

The London School of Economics and Political Science

**“American Constitutional Communication:
Appellate Court Opinions And The Implications For
“The judicial Power of the United States.””**

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the Degree of Doctor of Philosophy (Ph.D.)

Department of Government

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ABSTRACT

The replacement of traditional seriatim opinions with an “Opinion of the Court,” offers what initially appears to be an interesting but seemingly trivial characteristic of American law. In fact, this departure from convention represents an exceptional shift in the behavioral actions and expectations of American appellate judges. This switch in the method of judicial communication is an exemplar for the belief that institutions, and the rules that regulate them, matter seriously. Failure to appreciate and insist upon “sincerity” as a distinctive judicial trait has impoverished historical and structural approaches to constitutional argument and has aided in the conflation of judges and legislators. Moreover, the initial demotion of sincerity as a cardinal value of American judicial power was an amendment of constitutional structure of rather dubious motive and utter lack of process.

Anglo-American history reveals that judges performing their appellate functions consciously and consistently attended to a sincere, individual execution of their duty. Furthermore, an exploration of important Anglo-American jurisprudence reveals that sincerity is a presupposed though often neglected judicial virtue. This tripartite argument also includes a review of important constitutional theory and legal commentary regarding judicial communication. In the broadest sense, I endeavor to explain that the nature of law is inextricably related to its delivery and that the Constitution admits of a conversing, plurally-voiced dynamic of communication. These sorts of inquiries are true to American founding beliefs that a new science of politics can apply to old problems of governance. These arguments also highlight a guiding principle for any judiciary functioning in a constitutional democracy: public communication is critical for any consenting polity to discern the worth and import of the rule of law.

Preface

Like an opinion of a Supreme Court Justice, this paper is addressed to several audiences. The aim is to suggest that each of these audiences has neglected an important tradition of American law, and that this neglect has consequences. Establishing historical and jurisprudential foundations for this tradition is a large part of the goal for the argument which follows. Additionally, there is a secondary benefit which is accrued in making the attempt to establish foundations that I believe should be made more explicit: whatever the degree of persuasion attained, the vast bulk of materials which would be relevant to a debate on whether the tradition is either important or relevant can be found in the notes and bibliography of this paper. Before the attempt is made though, I wish to inform any constituent of the possible interested groups of my basic approach to the existing scholarship.

It is fair to say that each of the three parts of my argument is greatly influenced by a portion of the available materials. My exploration of American legal history, for example, is in the main a review and analysis of case law, certain selected statutes, and one or two exceptional letter-writing colloquies. In general, I have eschewed history by personal biography. Private speeches and comments have not been the basis of the argument from history laid out here. To the community of legal theory, there is no doubt that my discussion is guided by the philosophical reconstructions and distillations of a coterie of contemporary scholars who- through their extraordinary effort- have given students such as myself access to the insights of great thinkers on the subject of law. Gerald Postema's masterful- and indispensable- exploration of Benthamite positivism and its relationship to Common Law theory is one illustration of this. To the allegation that this dependence is harmful I can only respond that I would rather carry the additional baggage of great scholars than pretend that I could myself provide

the knowledge and context needed for each of the jurisprudential giants I explore. The third part of the paper, which deals with American constitutional theory and practice, can be indicted on a similar charge, that I am simply reacting to a small, influential argument about the American judiciary. The remarkable thing is that the argument I am reacting to is forwarded by a rather large number of constitutional commentators; the coterie in this case is in fact a thundering herd. I leave a great deal untouched in this area as well; Publius is only the tip of the iceberg, for example. These disclaimers of method are not sufficiently powerful to warrant omission at the outset by the interested student.

The word “acknowledge” does not convey the deep appreciation and respect I have for the group of people who have inspired and supported my endeavors. I was especially fortunate to come into contact with Dr. William Harris at an early point in my undergraduate career at the University of Pennsylvania. Professor Harris’ dedication to his craft and to his students was unmatched and remains for me the model of what undergraduate teaching at its best can be.

My years of study at the London School of Economics were both challenging and wonderful. The simple reality of being a graduate student at the LSE is that your primary supervisor is all-important. I could not have asked for a better mentor than Alan Beattie. What sets Alan apart from others I have discussed my ideas with is that the healthy concern and scepticism he brings to discussions with his students is tempered by trust. When a student feels that he is trusted- that an initial reciprocal respect is accorded his attempts at scholarship- the result can be rations of confidence which are indispensable to the lonely struggles of argument construction. He has been a friend and a colleague to a Yankee in Queen Elizabeth’s Court; I will miss him deeply.

Cheryl Schonhardt-Bailey provided important insights in the earlier stages of my work, and her general interest and friendship were also greatly appreciated. Cheryl always made me aware of the professional and practical facets of the academy, and in that way rounded out the education of a graduate student. I will miss Thanksgiving in Brockley.

Many people gave their time by meeting with me and reading portions of the manuscript at different stages. Gary McDowell at the University of London allowed me to audit his graduate seminar in American constitutional history, and met with me individually to discuss my ideas and provide suggestions. Sanford Levinson of the University of Texas confirmed the general possibility and importance of a thesis such as this at an early stage and pointed me in the direction of some pivotal material. Ronald Dworkin of Oxford University in a brief discussion introduced me to a few articles which proved indispensable to my thesis. Leonard Leigh was also an accessible and insightful audience for my chapters of legal history. Mark Tushnet, Louis Seidman and Sherman Cohn of Georgetown University Law Center also took the time to meet with me and discuss certain aspects of my paper, confirming the maxim that the best academics are accessible. Paul Kelly's total critique of an early rough draft of the paper at the LSE was indispensable. The British Library of Political and Economic Science has an exceptionally knowledgeable staff and proved helpful throughout my registration at the LSE. The staff of the Government Department is comprised of cheerful, diligent staff who never tired of my endless questioning and bothering.

Finally, my thoughts are always of my parents, my sister, my family and my close friends who supported me while we were separated by the Atlantic. One of those friends became my wife recently, and this paper is dedicated to her.

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I have sworn upon the altar of God, eternal hostility
against every form of tyranny over the mind of man.

Thomas Jefferson

The man that hath no music in himself,
Nor is not moved with concord of sweet sounds,
Is fit for treasons, stratagems, and spoils;
The motions of his spirit are dull as night,
And his affections dark as Erebus;
Let no such man be trusted.

William Shakespeare

For Stacey

INTRODUCTION

In 1989, distinguished law professor John Hart Ely gave a lecture where he lamented that he was one of the few remaining members of the “legal process” school.¹ The progeny of the legal realists, Ely explained, were dominating the landscape on both the left and the right with their slogans that law simply is politics and that “there is no reason courts should feel an obligation to behave differently from elected officials.” Ely’s lecture was couched in terms that betrayed his belief that the dominant view was wrong and that a reemergence of the legal process school would be both beneficial and likely.² How could such a renaissance be made (or encouraged) to occur? A short answer to this question, one that is developed throughout these pages, starts by recognizing that the obligations of judges are shaped and motivated like other political and legal obligations. Courts will stop behaving like legislatures when judges stop behaving like legislators. For judges to stop behaving like legislators, the institutions in which they reside must be purged of those incentives which encourage such behavior. Ultimately, what is required is a reconceptualization of judicial power. This thesis, then, is a small but concerted attempt to realize the aims of those like Ely; those like him must do more than bear witness to their demise.

If a large portion of the genius of the Constitution, as Bruce Ackerman correctly explains,³ is that it attempts to economize the (all too scarce)

¹ Ely gave the Sibley Lecture at the University of Georgia Law School on October 31, 1989. An extended version of the Sibley Lecture was published two years later. John Hart Ely, “Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures,” 77 Virginia Law Review 833-79 (1991).

² See, for example, *ibid.*, 854 at note 57.

³ Bruce Ackerman, We The People, vol. 1: Foundations (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991), 198-99.

resource of civic virtue (or public-spirited deliberation), then this paper is about a lost economy. What follows is an argument in support of a postulate- an axiom or prerequisite- of judicial behavior which I believe to be fundamental to the proper exercise of “The judicial Power of the United States.” The postulate was part and parcel of a complete original understanding of what American judicial power was and was envisioned to be. The thesis presented here is not another theory of judicial review or a broad accusation of tyranny by judiciary. This thesis is also not another vigorous defense- explicitly or by implication- of that approach to constitutional interpretation known as “original understanding.” Instead, this thesis is inspired by that uniquely American premise that “there is an intimate connection between procedure and substance, and that the institutional arrangements of a polity have a direct bearing upon its substantive actions.”⁴ What this means is that the Constitution in the first instance is about structure, not intention of any kind. The Constitution is largely about structure because those that framed and ratified it believed that structure would achieve desirable ends (intentions) like establishing justice and securing blessings of liberty. Moreover, structure properly understood is more than just architecture; attitudes and behavioral conventions inform and affect structure in important ways. “Inferring from structure” is a potent and legitimate source of constitutional interpretation and must include inferences and deductions made from the understood attitudes and conventions which pervade the institutions under analysis. Expectations and postulates of legal and political behavior then are essential for the preservation and maintenance of constitutional structure. With these rather uncontroversial premises in mind we can commence our inquiry.

⁴ Gary L. MacDowell, Equity and the Constitution: The Supreme Court, Equitable Relief, and Public Policy (Chicago: University of Chicago, 1982), 8.

A Fundamental Postulate of Judicial Behavior

Judicial power is supposed to be different than either executive or legislative power. As such, judges should behave differently than those who do not exercise judicial power. Today in the United States however, the judiciary consistently behaves in a way that is at odds with the foundational principles of that special authority. In fact, this behavioral postulate is so often violated that it is hardly regarded as a postulate at all. More alarming still, the operating institutional conventions of the United States Supreme Court (as well as lower appellate courts) will tend to produce outcomes that are in constant conflict with the postulate and make it probable that the postulate will continue to be violated.

Judges should behave sincerely. It is a seemingly innocuous postulate, but it has far-reaching consequences. The key word of course is “sincerely,” and what is meant by sincere includes meanings like, “being the same in actual character as in outward appearance; genuine; real; without deceit, pretense, or hypocrisy.”⁵ The virtue of sincerity in this context no doubt includes within its meaning terms like honesty and candor. David Shapiro offers elegant assistance when he writes that, “The problem of [judicial] candor... arises only when the individual judge writes or supports a statement he does not believe to be so.”⁶ This sort of positive definition though is not enough to convey the full meaning of the idea, as Shapiro well knows. Sincere behavior in the fullest sense is fundamentally opposed to strategic behavior, or, by transitivity, strategic behavior is not proper judicial behavior. Lawyers, legislators, presidents and other legal officials do not have to comport with the sincerity postulate; indeed, it is demonstrable that the authority of these positions not only permits but even requires such

⁵ Webster’s New World Dictionary, third college edition (1988), s.v. “sincere.”

⁶ David L. Shapiro, “In Defense of Judicial Candor,” 100 Harvard Law Review 736 (1987).

behavior at times. American judicial authority, however, is different. It is derived directly from the sincerity of the office, because that office is distinctively and essentially more human and less institutionalized than other offices. The basic claim that will be argued in the pages that follow is that- unlike executive and legislative power- judicial power owes its legitimacy to its close and special relationship with the individual human mind throughout its exercise. Before this connection is discussed further though there is more to explain and moderate here lest I unnecessarily confuse the reader or exaggerate the central claim.

Instances of judicial strategy are largely unexamined and disorganized in discussions of law and adjudication today. Shapiro has identified and classified five species of judicial “dissembling” which seem to cover the examples well and help to clarify the problem. They are as follows: (1) “Continuity”, (2) “Collegiality and Majority-Building”, (3) “Fear of the Effect of Knowledge”, (4) “The Conflict of Values and the Tragic Choice”, and (5) “Legal Right and Moral Duty.”⁷ Judicial strategy on behalf of continuity involves those instances where candor is sacrificed on behalf of the appearance of temporal coherence or a “natural evolution” of the law.⁸ There is no doubt an intimate relationship between concerns of strategy on behalf of continuity by judges and prevailing conceptions of stare decisis, as well as other general views about legal change. Because of the contemporary shape of these conceptions of legal change, it is fair to say that concerns about lack of candor due to concerns of continuity are infrequent today, not the principal point of attack of those who think about such matters. Strategic behavior due to the “fear of truth”⁹ (type 3, above) is

⁷ Ibid., 739-49.

⁸ Ibid., 739 [“A certain amount of conscious dissembling... is an appropriate, even a necessary, way of maintaining a sense of our connection with the past.”].

⁹ Ibid., 744 [“...fear that truthfulness would adversely affect the person addressed or would cause an undesired kind of behavior.”].

rarely done by judges, though those instances that can be identified are some of the most well-known examples of the practice. The fourth and fifth types of strategic behavior, moreover, are nonstarters for our purposes. The portrayal of strategic behavior as acceptable if done on behalf of reconciling irreconcilable “basic values”¹⁰ can only establish footing if the basic values which have been constitutionalized by a polity include such a commitment to that brand of “reconciliation.” The problem of judicial strategy in pursuance of an overriding moral commitment (type 5) does not exist in the American context, because of two prevailing facts about American legal history which have been present since the birth of the republic (and even before): (1) an important “natural law” strain, and (2) the available option of judicial invalidation of legislative and executive legal products. In fact, sentiments of collegiality or institutional loyalty are most often the animating force behind acts of judicial strategy; this particular strategic “animus” is in need of the most thorough and direct examination. It is worth clarifying that in principle each of these five species of strategic judicial behavior is the target of the argument that fills these pages. As a practical matter however I believe that two of the five (types 2 and 3 of Shapiro’s) provide justification for the great bulk of judicial strategy employed by the Supreme Court of the United States and the lower federal appellate courts.

