

Tulsa Law Review

Volume 34
Issue 2 *Practitioner's Guide to the October 1997
Supreme Court Term*

Winter 1998

A Cobbler's Court, a Practitioner's Court: The Rehnquist Court Finds Its Groove

Larry Cata Backer

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Larry C. Backer, *A Cobbler's Court, a Practitioner's Court: The Rehnquist Court Finds Its Groove*, 34 *Tulsa L. J.* 347 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol34/iss2/8>

This Supreme Court Review Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

A COBBLER'S COURT, A PRACTITIONER'S COURT: THE REHNQUIST COURT FINDS ITS "GROOVE"*

Larry Catá Backer[†]

I. INTRODUCTION

Commentators have reviewed the 1997-98 Supreme Court Term and judged it a great yawn, a Term of "relative quiescence."¹ There was a sense of emptiness at the end of the Term.

[F]undamental questions of liberty and equality were almost invisible. 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.²

The general opinion among the press, relying on their stables of law professor pundits, have declared the session to be uninteresting, at least from the perspective of the development of grand theory.³ And indeed, the 1997-98 Supreme Court Term may well appear insubstantial from an operatic perspective: there were no battles of grand theory, no orchestras playing contests of good versus evil for heavenly spectators, no great chorus of people screaming for this or that thing to be done in the name of one or more of the currently fashionable deities.

* Based on remarks delivered at the Conference, *Practitioner's Guide to the October 1997 Term of the United States Supreme Court*, at the University of Tulsa College of Law, December 11, 1998. In order to keep as close to the original flavor of the remarks, the text has been edited sparingly and a few footnotes have been added.

† Executive Director, Tulsa Comparative & International Law Center; Professor of Law, University of Tulsa College of Law.

1. Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 5 (1998) (citations omitted).

2. *Id.*

3. The pronouncement in a recent *Oregon State Bar Bulletin* piece nicely summarized this view: "In some quarters, the Supreme Court's 1997 term has been dubbed the Seinfeld term; it offered a lot of interesting observations but in the end it wasn't about anything at all." Jeff Bleich, Kelly Klaus, Elizabeth Earle Beske, *A Term About Something: Though Not Full of Sound and Fury, the Term Definitely Signified Something*, 58 Aug/Sep OR. ST. B. BULL. 19 (1998).

A closer view, however, reveals the shallowness of this judgment in at least two respects. The first has been well understood, especially by practitioners. These folk are pleased with the *form* of many of the decisions of the 1997-98 Term, especially in the areas of sexual harassment and criminal law, for the guidance the opinions have provided those who must administer or enforce the law, or otherwise conform their behavior to emerging legislative and judicial impositions.⁴ My second, and much less generally recognized, reason for judging the past Term significant is far less concrete, but important nonetheless. The past Term has fully exposed what the Rehnquist Court is about. The Court has at last revealed (and reveled in) its identity, its equilibrium, and perhaps its mission. This past Term uncovers a Court most productive and at its best (whatever one may think of the results in particular cases) when it eschews grand theory and instructs in the everyday application of the myriad of mundane obligations imposed upon people by court and legislature. This is a practitioner's court, a cobbler's court—and many should be happy for it.

The coming years will show that the Rehnquist Court has finally found its "groove."⁵ It is a Cobbler's Court. I will briefly discuss this past Term's federalism cases to illustrate the way in which this Cobbler's Court works, that is, how it approaches cases and fashions decisions. I believe these decisions evidence the way the Rehnquist Court has successfully adopted an incrementalist, highly focused approach to decision making.⁶ Moreover, recent Rehnquist Court cases also suggest what will be seen as the hallmark of this Court—the foremost purpose of decisions is to provide *practical* guidance to people, and especially administrators, enforcers and those bound by particular provisions, in the application of obligations and duties imposed by courts and legislators. I will then describe how the methodology of decision making illustrated in these cases reveals the Rehnquist Court as a grand Cobbler's Court. This is a Court at its best producing something of use to those who must administer the law. The days of high theory, the days of a Supreme Court masquerading as a Pontifical Court, are over—at least for the moment!

II. THE FEDERALISM CASES

The federalism cases this past Term which I review here⁷ were neither momentous, nor at the heart of the cultural or socio-political struggles of American

4. See, e.g., Lisa A Regini, *Supreme Court Cases: 1997-1998 Term*, 67 FBI L. ENFORCEMENT BULL. 25 (Oct. 1, 1998), available in 1998 WL 15028970.

5. See *HOW STELLA GOT HER GROOVE BACK* (Twentieth Century Fox 1998). Like the attitude shown by the title character, the Court's opinions have reeked of boredom, exhaustion, and lack of passion. Its boredom has been especially evident in the interminable battles over increasingly irrelevant theoretical stances. Its passion could have been aroused only when it attempted to move away from the fixation on those stances. At last, as a cobbler's court, Rehnquist and his colleagues have found their groove.

6. Jesse Choper made a similar point with respect to decisions of the 1996 Term, though such a judgment, in his opinion, might not be a cause for great rejoicing. See Jesse H. Choper, *On The Difference in Importance Between Supreme Court Doctrine And Actual Consequences: A Review of The Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259 (1998).

7. *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956 (1998); *Baker v. General Motors*, 118 S. Ct. 657 (1998); *Foster v. Love*, 118 S. Ct. 464 (1997); *Breard v. Virginia*, 118 S. Ct. 1352 (1998).

generations since the end of the Second World War. That battle has shifted, as it should, to the political realm. In the battle over the impeachment and removal of President Clinton, the Supreme Court has thankfully played a marginal role.⁸ Each of the cases, interesting in their own right, serves as an excellent example of the jurisprudence at which the Rehnquist Court excels. Each is narrowly tailored to a specific situation, aimed at the practitioner, not the theoretician.⁹ Each is meant to provide guidance to those who must live within the constraints of the law applied, and each is of little use outside the class of situations immediately presented.

A. *AT&T v. Central Office Tel., Inc.*¹⁰

AT&T is a classic preemption case, made more interesting because the federal legislation at issue was deemed to substantially foreclose action on state-based claims. While this result might have been ordinary even ten years ago, the Rehnquist Court has been endowed with a reputation for being significantly deferential to states and extraordinarily *nondeferential* to the federal government with respect to legislation such as the Brady Bill¹¹ and the Firearms Bill.¹² The fact that this Court, far more sensitive to state prerogatives, issued an opinion creating a broad area of federal preemption, perhaps even gratuitously broad, ought to make us stop long enough to see what was going on here.

