may not be used pretextually.³⁴⁷

Modern Commerce Clause doctrine rejects the requirement that Congress be motivated by commercial purposes,³⁴⁸ and I would not advocate a return to the older view.³⁴⁹ Nevertheless, the Court is searching for ways to limit federal power under the Commerce Clause in favor of state power. In *United States v. Lopez*,³⁵⁰ the Court invoked the states' traditional dominion over education and punishment of crimes of violence as one of the reasons to invalidate a federal statute prohibiting firearm possession in the vicinity of a schoolyard.³⁵¹ However, given the Court's unhappy experience with the traditional state functions test as a Tenth Amendment limit on Congress's power,³⁵² there is reason to doubt the test's utility as an internal limit under the Commerce Clause. In these circumstances, the Court might turn to its rights jurisprudence as a supplement to its federalism jurisprudence. When, as in the physician-assisted suicide cases, the possibility of experimentation by the states plays a substantial role in the provisional decision to deny recognition to a right, the Court ought to limit the federal government's ability to adopt a uniform national solution before there has been a substantial period for experimentation. In

ANTIFEDERALISTS: THE DEBATE OVER THE RATIFICATION OF THE CONSTITUTION 166, 167 (John P. Kaminski & Richard Leffler eds., 1989); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, at 536-43 (1969) (describing the Federalists' view that a bill of rights was unnecessary and the Antifederalists' contrary view).

³⁴⁵ See Dorf, *supra* note 272, at 1187 n.50 (citing Michael A. Gillespie, *Massachusetts: Creating Consensus, in* RATIFYING THE CONSTITUTION 138, 154-58 (Michael A. Gillespie & Michael Lienesch eds., 1989); John P. Kaminski, *The Constitution Without a Bill of Rights, in* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 16, 33-39 (Patrick T. Conley & John P. Kaminski eds., 1992); and Jean Yarbrough, *New Hampshire Puritanism and the Moral Foundations of America, in* RATIFYING THE CONSTITUTION, *supra*, at 235, 250-51).

³⁴⁶ 17 U.S. (4 Wheat.) 316 (1819).

³⁴⁷ See *id.* at 423; see also Lessig, *supra* note 245, at 448.

³⁴⁸ See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

³⁴⁹ *But cf.* Randy E. Barnett, *Necessary and Proper*, 44 UCLA L. REV. 745, 788-89 (1997) (arguing that Congress be presumed to lack the power to infringe "liberty interests").

³⁵⁰ 514 U.S. 549 (1995).

³⁵¹ See *id.* at 564; *id.* at 580-83 (Kennedy, J., concurring).

³⁵² See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985). *Lopez* is not the only case in tension with *Garcia's* rejection of the traditional state function test. As a matter of statutory construction, the Court requires a plain statement by Congress in order to interfere with a traditional and essential state function. See *Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1954 (1998) (assuming *arguendo* that the operation of a state prison is such a function (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991))).

this way, individual rights would inform federalism, and, in close cases, federalism would inform individual rights.

Using the states as experimental laboratories — both in the conventional sense and in the innovative sense of tying limits on enumerated powers to rights jurisprudence as just suggested above — would assist the Court only when the Court's doctrines permit different jurisdictions to take varied approaches to common problems.³⁵³ Since *Martin v. Hunter's Lessee*,³⁵⁴ however, the Supreme Court has seen its role as principally one of promoting uniformity in the interpretation of federal law.³⁵⁵ For example, an important criterion for deciding whether the Court will grant a petition for a writ of certiorari is whether the lower federal courts or state courts of last resort have issued conflicting rulings.³⁵⁶

Notwithstanding this vision of the Court's role, temporary disuniformity of federal law can assist the Court in learning from experience. The Court sometimes defers decision on a relatively novel question of federal law so that the issue can "percolate" in the state and lower federal courts.³⁵⁷ Rather than decide such issues immediately, the Court hopes to address them with the benefit of well-reasoned opinions by the federal courts of appeals and perhaps the state courts of last resort. To this justification should be added the possibility that the passage of time during which there is a circuit split creates a record of the consequences of different legal regimes.³⁵⁸ A trend toward allowing greater

³⁵³ Absent diverse practices among the states, comparisons with other national systems may prove helpful. One must always be careful not to draw overly broad conclusions based on different national conditions, but similar caution applies to discussions of domestic experience as well. Certainly Justice Scalia's open hostility to comparative law, see *Printz v. United States*, 117 S. Ct. 2365, 2377 n.11 (1997) (contending that "comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one"), seems unwarranted.

³⁵⁴ 14 U.S. (1 Wheat.) 304 (1816).

³⁵⁵ See *id.* at 347-48.

³⁵⁶ See SUP. CT. R. 10(a)-(b).

³⁵⁷ See, e.g., *Arizona v. Evans*, 514 U.S. 1, 23-24 n.1 (1995) (Ginsburg, J., joined by Stevens, J., dissenting) (citing *McCray v. New York*, 461 U.S. 961, 961-63 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari)).

³⁵⁸ During the debate over a proposed national court of appeals in the 1970s and early 1980s, some commentators endorsed percolation as a means of experimentation. See Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883, 898 (1974) ("Many [circuit splits] can be endured and sometimes perhaps ought to be endured while judges and scholars observe the respective workings out in practice of the conflicting rules, particularly where the question of law is a close one, to which confident answer will in any case be impossible."); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984) ("The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule."); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) ("[E]xperience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process."). It is not entirely clear from the quoted language whether the experimentation these commentators envisioned would have con-

percolation may already be under way; the decline in the Court's caseload over the last five years is undoubtedly due in part to the retirement of Justice White, who was a strong believer in granting certiorari to enforce the uniformity of federal law.³⁵⁹

There are, to be sure, many circumstances in which the uniformity of federal law should be paramount. In some instances, the very reason for federal, as opposed to state, regulation is to relieve interstate businesses of the burden of complying with fifty different regulatory regimes. Moreover, with respect to some controversial matters of individual rights, a uniform national regime is critically important to the Court's credibility.³⁶⁰ Similarly, concerns about equality and fair notice would tip the scales in favor of uniformity in the definition of criminal offenses. And of course, balanced against the learning facilitated in each case by temporary disuniformity are the costs that may accompany legal uncertainty, including unprotected reliance, inability to plan, and excessive litigation.³⁶¹ Hence, percolation will frequently not be worth the cost.³⁶² This is not to say, however, that percolation would never be justified.

sisted of doctrinal innovation, the sort of direct assessment of consequences of different legal regimes advanced here, or both.