To clarify matters further before the argument proceeds to any great depth, there are two important distinctions to keep in mind when the term “judges” is used in the formulation of the sincerity postulate. Firstly, I am referring to judges who are deciding matters of law, not fact. It is only to

¹⁰ Ibid., 747 [“...Guido Calabresi and Philip Bobbitt have argued that a certain amount of dishonesty may be desirable, if not inevitable, when life-and-death or other critical choices involve a clash of basic values.”]. See G. Calabresi and P. Bobbitt, Tragic Choices (1978). Even if the unfortunate and unavoidable “tragic choice” is a fact of American law, that does not mean that such a phenomenon should govern or animate its institutional character.

questions of law addressed by the judge where the sincerity postulate is operative.¹¹ Only appellate judges and courts are our concern here. Any student of the law is fully aware that often times matters of fact are not treated at all sincerely in a court of law. Factual situations that are highly doubtful to ever have occurred are spoken into the record for serious consideration by courts of law. Treating matters of fact insincerely does not threaten the authority of a common law judge. Matters of law, on the other hand, are a different story. Also remember that this general view of adjudication (within which the sincerity postulate is operative) is concerned solely with the resolution of cases on their merits. It is reasonably transparent that appellate courts in the United States engage in agenda-setting behavior that is certainly strategic and perhaps at times only minimally sincere. Processes such as the granting of appeals and writs of certiorari are not necessarily governable by the sincerity postulate.¹² Keeping these qualifications in mind, the more detailed sincerity postulate that is our subject reads as follows: Appellate judges, when deciding cases on their merits, should behave sincerely, not strategically.

To reiterate, keep in mind that throughout the following discussion judicial expression is the focus. How judges decide and communicate their decision is a serious part of the structuralism of American judicial power that has either been glanced over or ignored by the traditional constitutional and legal narrative. It is only logical that the understandings of properly judicial behavior influenced the construction of the American constitutional

¹¹ Indeed, I am willing to be very cautious here. Even in cases of mixed jurisdiction I would withhold the applicability of the sincerity postulate.

¹² There may be certain aspects of these processes that are governable by the sincerity postulate. In the United States Supreme Court, for example, a great deal of ink has been spilled on just what the precedential weight of these institutional decisions are- a clear indication that there is still really no consensus as to the standards of behavior judges should aspire towards when deciding such matters. In any event, these sorts of questions are more complicated because there are issues of jurisdiction-setting by Congress that is explicitly warranted by the Constitution. Decisions on the merits are exclusively in the judicial domain and so form a more discrete set of questions for theoretical exploration.

system.

There are many ramifications of having judges aspire to an ideal of sincerity, and some of the most readily apparent of these will now be discussed. Start with perhaps the most obvious prohibition of the postulate. It is clear that a judge when obeying the sincerity postulate may not “mitigate the rigours of the law,” by opting for an escape from an articulate response. Judicial power requires reason-giving. A judicial opinion of a case considered justiciable must in some discernible way meet the issues presented and not simply transform itself exclusively into, for example, an appeal for executive clemency. Doing so would modify the mandatory quality of adjudication beyond the point of recognition and would permit a strategic opportunity that judges are not permitted to exploit. The principle of the separation-of-powers in a constitutional democracy should not permit relief from the possible embarrassments of discussion and attempted reconciliation of a legal case. In fact, the perpetual colloquy that takes place among the branches goes to the very heart of the separation-of-powers principle.¹³ Sincerity is a necessary prerequisite of this communication; strategic judicial behavior only undermines the constitutional structure.

More exactly, the sincerity postulate prohibits “conclaving” or compromising a judge’s ratio decidendi for any reason. A sincere judge should make sure that his or her individual opinion is recorded when deciding a case. It should be fairly plain that the Supreme Court’s current practice of rendering its “opinion of the Court,” is continually at odds with the sincerity postulate. The authority of a judge is derived directly from the sincerity of the office, and any compromise of a case’s rationale can only be described as strategic. Furthermore, at a deeper level of substantive legal content, the sincerity postulate prohibits a judicial pronouncement from being just the regurgitation of vague “tests” of policy; an actual weighting

¹³ More will be said on this subject in chapters 3, 8 and 9. See text. *infra*.

of particular principle should be demonstrated. There is more to say about requirements such as these, for that is the task of the bulk of what follows. For the moment though, it is important to initially explain some of what the postulate permits as well as some foreseeable consequences of the postulate for the channelling of judicial power in the United States.

Begin with an important consequence of accepting sincerity as a judicial aspiration. The sincerity postulate at the core of judicial behavior visibly alters the customary internal process of Supreme Court decision making and, by extension, our own understandings of certain key points and players within that process. Opinion-assignment by the Chief Justice or the most senior Associate Justice (when the Chief is not in the majority) after the preliminary conference vote would no longer occur if proper attention was paid to the postulate (except, perhaps, in those instances where sincere majorities were achieved on both the case's result and rationale). The clearest possible articulation of the judge's ratio being the goal of the sincerity postulate, an institutionalized process of collective compromise is clearly at odds with it. The role of the Chief Justice of the Supreme Court has been transformed illegitimately into a position that actually serves to undermine the source of his and his brethren's authority by detaching the only accountable product of their effort. The same can be said of "seniority" generally as a rule of decision to the extent that it contributes to such detachment.¹⁴

There are to be sure a great number of objections to the initial argument laid out here. Many of these can be neutralized by considering

¹⁴ Seniority is determined by length of service except in the case of the Chief Justice, who is always considered the most senior justice. Seniority has been an important factor in Court tradition. Even under the seriatim form which prevailed in the Court's early years, reverse seniority governed the order of pronouncement. Seniority has also determined such traditions as seating arrangements on the bench and at conference. Managerial and public relations duties have also been the province of the Chief Justice traditionally. None of these senses of seniority contributes to the detachment of the products of the exercise of judicial power.

what the postulate permits. Firstly, the sincerity postulate does not prohibit agreement among judges. To the extent that any plurality of judges reach their result according to the same rationale, such agreement is plainly allowed. All that is required is that the ensuing rationale is sincerely obtained. Next, persuasion is also fully reconcilable with the sincerity postulate. A change of mind or a newly discovered path of decision is fully commensurate with a sincere approach. Of course, certain means of persuasion would be unallowable, such as the purposeful “watering down” or fundamental compromise of a rationale to win support. Rationale logrolling and case trading are two examples of generically strategic behavior and thus violative of the sincerity postulate.

Having briefly illustrated some of the aims, prohibitions, allowances and foreseeable consequences of the sincerity postulate the crucial question can be asked: from what and where is this postulate derived? Why elevate “sincerity” to such a position? Simply put, sincerity should be so elevated because the dominant theories of adjudication in the field of Anglo-American jurisprudence demand it, knowingly or not. Furthermore, and perhaps most importantly, sincerity deserves such serious attention because American constitutionalism was based upon it.

The ideas I have sketched out so far may be interpreted as those of a typical “judicial conservative.” In a sense this is true; I write as a person who is wary of illegitimate increases of judicial power. In another important way though, this paper demonstrates at a basic institutional level just how hollow such conservative claims of “original understanding” really are today. The structure of the Constitution has been transformed to a point where its most fundamental departmental relationships no longer serve the same ends or interact in the ways originally intended. Inexplicably, these “extra-Article V” transformations are virtually unaccounted for in the bibliography of originalist theory. Any truly complete “original

understanding” of American judicial power must include the understanding of just how that power was to be exercised; there was a purpose- indeed, a theory- behind the constitutional method. Without such attention and explanation, arguments for original understanding today are seriously incomplete and logically unextended. Many commentators take proponents of originalism to task in a similar way when they castigate them for their doctrinal contortions or avoidance of rights issues like those asserted in the famous desegregation cases. Attempts to reconcile a consistent theory of originalism with a serious theory of precedent even lead some commentators to conclude that some originalists are really “prudentialists” first, originalists only secondarily.¹⁵ These sorts of criticisms, I believe, are even more justifiable when conveyed at this basic institutional level which I have been describing and serves as the platform of the whole of what follows. Most every time the Supreme Court issues an institutional opinion today, it abandons the original understanding of how judicial power was to be exercised. This is because American judicial power was originally understood to be sincerely administered. Today judicial power is regularly employed in a strategic manner, undermining the potential force of that power and improperly amplifying the highest judicial voice in the land. To demonstrate the dominance of the strategic view, one need only survey the writings of the bench, bar and academy; for roughly the last forty years most commentators have contended that federal appellate judges today are too individualistic and that, in the case of the Supreme Court, a lack of appreciation of collegiality has been harmful to the institution.¹⁶ The trend since the 1950’s of increasing dissenting and concurring behavior by the

¹⁵ See, for example, Philip Bobbitt’s treatment of the jurisprudence of Robert Bork in Bobbitt, Constitutional Interpretation (1991), 83.

¹⁶ See for example John P. Frank, Marble Palace: The Supreme Court in American Life (1958), 129.

Justices is abhorred by the overwhelming majority of the academy.¹⁷ This wide consensus concerning the nature of American judicial power is proof that the history of judicial expression through the early nineteenth century is not deeply understood.

Chief Justice John Marshall's decision in 1801, for example, to institute the convention of institutionalized judicial expression immediately enhanced the strength and unity of the Court. In fact, Marshall's manoeuvre amounted to a genuine shift of constitutional power in the United States. This was no one-off historical anomaly. Marshall's move was an early salvo of a battle over the institutionalism of the "judicial Power of the United States." What we are left with today is a Supreme Court which in fact has allowed similar institutional concerns to erode its distinctive power-exercising function.

To understand the importance of institutional changes such as Marshall's, to understand how we have the kind of judicial power we have, a basic review of modern Supreme Court procedure is in order.¹⁸ There are five ways that a case can come before the Supreme Court of the United States. They are as follows: (1) original jurisdiction, (2) appeal, (3) writ of certiorari, (4) certification, and (5) extraordinary writ.

Original Jurisdiction. Very few cases come to the Court via original jurisdiction; for example, from 1970-1983, a total of fifty-seven cases (an average of four per term) came to the Court on original jurisdiction.¹⁹ Most original jurisdiction cases involve suits between two or more states. Article

¹⁷ See Appendix 1, *infra*.

¹⁸ For this section I have relied on several texts for information about Supreme Court procedure, jurisdiction and informal practice, as follows: Henry J. Abraham, The Judicial Process, sixth edition (Oxford: Oxford University Press, 1993); *idem*, The Judiciary: The Supreme Court in the Governmental Process, tenth edition (New York and London: New York University Press, 1996); F. Frankfurter and J. Landes, The Business of the Supreme Court (New York: Macmillan, 1928); H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court (Cambridge, Mass.: Harvard University Press, 1991); Posner, Richard A. The Federal Courts: Crisis and Reform (Cambridge, Mass.: Harvard University Press, 1985); R. L. Stern and E. Gressman. Supreme Court Practice, fifth edition (Washington: Bureau of National Affairs, 1978).

¹⁹ Perry, Deciding to Decide, 25.

III, Section 2 of the Constitution explains the subject-matter distinctions which determine the jurisdictional classification of a case.²⁰ Original jurisdiction cases go directly to the Supreme Court. Justice Marshall, in Cohens v. Virginia, put forward the notion that the Supreme Court was not required to exercise original jurisdiction in all the cases spelled out in Section 2.²¹ This strictly narrowed the aperture for those cases in which a “state shall be a party.”

Appeals. Within the Court’s appellate jurisdiction, cases where review is “obligatory” are called appeals. Within ninety days after final judgment has been entered in a lower court or if rehearing has been denied, the party wishing to appeal the case files a notice of appeal in the lower court and a jurisdictional statement in the Supreme Court. In addition to all the specific requirements the jurisdictional statement must contain, it must also state “reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.”²² This requirement allows the Court to dismiss “obligatory” appeals for want of a “substantial federal question.” Notices of appeal, like writs of certiorari (discussed below), in addition to showing that jurisdiction is technically proper, must also persuade the Court that the issues presented by the case are deserving of review.²³ “Even though the

²⁰ U.S. Const., Article III, §2, para. 2: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” The Supreme Court publishes rules which govern the procedures used for seeking review in selected volumes of the U.S. Reports and in the Appendix to Title 28 of the U.S. Code. Perry, Deciding to Decide, 28-29. Supreme Court Rule 9 governs the review process for procedures in original actions.

²¹ 6 Wheat. 264 (1821).

²² Stern and Gressman, Supreme Court Practice, 377-378; Perry, Deciding to Decide, 29. Supreme Court Rules 10 and 15 govern the review process for appeals.

²³ Of course, throughout this process of filing an appeal by the appellant, the appellee is granted opportunity to present motions for dismissal. Motions such as these are linked to the notice submitted by appellant, but one of the Court’s rules (Rule 16)

jurisdictional and formal procedures for certiorari differ from appeals,” one student of the Court writes, “the process, in reality, is not all that different.”²⁴

Throughout the 1970’s and most of the 1980’s, appeals made up roughly 20 to 25 percent of the cases argued before the Court. In 1988, Congress removed most categories of appeal, giving the Court virtually complete discretion in selecting which cases to review.²⁵

Writ of Certiorari. Overwhelmingly, the most common way for a case to come before the Supreme Court is for the Court to grant a writ of certiorari.²⁶ Writs of certiorari are discretionary writs, matters of “judicial grace.” Today, certiorari accounts for almost all cases (about 95 percent) argued before the Court; even before the 1988 reforms by Congress were instituted, certiorari accounted for about 80 percent of all cases argued. The

permits the appellee to move “on any other ground the appellee wishes to present as a reason why the Court should not set the case for argument.” Perry, Deciding to Decide, 30.