In this case, the United States Supreme Court ruled that the filed-rate doctrine¹³ applies to non-price features in utility tariffs, such as service conditions and billing options, as well as rates. The Court overturned the Ninth Circuit's decision.¹⁴ It ruled that the Communications Act of 1934 preempted a suit filed by a telephone reseller alleging that AT&T had breached promises to offer certain services, where AT&T's tariff already had addressed availability of such services.

The lawsuit was filed by Central Office Telephone, Inc. (COT), a reseller of

8. The Court's involvement in the Presidential cases, at once fascinating and misguided, is beyond the scope of this address. For a discussion of those cases from a different perspective, see Martin H. Belsky, *Investigating the President: The Supreme Court and the Impeachment Process*, 34 TULSA L.J. 289 (1999).

9. And in this way, perhaps, the Rehnquist Court has become as dismissive of the theoretician, and the legal academic, as the theoretician has been of the Court in the recent past.

10. 118 S. Ct. 1956 (1998).

11. Brady Handgun Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.).

12. Owner's Protection Act of 1986, Pub. L. 99-308, 100 Stat. 449 (1986) (codified as amended in scattered sections and titles of U.S.C.).

13. Under the filed rate doctrine:

the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Louisville & Nashville R.R. Co. v. Maxwell, 237 U.S. 94, 97 (1915), *quoted in* AT&T v. Central Office Tel., Inc., 118 S. Ct. 1956, 1962-63 (1998).

14. Central Office Tel., Inc. v. AT&T, 108 F.3d 981 (9th Cir. 1997).

long distance capacity on AT&T's network under an AT&T program known as "Software Defined Network" or "SDN." AT&T had filed a tariff detailing its responsibilities in fulfilling orders and billing for the program. The SDN was designed to give deep discounts to large customers who were heavy users of long distance services. The program also became attractive to resellers such as COT, who purchased blocks of time at the discount rates and resold them, at a profit, to smaller customers who could not individually qualify for participation in SDN. In its suit, COT claimed breach of AT&T's oral contract for more favorable terms than the tariff required. COT also claimed that AT&T tortiously interfered with COT's relations with its customers. A federal jury agreed, rendering a verdict in COT's favor for \$13 million, which the trial judge reduced to \$1,154,000 after post-trial proceedings.¹⁵

A divided Ninth Circuit United States Court of Appeals panel affirmed.¹⁶ It rejected AT&T's argument that the suit should have been barred by the filed-rate doctrine. The filed-rate doctrine prohibits a carrier from deviating from the terms and rates set forth in its filed tariff, and bars suits challenging the terms of a tariff that has been approved. AT&T's petition for a writ of *certiorari* was granted.¹⁷

Justice Antonin Scalia, writing for the majority, concluded that COT's contract claim was barred by the filed-rate doctrine, and that the tortious interference claim was wholly derived from the contract claim "Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services."¹⁸ Justice Scalia rejected COT's argument that the filed-rate doctrine was inapplicable because the same special services it sought were provided by AT&T to other customers without charge. "To the extent petitioner is claiming that its own claims for special services are not really special because other companies get the same preferences, 'that would only tend to show that the practice was unlawful [with regard to] the others as well.'"¹⁹ Lastly, Justice Scalia concluded that COT's tortious interference claim also was preempted, because it was wholly derivative of the contract claim for additional and better services.²⁰

Chief Justice William H. Rehnquist wrote a concurring opinion, in which he sought to take a less expansive view of the reach of the filed-rate doctrine. He emphasized that the filed-rate doctrine neither governs the entirety of the relationship between the customer and the carrier, nor shields the carrier from all state law liability. "For example, it does not affect whatever duties state law might impose on

15. *See id.* at 986.

16. *See id.* at 994.

17. In its *certiorari* petition, AT&T contended the decision conflicts with past Supreme Court decisions, and would destroy the major goal of the Communications Act of 1934 - national uniformity. "Indeed, by enforcing the 'side deals' COT alleges in this case, the court of appeals has made COT the beneficiary of the very discrimination that Sections 202 and 203 [of the Communications Act] and the filed tariff doctrine were intended to prohibit," AT&T maintained." 1 No. 5 ANDREWS TELECOMM. INDUS. LITIG. REP. 6 (1998), available in 1 No. 5 ANTINDLR 6 (Westlaw).

18. *AT&T*, 118 S. Ct. at 1963.

19. *Id.* at 1959 (citing *United States v. Wabash R.R. Co.*, 321 U.S. 403, 413 (1944)).

20. *See id.* at 1964-65.

petitioner to refrain from intentionally interfering with respondent's relationships with its customers by means other than failing to honor unenforceable side agreements, or to refrain from engaging in slander or libel, or to satisfy other contractual obligations."²¹ However, he agreed that COT's tortious interference claim was wholly derived from the contract claim.

The dissent was interesting, if only for its limitations. Justice John Paul Stevens argued that the high court should have remanded at least some of COT's tortious interference claims for a new trial, because these claims fell outside the reach of the filed tariff doctrine. "In my opinion, however, the jury's verdict on respondent's tort claim is supported by evidence that went well beyond, and differed in nature from, the contract claim."²² He expressed the view that while the "Court correctly states that the filed rate doctrine will pre-empt some tort claims; . . . We have never before applied that harsh doctrine to bar relief for tortious conduct with so little connection to, or effect upon, the relationship governed by the tariff."²³

Here the Court took the preemption doctrine, which it had previously construed narrowly, and applied it in a way reminiscent of the ERISA²⁴ era when the Court read preemption very broadly.²⁵ A closer examination of the case suggests that while the Court might have been using the language of preemption, it was actually speaking to another issue entirely. *AT&T* may be more important as a lesson in the construction of the relatedness of causes of action, than of the broadness with which preemption will be applied. In a real sense this case may speak more to the issue of "same transaction or occurrence" for purposes of claim preclusion, compulsory counterclaims and joinder of claims than to the issue of preemption. Here the guidance is real and very practical—what constitutes "connectedness" sufficient to have legal effect. It is hard to conceive of a greater jurisprudence of the case than this.

B. *Baker v. General Motors Corp.*²⁶

This case deals with the issue of state-to-state federalism in the context of full faith and credit. In *Baker*, a Michigan court entered a stipulated injunction that barred a former employee of General Motors (GM) from testifying against GM in other product liability cases. Plaintiffs in a Missouri product liability action against GM subpoenaed Baker's testimony. GM sought to bar the testimony on the basis of the Michigan injunction.²⁷ While noting that the settlement agreement and injunction could prevent the settling employee from volunteering his testimony, the Supreme Court held that they could neither bind non-parties to the Michigan proceeding nor

21. *Id.* at 1966 (Rehnquist, C.J., concurring).

22. *Id.* at 1967 (Stevens, J., dissenting).