³⁵⁹ See Michael J. Broyde, Note, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. REV. 610, 611-13 (1987). Thus, allowing percolation may be one of the Court's responses to caseload pressure. See Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1109-16 (1987) (arguing that given docket pressure, percolation makes a virtue of necessity). For an analysis of the multifarious causes of the shrinking docket, see Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403. Hellman notes that the Supreme Court typically pays inadequate attention to developments in the lower federal courts, although, due to their much larger caseload, they often have greater experience. See *id.* at 436; *supra* pp. 21-22 (noting Justice Ginsburg's willingness to draw upon the experience of the lower federal courts in construing a federal statute).

³⁶⁰ See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 866-69 (1992); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), "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").

³⁶¹ See Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990).

³⁶² Congress makes this judgment whenever it provides for mandatory expedited review by the Supreme Court. See Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (expedited review codified at 2 U.S.C. § 692 (1994)); Telecommunications Act of 1996, Pub. L. No. 104-104, § 561(b), 110 Stat. 142 (providing for expedited appellate review to Supreme Court); Cable Act of 1992, Pub. L. No. 102-385 (expedited review codified at 47 U.S.C. § 555(c)(2) (1994)). However, expedited review can lead to a rush to judgment. See Felker v. Turpin, 517 U.S. 1182, 1183 (1996) (Stevens, J., dissenting); Mark Tushnet, *"The King of France with Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes*, 1996 SUP. CT. REV. 163, 163-66.

Even if one concedes that percolation occasionally makes practical sense, one might object to the practice as unprincipled.³⁶³ According to this view, the Court has no business imposing (or acquiescing in the imposition of) what is, after all, an incorrect view of the law on some of those litigants whose cases are decided while a legal question is percolating. For example, suppose that the Court had allowed greater percolation with respect to the abortion issue: “the states would have been free to experiment with different approaches to the abortion question and eventually an answer might have emerged that would have commended itself to the Court, and the nation, as both principled and practical.”³⁶⁴ It may seem a decisive objection to this idea that “many thousands of young women’s lives [would have been] ruined in the meantime, while the ‘experiments’ were being conducted, by what the Court might later declare, when it deemed the ‘experiment’ to have lasted long enough, had been a violation of their constitutional rights.”³⁶⁵

Although there may be sound reasons for the Court to have rejected a period of experimentalism regarding the abortion issue, this last objection is not among them. When the resolution of a legal issue will inflict harm on one group (women, in the abortion example) if it is resolved one way, and another group (fetuses, to continue the present example) if resolved the other way, the risk of erroneous decision is great no matter what one decides.³⁶⁶ *Especially* if one believes there are right answers in hard cases — or even if one merely rejects the crude form of legal realism that regards any decision of a court of last resort as correct by virtue of the court’s having so decided — the possibility of error provides a reason to try as hard as possible to make the correct decision. In order to reduce the risk of the larger harm that would result from selecting a legal regime for the entire nation too quickly, the court may choose to permit the temporary coexistence of inconsistent legal regimes, knowing that at least one of them will later be deemed illegal.

Deontologists might object that this last claim amounts to an incoherent consequentialism of rights — the view that one should maximize the number of occasions on which we respect non-consequentialist rights, even if that means violating rights from time to time. That objection assumes, however, that we know what rights there are. Experimentalism addresses situations in which we do not.

³⁶³ This point need not, however, be phrased as an objection. See Bickel, *supra* note 40, at 51 (contrasting principle with prudence, rather than whim). But see Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 1 (1964).

³⁶⁴ Richard A. Posner, *Conceptions of Legal “Theory”: A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377, 386 (1997).

³⁶⁵ Ronald Dworkin, *Reply*, 29 ARIZ. ST. L.J. 431, 437 (1997).

³⁶⁶ See Posner, *Problematics*, *supra* note 180, at 1703.

In constructing a model of provisional adjudication, we might also turn to the distinction between as-applied and facial challenges to statutes and other government policies. In recent years, the Court has divided over the circumstances under which a litigant may challenge a government policy on its face.³⁶⁷ As understood within the terms of this debate, the distinction raises issues closely related to questions of third-party standing.³⁶⁸ The doctrine distinguishes between facial claims in which the claimant's own conduct is irrelevant because the challenged rule of law is invalid,³⁶⁹ and as-applied claims in which the claimant concedes the general validity of the rule, but claims that its application to her conduct violates her legal rights.³⁷⁰ Other things being equal, even those who take a relatively liberal attitude toward facial challenges prefer to resolve cases in a narrower, as-applied posture, because focusing on the actual facts of the case will look less like abstract review that borders on an advisory opinion, and more like the resolution of a straightforward case or controversy.³⁷¹

For similar reasons, the Court may believe that it is better to defer judgment about the meaning or validity of a statute or policy until there has been some substantial period of experience under it. Allowing percolation of this sort, however, may not always be feasible or desirable because circumstances may require the Court to provide an answer before it wishes. In such cases, it would be appropriate for the Court to place a heavy burden on the party seeking to foreclose experimentation.³⁷² Just as rejecting a facial challenge (in the conventional, third-party standing sense) does not preclude a party from bringing an as-applied challenge in a later case,³⁷³ rejecting a challenge to some statute or policy early in its life should not preclude a party

³⁶⁷ See *Washington v. Glucksberg and Vacco v. Quill*, 117 S. Ct. 2304, 2304 (1997) (Stevens, J., concurring in the judgments) (citing the exchange of views in *Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76 (1996)); *Washington v. Glucksberg*, 117 S. Ct. 2258, 2275 (1997). Justice Stevens has come close to endorsing my view. See *Glucksberg and Quill*, 117 S. Ct. at 2304 n.6 (citing Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 239-40 (1994)); *Glucksberg and Quill*, 117 S. Ct. at 2304 (Stevens, J., concurring in the judgments); *Janklow*, 517 U.S. at 1175 (mem. of Stevens, J.) (citing Dorf, *supra*, at 236, 238).

³⁶⁸ See Dorf, *supra* note 367, at 263; Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867-75 (1991). See generally Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984) (describing the problematic development of the third-party standing doctrine and proposing clarifications and modifications of the doctrine).

³⁶⁹ See *City of Chicago v. International College of Surgeons*, 118 S. Ct. 523, 531 (1997) (noting that a party bringing a facial constitutional claim is not bound by the administrative record).