The following table (Copied from Perry, Deciding to Decide, 294) lists the requirements for appeal and certiorari, for federal and state cases:

Federal Court:

Appeal

1. Act of Congress held unconstitutional in civil action; or
2. Court of Appeals invalidates state statute; or
3. Decision by three-judge court

Certiorari

1. Any civil or criminal case in Court of Appeals, before or after judgment or decree.

State Court:

Appeal

1. Treaty or statute of the United States held invalid; or
2. State statute held valid when challenged as repugnant to U.S. Constitution, law, or treaty.

Certiorari

1. Decision from highest possible court, and judgment is final; and
 - a. Validity of state statute is drawn in question on grounds of repugnancy to U.S. Constitution, treaty, or statute; or
 - b. Violation of federal right claimed; and:
 - (1) claim must have been asserted in state court, and
 - (2) state decision not based on adequate and independent nonfederal grounds.

²⁴ Perry, Deciding to Decide, 32.

²⁵ Public Law 100-352.

²⁶ Supreme Court Rules 17 and 19 govern the review process for certiorari.

Court began to use the writ of certiorari in 1891, when an Act of Congress made some types of lower court decisions a matter for the Court's discretion via the writ.²⁷ While the practice of "granting cert." started slowly, it grew in fits and starts until the late 1920's.²⁸ It was the Judiciary Act of 1925 that proved to be a major turning point, greatly enlarging the Court's discretionary jurisdiction by replacing mandatory appeals with petitions for certiorari.

The Supreme Court spends a great deal of its time deciding whether or not to grant cert., and in most cases it decides not to do so. In 1992, for example, 7,223 cert. petitions were made to the Court; the Court granted cert. to 97 cases, about 1.3 percent of the time.²⁹ As a rough estimate for the 1970-1992 terms, the Court granted cert. to about 3 to 5 percent of all cases. Given

²⁷ Lee Epstein, et. al., The Supreme Court Compendium: Data, Decisions, and Developments (Washington D.C.: Congressional Quarterly Inc., 1994), 46.

²⁸ Total petitions for certiorari for the 1916-1925 terms:

<u>Term</u>	<u>Granted</u>	<u>Denied</u>	<u>Other</u>	<u>Total Petitions</u>
1916	53	217	0	270
1917	49	225	7	281
1918	55	267	14	336
1919	46	246	11	303
1920	50	250	7	307
1921	58	267	17	342
1922	85	323	21	429
1923	72	293	41	406
1924	68	364	24	456
1925	100	428	11	539
TOTAL 10 TERMS	636	2880	153	3669

Source: Frankfurter and Landes, The Business of the Supreme Court, 295.

²⁹ It is common for students of the Court to distinguish between regular cert. petitions and those that are made in forma pauperis (i.f.p.). When a litigant does not have the money to bring an appeal, he may file in forma pauperis, exempting him from paying court costs. Much of the growth in the Supreme Court's caseload is attributable to the sharp increase in i.f.p.'s. The vast majority of i.f.p. petitions are presumed to be frivolous. These petitions then tend to skew the numbers somewhat. In 1992 for example, of the 7,223 cert. petitions filed, 4,792 of them were i.f.p. petitions. Of these, 14 were granted cert., a percentage of .3. Excluding i.f.p. petitions, 2,441 regular petitions were filed in 1992. Of these, 3 percent were granted cert., a total of 83. See Epstein, et. al., Supreme Court Compendium, 71. One political scientist gives a fair appraisal of the cert. process, given facts like these: "Whatever the implications, it is fair to say that for over half of the docket [the i.f.p.'s], the process is even more cursory than the standard treatment, which itself is fairly hasty." Perry, Deciding to Decide, 104.

such daunting prospects for success, it is important to remember that any decision to “deny cert.,” from a doctrinal or jurisprudential perspective, is theoretically without meaning; by refusing to grant cert., the Supreme Court is not saying that the judgment of the lower court was correct.

Certification. A virtually non-existent path to review, certifying questions to the Supreme Court is done by the lower court, not the litigants. From 1946-1974, the Court reviewed three certified questions.³⁰

Extraordinary Writ. The Supreme Court can issue special writs that allow for certain cases to be reviewed. Writs of mandamus, prohibition, habeas corpus, and common-law certiorari writs are all examples of extraordinary writs.³¹

From this brief overview, it is abundantly clear that the Court’s jurisdiction today is almost totally discretionary. Furthermore, scholarship has conveyed the strong impression that the agenda-setting procedure of today’s court is animated by a view of the Court by its members as primarily one of law clarification, not error correction (or “justice-doing”). The time and docket pressures that exist simply do not allow the Court to watch and ensure that justice is done in every case that raises an interesting question.³² This brief jurisdictional overview, however, does not convey any sense of how the Court decides, both jurisdictionally and on the merits. This is the present task, to illustrate internal Court practice- a practice which is largely characterized by unwritten rules.³³ When the court receives a cert.

³⁰ Stern and Gressman, Supreme Court Practice, 592.

³¹ *Ibid.*, 627. Writs of mandamus and prohibition order a lower court to, respectively, do something or not do something. Writs of habeas corpus ask for a person who claims to be unlawfully held to be released. Common-law certiorari writs are different from the more common, statutory-generated writ of certiorari, and review based on this type writ is rare. See Perry, Deciding to Decide, 28, 294-98.

³² See, for example, Perry, Deciding to Decide, 35-40.

³³ For much of this discussion on the informal procedures of the Court I have relied on Henry J. Abraham, The Judicial Process, sixth edition (Oxford: Oxford University Press, 1993), 170-244; Perry, Deciding to Decide, 41-91; Murphy, Elements of Judicial Strategy; Bernard Schwartz, Decision: How the Supreme Court Decides Cases

petition (or an appeal notice), they are processed in a few interesting ways. Most Justices are part of a “cert. pool,” which was instituted by Chief Justice Burger and several of his colleagues and was formed to reduce the workload of an ever-increasing number of cert. petitions. The petitions are randomly and proportionately distributed among the members of the pool. The members of the pool then have their clerks cert. pool memorandum which is then copied and distributed to each of the pool chambers. Those members who are not part of the cert. pool evaluate each petition themselves. Of course it goes without saying that the clerks of each Justice are a part of this; reviewing and preparing cert. memos are what these clerks do for much of their time at the Court. After the memos have been written, the Chief Justice prepares and circulates a “discuss list” to all chambers.³⁴ Any Justice can add cases to the discuss list just by informing the Chief Justice’s administrative clerk. All cases that do not make the discuss list are automatically denied cert.³⁵

Each Friday during term is conference day for the Court.³⁶ The morning is spent discussing cases that have already been argued, and after lunch the conference focuses on the discuss list. Only the Justices are present at conference. The Chief Justice begins discussion of the first case on the discuss list, and each Justice in order of seniority gives his comments on the case and usually announces his vote at that time. Any case which receives four votes is granted cert. This is known as the Court’s “Rule of

(New York: Oxford University Press, 1996).

³⁴ Chief Justice Hughes first circulated a “dead list” to other chambers where cases that were not worthy of review would be listed. This practice prevailed until 1950, when the process was reversed. Cases that were considered worthy of discussion are listed. Perry, Deciding to Decide, 85.

³⁵ In fact, the average discuss list only contains about 75 cases. More than three-quarters of cert. petitions are dismissed without even having been discussed at conference. Abraham, The Judicial Process, 195.

³⁶ Since 1974 the Court has also had a conference on Wednesday afternoons. On this aspect of the Court’s practice, see Perry Deciding to Decide, 43-44, 98-102; Abraham, The Judicial Process, 194.

Four,” and has been part of Supreme Court practice since at least 1925. In certain areas of the law where the Court has solidified into two discernible blocs (one of five, the other of four Justices), the minority bloc knows that they will lose on the merits if cert. is granted. So the minority bloc in these cases does not vote to grant cert., requiring an effective “Rule of Five” to operate. The Rule of Five, in fact, is a rare and more sophisticated variant of a more general tactic called a “defensive denial.” There are areas of law and specific cases where a Justice reasonably believes that if a case were granted cert., the outcome on the merits would not be to his liking. So a Justice may deny cert. for a case he believes is cert-worthy. In many instances this will confine the legal precedent to a small jurisdiction rather than allow the Court to pronounce it as a national rule.³⁷

When a case is granted cert., it is scheduled to be argued, usually some months later; oral arguments are accompanied by written briefs and are governed by strict time limits. After oral argument, the next Friday morning at conference the case will be discussed. Again, the Chief Justice is the first to state his views of the case and select the issues to be discussed. Most studies of the Court make the point that the internal procedure of the Court at conference is to “discuss down and vote up.” That is to say, the discussion of a case proceeds from the most senior to the most junior Justice, voting proceeds in reverse.³⁸ However, interviews with five Justices of the Burger Court conducted by H.W. Perry paint a different picture than the conventional wisdom.³⁹ The Court both discusses and votes by seniority, starting with the Chief Justice. These votes at conference are only preliminary and may be changed at any time. But though conference votes may lack permanence, they do not lack importance. The most senior Justice

³⁷ See *Ibid.*, 198-207.

³⁸ See for example, Abraham, The Judicial Process, 196, at note 124.

³⁹ Perry, Deciding to Decide, 44-49.

of the majority in conference assigns the majority opinion, with the Chief Justice always being considered the most senior. The assignor can designate anyone to write the majority draft, including himself. Any Justice is free to write a dissenting or concurring opinion, of course, but the convention of opinion assignment is nevertheless important.

The preceding review provides a basic familiarity with the everyday operations of the Supreme Court so that the argument that follows can proceed. This dissertation is organized into three parts. The first part is an historical survey, the goal of which is to highlight some original understandings and exercises of judicial power. English, colonial, early state and national practices are analyzed. The most discernible break from this understanding- from judicial sincerity- is Chief Justice John Marshall's replacement of the then traditional seriatim form of judicial expression with the now traditional "opinion of the Court." The shift in form of communication instituted by John Marshall was an example where the judicial branch altered the limits of thought and action that represented the functions and purposes of the legislative and executive branches of the federal government. The second part of the paper will then develop and expand upon the trait of judicial sincerity and explore its prominence within major strains and individual depictions of legal theory. Although it is largely overlooked by legal commentators, most visions of law assume sincerity as an essential judicial trait; those that do not do so are weakened by the omission. The third and final part connects these discussions to American constitutional theory and Supreme Court practice. This section includes an analysis of relevant portions of The Federalist as well as a wide range of more contemporary arguments which shed light upon the practical consequences of the presence of strategy and sincerity in the exercise of "The judicial Power of the United States."

PART I

Chapter One: A Concise History of Judicial Expression

The primary aim of this chapter is to illuminate the principles and attitudes that inform our understandings of American judicial power. The goal is to tell several stories and forge a kind of composite. This composite will then more clearly demonstrate the tensions within American separation of powers theory and judicial independence doctrine. I do not consider here whether certain intentions bind American judicial power to a certain practice or hierarchy of authoritative sources. This is a difficult question in its own right and would only distract the immediate purpose. In this chapter our focus will be on English, colonial, and early state judicial practice. The picture that emerges is without doubt one where sincerity was central to prevailing conceptions of judicial behavior. The central point of the narrative which follows is that Anglo-American appellate judges when acting in their judicial capacity both understood and comported with a behavioral ethic which I have been describing to this point as “judicial sincerity.” In some instances in fact, institutional arrangements of state judiciaries reflected the value placed upon the ethic. Chapter two will review the early years of the national judiciary, and discuss what was in effect the critical moment of departure from judicial sincerity as an ideal to be striven for within that institution.

England and the Colonies

Historical examination of most American legal practice inevitably forces the student back to England. The basic assumption is that early seriatim opinion writing is ultimately based upon the procedures of English appellate courts. When this assumption is probed, however, the findings are somewhat more intricate. For our purposes, three divisions organize our

inquiries. The Privy Council, the House of Lords, and the Common Law Courts of England each provide examples of relevant appellate procedures that could have influenced American revolutionaries and constitution-makers.¹

Colonial lawyers who wished to appeal the decisions of the local courts could take their case as far as the Privy Council. In 1641, an Act of Parliament left to the Council appellate jurisdiction from without the jurisdiction of the ordinary courts of law.² Sir William Holdsworth's majestic, History of English Law notes that from this positive declaration the principle developed that the Council heard any appeals from "foreign plantations."³ The Council came to its decision according the majority view of those present, but the decision was delivered as if unanimous irrespective of the individual opinions of the members. "When the business is to be carried according to the most voices," a 1627 Order of the Privy Council stated, "no publication is afterwards to be made by any man, how the particular voices and opinions went."⁴ There are two generally recognized reasons for this mode of proceeding. Firstly, any conclusions- however definitive- reached by the Council were only in theory "advice" for the

¹ From the outset it should be noted that this section which deals with English antecedents is indebted to the work of Karl M. ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 Cornell Law Quarterly 186 (1959). ZoBell's concise article is the most lucid historical exposition of the subject I have discovered and was largely responsible for introducing me to further sources on English legal history. I would also like to thank Professor Leonard Leigh of the London School of Economics and Political Science for sharing his thoughts with me on these subjects.

² See Harold Potter, Historical Introduction to English Law and its Institutions, third edition (London: Sweet & Maxwell Ltd., 1948), 143-44: "The Act... prohibit[ed] 'His Majesty or his Privy Council' from adjudicating upon questions relating to lands, tenements, hereditaments, goods, or chattels of any of the subjects of the kingdom'."