23. *Id.* at 1968 (Stevens, J., dissenting).

24. *See* 29 U.S.C. § 1114 (West 1998).

25. *See, e.g.,* California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc., 519 U.S. 316 (1997).

26. 118 S. Ct. 657 (1998).

27. *See id.* at 660-63.

dictate the admissibility of the testimony to another court.²⁸ Thus, the Missouri court could compel the employee to testify without violating the Full Faith and Credit Clause.

The most important pronouncement of the Court was that there was no general public policy exception to the obligations of courts under the federal Full Faith and Credit Clause. There does not exist, as a constitutional matter, any sort of “roving public policy exception to the full faith and credit due judgements”²⁹ The Court used *Baker* to interdict the practice, common in some circuits, of using “public policy” as the means of refusing to enforce judgments from other states. Lawyers in the Missouri courts could not argue against enforcement of the Michigan decree on the basis of the public policy of Missouri as might be divined by the federal courts.

But equally important was the Court’s reminder that the Full Faith and Credit Clause provides no blanket command for approaching judicial decisions of sister states. The Supreme Court cautioned that “[f]ull faith and credit . . . does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister State judgment as preclusive effects do; such measures remain subject to the even-handed control of forum law.”³⁰ The Court noted that “[o]rders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.”³¹

As such, the Full Faith and Credit Clause must be read in the context of the limitations of judgments generally, on the one hand, and the power of state courts of litigants outside its territorial jurisdiction, on the other. Judgments bind only the parties to the litigation producing the judgment. Moreover, even equitable decrees of a court can bind only those people and things over which a court has power. In this case, the law of the Michigan case did not bind the plaintiffs in the Missouri case. They were strangers to that other litigation. Moreover, Michigan neither had power over the litigants in the Missouri case nor over the Missouri court. The latter remains free, within the sovereign state of Missouri, to determine what testimony it would admit as evidence and whom it would compel to testify in litigation before it. The Court reasoned instead that Michigan lacked the “authority to control courts elsewhere by precluding them in actions brought by strangers to the Michigan litigation from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.”³²

28. *See id.* at 665-66.

29. *Id.* at 664.

30. *Id.* at 665.

31. *Id.* at 659.

32. *Baker v. General Motors*, 118 S. Ct. at 666. At oral argument, “Justice Ruth Bader Ginsburg picked up on another consideration, suggesting that ‘what you were talking about is one state’s right to dictate the rules of admissibility of evidence in another state, and [that] the Full Faith and Credit [Clause] is about relations . . . between the states in the national union more than it is about personal rights of individuals.’” Jeffrey Robert White, *Experts and Judges*, 34 TRIAL 91, 92 (Sept. 1998) (Transcript of oral argument, 1997 WL 638425, at *6, *Baker v. General Motors*, 118 S. Ct. 657 (1998)).

The question now becomes—what sort of judgments will be granted full faith and credit. Of course money judgments will be enforced. What about injunctions? Rather than devote a tremendous amount of paper to sweeping theoretical observations, the Court went out of its way to provide practical guidance in the context of the problem facing the litigants. The Court suggested a fact-based test with the sort of *ad hoc* balancing for which it has come to be noted in other areas, for example, the First Amendment.³³ Enforcement of injunctions will depend on the facts and circumstances of the matter before a court, but every court will have to consider certain factors. Enforcement will depend on the identity of both the parties seeking enforcement and the parties against whom the enforcement is sought.

While the Michigan decree is enforceable against Elwell, the lack of connection of the Bakers to the original litigation militates against application of the decree to them. Also to be considered is the power of the issuing court. Michigan courts have authority within Michigan, but Michigan courts have no basis for asserting power over the courts of sister states. Enforcement also depends on the nature of the judgment. Judgments for things certain—money, for example—leave little room for error in application. Injunctions are another matter. They are subject to interpretation as well as to modification. This weighs against application of injunctions against the process of a court of a sister state.

“It is important to examine the three separate opinions in detail because the rationale for the *Baker* decision, as articulated by the majority and disputed by the concurrence, is the only recent direction by the Supreme Court on the issue of full faith and credit to equitable decrees.”³⁴ The concurrences would not have reached the constitutional issues. The concurrence in *Baker* recognized the existence and enforceability of the injunction and the settlement agreement arising out of a contract of employment. The boundaries of that injunction and settlement agreement are a matter of state law, and in this case, Michigan law proved adequate to decide the case.³⁵ Under Michigan law, a person subject to agreements like the one involved could testify in other cases were he ordered to do so by another court.³⁶ Justice Scalia argued that enforcement measures, like injunctions, do not travel with sister state judgments as do preclusive effects.³⁷

The primary beneficiaries of the ruling are tort plaintiffs. Had General Motors been able to enforce its Michigan equitable decree throughout of the nation, plaintiffs would have been hard-pressed to produce the sort of damaging expert testimony vital to winning large jury verdicts. Moreover, such a result would have encouraged other companies to enter in agreements similar to that between General Motors and Elwell.

33. See, e.g., Larry Catá Backer, *The Incarnate Word, That Old Rugged (Klan) Cross and the State: On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996).

34. Polly J. Price, *Full Faith And Credit And The Equity Conflict*, 84 VA. L. REV. 747, 764 (1998).

35. See *Baker*, 118 S. Ct. at 668, 670-71.

36. See *id.* at 673.

37. See *id.* at 668.

As one commentator has noted:

The ruling's immediate impact is very clear. Corporations may not use gag orders from one state to block whistleblowers from being called to testify in other states. Had the Court ruled for GM, other companies surely would have followed suit by forcing disgruntled workers to sign nondisclosure agreements in exchange for severance pay. "The Court has told GM and other companies they're just not going to be able to buy the silence of people who have evidence in important cases," says Jeffrey White of the Association of Trial Lawyers of America. Public Citizen, the Ralph Nader organization, hails the GM ruling as a "landmark for consumers." Companies "can no longer gag its whistleblowers or smother their revelations," the group says.³⁸

These are indeed happy days for the plaintiff's bar. In a world in which Americans are becoming accustomed to telling any one who will listen everything they know about anything, the practical effect of *Baker* will be a far more lively tort practice across state lines.

The case has proven troublesome to some commentators.³⁹ On the other hand, *Baker* may well suggest some of the thinking of the Court should it confront the constitutionality of the Defense of Marriage Act.⁴⁰ Some commentators have argued that the rejection of any public policy exception for applying the Full Faith and Credit Clause might make it harder for states to avoid recognizing same sex marriages made legal in other states. It may also void the provisions of federal law with respect to the recognition of such unions.⁴¹ Yet, it is not clear that one can wring such lofty theory from out of the *Baker* case. This is not that kind of opinion.