³⁷⁰ See *Planned Parenthood v. Casey*, 510 U.S. 1309, 1313 (1994) (Souter, Circuit Justice, in chambers). But see Matthew Adler, *Rights Against Rules*, 97 MICH. L. REV. (forthcoming 1998) (arguing that as-applied challenges do not exist).

³⁷¹ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 403 n.3 (1989).

³⁷² For a suggestion along these lines, see *Glucksberg*, 117 S. Ct. 2258, 2292-93 (Souter, J., concurring), which raised the possibility of provisionally denying recognition to an asserted right — in that case, physician-assisted suicide — in order to allow legislative experimentation.

³⁷³ See *Penry v. Lynaugh*, 492 U.S. 302, 321 (1989).

from bringing a later challenge based on what has been learned from experience.³⁷⁴ A decision that a statute in operation for some substantial period forbids some practice — based on lessons learned during the statute's operation — would thus be consistent with a decision permitting that practice shortly after the statute's enactment, just as a successful as-applied challenge is consistent with an earlier, unsuccessful facial one.³⁷⁵

C. Practical Considerations

How would provisional adjudication work in practice? Two models provide guidance. Consider first the concept of "constitutional remand," advocated most forcefully by Judge Calabresi.³⁷⁶ Under this approach, when an old law presents the possibility of a conflict with constitutional rights, the courts should hesitate to invalidate the law on constitutional grounds. Instead, they may "remand" to the legislature for a determination regarding whether the law continues to reflect public policy. If the legislature does not reenact the law, the court need not decide the constitutional issue. Under Judge Calabresi's approach, if the legislature does reenact the law, the court should then be reluctant to invalidate it.

Judge Calabresi's model of constitutional remand serves several functions. First, as a substantive constitutional doctrine of desuetude, it protects against prosecutions of persons who lack fair notice of the

³⁷⁴ Dissenting in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), Justice Souter contended that there was no reason to wait for an as-applied challenge to the federal statute requiring the National Endowment for the Arts to consider "general standards of decency and respect for the diverse beliefs and values of the American public," 20 U.S.C. § 954(d)(1), when granting awards, because illicit viewpoint discrimination would not be apparent in any particular NEA decision. See *Finley*, 118 S. Ct. at 2193 (Souter, J., dissenting). Thus, the conventional basis for preferring as-applied challenges — that they present an informative, concrete, factual setting — did not apply. Note, however, that subsequent experience under the statute could reveal a *pattern* of NEA decisionmaking that bespeaks viewpoint discrimination, which would be powerful evidence that the risks Justice Souter identified had come to pass. Of course, the Court would then have to be willing to recognize the value of statistical evidence, which it has thus far been reluctant to do. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 294–97 (1987).

³⁷⁵ Justice Breyer hinted at such a possibility in his dissent in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998). He stated that he would uphold the "experiment" of the Line Item Veto Act, see *id.* at 2131 (Breyer, J., dissenting), suggesting that experience under the Act would reveal whether it actually posed a threat to the balance of power struck by Article I. Although such effects might seem difficult to measure, some commentators have drawn important lessons from states' use of similar mechanisms. See, e.g., RICHARD BRIFFAULT, *BALANCING ACTS* 31–41 (1996).

³⁷⁶ See *Quill v. Vacco*, 80 F.3d 716, 738–43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd* 117 S. Ct. 2293 (1997); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 146–49 (1982). Judge Calabresi developed the concept of constitutional remand proposed originally in Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 30–35 (1957).

wrongfulness of their conduct.³⁷⁷ Second, as a principle of judicial restraint, it enables courts to avoid invalidating legislative acts in the event that the legislature chooses not to reenact the remanded policy. Quite apart from these functions, the constitutional remand can serve as a model for implementing a third purpose: the establishment of partial and temporary judicial norms. If the legislature reenacts the challenged law after a constitutional remand, the court, in Judge Calabresi's view, ought to consider that fact a reason to uphold the law. Between remand and the judicial rehearing, a kind of learning occurs: the legislature's reenactment of the challenged law measures (albeit imperfectly) social support for the challenged policy.

Of course, the degree to which the public supports a law is only one factor bearing on adjudication. In constitutional law, even a law that is reenacted after a remand to the legislature may be invalid. Further, in many instances it will be perfectly obvious at the outset of litigation that a challenged policy enjoys widespread public support. In such cases, a remand of the sort Judge Calabresi envisions would serve no useful purpose. We might generalize the concept of constitutional remand beyond constitutional cases involving desuetude claims to the broader category of cases in which the judicial selection of an appropriate legal rule turns on the question of how various legal regimes will work in practice.³⁷⁸

The second model for provisional adjudication is the notion, familiar from cases involving the constitutional rights of criminal suspects, of "prophylactic rules." In the earlier discussion of *Pennsylvania Board of Probation and Parole v. Scott*,³⁷⁹ I noted that the Court's assessment of whether the exclusionary rule applies to parole violation hearings turned on whether such application would deter illegal police conduct.³⁸⁰ Under the Court's precedents, the Fourth Amendment does not by itself confer on criminal defendants a right to have relevant but illegally seized evidence excluded from subsequent proceedings. Instead, the Court justifies the exclusionary rule on prudential grounds, as a deterrent to police violations of the Fourth Amendment. The rule applies when, in the Court's judgment, the deterrence benefits of exclusion outweigh the costs of losing reliable evidence.³⁸¹

³⁷⁷ The West Virginia courts apply a doctrine of desuetude expressly rooted in this concern. See *Committee on Legal Ethics v. Printz*, 416 S.E.2d 720, 724-26 (W. Va. 1992).

³⁷⁸ The Court's antitrust doctrine provides a useful example. In deciding whether to adhere to stare decisis, the Court acknowledges "a competing interest, well-represented in [its] decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 118 S. Ct. 275, 284 (1998) (overruling an earlier decision that treated vertically imposed maximum prices as per se illegal).

³⁷⁹ 118 S. Ct. 2014 (1998).

³⁸⁰ See *supra* p. 42.

³⁸¹ See *Pennsylvania Bd. of Probation and Parole v. Scott*, 118 S. Ct. 2014, 2019-20 (1998); *Stone v. Powell*, 428 U.S. 465, 482-88 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

Similarly, the Court has held that, although failure to inform a suspect held in custody of his rights to silence and an attorney does not itself violate the Fifth Amendment's prohibition on compulsory testimony, as a prophylactic measure, the prosecution is barred from using a defendant's statement in its case-in-chief absent the now-familiar *Miranda* warnings.³⁸² Under both the Fourth and Fifth Amendments, the Court has formulated legal principles designed to protect constitutional values while acknowledging that these principles do not flow directly from the Constitution.