³ Sir William Holdsworth, A History of English Law, vol. 1 (London: Meuthen & Co., 1956), 516 [hereinafter cited as "Holdsworth"]. Harold Potter also explains that 'foreign plantations' was the seventeenth century name for what are now called colonies and that, "The principle that all appeals from the plantations should lie to the Privy Council appears to have been finally laid down, in 1724, in Fryer v. Bernard." Potter, Historical Introduction to English Law, 144.

⁴ As quoted by Alexander Simpson, Jr., "Dissenting Opinions," 71 University of Pennsylvania Law Review 207 (1923). This latent and focused mode of proceeding established roots in colonial America as well. See text infra.

Crown. Because of this time-honored tenet, it was thought that only a consolidated, focused “recommendation” be submitted. Second, all Council decrees and writs had no effect whatsoever until the King confirmed them. It would be logically ambiguous for a King to speak through a writ- which ran in his name- simultaneously in two voices or more.⁵

Touching momentarily on the theoretical underpinnings of this manner of pronouncement, an Order of the Privy Council has a pedigree of commentary that reaches at least as far back as the early seventeenth century in writings of Sir Edward Coke.⁶ Coke emphasized the role of the councillor as advisor, with the implication being that obligations of secrecy flowed from the terms of his oath. It is important to notice that the final product of the Council was seen as something qualitatively different than other judicial expressions. Notwithstanding the recognized judicial quality of an Order of the Privy Council,

no common lawyer would have called the Order in Council a judgment, even if emitted in a common law cause. In form and flexibility of content the Order resembles a chancery decree, and it stands upon a similar theoretical footing. In the first case the King is exercising directly in Council an ultimate prerogative and expresses his pleasure in peremptory form.⁷

Holdsworth cites only three pre-revolutionary cases in which the Council ever published dissenting opinions.⁸ Dissenting or concurring opinion, then, was, “unknown in the tribunal whose jurisdiction made it the ultimate arbiter of American causes.”⁹

⁵ Ibid.

⁶ See Joseph Henry Smith, Appeals to the Privy Council from the American Plantations (N.Y.: Columbia University Press, 1950), 314-17.

⁷ Ibid., 316-17.

⁸ 1 Holdsworth 519.

⁹ ZoBell, “Dissenting Opinions,” 189. Interestingly, Felix Frankfurter and John Lande, in their study of the business of the U.S. Supreme Court, considered the Privy Council a comparable tribunal to the Supreme Court. The Privy Council, they explained in 1927, “performs a function for the British Commonwealth of Nations comparable to the part played in our federal scheme by the Supreme Court.” Frankfurter and Lande, The Business of the Supreme Court (New York: Macmillan, 1928), 307.

In the eighteenth century, the House of Lords was the court of dernier resort for those disputes which commenced in English courts of law and equity, and had been established as such two centuries before. Seriatim opinions were the conventional practice of the Lords, with each participating judge announcing his opinion in order of seniority. The reports of Parliamentary debates, however, were not authorized to be published until 1848. In fact, one legal historian relates two instances (in 1698 and 1762) when attempts at reporting cases resulted in a reprimand by the house.¹⁰ The American legal profession surely was aware of the manner of proceeding, but the actual opinions of the Lords could not have been known.

The reality of colonial judicial machinery, however, left the three great Common Law courts- King's Bench, Exchequer, and Common Pleas- with the collective "final word" in most eighteenth century litigation. The reports for these tribunals were published as early as the thirteenth century, and even a brief examination reveals that opinions were delivered seriatim and that reporters generally tried to record and attribute individual pronouncements.¹¹ Colonial lawyers would have had access to these reports, and it is these courts' proceedings that were most familiar to them. It is important to understand that English practices of judicial pronouncement were "brief, oral and optional," and in that way were markedly dissimilar from American judicial practice today.¹² This trait is perhaps not that surprising, given British constitutionalism's well-known conventional character, but it would be misleading to suggest a very close analogy with

¹⁰ T.F.T. Plucknett, A Concise History of the Common Law, fourth edition (London: Butterworth & Co., 1948), 192-93.

¹¹ Winfield, The Chief Sources of English Legal History (1925), 145-58. See also ZoBell, "Dissenting Opinions," at note 31, for a full representation of the practice of opinion delivery by these courts.

¹² See Max Radin, "The Requirement of Written Opinions," 18 California Law Review 486 (1930).

American courts today.

There was an exceptional period in the practice of the Common Law courts, however, involving a personality that must be included in a discussion of this kind. William Murray, the first Earl of Mansfield, is recognized in English history as one of the great parliamentarians and perhaps the greatest jurist of the eighteenth century.¹³ Born in 1705, Murray became Lord Chief Justice of the Court of King's Bench in 1756 and held the place until 1788. Legal historians generally describe the age that preceded Mansfield as one of technical obsession and intellectual stasis. Mansfield would harness the common law to the ascendant age of industry and commerce; he saw his mission as restoring, "the due proportion between principle and practice which alone could satisfy the needs of an advancing society. The law was to be justified to the litigant."¹⁴ Substantively, Mansfield is best known for his contributions to the law of shipping, commerce, and insurance. Also, the law of evidence and the action of assumpsit received expansion during his tenure. His intolerance of those laws favoring slavery or disfavoring Roman Catholics is also well documented.¹⁵

It is Mansfield's formal achievements, though, which deserve attention here. Mansfield was held in high regard by his contemporaries, and was able to coax his fellow judges and alter the court's traditional procedure according to his own ideas. Immediately upon Mansfield's arrival, the way the court did business changed markedly, and many of these reforms (which were fully described later in William Blackstone's Commentaries)

¹³ The following sources were utilized for general information on Lord Mansfield: C.H.S. Fifoot. Lord Mansfield (Oxford: Clarendon Press, 1936); Edmund Heward. Lord Mansfield (Chichester: Barry Rose Ltd., 1979); James Oldham. The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century, 2 vols. (Chapel Hill: University of North Carolina Press, 1992); J. Campbell, The Lives of the Chief Justices of England, vol. 2 (London: John Murray, 1849-57), 398-402.

¹⁴ Fifoot, Lord Mansfield, 52.

¹⁵ Perhaps the most notable example of these attitudes can be seen in Mansfield's opinion in Somerset v. Stewart, 1 Lofft 499 (K.B. 1772).

survive with few changes today.¹⁶ One of the procedural modifications adopted by Mansfield was the use of the “opinion of the court,” which was usually delivered by him. This innovation, as implemented by Mansfield, was introduced chiefly as a way to reduce delay or expense. Not only did Mansfield favor the institutional opinion, but he also made it the practice of his court that, “he would himself dictate the case and would require its signature by both counsel before the completion of the trial,” in contrast to the previous custom of drafting the statement in chambers which allowed, “lethargic or unscrupulous counsel to adjourn its argument sine die.”¹⁷ A 1759 case, Luke et al’ versus Lyde,¹⁸ offers a glimpse of the thinking that animated Mansfield’s desire to give institutional opinions:

He [Lord Mansfield] said, he always leaned, (even where he had himself no doubt,) to make cases for the opinion of the Court ; not only for the greater satisfaction of the parties in the particular cause, but to prevent other disputes, by making the rules of the law and the ground upon which they are established certain and notorious : but he took particular care that this should not create delay or expence to the parties : and therefore he always dictated the case in Court, and saw it signed by counsel, before another cause was called ; and always made it a condition in the rule, “that it should be set down to be argued within the first four days of the term.”¹⁹

The institutional opinion, then, for Mansfield was one piece of an entirely new procedural arrangement that sought to address the deficiencies that plagued the Common Law’s adaptation to a new age. Indeed, perhaps Mansfield’s greatest accomplishment was to reduce the backlog of cases and efficiently handle the increased litigation that came with industry and mercantilism. Keeping in mind the influence obviously wielded by Mansfield, coupled with the sweeping changes he introduced, it is not

¹⁶ Sir James Burrow prints the reforms implemented by Mansfield at 1 Burrow 9, 52-53, 57-58, 252-58 (1756-1757).

¹⁷ Fifoot, Lord Mansfield, 53.

¹⁸ 2 Burrow 882.

¹⁹ *Ibid.*, 887.

surprising that the King's Bench during his tenure rarely saw dissent.²⁰ "During the thirty-two years in which Lord Mansfield was Chief Justice," Mansfield biographer C.H.S. Fifoot explains, "there were not more than twenty cases in which a dissenting opinion was recorded and only six decisions reversed on appeal."²¹ Mansfield was well known and admired in America, and no doubt his influence can be seen in similar innovations developed by later colonial jurists.

In short, a brief review of the analogous English institutions leaves the student begging more questions than at the start. The Privy Council, with its executive ties, registered no dissent whatever and issued a single "representative" opinion. In the House of Lords, seriatim practice was the norm, but there was no wide dissemination of its opinions due its legislative affiliation. The judges of the Common Law courts delivered their opinions seriatim, though the influence the institutionally-minded Mansfield should not be overlooked. In light of these findings, the practice first developed by the Supreme Court of the United States seems to bear the mark of a new species. Indeed, the judiciary of the Constitution of 1787 may properly be said to have no analogous institution; remember that the removal of the judiciary from the executive and the construction of its own independent department was itself an unprecedented and distinctly American

²⁰ In 1769, 13 years into Mansfield's tenure, Lord Yates expressed the first dissenting voice heard on Mansfield's bench, in the case of Millar v. Taylor, 4 Burrow 2303. The suit was brought to protect a copyright, and the majority opinion of Lord Mansfield, Lord Willes and Lord Aston decided in favor of the plaintiff. According to the reports, Mansfield noted that, "this is the first instance of a final difference of opinion in this court since I sat here. Every order, rule, judgment and opinion, has hitherto been unanimous. That unanimity never would have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not open to conviction, and ready to yield to each other's reasons." See 4 Burrow 2395.

²¹ *Ibid.*, 46-47. James Oldham recently corrected Fifoot's statistic: "Fifoot counted twenty instances, although there were others in unreported cases or in cases that were not in the principal reports. Nevertheless, over the thirty active years Mansfield served as Chief justice, the degree of unanimity in the decisions was high." Oldham, 1 The Mansfield Manuscripts, 47. As an example of a "non-principal" case, Oldham cites Atkins v. Davis, Cald. 315 (1783). *Ibid.*, at note 13.

manoeuvre.²²

It is the belief that American political attitudes were fundamentally rethought that informs the whole of Gordon Wood's classic study, The Creation of the American Republic, 1776-1787. Wood's basic point is that this era is where Americans had to actualize those principles and forms they had invoked on behalf of revolution.²³ Taking his cue from Progressive historians, Wood rightly views the Constitution as a somewhat aristocratic reaction to democratic excesses of the revolution.²⁴ These reactions and inventions- constitutional and jurisprudential- for Wood were decidedly American in character, having broken away from the mother country long before the Supreme Court first met in the New York City Stock Exchange in 1790. To put it another way, a formulation that only emphasizes America's ties to Great Britain depends on the premise that early American law had, at base, a singular source that was relied upon for certainty and authority. Wood describes the situation more accurately as an uncertain and flexible jurisprudence being fed by a plurality of sources. Colonial and confederation legal development, while composed of a mixture of English statute and common law, is viewed as an agent (and even a catalyst) rather than a product.²⁵

While law was evolving into an American variant, early American political theories were being put into practice. The revolution may have promised a new way for men to govern themselves structurally, but the

²² For more on this particular invention within the whole of American separation-of-powers doctrine, see W.B. Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution (The Hague: Martinus Nijhoff, 1965), 116-17, 124-25.

²³ One of Wood's many distillations of this general theme can be found in his chapter on "Law and Contracts": "The problem for Americans in the 1780's then was to refine and make effective the distinction between fundamental and statutory law that all in 1776 had at least paid lip service to, and this essentially involved making clear the precise nature of a constitution." Gordon S. Wood, The Creation of the American Republic, 1776-1787, (New York: W.W. Norton & Co., 1972), 275.

²⁴ *Ibid.*, 626.

²⁵ *Ibid.*, 296.

functional know-how had to be tested in an ad-hoc fashion. Edward Corwin, in his seminal article on post-revolutionary constitutionalism, asserts that revolutionary ardor did not translate into coherent theory.²⁶ Corwin explains:

That the majority of the Revolutionary constitutions recorded recognition of the principle of the separation of powers is, of course, well known. What is not so generally understood is that the recognition was verbal merely, for the reason that the material terms in which it was couched still remained undefined; and that this was true in particular of "legislative power" in relation to "judicial power".²⁷

Keeping the views of these historians in mind, the practices of the early American states will be given a more positive review. There is something intuitively unsatisfactory in summarily establishing this bit of American appellate procedure as a European inheritance and moving on. This is not to dismiss English background as unimportant, but rather to develop a fuller picture of early American jurisprudence by focusing on previously neglected areas of the composition. The following review of the conventions and procedures employed by the states at this time is one attempt to do this, but before we move on, some general remarks should be duly noted.

Strict correlations are not possible to achieve given the constraints of the materials here. Legal reporting at the close of the eighteenth century was an emerging practice that lacked a great deal of accuracy and consistency, not to mention technology. The first reporters primarily were interested in aiding themselves and their professional colleagues in having command of authoritative precedent in a new legal world. Some were fortunate later on to fill a much needed void for states who wished to establish a more stable and certain system of law. Others would prove still

²⁶ Edward S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," 30 *American Historical Review* 511-36 (1925).