While the justices have not ruled squarely on the question of whether marriages are entitled to full faith and credit, *Baker* cheers Evan Wolfson, director of the marriage project for the Lambda Legal Defense Fund in

38. David G. Savage, *Will a Car Crash Ruling Lead to Recognition of Gay Marriage?*, 84 MAR. A.B.A.J. 42, 43-44 (1998); see also Julie Brienza, *Court Makes It Harder for Corporations to Silence Whistleblowers*, 34 MAR. TRIAL 17 (1998).

39. See, e.g., Polly J. Price, *Full Faith And Credit And The Equity Conflict*, 84 VA. L. REV. 747 (1998) ("The Court reached the correct result in the case before it, but the basic problems of "equity conflict" remain unresolved. Both the Court's opinion and the two concurrences were unsatisfactory because the Court failed to address the key underlying issue of whether or to what extent courts may rely on state law to enjoin extraterritorial conduct. Had the Court focused on this issue, I argue, it could have based its decision upon a more appealing rationale." *Id.* at 749). But see Earl M. Maltz, *The Full Faith and Credit Clause and the First Restatement: The Place Of Baker v. General Motors Corp.* In *Choice of Law Theory*, 73 TUL. L. REV. 305 (1998) (arguing that the majority opinion in *Baker* conforms to the Restatement of Conflict of Laws and suggesting that the Restatement sets forth a plausible approach to choice of law problems). See generally, Laurie Kratyk Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

40. For general commentary on the Defense of Marriage Act and its Full Faith and Credit Clause Implications, see, e.g., Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

41. See, e.g., David G. Savage, *Will a Car Crash Ruling Lead to Recognition of Gay Marriage?*, 84 Mar. A.B.A.J. 42 (1998).

New York. "This augurs well for us," he says. "The Court makes clear we live in one country, not 50 separate kingdoms, and if marriage is akin to a judgment, it gets full faith and credit across the country." But Edward Hartnett, a professor of civil procedure and constitutional law at Seton Hall's law school in Newark, N.J., says Wolfson's optimism may be misplaced. In Hartnett's view, Ginsburg's opinion "studiously avoids making any comment that affects one way or another the constitutionality of the Defense of Marriage Act."⁴²

I suspect that *Baker* will prove to be of little help should the Court ever review the validity of the Defense of Marriage Act. *Baker* can be distinguished on its facts alone. As to the availability of *Baker* to prevent states from recognizing same sex marriages, the answer is a little different, but no more comforting. *Baker* can be used as a means of framing the question. However, *Baker* does not imply how the Court will weigh the factors other than that it will not weigh competing public policies, and to that extent, perhaps the case provides the advocates of same-sex marriage a little victory. A Cobbler's Court does not give that game away before its time.

C. *Foster v. Love*⁴³

As one commentator has noted, citing Woodrow Wilson, the state-federal balance of power cannot "be settled by the opinion of any one generation, because it is a question of growth and every successive stage of our political and economic development gives it a new aspect and makes it a new question."⁴⁴ *Foster*, perhaps, proves the point.

In *Foster*, the Court held that Louisiana's "open primary" statute violated federal law. The Elections Clause of the Constitution⁴⁵ invests the States with responsibility for the mechanics of congressional elections, but grants Congress "the power to override state regulations" by establishing uniform rules for federal elections.⁴⁶ Congress has passed legislation setting the date of the biennial election for places in the Senate and House of Representatives.⁴⁷ Congress also mandates holding all congressional and presidential elections on a single November day.⁴⁸ Since 1978, Louisiana has held in October of a federal election year an "open primary" for congressional offices, in which all candidates, regardless of party, appear on the same ballot and all voters are entitled to vote. A candidate receiving a majority of votes at the open primary "is elected" and does not have to stand for

42. *Id.* at 44.

43. 118 S. Ct. 464 (1997).

44. Donald C. Wintersheimer, *Relationship Between Federal and State Constitutional Law*, 25 N. KY. L. REV. 257, 277 (1998) (quoting, in part, WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1908)).

45. U.S. Const. art. I, § 4, cl. 1.

46. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832-833 (1995).

47. 2 U.S.C. §§ 1, 7 (1994).

48. *See* 2 U.S.C. §§ 1, 7 (1994); 3 U.S.C. § 1 (1994).

election on federal election day. Louisiana voters challenged this primary as a violation of federal law. Finding no conflict between the state and federal statutes, the District Court granted summary judgment in favor of the state's Governor and Secretary of State. The Fifth Circuit reversed.

The Court relied on the Elections Clause of the Constitution and concluded that Congress "has the power to override state regulations" by establishing uniform rules for federal elections, binding on the States. Thus, Congress has legislated that all federal elections be held on a single day throughout the country. The purpose of this legislation was to protect the integrity of the federal election process. On that basis, federal law affecting federal office could preempt any state law which interfered with the authority of the federal government to protect the order and manner in which those who seek its offices are elected.⁴⁹ As such, in striking down the Louisiana statute as conflicting with federal law, the Court noted an important policy behind a single federal election day: to prevent early elections in one state from influencing later elections in another state. This latter point, of course, is actually the most interesting aspect of this case. The problem of broadcasting election results early has become increasingly troublesome in the second half of the twentieth century. Louisiana's provision was merely a formalized and extreme form of the problem. More perverse, perhaps, is the effect of broadcast and electronic journalism on national elections. The Court means to preserve the vitality of the two party system in the United States. Why else worry about the effect of broadcasting election results in New York before the polls have closed in California? This Court has shown itself to be very interested in the preservation of the basis of our two party republican form of government.⁵⁰

D. Breard v. Greene⁵¹

This is a case which will have repercussions in a number of areas, yet the Court was careful to focus the case as narrowly as possible. Here the Court demonstrates a significant deference to the dignity of American states within the system of international law. Late twentieth century Americans, accustomed to the centralizing tendencies so successfully pursued since the beginning of the century may find the opinion curious and perhaps mildly disturbing. The opinion puts people on notice that the American Republic remains a federation, and perhaps a federation which is different in less substantial degree from its cousin, the European Union.

Let's start with the facts of the case, which are a bit complex. Breard, a citizen of Paraguay residing in the United States, was arrested in Virginia and charged with attempted rape and capital murder. Following a 1993 jury trial, he was convicted of

49. Social scientists have found that the way primaries are ordered may affect the nature of candidates elected. *See, e.g.,* Elisabeth R. Gerber and Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304 (1998).

50. *See generally, e.g.,* Larry Catá Backer, *Reading Entrails: Romer, VMI and the Art of Divining Equal Protection*, 32 TULSA L.J. 361 (1997).