Although critics have questioned the legitimacy of the Court's practice of imposing prophylactic rules,³⁸³ those questions derive whatever force they have from textualist assumptions. There is no substantive difference between saying, on the one hand, that even though the literal text of the Constitution or a statute permits a practice, the Court will "interpret" that text as prohibiting the practice, and, on the other hand, conceding that the Court has imposed a prophylactic rule that goes beyond what the authoritative text itself actually requires. The distinction is entirely one of nomenclature, which is why David Strauss quite accurately notes that in a substantive sense, prophylactic rules are ubiquitous in the law.³⁸⁴ Doctrines such as the presumptive invalidity of content-based restrictions of speech or the tiers-of-scrutiny approach to equal protection could be readily conceived as mere prophylactic measures designed to protect the underlying constitutional values.³⁸⁵

Yet perhaps nomenclature matters. So long as the Court conceives of its role as finding the meaning of constitutional and statutory provisions, the notion of experimentation and provisional adjudication will be tinged with illegitimacy. How can states be authorized to violate the Constitution? How can a federal statute mean one thing in the states comprising the First Circuit and something else in the states

³⁸² See *Brecht v. Abrahamson*, 507 U.S. 619, 647 (1993) (White, J., dissenting); *Miranda v. Arizona*, 384 U.S. 436, 445-57 (1966).

³⁸³ See, e.g., Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 124-56 (1985); Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21-23 (1975); Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 768-83 (1989). Other commentators are more sympathetic to the federal courts' formulation of doctrine that is not specifically authorized by statute or the Constitution. See, e.g., Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1777-91 (1991); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 287-95 (1988).

³⁸⁴ See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988).

³⁸⁵ See *id.* at 200 (speech); *id.* at 204-07 (equal protection). See generally Fallon, *supra* note 21 (arguing that detailed constitutional doctrine should be understood as an implementation, rather than an interpretation, of the Constitution).

comprising the Second Circuit? And how can the Constitution or a federal law mean X at one time and Y some years later? To understand adjudication as a quest for meaning is to privilege static conceptions of the judicial enterprise.

In contrast, understanding adjudication in prophylactic terms opens up possibilities for experimentation. Thus, in *Miranda*, the Court did not frame the requirement of warnings as a once-and-for-all-time rule. Instead, the Court expressly invited Congress and the states to devise "other procedures which are at least as effective in apprising accused persons of their right of silence."³⁸⁶ As it turned out, neither Congress nor the states have seriously attempted to come up with a more effective alternative to *Miranda* (or the Fourth Amendment exclusionary rule),³⁸⁷ but that result was hardly foreordained. Were the Court to create conditions favorable to experimentation — such as providing states and other jurisdictions with reasonably secure guarantees that good faith experiments will not lead to retroactive liability in the event they ultimately fail³⁸⁸ — innovations consistent with broadly understood federal norms would be likely to flourish.³⁸⁹

Ironically, however, the recognition of the ubiquity of prophylactic rules may undermine the very notion of prophylaxis, which implies the existence of "core" or "real" legal requirements that exist beneath the prophylactic layer. If all or most federal doctrine is prophylactic, only the bare constitutional or statutory text would appear to be real. Given the relatively modest role that text plays and should play in the resolution of Supreme Court cases, we are left with a small core of real (as opposed to prophylactic) legal norms. Thus, reflecting on the large role of doctrinal prophylaxis may lead us, by a seeming paradox, to discard the dichotomy of core versus prophylactic norms.³⁹⁰

But if this maneuver solves one conceptual difficulty, it also creates a more serious one. Once courts recognize all doctrine to be, in some sense, optional, adjudication loses its capacity to perform the settlement function. Now the formalist can justifiably complain that we have simply discarded the rule of law in favor of a flexibility bordering on chaos.

This critique suggests that we should not give up too quickly on the concept of prophylaxis. For even if there is no deep metaphysical distinction between core and periphery, in any given epoch there will continue to be important distinctions between what is contestable and

³⁸⁶ *Miranda*, 384 U.S. at 467.

³⁸⁷ See Dorf & Sabel, *supra* note 17, at 459–62.

³⁸⁸ See *id.* at 463–64.

³⁸⁹ Cf. Friedman, *supra* note 322, at 399–400 (describing the leading role of the states in legislative innovation).

³⁹⁰ See Dorf & Sabel, *supra* note 17, at 458–59.

what is not.³⁹¹ A court could recognize as much without affirming Platonic essences.

To be concrete, the Court could expressly designate some of its decisions — or to be more precise, some portion of the legal norm announced in any given case — as subject to experiment, in much the same way that it did in *Miranda*. It could also designate some doctrines or decisions as provisional, promising to revisit these matters at some future date. Such a designation could be accompanied by a prohibition of or invitation to experimentation, as the Court deemed appropriate.

Moreover, such prohibitions or invitations could be addressee-specific. To implement the sort of rights-centered federalism discussed above,³⁹² for example, a decision provisionally denying recognition of a right to the aid of physicians in dying would permit states to legislate broadly, but restrict federal legislation on the subject to such matters as adopting policies for federal enclaves; Congress would be denied the power to preempt state law or to use the spending power to coerce states to adopt a uniform national policy.³⁹³

Finally, the designation of particular decisions or parts thereof as subject to experimentation (or not) would require the Court to adopt a default for cases in which no such designation accompanied a decision. The doctrine of *stare decisis* seems to be an appropriate default. Under current law, the overruling of a past decision requires something beyond a mere change of mind or personnel. In cases in which the Court's legitimacy is at stake, something beyond even the usual factors may be required. As the Court explained in *Planned Parenthood v. Casey*,³⁹⁴ a dramatic change in the facts or the perception of facts underlying the earlier ruling may qualify.³⁹⁵ Because such changes in reality and perceptions are an increasingly common feature of our age, adhering to the current understanding of *stare decisis* should entail an increasing willingness to overrule past decisions. Thus, as I envision it, expressly provisional adjudication would be set against a background that is itself quite dynamic.

³⁹¹ See Lessig, *supra* note 147, at 1842–46.