²⁷ *Ibid.*, 514.

more fortunate in being able to cash in on these emerging markets.²⁸ The point of all this history is not to unveil a previously unseen relic or statistical proof. The purpose is to compile information that up to this point has been lurking in many disparate places and tell a story that is relevant to the broader enterprise of American constitutional theory.

Before proceeding, a quick word on selection. States were chosen using four main criteria, each relative to the period under consideration, as follows: (1) a well developed judicial “system” or hierarchy (as indicated by statutes and constitution), (2) a highly respected bench and bar, (3) the best examples of accurate and continuous legal reporting and (4) regional (north-south) balance. For each region, three states were chosen. There is one state which receives fuller treatment than the other two; the other two states are included to supplement or buttress the general points revealed by analysis of the two main states. Virginia in the south is our primary focus, with North Carolina and South Carolina added for support and comparison. In the north, Connecticut receives the fullest treatment, with Pennsylvania and New York supplementing the study. All six are eminently qualified for a study such as this. Some legal historians may question the omission of a few of the excluded (i.e. Massachusetts in the North, Maryland in the South), but as for the chosen six, dissent should be minimal.²⁹

The States: Early Practice

It is crucial to understand from the outset that no state at the time of the founding had anything resembling a modern American judicial

²⁸ For more general history on early American legal reporting, see Erwin C. Surrency, “Law Reports in the United States,” 25 American Journal of Legal History 48 (1981); J. Wallace, The Reporters Arranged and Characterized (4th ed., 1882).

²⁹ Of the seven states not chosen, Delaware, Georgia, New Hampshire and Rhode Island were clearly inferior with respect to the mentioned criteria. Maryland was distinguishable from this bottom tier but still did not reach the threshold of the chosen states. Massachusetts and New Jersey were also better, but with the rejection of Maryland the decision was made to keep regional balance.

system.³⁰ Trial and appellate functions were intermingled; hierarchies were not so discernible as they are today. Conventional views of law and government were also different, which in turn affected the structure of the judiciary and legal procedure. With few exceptions, all eighteenth-century courts were trial courts, often with multiple judges or a jury engaged in “finding” the law. The well-developed hierarchy and clean distinction between trial and appellate jurisdictions that is so common today was not a part of eighteenth-century judicial practice. One legal historian explains that, “the basic court system structure in 1787-89, both in the American states and in England, was horizontal. There were different levels of courts, which by definition means that some were ‘superior’ and others were ‘inferior.’ All were trial courts.”³¹

There are other important differences to consider when approaching early state judicial systems. In the eighteenth century, doctrines of legal formalism were dominant; judges simply “found” the law. Today, legal realism reigns supreme; appellate judges through their written opinions “make” law, at least interstitially. Lawmaking (mainly appellate) judges today painstakingly write opinions that are published in legally sanctioned reports. “Appellate” judges in the eighteenth-century, for the most part, did not publish their opinions. Most existing reports of the period are the notes of a lawyer, not the verbatim opinions of the judges. It wasn’t until the early nineteenth-century when state-sanctioned reporting commenced.³² Finally,

³⁰ For a concise explanation about state “judicial systems” in 1789, see Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence, ed., Wythe Holt and L.H. LaRue (Norman, OH: University of Oklahoma Press, 1990), 27-52.

³¹ *Ibid.*, 35 [original emphasis].

³² I reprint here a table from *ibid.*, 46-47, showing the origins of “modern” law-reporting systems in the original thirteen states and the United States. “A modern system of law reporting is defined as one in which the decisions of a court, and the reasons for the decisions, are published on a regular and timely basis, so as to be generally available to all courts, the legal profession, and the public.” *Ibid.*

there was no exclusively judicial appellate-review function in the eighteenth century. Eighteenth-century notions of sovereignty were such that, for the most part, essentially “judicial” functions were performed by a combination of legislative, executive and judicial officials. These notions, of course, changed rather markedly in the formative years of the republic.

Northern States

Connecticut:

Alexander Hamilton in 1788 wrote that the state of Connecticut, “has been always regarded as the most popular State in the Union.”³³ For Hamilton to proclaim Connecticut as the “democratic” example of the time is an interesting admission in light of the fact that Connecticut had no constitution, only its revised charter of 1662.³⁴ No doubt Hamilton was correct in his estimation, as the organic law provided for the governor,

New Hampshire	1819	Nathaniel Adams
Massachusetts	1805	Ephraim Williams
Rhode Island	1847	Thomas Durfee
Connecticut	1815	Thomas Day
New York	1804	George Caines
New Jersey (Law)	1808	William Sanford Pennington
New Jersey (Equity)	1837	N. Saxton
Pennsylvania	1809	Horace Binney
Delaware	1837	Samuel M. Harrington
Maryland	1852	
Virginia	1807	William W. Hening and William Munford
North Carolina	1818	John Louis Taylor
South Carolina	1819	John Mill
Georgia	1847	
United States	1804	William Cranch

³³ Alexander Hamilton, James Madison, and John Jay, The Federalist. Jacob E. Cooke, ed. (Middletown, Conn.: Wesleyan University Press, 1961); Federalist 83, at 574. All subsequent references to The Federalist are taken from the Cooke edition and will be made in shortened form including the number of the paper and the page number of the edition.

³⁴ The colonial charters of Connecticut and Rhode Island were granted in 1662 and 1663, respectively. In 1776, these were revised to expunge references to the Crown.

Early state constitutions and organic laws are conveniently located in Francis Newton Thorpe, ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws, 7 vols., (Washington, 1909). These are consulted especially for later developments of the American judiciary. Otherwise, I am indebted to the notes from the section entitled, “Notes on State Constitutions,” in Bernard Bailyn, ed., The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification, part 1, (New York: Library of America, 1993), 1117-22.

deputy governor, and the council (which served as the upper house of the General Assembly) to be elected annually by the freemen, while the lower house was elected semi-annually by the towns. Further, there was no executive veto of legislation and judges were annually chosen by the legislature.³⁵ At the apex of the judicial hierarchy was the Supreme Court of Errors, which consisted of the governor, lieutenant governor, and the council.³⁶ The Supreme Court of Errors as organized in 1784 reviewed writs of error from judgements of the Superior Court. The Superior Court had quite an extensive jurisdiction, both original and appellate, covering cases in law and equity.³⁷

It is a widely accepted lesson of American history that the period between the revolution and the framing of the Constitution saw the reexamination and refinement of political forms. It is more rare to find the application of this lesson to matters of judicial behavior. On the second Thursday of May, 1784, the Connecticut General Assembly passed an act titled, "An Act establishing the Wages of the Judges of the Superior Court."³⁸ The act itself received the endorsement of both Roger Sherman and Richard Law, whose efforts aided its passage.³⁹ The law itself is concise; its importance for

³⁵ Bailyn, Debate on the Constitution, 1121-22.

³⁶ Information regarding the Connecticut judiciary here is taken from Thorpe, Federal and State Constitutions; Bailyn, Debate on the Constitution; and the volumes of law reports produced by the first three reporters for the state. See text infra. They are as follows:

Ephraim Kirby, Reports of Cases Adjudged in the Superior Court of the State of Connecticut from the Year 1785, to May 1788; with some Determinations in the Supreme Court of Errors (Litchfield, Conn.: Collier & Adam, 1789) [hereinafter cited as "Kirby"].

Jesse Root, Reports of Cases adjudged in the Superior Court and Supreme Court of Errors, from July A.D. 1789 to June A.D. 1793, (1798) [hereinafter cited as "Root"].

Thomas Day, Reports of Cases, Argued and Determined in the Supreme Court of Errors, of the State of Connecticut, 1802-1813, second edition, 5 vols., (Philadelphia: P.H. Nicklin & T. Johnson, Law-Booksellers, 1830) [hereinafter cited as "Day"].

³⁷ 1 Root xxxiv.

³⁸ State of Connecticut, Acts and Laws of the State of Connecticut, in America (New London: Timothy Green, 1784), 267-68.

³⁹ E.C. Surrency, "Law Reports in the United States," 25 American Journal of Legal History 55 (1981), at note 23, citing Charles Warren, A History of the American Bar (1911), p. 328.

setting the expectations of Connecticut judicial behavior is immense. After the provision regarding compensation, the legislation reads:

Be it further enacted by the Authority aforesaid, That it shall be the Duty of the Judges of the Superior Court, in all Matters of Law by them decided, on Writ of Error, Demurer, special Verdict or Motion in arrest of Judgment, each one to give his Opinion seriatem, with the Reasons thereof, and the same reduce to Writing and subscribe ; to be kept on File, that the Case may be fully reported, and if removed by Writ of Error, be carried up with greater Advantage ; and thereby a Foundation be laid for a more perfect and permanent System of common Law in this State. And it shall be the Duty of the Supreme Court of Errors, to cause the Reasons of their Judgment to be committed to Writing, and signed by one of the Judges, and to be lodged in the Office of the Clerk of the Superior Court.⁴⁰

Any reader of this law must remember that the Supreme Court of Errors was a body deliberately fused with political, legislative characteristics, whereas the technically subordinate Superior Court was where purely judicial expertise resided. This legislation is a testament to the belief that judicial power was expected to be linked to precise modes of individual behavior and thought. Drafted just three years prior to the Constitution, this law is best viewed as an extension of the enlightenment ideas that filled the age.

With the express blessing of the legislature then, it is at this point that Ephraim Kirby, esquire, enters the picture and produces, “the first comprehensive publication of American law reports, federal, state or colonial.”⁴¹ “Ephraim Kirby of Litchfield, Connecticut,” of whom the Acorn Club of Connecticut described as, “Revolutionary soldier, statesman, member of the Litchfield County Bar, and First Federal Judge of the territory embraced in the Louisiana Purchase, was also the first reporter of decided

The views of these two men on the Constitution are well known. Sherman, a participant at Philadelphia and signer of the Constitution, and Law, a speaker at the Connecticut ratifying convention, were two of the most respected lawyers in revolutionary America.

⁴⁰ Connecticut, Acts and Laws, 268. Original Emphasis.

⁴¹ *Ibid.*, 1296.

cases in any court in the United States.”⁴² In fact, important cases were reported before Kirby, but mainly in pamphlets or newspapers and only sporadically. Kirby’s volume covers 201 cases for the years 1785 through 1789, and he also recorded forty-five other cases for the same period that were later compiled into a supplement in 1933. The cases for the most part offer a summary of counsel’s pleadings and a compact statement of the law settled with each decision. It is also clear that Kirby took his responsibility seriously, influenced as much by the emerging market for such reports as the imprimatur of the General Assembly. Indeed, one historian explains that Kirby’s own publication was greatly influenced by the style of Cowper’s Reports of King’s Bench rulings produced in the 1770’s.⁴³

The Superior Court of Connecticut in February of 1786, where Kirby begins his reporting, consisted of five men, as follows: Richard Law, Eliphalet Dyer, Roger Sherman, William Pitkin, and Oliver Ellsworth. The first case reported in a comprehensive volume in America, Whiting and Frisbie v. Jewel, records that Judge Sherman (the only person who would sign all three of the critical documents that led to the formation of the national government) dissented from an opinion, “By the Court.”⁴⁴ Throughout Kirby’s Reports, institutional opinions for the majority are the norm, denoted by “By the Court,” or “By the Whole Court,” in his pages.⁴⁵ This form of Kirby’s, in light of the seriatim requirement compelled by the

⁴² Origen Storrs Seymour, Reports of Cases Adjudged in the Superior Court taken by Ephraim Kirby after the time of his reports (Litchfield, Conn.: The Acorn Club, 1933), preface [hereinafter cited as “Kirby’s Supplement”].

⁴³ Briceland, “Ephraim Kirby: Pioneer of American Law Reporting, 1789,” 16 American Journal of Legal History 297 (1972), 312-13. Also, for a general explanation of the circumstances surrounding Kirby’s venture, see Craig Joyce, “The rise of the Supreme Court Reporter: an institutional perspective on Marshall Court ascendancy,” 83 Michigan Law Review 1291-1391(1985), 1296-1300, passim.

⁴⁴ Kirby, 1.

⁴⁵ Of Kirby’s 201 reported cases, 132 were decided by a single institutional opinion; 33 had a dissenting opinion in addition to the institutional opinion; 3 included three or more opinions, see text infra.; 32 cases either did not get an formal opinion written due to jurisdictional concerns or were reported cursorily.

assembly, is probably due to the purpose he had in mind for his reports. It isn't until August of 1786, in the matter of Stoddard v. Bird,⁴⁶ where a case can be found with more than two opinions rendered. According to Kirby, in this case the seriatim form is followed, except that the opinions are given in reverse order of seniority, in contravention of the English practice. With all five judges writing (or, more accurately for the period, speaking) there are three opinions for the majority (Pitkin, Dyer, and Law) and two in dissent (Ellsworth and Sherman). This is the only case in Kirby's Reports where the majority divides in this manner, producing a "conversing" effect. In fact, with only two other exceptions, all of the cases in Kirby's Reports are decided by one or two opinions.⁴⁷ Dissent, then, was clearly permitted, but the judges apparently combined when in the majority; concurring opinions were either not produced or not recorded.⁴⁸

Kirby did not produce a second volume, and so it was left to Jesse Root, a newly appointed judge of the Superior Court, to assume the task of reporting. Unfortunately, Root's Reports reflect a different philosophy from Kirby's. Covering cases in the Superior Court and Supreme Court of Errors for the period 1789-1798, Root's volumes are loosely reported and often they do not record the specific opinions as Kirby tried to do. Many cases are only barely sketched; few dissenting or concurring opinions are mentioned at all. Instead, the doctrinal judgments of the court are stated simply, often with Root casually beginning, "the court said," or "the court is of the opinion," or the like. Like Kirby, Root is more interested in the court's ruling than its

⁴⁶ Kirby, 65.