51. 118 S. Ct. 1352 (1998).

both charges and sentenced to death. On appeal, the Supreme Court of Virginia affirmed the convictions and sentences,⁵² and the United States Supreme Court denied *certiorari*.⁵³ State collateral relief was subsequently denied as well. In 1996, Breard filed a motion in the United States District Court for the Eastern District of Virginia for federal habeas corpus relief, in which motion the accused argued for the first time that (1) the Vienna Convention on Consular Relations⁵⁴ conferred on foreign nationals the right to consular assistance following arrest; and (2) at the time of the accused's arrest, the arresting authorities had failed to inform him that he had the right, as a foreign national, to contact his nation's consulate. The District Court, in dismissing the habeas corpus petition, concluded that the accused (1) had procedurally defaulted the Vienna Convention claim when he failed to raise the claim in state court, and (2) could not demonstrate cause and prejudice for this default.⁵⁵ The Fourth Circuit affirmed.⁵⁶ In a separate action, the District Court, the Republic of Paraguay, Paraguay's ambassador to the United States, and Paraguay's consul general to the United States brought suit against some Virginia officials for the alleged violation of Paraguay's rights under the Vienna Convention. Additionally, the Paraguayan consul general, alleging a denial of his own rights under the Vienna Convention, asserted a claim under 42 U.S.C. § 1983. The District Court dismissed the action for lack of subject matter jurisdiction,⁵⁷ and the Court of Appeals affirmed.⁵⁸

In 1998, Paraguay pursued the Vienna Convention claim by instituting proceedings against the United States in the International Court of Justice (ICJ), which issued an order requesting that the United States take measures to insure that the accused not be executed pending the final decision in the ICJ proceedings.⁵⁹ Paraguay also invoked the Supreme Court's original jurisdiction over cases affecting ambassadors and consuls, filing a motion for leave to file a bill of complaint. At the same time, the accused filed a petition for habeas corpus as an original matter in the Supreme Court. Both Breard and Paraguay filed applications for a stay of execution.

The Supreme Court denied the petitions, the stay applications, and the motion for leave to file a bill of complaint. In a *per curiam* opinion expressing the views of Justices O'Connor, Scalia, Kennedy, Thomas, and the Chief Justice, the Court rejected the argument that the execution violated the Vienna Convention. The *per curiam* explained that Breard had procedurally defaulted on his rights under the Vienna Convention by failing to raise the claim in the state courts.⁶⁰ On two grounds, the Supreme Court rejected Paraguay's argument that because the Vienna Convention was the "supreme law of the land," the procedural default doctrine could

52. 445 S.E.2d 670 (Va. 1994).

53. 513 U.S. 971 (1994).

54. 21 U.S.T. 77.

55. See 949 F. Supp. 1255 (E.D. Va. 1996).

56. See 134 F.3d 615 (4th Cir. 1998).

57. See 949 F. Supp. 1269 (E.D. Va. 1996).

58. See 134 F.3d 622 (4th Cir. 1998).

59. See *Breard v. Green*, 118 S. Ct. 1352, 1354 (1998) ("On April 3, 1998, nearly five years after Breard's conviction became final, the Republic of Paraguay instituted proceedings against the United States in the International Court of Justice (ICJ), alleging that the United States violated the Vienna Convention at the time of Breard's arrest.").

60. See *id.* at 1355.

not be invoked. First, the Court explained that the Vienna Convention itself permitted the United States to invoke the procedural default doctrine.⁶¹ The Court also rejected the claim on the basis of its view that the United States' obligations under the Vienna Convention have been modified by the subsequently enacted Antiterrorism and Effective Death Penalty Act (AEDPA).⁶² The opinion went on to conclude that even if the Vienna Convention claim had been properly raised, the claim would have no effect, because Breard was unable to show that the violation had an effect on the trial that ought to have resulted in the overturning of the judgment of conviction. His claims were of a sort more speculative than those routinely rejected by the courts in other cases.⁶³

The per curiam then dealt with Paraguay's claims. The Court declared that the Vienna Convention did not clearly provide a foreign nation with a private right of action in United States courts. This statement was asserted without reference to case law or other corroborative source.⁶⁴

The per curiam's Eleventh Amendment analysis was both short and confused. The Court reminded us that "the States, in the absence of consent, are immune from suits brought against them . . . By a foreign state."⁶⁵ This presented the Eleventh Amendment in its role as repository of some sort of constitutionalization of sovereign immunity. Then the Court rejected the argument that *Young* applied.⁶⁶ "Though Paraguay claims that its suit is within an exemption dealing with continuing

61. It argued that the procedural rules of the forum state govern the implementation of a treaty in that state. United States procedural rules require the assertion of error in criminal proceedings must first be raised in state courts in habeas proceedings. "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of violation of those rights now on federal habeas review." *Id.* It argued that the procedural rules of the forum state govern the implementation of a treaty in that state, and because U.S. procedural rules require the assertion of error in criminal proceedings must first be raised in state courts in habeas proceedings

62. 28 U.S.C. §§ 2254-66. (Supp. 1998) (referring to *Reid v. Covert*, 354 U.S. 1 (1957)). "Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be." *Breard*, 118 S. Ct. at 1355 (citing *Teague v. Lane*, 489 U.S. 288 (1989)). Because Breard had not raised the issue before the state courts, he would be unable to establish how the lack of consular advice prejudiced him. *See id.*

63. *See id.*

64. *See Breard*, 118 S. Ct. at 1356.

65. *Id.* at 1355-56 (citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329-330 (1934)); *see also* Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189 (1981).

66. *Ex parte Young*, 209 U.S. 123, 159-160 (1908). The rules, as expressed by that Court, creates an "exception" to the limitation of suits in federal courts against states for violation of federal law.

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney General seeks to enforce be a violation of the Federal Constitution, the officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. For a nice review of the cases constructing the current understanding of the Eleventh Amendment, *see, e.g.*, Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

consequences of past violations of federal rights, we do not agree. The failure to notify the Paraguayan Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case."⁶⁷

The Court then rejected Paraguay's § 1983 claim on the ground that Paraguay was not a "person" for purposes of the statute and thus was not authorized to bring suit.⁶⁸ And finally, though with regret, the Court suggested that ultimately the issue for Paraguay was political. While Paraguay and the federal government could attempt to use such diplomatic means as were available to prevail upon the Governor of Virginia to postpone the execution, the Court could not compel any action on the part of the Virginia governor.