³⁹² See *supra* pp. 62–65. Neal Katyal has recently proposed linking rights and federalism in a rather different way. See Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1773–79 (1998) (suggesting that federal courts abstain from deciding some difficult cases involving assertions of federal rights in order to allow state courts to issue definitive interpretations of state law that obviate the need for federal constitutional rulings).

³⁹³ Cf. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1935–54 (1995) (proposing a federalism-based general prohibition on “regulatory spending” by Congress).

³⁹⁴ 505 U.S. 833 (1992).

³⁹⁵ See *id.* at 862–63 (explaining that changed facts and changed understandings of facts justified the repudiation of *laissez-faire* and separate-but-equal constitutionalism).

D. Legitimacy and the Bully Pulpit

Is increased doctrinal volatility too high a price for the Court to pay in terms of its own legitimacy? Probably not.³⁹⁶ The legal realist insight that courts make political decisions has been with us for over a century without having substantially eroded confidence in courts generally, or in the Supreme Court specifically. According to one recent survey, the Court enjoys greater public confidence than Congress or government in general.³⁹⁷ Moreover, a Court that doggedly adhered to outdated precedents would also call its legitimacy into question.³⁹⁸ Even if a loosening of the Court's attitude toward precedent were to result in a small diminution in the Court's legitimacy, such loosening might have other benefits that would justify the change.³⁹⁹

To say that the Court's legitimacy could survive a shift towards provisional adjudication, however, is not to say that provisional adjudication would solve the basic difficulty of adapting to rapid change. Indeed, we might think that provisional adjudication is subject to the same criticism as the gradualism of the traditional common law method.⁴⁰⁰ Each of the doctrinal changes advocated here — expanded use of the states as experimental laboratories, percolation, and provisional upholding of laws challenged shortly after their enactment — would have the effect of *delaying* the Court's ultimate resolution of legal questions.

The comparison between the gradualism of common law evolution and the delays accompanying provisional adjudication is somewhat inapt. The sorts of delays introduced by such mechanisms as percolation will typically be measured by months and years, rather than the generations of delay entailed in common law evolution. Moreover, traditional common law evolution proceeds by largely unconscious mechanisms, whereas provisional adjudication inquires directly into the real-world effects of various legal regimes. It seeks workable legal answers at the retail level, and thus harkens back to an earlier conception of

³⁹⁶ See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 408–09 (arguing against a Weberian formal conception of legitimation because the public has little awareness of legal institutions or legal decisionmaking); Nicholas S. Zeppos, *People's Court*, 44 VAND. L. REV. 847, 847–48 (1991).

³⁹⁷ See Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 754 (1994).

³⁹⁸ See *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (“[A] decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself.” (quoting *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting) (quoting Peter L. Szanton, *Stare Decisis: A Dissenting View*, 10 HASTINGS L.J. 394, 397 (1958–59)) (internal quotation marks omitted)).

³⁹⁹ See *Dorf*, *supra* note 11, at 1772 (“[L]egitimacy should be viewed as a matter of degree: That one interpretive technique is, in some cases, *more* legitimate than another does not render the less legitimate approach *illegitimate*.”).

⁴⁰⁰ See *supra* section II.C.

common law as rooted in the practices of the community⁴⁰¹ — except that given the complexity and dynamism of modern life, provisional adjudication recognizes that judges will rarely be familiar with the relevant social practices.

But if provisional adjudication escapes the critique of gradualism, it may still fall prey to the critique of judicial use of social science. Provisional adjudication can only be successful to the extent that the Court understands what lessons to draw from the experience it observes. Yet this appears to bring us back to the problem with which we began — the Court's limited ability to evaluate empirical and predictive claims.

Consider an example. A decade ago, in *Morrison v. Olson*,⁴⁰² the Court upheld severe restrictions on the President's power to remove an independent counsel because it found that the restrictions were not "of such a nature that they impede the President's ability to perform his constitutional duty . . ." ⁴⁰³ This conclusion appeared to be little more than a guess, given the lack of experience under the statute at the time.

Suppose that the Court were now to regard *Morrison* as merely provisional. What lesson should be gleaned from the ferocity of Independent Counsel Kenneth Starr's investigation of President Clinton's efforts to conceal his sexual encounters with a former White House intern?⁴⁰⁴ Is Starr's zeal attributable to his own peculiar (per-

⁴⁰¹ See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1655 (1994) ("[I]n the course of the seventeenth century . . . there emerge[d] among the English common lawyers the strong conviction that the primary source of the validity of law — including both its moral validity and its political validity — is its historical character, its source in the customs and traditions of the community whose law it is."); Andrea C. Loux, *The Persistence of the Ancient Regime: Custom, Utility, and the Common Law in The Nineteenth Century*, 79 CORNELL L. REV. 183, 183 (1993). By the middle of the nineteenth century, this notion of common law as the embodiment of the community's practices had largely given way to the view of common law as the product of judicial reason. See, e.g., *Norway Plains Co. v. Boston & Maine R.R.*, 67 Mass. (1 Gray) 263, 267 (1854) ("[T]he common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it."); see also Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1394–1417 (1997) (associating the approach of the mid- to late nineteenth century with natural law).

⁴⁰² 487 U.S. 654 (1988).

⁴⁰³ *Id.* at 691.

⁴⁰⁴ After President Clinton testified before a grand jury investigating allegations that he committed perjury and obstruction of justice by concealing a sexual relationship with a former White House intern, his personal lawyer stated: "We're hopeful that the President's testimony will finally bring closure to the independent counsel's more than four-year and over \$40 million investigation, which has culminated in an investigation of the President's private life." John M. Broder, *Testy Finale, Risky Gambit*, N.Y. TIMES, Aug. 18, 1998, at A1. This statement amounted to wishful thinking. Less than a month later, Starr delivered to the House of Representatives a sexually explicit report finding 11 potential grounds for impeachment, which the House promptly disseminated to the public at large. See *The Starr Report: Full Text of Findings Sent to Congress*, N.Y. TIMES, Sept. 12, 1998, at B1, B9–B10. As this Foreword goes to print, the House has begun a formal impeachment inquiry.

haps politically partisan) desire to drive President Clinton from office? Alternatively, is the Starr investigation a reflection of the incentives that any independent counsel faces? According to this latter view, the independent counsel is a Frankenstein's monster because he acts without the constraint of scarce resources that confronts ordinary prosecutors.⁴⁰⁵ If the Court were to draw this broader inference, it would be appropriate to overrule *Morrison*.