⁴⁷ Phenix v. Prindle, Kirby, 207; Gustin v. Brattle, Kirby, 299. Phenix was decided 4:1, with Judges Dyer, Sherman, Pitkin, and Ellsworth joining in the court's opinion with Judge Law dissenting. Ellsworth also adds an additional opinion that seems to be responding to Law's critique of the majority, bringing the total for the case to three. Gustin was accompanied by a "By the Court," opinion and two separate dissents by Judges Law and Dyer.

⁴⁸ Two instances of concurring behavior can be discerned, but in both cases none of the additional remarks were treated as a separate concurrence. See Huntington and Others v. Carpenter, Kirby, 45; Kibbe v. Kibbe, Kirby, 119.

reasoning. Also, Root's Reports give the impression that the Superior Court increasingly appears to be citing its own reported precedents. As a result, many cases are disposed of summarily with a simple cursory judgement and without formal opinion. Root's two volumes are not very helpful for the student of judicial expression.

Seven years after Root, Thomas Day hoped to satisfy the laws of supply and demand by publishing cases decided by the Supreme Court of Errors beginning with the 1805 term. During that time, he was persuaded, "by the advice of several gentlemen, whose opinions he highly respected, to extend his plan, so as to publish a volume, comprising the decisions of the three preceding years."⁴⁹ Day's five volumes accordingly account for those cases reaching the Supreme Court of Errors for eleven years starting in 1802. Preparing the first volume then was really a historical exercise for Day, and he was "particularly aided" by notes from a member of the court, briefs from counsel, and minutes from a professional friend, in addition to being given "free access to the records, from which the statements of the cases have been extracted, and the reasons of the Court transcribed."⁵⁰ Nevertheless, Day's Reports are still wanting of important information. Day relies heavily on the briefs and arguments of counsel, especially from the point of view the court will subsequently support. Many times no reasons for the court decision are reported. The blame is really not Day's; in the case of Dickinson v. Kingsbury, Day explains the habits of the Supreme Court of Errors, as follows: "It was the practice of this Court to assign their reasons in writing, in cases of reversal only; but individual members of the Court sometimes favored the reporter with their minutes, from which he has been enabled, in cases of affirmance also, to state the grounds of decision."⁵¹ Even in cases of reversal, Day gives the impression that the Supreme Court of Errors did not

⁴⁹ "Advertisement," 1 Day iii.

⁵⁰ Ibid.

⁵¹ 2 Day 11, (1805), at note (g).

issue separate opinions. Not a single case reported by Day through the year 1810 contains more than two opinions, and the majority never divides. A few pages later, Day helps to confirm this with another glimpse of the court's protocols. In Nichols v. Hotchkiss, the report reads: "By the Court, unanimously, the judgement was reversed. Some member was appointed to draw the reasons; but this was never done."⁵² The court, it can be inferred from this passage, appointed someone to draw up the reasons and reconciled diversities of opinion into a single institutional statement.

The organization of the Connecticut judiciary was changed by an act of the legislature in 1806. The General Assembly clearly had designs of efficiency in doing this, as judges of the branches (who were also judges of the court of dernier resort) could conveniently hear arguments on motions for new trials and cases stated. The Superior Court was divided into three branches- civil, criminal, and chancery- and determined questions of both law and fact. Meanwhile, the Supreme Court of Errors was reduced from fourteen to nine, and consisted of all the judges of the newly formed Superior Court, and had cognizance only of writs of error from the Superior Court.⁵³ This is an interesting action, not the least bit influenced by the growth of a viable system of law developed by the state. And if the legislature's action in 1806 was interesting, its reaction three years later speaks volumes for this study. Things change markedly for the judiciary of Connecticut in 1810. Day explains, "At the session of the legislature in October, 1809, an act was passed, making it the duty of all judges of the supreme court of errors to give their opinions in all matters of law by them

⁵² 2 Day 125 (1805): "The reporter has understood, that, when the case was under consideration, there was, on the first point, no diversity of opinion, all the Court holding, that the declarations of *Downey* and his wife were inadmissible. On the second point, ELLSWORTH, Asst. remarking, that it was competent for *Downey* and his wife to give the evidence offered, as there was no covenant in the quit-claim deed, HOSMER, Asst. replied as follows: I do not assent to that proposition...."

⁵³ 3 Day 27, 28.

decided, publicly and separately.”⁵⁴ It appears that the Court subscribed to the seriatim form, with reverse seniority governing the order of delivery. Day’s own reporting does not fully reflect this change, but considering that his purposes are really professional rather than public in nature this is not surprising.⁵⁵ What is remarkable about this shift is that it occurs when the U.S. Supreme Court under the guidance of John Marshall was in its full stride establishing itself institutionally, shifting to a “conclaved” institutional statement for its rulings. In fact, Day’s own reports demonstrate that the Bar and Bench of Connecticut paid attention to the nationalist Chief Justice. In two consecutive 1807 cases, for example, Day writes that counsel for the defendants cites the work of John Marshall as authority.⁵⁶ In the midst of a drive for efficiency and stability, and during an era when Common Law rules were being fundamentally challenged, it is striking that the Assembly opted for a course that would expose the individual divisions of the Bench.

Connecticut’s early judicial practice offers one very important lesson to the student of judicial behavior. Right from the very beginning, it is plain to any student of Connecticut’s law reports that the judges and legislators of that state were attempting a new kind of reconciliation of their inherited legal and political forms. Specifically, the ancient Common Law tradition of their forbears was being harnessed to the newly applied political science of the written word. The Common Law tradition (as we will discuss in more detail in chapter four) from its inception to its reception in colonies like Connecticut was essentially an oral tradition; its reduction and

⁵⁴ 4 Day 130, at note (b) [original emphasis].

⁵⁵ It should be noted that Day does account for some of cases where three or more opinions are at play. In the three years (June, 1810 through June, 1813) covered by Day’s volumes after this legislative change, 18 of 116 cases are reported as having three or more opinions.

⁵⁶ See Whittelsey v. Wolcott, 2 Day 337 (1807), at note (r) [citing Marshall’s biography, Life of Washington, to explain the intended powers of the newly formed presidency]; Sanford v. Dodd, 2 Day 441 (1807), at note (g) [Day: “This was admitted to be law by Chief Justice MARSHALL, in the case of Insurance company of Alexandria v. Young, 1 Cranch 341.”].

application to writing would directly serve political and legal values such as accountability and comprehensiveness in ways that pre-enlightenment republics had never before attempted. What the above review of early Connecticut judicial practice begins to demonstrate is that, in order for this novel reconciliation of the Common Law to have any chance of success, the behavioral expectations of judges- when acting in their judicial capacity- needed more explicit definition than had been provided for in the past. The common thread which runs through each of the states in this section is that judges and legislators were fashioning new attempts and responses as to how the ancient tradition of the Common Law would serve the new science of politics, and what the consequences of that commitment would mean for those who would wield this new reconstruction of judicial power. As the judicial practices of Pennsylvania and New York indicate, the commitments and the consequences were not uniform.

Pennsylvania:

Citizens of the commonwealth of Pennsylvania were well known for their radicalism and innovation during the periods of revolution, confederation and constitution-making. Neither, however, of Pennsylvania's constitutions of 1776 or 1790 contain explicit provisions about the form judicial opinions should take. Judicial officers under the 1776 constitution had to take two oaths before entering office, the oath of allegiance and the oath of office. These oaths together address the values of individual faithfulness to the constitutional project of the commonwealth and, within that project, the task of individual judicial duty.⁵⁷ The

⁵⁷ The "Oath or Affirmation of Allegiance" reads as follows: "I ___ do swear (or affirm) that I will be true and faithful to the commonwealth of Pennsylvania: And that I will not directly or indirectly do any act or thing prejudicial or injurious to the constitution or government thereof, as established by the convention. [emphasis added]" The "Oath or Affirmation of Office" reads as follows: "I ___ do swear (or affirm) that I will faithfully execute the office of ___ for the ___ of ___ and will do equal right and justice to all men, to the best of my judgment and abilities, according to law." See Francis N. Thorpe, ed., The Federal and State Constitutions, vol. 5 (Washington, 1909),

Constitution of 1790 had a similar requirement, proclaiming that all officers, legislative, executive or judicial, “shall be bound, by oath or affirmation, to support the Constitution of this commonwealth, and to perform the duties of their respective offices with fidelity.”⁵⁸ Since before the revolution the courts of judicature in Pennsylvania were directed by statute to follow the example of their English counterparts.⁵⁹ In general terms as well, after the revolution the legislature left it to the discretion of the judges to make rules for regulating practice within the courts.⁶⁰ Matters of law and equity were merged in the state since the revolution.

Notwithstanding the oaths of office discussed above, from the very beginning it appears as though Pennsylvania’s judiciary was bent toward disseminating law by a homogeneous, institutional voice. Unfortunately, the only proof of early Pennsylvania judicial practice a student has is the work of Alexander J. Dallas, whose reports are well-known for their lack of precision. Dallas’ notes covered different tribunals within the commonwealth and also recorded the practice of the newly-formed federal courts.⁶¹ In courts like Common Pleas and Oyer & Terminer (lesser courts in

3090.

⁵⁸ Penn. Const. Art. VIII, as cited in John Purdon, Digest of the Laws of Pennsylvania, From the Year One Thousand Seven Hundred, to the Twenty-Fourth Day of March One Thousand Eight Hundred and Eighteen. With References to Reports of Judicial Decisions in the Supreme Court of Pennsylvania (Philadelphia: Philip H. Nicklin, 1818), xxiv.

⁵⁹ See, for example, “An Act for establishing courts of judicature in this province,” May 22, 1722, in Purdon, Digest of the Laws of Pennsylvania, 310.

⁶⁰ “An Act for the more speedy and effectual administration of justice,” September 25, 1786, in *ibid.*, 314.

⁶¹ See Alexander J. Dallas, Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution (Philadelphia: T. Bradford, 1790); Reports of Cases Ruled and Adjudged in the Several Courts of the United States, and of Pennsylvania, Held at the Seat of the Federal Government (Philadelphia: Printed for the Reporter at the Aurora Office, 1798); Reports of Cases Ruled and Adjudged in the Several Courts of the United States, and of Pennsylvania, Held at the Seat of the Federal Government (Philadelphia: Printed for the Reporter by J. Ormrod, 1799); Reports of Cases Ruled and Adjudged in the Several Courts of the United States, and of Pennsylvania, Held at the Seat of the Federal Government (Philadelphia: Printed for P. Byrne, by Fry and Kammerer, 1807).

the hierarchy), and the Supreme Court (an intermediate bench), the form of judicial pronouncement according to Dallas is almost exclusively via an “opinion of the court.” The apparent form of judicial pronouncements here probably owes more to Dallas’ reporting style than to actual practice. On the High Court of Errors and Appeals, the highest court of the judiciary at that time, Dallas shows the Chief Justice delivering unanimous opinions of the court in most cases, though there are instances of seriatim behavior and Dallas refers to it as such.⁶²

Contemporary reporters of Dallas confirm the charges of inaccuracy levelled against him. Both Jasper Yeates and Horace Binney published casebooks of the Supreme Court of Pennsylvania that overlapped with Dallas’ volumes.⁶³ Yeates reports demonstrate that the opinion of the court was the normal mode of proceeding but that seriatim behavior did occur on occasion. Binney’s reports give more of an impression that a separate form was followed, but still show institutional expressions delivered regularly. In fact, Pennsylvania appears to be the one state where it seemed that the institutional voice of the judiciary was an accepted fact of their constitutional politics. Though the accounts of reporters may be sketchy concerning the manner of judicial pronouncements, in 1806 Pennsylvania’s General Assembly was perfectly clear. It was agreed that an “opinion of the court” should be “reduced to writing” if either of the parties requested it.⁶⁴

⁶² For examples of separate opinion delivery, see Levezey v. Gorgas, 4 Dallas 71 (1799), and Burd v. Smith, 4 Dallas 76 (1802).

⁶³ Jasper Yeates, Reports of Cases Adjudged in the Supreme Court of Pennsylvania: With Some Select Cases at Nisi Prius, and in the Circuit Courts, 4 vols. (Philadelphia: JNO. Campbell, 1871) [vols. 1,2] (Philadelphia: T. & J.W. Johnson & Co., 1889, 1890) [vols. 3, 4] (covers period 1791-1808). Horace Binney, Reports of Cases Adjudged in the Supreme Court of Pennsylvania, 3 vols. (Philadelphia: Kay and Brother, 1891) (Volume 3 is Philadelphia: Farrand and Nicholas, 1811). [fix citation]

⁶⁴ “An Act to alter the judiciary system of this commonwealth,” February 24, 1806, in Purdon, Digest of the Laws of Pennsylvania, 322. The text of the relevant section is as follows: “In all cases in which the judge or judges holding the supreme court, court of *nisi prius*, circuit court, or presidents of the courts of common pleas, shall deliver the opinion of the court, if either party by himself or counsel require it, it shall be the duty of the said judges respectively, to reduce the opinion so given with their reasons therefor to writing, and file the same of record in the cause.”

This recognition (and perhaps the implied legitimation) of the single-voicedness of a court is exceptional if not unique for this period.