Justice Souter filed a separate opinion, and Justices Stevens, Ginsburg and Breyer dissented. The three dissenters stressed their annoyance with Virginia's determination to speedily execute Mr. Breard. As Justice Breyer explained, Virginia's execution schedule "leaves less time for argument and for Court consideration than the Court's rules provide for ordinary cases. Like Justice Stevens, I can find no special reason here to truncate the period of time that the Court's rules would otherwise make available."⁶⁹ On that basis, the dissenting Justices were unwilling to concede the substantive points taken for granted in the *per curiam*.⁷⁰

Breard is a fine example of the product of a court unwilling to leap into great issues, even when they are staring it in the face. Here the Court provides simple guidance grounded in the traditional notions of treaty application and federal/state comity. Indeed, the only thing which troubles the justices is the speed with which this simple decision is made. It offends some of the justice's supra-constitutional notions of fairness in constitutional adjudication.⁷¹ The substance of the decision might well be less troubling even to the dissenters.

Yet, the Court's treatment of the Vienna Convention, while neither new nor extraordinary, reminds us of the problems the United States will face with increasing frequency in this era of rapid entanglements in international legal systems. These entanglements are transforming our traditional two layer system of state and federal governments bound together by a constitution. In its place, we are blundering into a three layer federal system composed of state, national and supra-national governments.⁷² While the relations between state and national governments are still governed by a constitution, the between the national government and the supra-national entity is governed by any number of agreements we call "treaties" in

67. See *Breard*, 118 S. Ct. at 1356 (citation omitted).

68. See *id.*

69. *Id.* at 1357 (Breyer, J., dissenting).

70. Justice Breyer makes this quite clear in his dissent. See *id.*

71. For a discussion of the fashioning of fairness as a major extra-constitutional principle of constitutional law, see Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*, 33 TULSA L.J. 135 (1997).

72. Actually, there may be four layers—state, tribal, national and supra-national. The United States has yet to sort out its relationship with the Indian tribes, and between the tribes and the states.

contradistinction to “constitutions.”⁷³ The United States, to varying degrees, is now subject to any number of conventions, leagues of nations for this or that purpose and with this or that set of enforcement mechanisms. We have lately limited our sovereignty to the extent necessary to comply with our obligations under the North American Free Trade Act⁷⁴ and as a part of the World Trade Organization. We form a part of the web of relationships arising through the United Nations.

These are the multiple and fluid levels of our emerging federal system. The coming century will reveal the way in which our eighteenth century federal system incorporates these twentieth century piecemeal accretions and cessions of sovereignty. For the moment, our federal legislative and executive branches will continue to commit the United States to entry into multi-national systems of all descriptions. Our judicial branch treats these commitments as essentially political—binding only as and to the extent that Congress so provides by additional legislation. Treaties remain hortatory devices unless the Congress explicitly tells us otherwise or unless Congress passes “real” national legislation implementing the “promises” made in the treaty.⁷⁵ Moreover, such treaty obligations can be modified or abrogated by subsequent legislation.

Our jurisprudence is very near like that in Britain, which is also trying now to understand the nature of its new place within the emerging European Union.⁷⁶ The United States takes the position that though it cedes sovereignty to an extent when it becomes a member of international organizations, it only loses that sovereignty as and to the extent it so specifies, from time to time. Moreover, unlike the states of the American federal union, the American national government reserves for itself the right to secede from these international unions at will.

What I find richly amusing about this is that as the national government becomes more and more a subordinate level of supra-national government, the rhetoric coming from the judiciary in opinions like *Breard* begins to sound suspiciously, deliciously, and ironically like the rhetoric of John C. Calhoun, urged on the national government a century ago in defense of the sovereign majesty of South Carolina (and other states) to resist the power of government at the national level.⁷⁷

73. I reject the common understanding of a fundamental difference between treaties and constitutions, the former being a creature of the “law” between nations and the latter belonging to a different “species” of law. See generally Larry Catá Backer, *Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union*, HARVARD JEAN MONNET WORKING PAPER, No. 4/98 (1998) <<http://www.law.harvard.edu/Programs/JeanMonnet/papers/98/98-4.html>> (visited Feb. 22, 1999); Prasad Sharma, *Restoring Partial Democracy: Why the U.S. Should Listen to Citizen Voices While Engaging in International Environmental Law Making*, 12 EMORY INT’L L. REV. 1215, 1231 (1998).

74. North American Free Trade Agreement, 19 U.S.C.A. § 3301-3473 (West Supp. 1998).

75. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) (A treaty is in its nature a contract between two nations, not a Legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intraterritorial; but is carried into execution by the sovereign power of the respective parties to the instrument).

76. See *Blackburn v. Attorney General*, [1971] 2 All E.R. 1380 (C.A.) (British execution of European Community Treaty had no effect in Britain unless implemented by act of Parliament); *Macarthy, Ltd. v. Smith*, [1979] 3 All E.R. 325 (C.A.) (Parliament has authority to abrogate or modify Britain’s obligations under the European Community Treaty).

77. See generally JOHN C. CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN (1811-1850) (Ross M. Lence, ed. 1992).

This philosophy was discredited (by war) when applied to the relationship between states and the national government of the United States. It is accepted with little question in defining the relationship of one "state" to another in the context of multi-state unions. However, as these unions begin to take on more of the attributes of government, the parallels will be hard to dismiss.

III. A COBBLER'S COURT, A PRACTITIONER'S COURT

My discussion of these cases leads me back to where we started this morning. More specifically, it leads me back to Judge Holmes' opening remarks on his grateful assessment of the role this Supreme Court has finally embraced.⁷⁸ I want to draw on some lessons raised by the cases I have just considered and attempt to draw some useful conclusions about the nature of the Supreme Court's approach to the profession. This exercise will also help us understand why many commentators carry on about their view that the Rehnquist Court's decisions are so "disappointing." Stella has indeed got her groove back—the Rehnquist Court is now grooving to the petitioners' beat. It has fulfilled its promise by embracing its vocation—that of Cobbler's Court.⁷⁹ Sadly, for many of us, Rehnquist's Stells is not grooving the way we want her to.