Instead of, or perhaps in addition to, revisiting *Morrison*, might the Court appropriately reconsider its recent decision in *Clinton v. Jones*,⁴⁰⁶ which held that the Constitution affords the President no temporary immunity from civil lawsuits for conduct occurring prior to his Presidency?⁴⁰⁷ It was, after all, discovery conducted in *Jones* that led to the widening of Starr's investigative authority to include the President's extramarital sex life. Again, the answer depends on whether one views the course of events as merely idiosyncratic rather than as a harbinger of likely litigation against future Presidents. Perhaps the error in *Jones* was not the Supreme Court's decision to permit the case to go forward, but the district court's decision to permit discovery regarding the possibility of completely consensual sex in a case involving allegations of wholly unrelated sexual harassment.

As the extraordinary events of the past year illustrate, the question of what lesson experience teaches is only partly an empirical one. It is often an ideological question as well. Nonetheless, experience matters even to ideologically laden questions, and it has mattered in the most important cases of this century. The overruling of *Lochner* was justified in part by the experience of the Great Depression,⁴⁰⁸ and *Brown v. Board of Education*⁴⁰⁹ has been most persuasively defended as the Court's recognition that, as actually practiced, American segregation was a crucial piece of a system of racial subordination.⁴¹⁰ If the Court can learn from experience with respect to such value-laden and contested matters as these, surely the intertwining of fact and value should not pose an insuperable obstacle to learning from experience in

⁴⁰⁵ See, e.g., Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 488-92 (1996) (explaining that the target of an independent counsel's investigation will typically be scrutinized more closely and treated more harshly than the target of an ordinary prosecutor's investigation).

⁴⁰⁶ 117 S. Ct. 1636 (1997).

⁴⁰⁷ See *id.* at 1639.

⁴⁰⁸ See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (taking judicial notice of the Great Depression). *West Coast Hotel* overruled *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and "signaled the demise of *Lochner*." *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992) (opinion of the Court).

⁴⁰⁹ 347 U.S. 483 (1954).

⁴¹⁰ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429-30 (1960) (arguing that *Brown* was justified because it was widely understood that racial segregation in the American South was an instrument of white supremacy).

the more mundane and less visible cases that are the Court's bread and butter.

A move in the direction I advocate would, therefore, hardly eliminate the need for judicial value judgments. Consider the sexual harassment cases under Title VII. Five years ago, the Court ruled that whether sexual harassment is so severe or pervasive as to create a hostile work environment in violation of Title VII "cannot be [measured by] a mathematically precise test," but depends on "all the circumstances."⁴¹¹ The Court stressed that "no single factor is required."⁴¹² Although the Court's 1997 Term decisions in *Burlington Industries, Inc. v. Ellerth*⁴¹³ and *Faragher v. City of Boca Raton*⁴¹⁴ set forth the conditions under which employers are vicariously liable to one employee for sexual harassment by another,⁴¹⁵ they did not alter this substantive standard. In effect, the Court's totality-of-the-circumstances approach to sexual harassment jurisprudence delegates the decision in many cases to the finder of fact, thereby minimizing the Court's role. Indeed, even though *Burlington Industries* and *Faragher* were widely praised for establishing "bright line" rules about the scope of employer liability,⁴¹⁶ these cases delegate to the factfinder the critical question of what constitutes "a stated policy suitable to the employment circumstances."⁴¹⁷

I do not mean this observation as a criticism. Such delegations can be wholly appropriate. Given the variety of workplaces to which Title VII applies and the likelihood of continued rapid change in the nature of most employment, more detailed doctrinal rules could lead to anomalous results in unanticipated circumstances. If the EEOC and similar state agencies take the lead in disseminating the most successful strategies for preventing and combating sexual harassment, the ambiguity in the Court's precedents might prove to be their greatest strength.

⁴¹¹ *Harris v. Forklift Sys.*, 510 U.S. 17, 22–23 (1993). The Court set forth a nonexhaustive list of relevant factors: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; . . . whether it unreasonably interferes with an employee's work performance; and the effect on the employee's psychological well-being" *Id.* at 23.

⁴¹² *Id.*

⁴¹³ 118 S. Ct. 2257 (1998).

⁴¹⁴ 118 S. Ct. 2275 (1998).

⁴¹⁵ See *Faragher*, 118 S. Ct. at 2292–93; *Burlington Indus.*, 118 S. Ct. at 2270.

⁴¹⁶ See, e.g., Chris Black, *Court Sets Sex Harass Guidelines: Employer May Be Liable for Supervisor*, BOSTON GLOBE, June 27, 1998, at A1 ("Today the court has set a clear, bright-line standard for establishing when an employer is or is not responsible for sexual harassment in the work place." (quoting U.S. Chamber of Commerce General Counsel Stephen A. Bokart)); Linda Greenhouse, *Supreme Court Weaves Legal Principles From a Tangle of Litigation*, N.Y. TIMES, June 30, 1998, at A20 ("[T]he rulings [were] praised by women's rights leaders, the Chamber of Commerce and Federal trial judges alike for providing the first clear set of rules in this rapidly evolving area of employment law.").

⁴¹⁷ *Faragher*, 118 S. Ct. at 2293; *Burlington Indus.*, 118 S. Ct. at 2270.

But delegation to trial courts or administrative agencies can only go so far. There is also a place for judicial activism of a certain sort. When — as in both the desegregation cases of the 1950s and 1960s⁴¹⁸ and the sexual harassment cases of the 1990s — the Court's interpretation of authoritative text calls into question deeply entrenched social attitudes and practices, the success of the Court's efforts will necessarily depend in part upon its ability to lead. Earlier, I criticized the Court's textualism in *Oncale* for failing to provide sufficient guidance about when sexual harassment constitutes sex discrimination.⁴¹⁹ Juxtaposing this failure with the Court's approach in the desegregation cases, we can see that the problem with the Court's sexual harassment jurisprudence is not so much its failure to guide, as its failure to inspire.