New York:

Citizens of New York were faithful to a written constitution since 1777 which called for the establishment of a Supreme Court of Judicature and, above this in the hierarchy, a Court of Errors. Matters of law and equity were separated, and the document prescribed no provision about oaths or affirmations for judicial officers or the manner of judicial pronouncements.⁶⁵

The behavior of New York's courts reinforces some of the points that have been made previously. In New York's Supreme Court, an intermediate tribunal of mixed jurisdiction, institutional opinions were employed very frequently.⁶⁶ In Weaver v. Bentley, for example, Judge James Kent delivers the opinion of the court, the Chief Justice and two Judges concur, and then Judge Robert Livingston offers a full dissent.⁶⁷ There are exceptions,⁶⁸ but when an appellate case is given a full hearing and decided on its merits, an institutional opinion appears to be the norm followed by concurrences and dissents. In sum, the appearance of the pronouncements are similar to the practice of the United States Supreme Court since John Marshall's arrival.

Cases that proceed to the "Court for the Trial of Impeachments and the

⁶⁵ See Thorpe, Federal and State Constitutions, 2623. The New York Constitution of 1821 did contain an oath or affirmation provision. *Ibid.*, 2639.

⁶⁶ See William Johnson, Reports of Cases Adjudged in the Supreme Court of Judicature of the State of New-York; From January Term 1799, to January Term 1803, Both Inclusive; Together with Cases Determined in the Court for the Correction of Errors, During that Period, 3 vols. (Vol 1 is New-York: Issac Riley, 1808; vol 2 is same, 1810; vol 3 is New-York: C. Wiley, 1812) [hereinafter cited as "Johnson's Cases"]; George Caines, New-York Term Reports of Cases Argued and Determined in the Supreme Court of That State, second edition, 3 vols. (New York: I. Riley, 1813-14) [hereinafter cited as "Caines"]. Caines' reports cover span the years 1803-1805.

⁶⁷ 1 Caines 47 (1803).

⁶⁸ See, for example, Barnewall v. Church, 1 Caines 217 (1803), where the seriatim form was used.

Correction of Errors” during this period illuminate the matter further.

Though the reports often lack detail, it is clear that diversity of opinion was welcomed in New York’s highest court. Though some cases are followed by institutional declarations, where there is diversity as to result the Court of Errors almost always includes multiple opinions on both sides of a decision.⁶⁹ The Court’s own published rules included a general provision stating that its practice, “shall be similar to the practice of the court of exchequer chamber in England; and that on appeals it shall be conformable to that of the house of lords in England, when sitting as a court of appeals.”⁷⁰ This is seriatim practice, in the main.

In the equity courts of the state, there is a final lesson to be learned again. Before the revolution, the Chancery Court of New York consisted of the Governor and his Council. After 1778, the Court was ruled by a single member- the Chancellor- and saw an increase in its business and prestige. In 1814, an act of the legislature made it, “the duty of the reporter, from time to time, to report and publish such decisions of the Court of Chancery, as the Chancellor of the State shall deem of sufficient importance to be reported and published.”⁷¹ The volumes published in pursuance to this act were of excellent quality, and make it plain that the Chancellor was perhaps the dominant figure in shaping the common law of the state.⁷² Here was a place where an individual was identified with an institution.

Both Pennsylvania and New York make the point I stressed out the outset: the history presented here is not at all a one-sided portrayal of the

⁶⁹ Article Thirty-two of the New York Constitution states that this court consisted of the “President of the Senate for the time being, the Senators, Chancellor, and Judges of the Supreme Court, or the major part of them.”

⁷⁰ See New York (state) Court of Errors, Rules of the Court for the Trial of Impeachments, and the Correction of Errors (Albany: Jesse Buel, 1818), 8.

⁷¹ See William Johnson, Reports of Cases Adjudged in the Court of Chancery of New-York, 7 vols. (Albany: E.F. Backus, 1816-24), 1: vi. Johnson’s chancery reports cover the years 1814-1823.

⁷² New York finally merged law and equity jurisdiction in 1848.

dominance of sincerity as a recognized judicial ethic. Because of simple institutional facts (such as the division of law and equity matters, the particular conception of judicial power envisioned by the legislature of the day, or the patent fact that much post-revolutionary judicial practice lacked the hierarchy and distinction that would make purely judicial attitudes more discernible to the historian) it would be foolish to suggest that early state judicial practice was a model of what I call judicial sincerity. It would, however, be equally foolish to dismiss or underemphasize the important role this fundamental assumption played in the expectations and applications of newborn variants of judicial power. Even when taking contradicting data into account, the fact remains that each of the three northern states that have been the focus of our analysis to this point reveal strong commitments to the individual nature of judicial power. Much of the discussion to this point has attempted to view expectations of judicial attitude through the lens of the legislature; unfortunately, much of the historical record does not provide evidence of judicial attitudes more directly. For that, we must turn southward.

Southern States

Virginia:

The Virginia Company of London in 1618 and 1619 forged the early governmental machinery for the colony in order to stimulate migration and morale. When in 1624 the company lost its charter, the monarchy filled the void. The 1620's and 1630's saw the king appoint a royal governor, incorporate the colony in the royal domain, and recognize the early assembly (a remnant of the old company charter). The assembly then, from its inception until the revolution, was a creature of executive power. Even after the Glorious Revolution, when assemblies would be gradually accumulating power at the expense of the executive, the courts were still the

domain of the royal governor. This dependence was a feature not just of the court's existence but also their procedure as well.⁷³ The assembly did have some important input of its own,⁷⁴ but this executive relationship was undoubtedly settled in colonial minds until John Adams' revolutionary thinking came on the scene.⁷⁵

For much of Virginia's colonial history, the General Court was the "highest and last resort in the colony, and subject only to appeals to England."⁷⁶ Two lawyers, Sir John Randolph and Edward Barradall, recorded 137 cases of the General Court, spanning the years 1728-1741. A review of these reports provides some limited but important insight. Perhaps most evident to legal scholars is the wide discretion employed by a body made up chiefly of laymen. There were few precedents for those causes related to English law; none for those based upon colonial statute. Combine with these difficulties an increase in workload that was symptomatic of the times, and a discomfoting situation begins to materialize. Colonial jurisprudence should

⁷³ The early system of Quarter Courts, for example, heeded the advice of King James that the judicial proceedings were to be, made and done summarily, and verbally without writing, until it comes to the judgment or sentence, and yet, nevertheless, our will and pleasure is that every judgment and sentence hereafter to be given in any of the causes aforesaid, or in any other of the said presidents and councells, or in the greater number of them, within their several limits and precincts, shall be briefly and summarily registered into a book, to be kept for that purpose, together with the cause for which the said judgment or sentence was given; and that the said judgment and sentence so registered and written shall be subscribed with the hands or names of the said president and council, or such of them as gave the judgment or sentence.

R.T. Barton, ed., 1 Virginia Colonial Decisions: The Reports by Sir John Randolph and by Edward Barradall of Decisions of the General Court of Virginia, 1728-1741, 214-15 [hereinafter cited as "Virginia Colonial Decisions"]. The author here is citing William Waller Hening, The Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, vol. 1 (Richmond: G. Cochran, 1823), 71 [hereinafter cited as "Statutes at Large"].

⁷⁴ The revision statute of June, 1642 is the best example of this. See Barton, 1 Virginia Colonial Decisions 215.

⁷⁵ Gwyn, Separation of Powers, 116-17.

⁷⁶ Barton, 1 Virginia Colonial Decisions 218.

be noted most of all for its lack of system.⁷⁷ The consequences of this uncertainty for later constitutional politics in Virginia and elsewhere were serious:

Such experience bred among the colonists a profound fear of judicial independence and discretion, reflected in their repeated resort to written charters and to legislative intervention either by direct interference in the process of adjudication or by the correction and amendment of court-administered law by statute.⁷⁸

The recordings of Randolph and Barradall also interest the student of judicial behavior more readily in one key respect. The rulings of the General Court were not presented like those of the Privy Council. Dissenting behavior was not secretly and collegially eradicated. The notes indicate that there were differences of opinion in certain instances, though they were not recorded as opinions by the reporters.⁷⁹ This favoring of the majority position is not surprising given that Randolph and Barradall intended to use these notes for private advantage rather than publication. Moreover, this behavior remained even when the court exercised extraordinary power.⁸⁰ The court also exhibits “per curiam” behavior, summarily dismissing causes without formal opinion.⁸¹ Randolph and Barradall’s reports offer a rough skeleton of the practices adhered to by an early Virginia “appellate”

⁷⁷ See Wood, Creation of the American Republic, 296: “Much of the colonists’ law (and no one was sure quite how much) came from outside their society, in English statutes, legal authorities, and court precedents, and mingled confusedly with their own colonial law in court systems that were, relative to the English courts, remarkably undifferentiated.” Also see generally, “Law and Contracts,” *ibid.*, 259-305.

⁷⁸ *Ibid.*, 298.

⁷⁹ For some examples of this see the following in Barton, Virginia Colonial Decisions: Smith v. Brown, R7; Berryman v. Cooper, R60; Fleming v. Digg’s, R80; Meekins v. Burwell, R97; Iones v. Langhorn, R109; Stith v. Soane, B38; Morris v. Chamberlayne, B51; Bernard v. Stonehouse, B64; Godwins v. Kinchen, B71; Rogers v. Spalden, B81. [Citations here give the case followed by the reporter’s initial and the page number. Randolph’s reports are compiled in vol. 1, Barradall’s in vol. 2.]

⁸⁰ See Churchill v. Blackburn (1730), *ibid.*, R29: “This Judgment is absurd and against Common Sense, and can’t possibly be affirmed in this Court, and I pray that it may be reversed. And it was reversed by the whole Court except one.” Randolph cites and argues the rationale of Coke’s opinion in *Dr. Bonham’s* case throughout.

⁸¹ For examples, see Harwood v. Grice, B45; Taylor v. Graves, B59; Hill v. Hill, B60; Burwell v. Ogilby, B107.

tribunal.

The Virginia Constitution of 1776 incorporated a revolutionary principle, namely that “The legislative, executive and judiciary departments shall be separate and distinct, so that neither exercises the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them at the same time.”⁸² These succinct and powerful commands- so widely imitated- were almost immediately at odds with the practical understandings of government that withstood the colonial and revolutionary periods. Virginia’s political and legal history after 1776 demonstrates the source of these tensions and ambiguities. Virginia’s General Assembly passed laws which created its judicial machinery. One such act, passed in October of 1778, deserves attention.⁸³ It reveals, implicitly, the assumed views of those thinking about the role of judiciary.

The relevant section of the act follows:

FOR establishing a court of appeals for finally determining all suits and controversies, Be it enacted by the General Assembly, That at such a place as shall be appointed by an act of general assembly there shall be holden a court of appeals, which, in causes removed after decision from the high court of chancery, shall consist of the judges of the general court, and three assistant judges to be chosen by joint ballot of both houses of the Assembly;... three fourths of the members who are to be of the said court in any case shall be sufficient to proceed to business, the judges also of that court from which the cause is removed after decision, shall attend at their places in the hearing thereof, and shall there deliver the reasons of their judgments.⁸⁴

Virginia was far ahead of the rest of the nation in establishing an appellate court in the modern sense. Still, notice that “judges” are the operative word here rather than “courts” or other institutional terms. Unlike the later national appellate process, the Court of Appeals itself would draw judges from already existing tribunals. Especially indicated towards the end of the above

⁸² As cited in A.H. Kelly, W.A. Harbison and H. Belz, The American Constitution: Its Origins and Development, seventh edition (New York: W.W. Norton & Co., 1991), vol. 1, 72.

⁸³ “An act for establishing a Court of Appeals,” October 3, 1778, in Hening, 9 Statutes at Large 522.

⁸⁴ *Ibid.*, 522-23.

passage, it is clear that judicial power at this time in Virginia was understood to be exercised by each individual judge, not an institution. The statutes of this period do not explicitly address the issue, but it is plain that the procedure and behavior of the judiciary was left to common voluntary practice. These views are not extraordinary given the conventional wisdom and the practice of the Virginia courts at the time.

In the final decade of the eighteenth century, a future Supreme Court Justice was taking notes of cases argued before the newly constituted Virginia Court of Appeals for his own personal use. Bushrod Washington would eventually publish these, his reports covering cases argued from 1790 through 1796.⁸⁵ Much of the internal politics of this tribunal is reflected in Washington's notes; they confirm later dialogue between Thomas Jefferson and William Johnson that I will discuss later. The reports also illustrate the divide between the political theory and practice of the period. The opinion of the judges in the case of Thornton v. Smith, decided in the spring of 1792, neatly summarizes the day's conventional wisdom on the nature of judicial power. "In Virginia," the opinion explains, "we have no Courts, deriving their origin from Prescription, or Charter. They are all created by the legislative acts, defining their powers, and their jurisdictions."⁸⁶ A statement such as this goes a long way towards explaining the gap that existed between the rhetoric and understanding of separation of powers doctrine.

Washington's volumes also betray a tribunal dominated by a single member- in this case its President, Edmund Pendleton. Pendleton sat on the first court of appeals from its inception in 1779 to the year it was dissolved in 1789. When the new court was constituted later that year, he was

⁸⁵ Bushrod Washington, Reports of Cases Argued and Determined in the Court of Appeals of Virginia, 2 vols. (Richmond: Thomas Nicolson, 1798) [hereinafter cited as "Washington"].