The Rehnquist Court has become disappointing, and particularly disappointing this past Term, because the Court has failed to meet *our* expectations of a Supreme Court of the American federation. We have gotten very used to the American Supreme Court acting out scenes from Cecil B. DeMille's movie *The Ten Commandments*.⁸⁰ We expect the *sturm und drag* of the great scenes between Charlton Heston's Moses and Yul Brenner's Raamses leading to the exodus from Egypt with the Court playing the role of the supernatural—God or Satan depending on the listener's point of view. This Court, as supernatural, makes the big pronouncements in the big cases: *thou shalt abort; thou shalt not lead prayer in public schools; thou shalt not take the vote from gay people*. Such pronouncements send chills up our collective spines. This is the Court doing God's work—or the Devil's. This is what we want our court to do. It's like heroin addiction. If we do not get our hit, we wonder what is wrong; and we have been supplied with this stuff at least since the days of the Warren Court.⁸¹

This is the Court of grand theory for which we watch, like so many Hollywood groupies waiting for their starlet of the moment. This is the Court which, as Judge Holmes noted, provides us with pronouncements of fundamental principles of constitutional law.⁸² These fundamental principles of constitutional law help all of us, perhaps, to understand *how* to approach our own reading of the federal

78. See Sven Erik Holmes, *Introduction: The October 1997 Supreme Court Term*, 34 TULSA L.J. 201 (1999).

79. My notion of Cobbler's Court is further explored *infra* notes 87-104 and accompanying text.

80. See *THE TEN COMMANDMENTS* (Paramount 1956).

81. For a sense of this sort of addiction, see *e.g.*, *THE WARREN COURT: A RETROSPECTIVE* (Bernard Schwartz, ed. 1996).

82. See Holmes, *supra* note 78, at 202.

Constitution. It helps illuminate for us the normative walls within which we are permitted to interpret our basic law. Law professors, journalists, and politicians all love grand theory. We cannot get enough. Our engagement with grand theory keeps us employed. It is sexy, ambiguous, and malleable. It perpetuates the illusion that some powerful entity (the Court) is engaging in very important work (its opinions), which will fundamentally transform our social order—or destroy it. Even lawyers love grand theory. It is ambiguous and malleable, but not in the sense that gives pleasure to academics. Like sculpting clay, soft and porous, giving way to any touch, grand theory creates the possibility of endless litigation. Litigation, at the fees it generates, makes it possible for lawyers to pay the tuition our universities charge to keep academics comfortably employed. This technology of law is both a closed system, and the source and fuel of its perpetuation.⁸³ Grand theory is a wonderful thing.

Yet, much like sermons delivered in our houses of worship, it is sometimes hard to grasp what is left of grand theory in the dimming afterglow of its delivery. Think about what happens to the words, those wonderful grand general billowing words and ideas, delivered with such eloquence, between the time you get into your car and the time you get home. Can you even reconstruct that which was said by the time you sit in front of the television? You can remember the general idea, but you have no idea how this idea ought to apply to the circumstances of your everyday life. Grand theory can at times provide little guidance to governments, courts, lawyers, or people. At this point, you come closer to understanding Judge Holmes' tone when he declares his undying gratitude when the Court actually provides guidance to the inferior courts.⁸⁴ The implication, of course, is that for years it has not provided that guidance.

Grand theory is at its best at the most general of levels. It is most useless at the level of the individual, or at the level of application. It is animated by the love of humankind, but requires a blindness to individual humans, each uniquely situated. Justice Scalia is my candidate for poster boy of grand theory. Justice Scalia tends not to let the individual get in the way of theory. What seems inconsistent—*Oncale*⁸⁵ on the one hand and *Romer*⁸⁶ on the other—can be explained by his consistent passion for application of the logic of a theory he has taken great pains to develop. In the former, the internal consistency of the statute assumed paramount importance, the individual and his situation was of secondary importance. In the latter case, moral theory applied to groups of people took center stage. Individuals were of no consequence in the analysis or for the theory

83. Cf. Niklas Luhmann, *Law as Social System*, 83 NW. U.L. REV. 136 (1988-89) (on law as a self-perpetuating closed system); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

84. See Holmes, *supra* note 78, at 201.

85. *Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998) (sex harassment statute covers instances of same sex harassment).

86. *Romer v. Evans*, 116 S. Ct. 1620 (1996) (Majority voided a Colorado constitutional amendment affecting the participation of gay people in the political process. Justice Scalia dissented arguing that traditional deference to issues of sexual morality supported the amendment. See *id.* at 636.).

Despite the efforts of Justice Scalia, the Rehnquist Court has increasingly shown itself inept at grand theory. The titans of grand theory of a generation ago are now largely absent from the court. Though the Court remains as fragmented as ever, the fissures are no longer necessarily ideological. Instead, the differences could be better understood as differences in the sense of what the nature of the Court's work ought to be. There are a number of justices now who are uncomfortable with grand theory. It is harder and harder for Justice Scalia to find people to play the game so popular on the Burger and Warren Courts. As a result, the Rehnquist Court has been unable to stamp on the public mind, or even the academic mind, its peculiar vision of a theory of American Constitutional law or even a theory of courts or the American political system. It has never really made such pronouncements, unlike its predecessor Courts under Chief Justices Warren and Burger.

With this Term's cases, however, we can begin to clearly see the "groove" of this Court. This is not a court of grand theory; this is a cobbler's court. What do I mean by this term? A cobbler's court is in some ways the antithesis of a court of grand theory. A cobbler's court is a practitioner's court, a pragmatist court. It is a court that desires to be fair,⁸⁷ is respectful of the past (at least when it suits them),⁸⁸ and is deferential to its own traditions⁸⁹ and past opinions.⁹⁰ Most importantly, it is a court which is less comfortable making pronouncements at the level of humankind, and much more comfortable making law for the individual. This is a court guided by a mentality which prefers to give guidance to the courts,⁹¹ to fill in the blanks, to provide regularity and some comfort to those who it must advise, to look at the practical.

This is a court which prefers to contextualize its decisions. This is a court which balances the interests of everyone involved in a litigation. Yet, the Rehnquist cobbler's court creates as much frustration as was created by the grand but empty theory of prior courts. But the frustration is of a different order. The court's emphasis on the individuality of cases creates a contextualization nightmare. Where the facts of a case make all the difference in the world, the value of guidance diminishes as facts deviate from those adjudicated. After all, no two sets of facts are exactly alike.

As a result, the nature of the battles within the Rehnquist Court has been of a substantially different character than the battles fought in the Warren and Burger Courts. The Warren and Burger Courts spawned huge ideological battles. These

87. See Larry Catá Backer, *Fairness as a General Principle of American Constitutional Law: Applying Extra-Constitutional Principles to Constitutional Cases in Hendricks and M.L.B.*, 33 TULSA L.J. 135 (1997).

88. *Clinton v. New York*, 118 S. Ct. 2091 (1998), provides a good example of the way in which the Court attempts deference to the past.

89. See, e.g., *Swidler v. Berlin*, 118 S. Ct. 2081 (1998) (affirming the broadly applied rule of privilege, though leaving the door open for reconsideration on the appropriate factual situation).