The legal prohibition of sexual harassment is a hot political topic. Remarkably, in the Court's four sexual harassment rulings during the 1997 Term, no disagreement was expressed about what constitutes sexual harassment, nor was there any disagreement that the law appropriately treats it as invidious. Yet there is a rhetorical bloodlessness to the Court's condemnation of sexual harassment. Indeed, the Court's strongest language appears in the one 1997 Term sexual harassment case in which a defendant won,⁴²⁰ thereby suggesting that the condemnation was perfunctory.⁴²¹ Although it would be naive to think that strong language from the Supreme Court would by itself bring public attitudes about sexual harassment into line with the law, it would be equally naive to think that the Court's bully pulpit has no power to shape social norms.⁴²²

This call for the Court to take moral stands may seem inconsistent with delaying techniques like percolation and greater emphasis on fac-

⁴¹⁸ The Court's approach to desegregation of *de jure* racially segregated schools also relied heavily on district courts' application of multifactor balancing tests. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15–16 (1971); *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).

⁴¹⁹ See *supra* pp. 22–24.

⁴²⁰ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 118 S. Ct. 1989, 2000 (1998) (“No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system.”).

⁴²¹ Perhaps the justices believed that the facts spoke for themselves in *Faragher* and *Burlington Industries*. Certainly, unadorned detailed description can be moving. See, e.g., *Bragdon v. Abbott*, 118 S. Ct. 2196, 2203–04 (1998) (describing the course of HIV infection and AIDS).

⁴²² The Court appears to recognize as much. In recent memory, divisive social issues such as abortion and gay rights have provided the occasion for its strongest moral language. See, e.g., *Romer v. Evans*, 517 U.S. 620, 623 (1996) (“[The Constitution] neither knows nor tolerates classes among citizens.” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *Romer*, 517 U.S. at 635 (“A State cannot . . . deem a class of persons a stranger to its laws.”); *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

tual development. We are all familiar with politicians appointing commissions to conduct further study of an issue in order to postpone indefinitely any resolution. But the apparent inconsistency dissolves when we recognize that moral leadership does not invariably entail centralized decisionmaking. For example, in taking a stand against the demonization of persons infected with HIV⁴²³ or workplace sexual harassment, the Court signals to the lower courts and the body politic that they must take these matters seriously, even if the Court recognizes that the particular action appropriate in any given circumstance cannot be determined by a judicially created, one-size-fits-all legal rule.

Thus may the Court make a virtue of necessity. Constitutional lawyers are familiar with what Lawrence Sager calls “underenforced constitutional norms.”⁴²⁴ The Constitution (or a federal statute) may speak to some question, but the institutional limitations of the judiciary nevertheless make a complete judicial solution impossible. Consequently, the courts “underenforce” the legal norm. Yet underenforcement need not equal nonenforcement. As the Court has long recognized, even when the Court cannot provide a complete remedy, considerable power flows from its ability to declare what the law is and when the law has been violated. In *Marbury v. Madison*,⁴²⁵ for example, Chief Justice Marshall invoked Blackstone’s maxim that legal rights require legal remedies while at the same time holding that the Court was without jurisdiction to grant *Marbury* a remedy.⁴²⁶ Although Marshall’s goal may have been simply to embarrass his Republican nemeses, his technique has much broader applicability. Especially in an age when the judiciary is painfully aware of its own limitations,⁴²⁷ the articulation of fundamental (albeit corrigible) values may be its central task.⁴²⁸

⁴²³ See *Bragdon*, 118 S. Ct. at 2213 (holding that asymptomatic HIV infection is a disability under the Americans with Disabilities Act).

⁴²⁴ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); see also Lawrence Gene Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 420–28 (1993) (proposing that constitutional adjudication should allow popular politics to solve “complex questions of social strategy and social responsibility”).

⁴²⁵ 5 U.S. (1 Cranch) 137 (1803).

⁴²⁶ See *id.* at 163, 176–77.

⁴²⁷ See Victoria F. Nourse, *Making Constitutional Doctrine in a Realist Age*, 145 U. PA. L. REV. 1401, 1403–05 (1997) (arguing that the basic structure of modern constitutional doctrine reflects judicial self doubt).

⁴²⁸ After all, it is one thing to admit that the complete resolution of a pressing social problem is beyond the judiciary’s capacity; it is quite another to deny the problem’s existence. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 33–34 (1989) (“To announce that government bears no responsibility for [race discrimination in capital sentencing and related] problems is to legitimate government’s actions, and to relieve both governmental and nongovernmental actors of responsibility for solving these problems in institutionally appropriate ways.” (emphasis omitted)).

IV. CONCLUSION

Despite occasional battles between textualism and purposivism in statutory and constitutional interpretation, the common law method of case-by-case elaboration of legal principles appears to be the dominant interpretive methodology of the Supreme Court. This Foreword has noted the affinities between the common law method and the Socratic method, and has expressed concern regarding the Court's unconscious emulation of long-dead Greek philosophers in over-emphasizing contemplation at the expense of systematic observation. It has suggested correctives in the form of doctrines and practices that would enable the Court to benefit from experimentation under conflicting regimes, while recognizing that limitations inherent in the Court's institutional posture constrain its ability to assess the outcome of such experiments.

In addition to the limits just identified, one might add a seemingly more serious objection. Figuring out what "works" in practice only makes sense if one has a normative framework for measuring success.⁴²⁹ Jim Crow worked reasonably well as a system of social control,⁴³⁰ but disastrously as measured by a norm of equal human dignity.

We may, however, concede — indeed insist upon — the necessity of normative reasoning without denying the relevance of experience. Experience is obviously relevant instrumentally in numerous ways: if, for example, the Court believes that government-sponsored race based affirmative action is only permissible when race neutral means fail to achieve an otherwise compelling objective, it will be useful to know how effective race neutral means are in achieving such objectives.

Yet implicit in this Foreword has been a stronger claim about the value of experience that can be broadly associated with American pragmatism.⁴³¹ The claim is not only that individual and societal experience is relevant in measuring institutions and practices against pre-

⁴²⁹ See Dworkin, *supra* note 150, at 1735; Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 366-67 (1997); Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1265-67 (1997).

⁴³⁰ See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 627 ("According to the prevailing social science of the 1910s and 1920s, the social value created by a comprehensive, state-enforced plan of racial separation was far greater than any costs imposed on its victims.")