90. See, e.g., *Planned Parenthood v. Casey*, 510 U.S. 1309 (1994).

91. The sex harassment cases are a good example of this tendency this past Term. See *Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998); *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Indus. v. Ellerth*, 118 S. Ct. 2257 (1998). Another good example is *Sacramento v. Lewis*, 118 S. Ct. 1708 (1998) in which the Court severely limited the circumstances under which people could recover from police for injuries received as a result of a high speed chases. This is a court which prefers to contextualize its decisions.

were battles over grand theory, over a vision of the socio-legal political culture in which decisions are made. The particular litigants and their causes of action became marginal characters in the battle of the titans. Lawyers understood the nature of the battles. The 1960s saw the explosive growth of “strategic” and “impact” litigation on a willing judiciary.⁹²

In contrast, the Rehnquist Court, especially after the retirement of Justice Brennan (when the Rehnquist Court perhaps really began), spawned a very different type of battle. Here we see more often the battle between two very different styles of appellate judging. This is best personified by the battles between Justice Scalia, a master of the old grand theory school, and Justice O’Connor, leading figure of the cobbler’s court. This is especially evident in their contests over the interpretation of the Religion Clauses.⁹³ For those of you used to the heady days of Kennedyesque idealism, my conclusions may well be disappointing. For practitioners, for the bench, and for those who want to be able to understand and apply the law, the Rehnquist Court, no matter how wrongheaded an individual opinion may be, provides the sort of approach to cases which may well be a relief after a generation of high theory.

The cases this Term provide good examples of both the way in which a cobbler’s court functions at its best and the way in which a cobbler’s court approaches its role as constitutional arbiter. Tradition and the preservation of bright lines rules were at the heart of *Swidler*.⁹⁴ *Baker’s* rejection of the use of the public policy exception to resist application of the constitutional obligation of Full Faith and Credit stands as another example.⁹⁵ It was also present to a great extent in *Breard*.⁹⁶ A cobbler’s court is deferential to government and devises practical rules to give effect to this deference. Thus, in *Finley*, the majority, through Justice O’Connor, used a dormant commerce clause analogy to support the government’s imposition on exclusionary rules to govern its patronage of the arts.⁹⁷ Where the government is acting as patron rather than sovereign, different and more lax rules ought to apply. Likewise, deference was at the heart of the Court’s opinion in *Sacramento v. Lewis*⁹⁸ which substantially frees police officers, and the governments which employ them,

92. For a taste of this see, e.g., Edward v. Sparer, *The Role of the Welfare Client’s Lawyer*, 12 U.C.L.A. L. REV. 361 (1965); Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993).

93. See, e.g., Larry Catá Backer, *The Incarnate Word, that Old Rugged (Klan) Cross and the State: On the Supreme Court’s October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996).

94. *Swidler v. Berlin*, 118 S. Ct. 2081 (1998). In holding that the attorney-client privilege survives the death of the client, a simple bright line rule, the Chief Justice took the high road, upholding a broad, simple and old fashioned reading of the privilege. The Chief Justice conceded, however, that the establishment of a bright line rule does not mean it should stand for all time, but compelling proof of a generalized change in circumstances is needed to warrant such an overturning. The dissent by Justice O’Connor was based on the other face of the cobbler’s court—the desirability of contextualization. Justice O’Connor would have converted the privilege effectively to a work product shield at the death of the client. Such a shield could be pierced in a criminal proceeding (at least) where a balancing of the interest in preservation of the confidence was outweighed by the interest in disclosure. The factors to be weighed would include the interest in exonerating an innocent criminal defendant, the existence of a compelling law enforcement interest, and the need to preserve incentive to communicate with one’s lawyer.

95. *Baker v. General Motors, Corp.*, 118 S. Ct. 657 (1998). See text *supra* Part II.B.

96. *Breard v. Green*, 118 S. Ct. 1352 (1998). See text *supra* Part II.D.

97. *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2177 (1998).

98. 118 S. Ct. 1708 (1998).

from liability for damages resulting from high speed chases. Within the ambit of its authority, The Court also showed a willingness to confirm the power of the federal government within the ambit of its authority over elections,⁹⁹ and telecommunications.¹⁰⁰

Most important, of course, is the continued emphasis on the context of the decision. This is a court which tends to be leery of absolutes and to adhere closely to the facts before it (at least as the Court construes the facts on which it wishes to rely). Balancing and factor analysis is the order of the day. Justice Thomas's embrace of the principle of proportionality in Excessive Fines Clause cases provides a nice example.¹⁰¹

The fact that the Rehnquist Court can impose both bright lines rules and fact base balancing tests in almost equal measure is less contradictory than it might appear at first blush. It also serves as further evidence of the pragmatism, the practitioner orientation, of this court. The answer lies in the nature of the litigants. With respect to common law claims, or claims that do not involve the government as principal or enforcer, then a highly contextualized balancing is often the rule. In these cases, the peculiar facts before the courts and the interests of the litigants and the court must be considered in arriving at a judgment of the case before a court. The shortcomings of this approach are well known.¹⁰² On the other hand, the Court will take a different approach, one favoring bright line rules, where the government is an active participant or in cases of statutory interpretation. In this context the court seems to favor simple rules, which are easy to apply.¹⁰³ *Oncale* is a good case in point.¹⁰⁴

IV. CONCLUSION

I have offered a different vision of the Rehnquist Court. Rather than consider the preceding Term a disappointment, I consider it a great success. The Rehnquist Court has finally found its stride. That law professors and headline mongers may be disappointed is of little moment. The Rehnquist Court, in eschewing grand theory, will be able to provide a significant contribution to jurisprudence. At last we will have the evidence to argue intelligently about something other than grand theory: Does a Supreme Court with a pragmatist or a theoretical bent do us the better service? Only time will tell.

99. See *Foster v. Love*, 118 S. Ct. 464 (1998). See text *supra* Part II.C.

100. See *AT&T v. Central Office Tel., Inc.*, 118 S. Ct. 1956 (1998). See text *supra* Part II.A.

101. *United States v. Bajakajian*, 118 S. Ct. 2028 (1998). Use of the principle of proportionality is common in Europe and has been embraced as an important principle of constitutional adjudication in by the European Court of Justice. See, e.g., NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* (1996).

102. Facts and circumstances adjudication can result in the creation of hollow rules consisting for the most part of factor recipes. In abusive cases these factor recipes can be used as a screen through which a cynical court or a manipulative counsel can reach a quite arbitrary decision. Moreover a highly contextualized approach can make planning as difficult as the most obtuse statements of grand theory.

103. Of course, simple rules for complex problems can be bad medicine indeed. See Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 *TULSA L.J.* 329 (1999).

104. *Oncale v. Sundowner Offshore Serv.*, 118 S. Ct. 998 (1998). See *supra* note 91.