⁴³¹ The leading pragmatists were Dewey, James, and Pierce. See JOHN DEWEY, *LOGIC: THE THEORY OF INQUIRY* (1938); WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* (1907); Charles S. Peirce, *How to Make Our Ideas Clear*, reprinted in *PRAGMATISM: A READER* 26 (Louis Menand ed., 1997). Two leading neo-pragmatists are Bernstein and Rorty. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* (1983); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982). For an insightful discussion of the odd road from early to late twentieth century philosophical pragmatism, see Louis Menand, *An Introduction to Pragmatism*, in *PRAGMATISM: A READER*, *supra*, at xi, xxxi-xxxiv. For a concise history of pragmatism generally, see *id.* at xi-xxiv.

determined normative structures, but also that such experience plays a critical role in the (re-)formulation of these normative structures.⁴³² Criticism of pragmatism as insufficiently normative mistakes pragmatism for amoral instrumentalism.⁴³³ Pragmatism's insistence upon the priority of experience over theory, of doing over philosophizing, does not require the abandonment of concerns for justice, or more generally, of normativity.⁴³⁴

Will the Court be receptive to the modest reform agenda I have proposed here? In some ways it seems an obvious fit, at least for the Court's legal process majority. In addition to endorsing (a textually constrained) purposivism in statutory interpretation, the legal process school emphasized judicial consideration of the allocation of authority based upon relative institutional competence.⁴³⁵ By permitting social and political actors other than the Court to take leading roles in addressing novel situations, provisional adjudication complements the

⁴³² Hence, the Court's treatment of normative and empirical questions as intertwined is only sometimes a result of confusion. *But cf.* Faigman, *supra* note 315, at 572 ("Interpretive facts are permeated with values only because the Court does not expend sufficient energy separating one from the other.")

⁴³³ No doubt Holmes, who played the leading role in introducing pragmatism into the law, bears substantial responsibility for the association of pragmatism with instrumentalism. *See* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788-89 (1989); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 315-16 (1996); *see also* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 26 (1925) (stating that judicial decisionmaking should be considered "relative to consequences" (emphasis omitted)). Pragmatism's contemporary champions also contribute to the confusion. For example, in the case of abortion, Judge Posner writes: "[P]ragmatism, at least my sort of pragmatism, recognizes that . . . moral disagreement is insoluble and wishes to use this recognition as the starting point when deciding what abortion rights, if any, to recognize." Posner, *Reply to Critics*, *supra* note 180, at 1799. My sort of pragmatism, however, always leaves open the possibility that experience and interaction will dissolve what looked like intractable disagreement over first principles. For a discussion of Judge Posner's ambivalent relationship to pragmatism, *see* Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568 (1995) (reviewing RICHARD A. POSNER, *OVERCOMING LAW* (1995)).

⁴³⁴ Louis Menand writes:

It is sometimes complained that pragmatism is a bootstrap theory — that it cannot tell us where we should want to go or how we can get there. The answer to this is that theory can never tell us where to go; only we can tell us where to go. Theories are just one of the ways we make sense of our needs. We wake up one morning and find ourselves in a new place, and then we build a ladder to explain how we got there. The pragmatist is the person who asks whether this is a good place to be. The nonpragmatist is the person who admires the ladder.

Menand, *supra* note 431, at xxxiv; *see also* RORTY, *supra* note 174, at 11 (arguing in favor of "a pragmatist conception of knowledge [that] eliminates the Greek contrast between contemplation and action").

⁴³⁵ *See, e.g.*, Peller, *supra* note 63, at 594 ("The process-theorists imagined that there could be a kind of natural, functional correlation between different kinds of disputes and different kinds of institutions . . ."); Anthony J. Sebok, *Reading The Legal Process*, 94 MICH. L. REV. 1571, 1573 (1996) ("The first theme [of *The Legal Process*] emphasizes that legal process theory grapples with institutional competence.")

principles of deference that form the backdrop to most of the Court's work.⁴³⁶

However, in challenging the Court's Platonic reliance on introspection, this Foreword appears to conflict with another crucial pillar of the legal process school, namely, the belief that the courts can engage in — indeed enjoy an institutional advantage when engaging in — reasoned elaboration.⁴³⁷ Legal process theorists held the “belief that those who respect and exercise the faculty of reason will be rewarded with the discovery of a priori criteria that give[] sense and legitimacy to their legal activities.”⁴³⁸ If understood as pure Platonic philosophizing, reasoned elaboration seems inconsistent with the spirit of this Foreword. Yet it would be a gross mischaracterization of the legal process method to associate it with philosophical speculation divorced from reality.⁴³⁹ Legal process theorists insisted upon situating legal questions in their real-world context, an attitude that seems to be shared by the purposivist majority of the Court. Accordingly, it is at least plausible to argue that as an alternative to the skepticism of legal realism, legal process theory offered not the idealism of Plato but the pragmatism of Dewey.⁴⁴⁰ Reinterpreted within the pragmatist tradition, the legal process theory endorsed by the majority of the Justices ought to be hospitable to provisional adjudication.⁴⁴¹

The Court's legal process majority should also be hospitable to a call for it to infuse its work with broad statements of moral principle. Although the current Justices were taught by Hart, Sacks, and Wechsler, they are of a different generation. Whereas their teachers' views were shaped in response to *Erie* and the overruling of *Lochner*, for the current Justices, “the central, intellectually formative case” was *Brown v. Board of Education*.⁴⁴² Thus, they understand that they must some-

⁴³⁶ See *supra* pp. 47–50.

⁴³⁷ See HART & SACKS, *supra* note 63, at 143–58; see also *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992) (“The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.”).

⁴³⁸ Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 605 (1993); see also DUXBURY, *supra* note 159, at 5 (“The central message of the process tradition in American jurisprudence is that judges ought to place their faith not in politics but in reason . . .”). Anthony Sebok identifies the three conventional pillars of legal process thought as: allocation of authority to the institution with greatest competence; purposivism in statutory interpretation; and the belief in reasoned elaboration. See Sebok, *supra* note 435, at 1573–75. He then offers a counter-interpretation. See *id.* at 1575.

⁴³⁹ See Laura Kalman, *Eating Spaghetti with a Spoon*, 49 STAN. L. REV. 1547, 1562–63 (1997) (reviewing DUXBURY, *supra* note 159).

⁴⁴⁰ See Sebok, *supra* note 435, at 1574 & n.11 (citing Peller, *supra* note 63, at 583–84 (citing JOHN DEWEY, FREEDOM AND CULTURE (1939))).

⁴⁴¹ See Dorf & Sabel, *supra* note 17, at 284–86.

⁴⁴² Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 959 (1994); see also DUXBURY, *supra* note 159, at 266 (observing that Hart and Sacks did not

times provide principled moral leadership, even if, as the 1997 Term illustrates, they find that their docket affords them few opportunities to do so.

even mention *Brown*); LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 30-36 (1996) (describing legal process theorists' efforts to account for *Brown*).