⁸⁶ 1 Washington 81.

immediately made president and held the post until his death in 1803. One member of the bar wrote of Pendleton, “He is said to have resembled lord Mansfield, as much in his person and manner, as in the structure of his mind; and he certainly entertained a very high respect for the judicial opinions of that nobleman, as if he had an innate sense of congeniality.”⁸⁷ Somewhat like Burrow’s reports of the Court of King’s Bench during Mansfield’s tenure, the prefatory phrase, “The PRESIDENT delivered the opinion of the court,” floods Washington’s Virginia reports. For two years (Fall Term, 1790 until Fall Term, 1792), of those cases where a formal opinion is rendered, Pendleton is the sole conduit of the court’s pronouncements. Of 126 total cases recorded in Washington’s first volume, only 13 opinions were clearly given by someone other than the President.⁸⁸ There are no dissenting or concurring opinions reported until 1795, when Judge Spencer Roane arrives on the bench.⁸⁹ Described as a man who, “abhorred oppression, and the arbitrary assumption of power by courts, or individuals,” Roane was a vociferous Jeffersonian who did not shy away from the political issues of the day.⁹⁰ Bernard v. Brewer, argued during Roane’s first Fall Term, is the first case reported by Washington to include more than one opinion, with judges William Fleming and Peter Lyons offering contributions in addition to Pendleton’s.⁹¹ After this point cases are usually

⁸⁷ Taken from the biographical sketch by Daniel Call in volume four of his reports of that tribunal. See text infra.

⁸⁸ The following citations are all Washington’s Cases, volume one: Scott v. Call, 115; Wilson & McRae v. Keeling, 194; McWilliams v. Willis, 199; Hawkins v. Berkley, 204; Brown v. Garland, 221; Taylor v. Peyton, 252; Smith & Moreton v. Wallace, 254; Peter v. Cocke, 257; Carr v. Gooch, 260; Cole v. Clayborn, 262; Buckner v. Smith, 296; Pendleton v. Vandevier, 381; Elliott v. Smock, 389.

⁸⁹ The judges of the Court of Appeals for the period covered by Washington’s cases are as follows: Edmund Pendleton, Peter Lyons, Paul Carrington, William Fleming, and James Mercer. On November 12, 1793, Henry Tazewell replaces Mercer, and on April 13, 1795, Spencer Roane replaces Tazewell. 1 Washington viii.

⁹⁰ The same account also notes that Roane was, “very well acquainted with some of the most popular of the modern reporters, particularly Burrows and Atkyns. [original emphasis]” Taken from 4 Call xxv. See text infra., at note 93.

⁹¹ 2 Washington 76.

accompanied by several opinions. There are some exceptions, with an “opinion of the court,” sometimes appearing in different ways,⁹² but the several opinions are definitely the norm.

Daniel Call picks up reporting where Washington leaves off, recording cases decided by the Virginia Court of Appeals for the next twenty years.⁹³ In addition, a later volume of Call’s includes important cases decided by the first Court of Appeals that will be discussed below. Call’s first volumes of reports, in concert with Washington’s, prompt an additional observation about the Virginia judiciary. Even after Roane displaces the “opinion of the court,” it is clear that Pendleton still harnessed the opinions of his brethren tightly. Roane’s insistence may have provided for the airing of “concurring” types of behavior, but dissenting behavior was still rarely seen. Pendleton seems to have managed this generally using two techniques: per curiam opinions, or the appending of a final opinion or resolution of the court after hearing the judges separately. It is also evident that there was little dissent among the members on most issues, but even when there was disagreement, much of it was economized away. Of the 159 total cases reported in Call’s first volume, only 6 cases include a dissent.⁹⁴ In light of their general quality and the fact that Washington and Call both received the notes of the judges in preparing their works, these figures seem trustworthy. The same pattern holds for the other Call volumes (2, 3, 5 and 6) that cover the second Court of Appeals.

⁹² See Skipwith v. Baird, 2 Washington 165, for an example of an “opinion of the court” after 1795. For another variation, see Picket v. Dowdall, 2 Washington 106, which includes opinions by Fleming, Carrington, Pendleton, and an “opinion of the court.”

⁹³ Joseph Tate, ed., Reports of Cases Argued and Adjudged in the Court of Appeals of Virginia, by Daniel Call, second edition, volumes 1-3 (Richmond: Peter Cottom, 1824); Daniel Call, Reports of Cases Argued and Decided in the Court of Appeals of Virginia, volumes 4-6 (Richmond: Robert I. Smith, 1833) [all volumes are hereinafter cited as “Call”].

⁹⁴ For those cases where dissent is voiced, see Gibson v. Fristoe, 1 Call 54; Baird & Co. v. Mattox, 1 Call 226; Jollife v. Hite, 1 Call 262; Shaw v. Clements, 1 Call 373; Graves v. Webb, 1 Call 385; Jones v. Commonwealth, 1 Call 482.

In Call's fourth volume, cases determined by the first Court of Appeals (1779-1789) are the subject, and two of these cases deserve special attention. The first, Commonwealth v. Caton,⁹⁵ has a well-searched history. Decided in 1782, and reported in 1827 from surviving records, this was the first case in the United States history, in Call's words, "where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal."⁹⁶ At issue was a pardon granted by Virginia's House of Delegates for three convicted traitors. This action did not comport with the Treason Act of 1776 which provided for pardons to be granted by the entire General Assembly. Apart from the jurisdictional question of whether the case reached the Court of Appeals properly, the central questions of the case were: (1) could the court declare an act of assembly void if repugnant to the "Act for the Constitution of government"; and (2) was the Treason Act of 1776 contrary to the Virginia Constitution?⁹⁷ Of the eight judges hearing the case, six met these issues squarely.⁹⁸ Five answered the first question affirmatively, and then followed with the second determination that the act was constitutional. Breaking down the majority, Call is confirmed in his assessment that Chancellor George Wythe's opinion was the most assertive and articulate, while Edmund Pendleton also forwarded a considered view.

⁹⁵ 4 Call 5 (1782). In addition to the report, information on this case was taken from Julius Goebel, Jr., History of the Supreme Court of the United States, vol. 1: Antecedents and Beginnings to 1801 (New York: The Macmillan Company, 1971), 125-28. Where the two sources did not square with each other, I have relied on the Goebel text.

⁹⁶ 4 Call 20 [original emphasis].

⁹⁷ Specific construction taken from Goebel, Jr, Antecedents and Beginnings to 1801, 127, citing Force Transcripts, Library of Congress, Washington D.C., 8696-97. Also see 4 Call 6-7.

⁹⁸ Judge Bartholomew Dandridge and Judge John Blair, the latter a future U.S. Supreme Court Justice, "declined the question," and "waived the question," respectively. Goebel, Jr, Antecedents and Beginnings to 1801, 127, citing Force Transcripts, Library of Congress, Washington D.C., 8715.

One judge, Peter Lyons, answered question one in the negative.⁹⁹ Call's version, an exercise in historical reconstruction, is lacking in many ways, but it is clear from his reports that the seriatim practice was the norm even in cases of great importance. Indeed, this charge can be levelled at the volume as a whole, but when opinions are reported the seriatim practice is revealed.

The second case involves a 1788 law that would have required the judges of the Court of Appeals to act as district judges in addition to their duties. There was no case or controversy before the court; the court instead issued a "Remonstrance" in response to what it perceived as a legislative threat to judicial independence implicit in the separation of powers, tenure, and salary provisions of the constitution.¹⁰⁰ The content of that letter was nothing less than a "candid justification of authority to put statutes to a constitutional test," and- given that it was published shortly before the Virginia ratifying convention for the federal Constitution- held a special resonance at the time.¹⁰¹ Since the genre of this pronouncement was so qualitatively different, a detailed study of who said what is not needed. Rather, the case is included here because it adds context to Pendleton's forthcoming containment of his brethren's expression on the second Court of Appeals constituted the following year. The reports discussed in this section make it fairly clear that Pendleton makes his "switch" towards institutionalizing the court's voice after the court's reconstitution in 1789. The practice of the first Court of Appeals was clearly seriatim. Pendleton's move, then, corresponds quite nicely with the 1788 controversies over

⁹⁹ Ibid., citing Force Transcripts, Library of Congress, Washington D.C., 8714. The act was repealed in 1788 as contrary to the spirit of the constitution. Hening, 12 Statutes at Large 507.

¹⁰⁰ 4 Call 135.

¹⁰¹ Goebel, History of the Supreme Court, 129. Also see 4 Call 142, 146.

Goebel also notes that the impact of the "Remonstrance" was further enhanced by a North Carolina litigation, Bayard v. Singleton, 1 Martin 42 (1787), dealing with the constitutionality of a statute. This case will be dealt with in the section devoted to that state, *infra*.

judicial independence and asserts the dignity and united foundation of the newly created tribunal.

The reports of William Hening and William Munford commencing in 1806 confirm the same norms of behavior reported in Call's.¹⁰² Hening and Munford's volumes are more reliable than their predecessors, as they produced them, "professedly with a view to disseminate the decisions," to the public and that, "the notes of the Judges (which they were so obliging as to furnish) have precluded the possibility of any inaccuracies."¹⁰³ With Roane's continuing presence, and without Pendleton's, it is not surprising that the court adhered to the seriatim form as the usual way of pronouncing its opinions.

Virginia's history of judicial practice is important for its early and plain recognition that judges carried with them certain expectations and beliefs about the power they wielded- about how they should execute judicial power. The example of Edmund Pendleton and his extension of Mansfieldian procedure as is often used by students of judicial behavior to explain a steady historical progression to the institutionalism of John Marshall. Perhaps because of the peculiar institutionalism of judicial power that dominates appellate judging today, Spencer Roane's counterweight is largely diminished in most conventional narratives. This skewed picture overlooks the fact that Pendleton's institutionalism (like John Marshall's would be) was born out of the insecurity and uncertainty correctly sensed by a "judiciary" expanding its authority in a truly revolutionary, "independent" direction. Interestingly though, at one of the crucial points in this revolutionary expansion, the importance of the individual nature of judicial power is evidenced by Virginia's highest judges.

¹⁰² William W. Hening and William Munford, Reports of Cases Argued and Determined in the Supreme Court of Appeals of Virginia, 4 vols. (Flatbush, N.Y.: I. Riley, 1809) [hereinafter cited as "Hening and Munford"].

¹⁰³ 1 Hening and Munford v, vi. Original emphasis.

South Carolina:

It is beyond dispute that the judiciaries of the Carolinas were among the most respected throughout America's early constitutional history. Consider that in the nation's first fifteen years, fifteen men were appointed to the United States Supreme Court. Both North Carolina and South Carolina were home to two of the appointees.¹⁰⁴ It is specifically South Carolina and one of its judges, however, which is presently of concern. Elihu Hall Bay was one of the Associate Judges of the Superior Courts of South Carolina after the revolution and his reports were the first of the kind ever published in the state. The reports cover the years 1783-1795 for what was mainly an intermediate bench within the hierarchy, taking cases mainly from Courts of Common Pleas and General Sessions of the Peace.¹⁰⁵ Bay's publisher notes that, "Where there has been occasionally any difference of sentiments on the bench," or when a particularly important case came before the court, Bay reported, "the opinions of the judges seriatim, as they were delivered."¹⁰⁶ In these instances though, Bay often relied on all the arguments of his brethren only from his own notes.

As this last disclaimer makes clear, an examination of the volume shows a rather "homogeneous" picture of the Superior Courts of South Carolina. Diversity of opinion was rare, though the opportunity to be heard in exceptional instances was available. Considering the pedigree of the court and the context of the day this is not so surprising. Bay's second book is

¹⁰⁴ James Iredell and Alfred Moore were from North Carolina. John Rutledge and William Johnson were from South Carolina. Only Virginia and Maryland sent more (3 each) during this span, and no other state equalled the mark.

¹⁰⁵ Elihu Hall Bay, Reports of Cases Argued and Determined in the Superior Courts of Law in the State of South-Carolina, Since the Revolution, second edition (New York: I. Riley, 1809), vol. 1 [hereinafter cited as "Bay"].

¹⁰⁶ *Ibid.*, v.

more meaningful.¹⁰⁷ It consists of decisions made in the Constitutional Court of Appeals from 1796-1804; a court specifically established by an article of the state constitution to hear appeals from the Common Law courts. The Constitutional Court frequently utilized institutional opinions and high levels of unanimity, with occasional instances of diversity via the seriatim form.¹⁰⁸ Also notable is the December, 1799 appointment of Judge William Johnson to the Court. Even after Johnson comes to the bench, there is only one case where the judges delivered their opinions separately. Further, Johnson delivers the “opinion of the court” in an instance of unanimity and, in a case where there was a sole dissenter, the “opinion of the majority of the judges.”¹⁰⁹

Another judge’s manuscripts, Joseph Brevard, overlap Bay’s reports and seem to contradict his picture of the Constitutional Court, or at least temper the view.¹¹⁰ Looking at the intersecting years (1796-1804), these reports show a greater usage of the seriatim form than Bay’s reports alone would suggest. This would seem to emphasize that Bay was a judge first and a reporter second. Institutional opinions are prevalent but the seriatim form is shown all the way through Brevard’s manuscripts to the year 1816. According to Brevard’s reports in fact, of twenty-one cases heard in 1815 (a time when the U.S. Supreme Court under Marshall’s direction is consistently delivering homogeneous pronouncements) there is not one instance of an institutional or collective opinion.¹¹¹ Even where only one judge writes and

¹⁰⁷ Elihu Hall Bay, Reports of Cases Argued and Determined in the Superior Courts of Law in the State of South-Carolina, Since the Revolution, volume two (New York: I. Riley, 1811).

¹⁰⁸ For example, see Lindsay and others v. Commissioners, 2 Bay 38 (1796).

¹⁰⁹ See Butler v. Bailey, 2 Bay 244 (1800) and Campell v. Williamson, 2 Bay 272 (1800), respectively.

¹¹⁰ Joseph Brevard, Reports of Judicial Decisions in the State of South Carolina, 3 vols. (Charleston: W. Riley, 1839, 1840) [hereinafter cited as “Brevard”]. Volume one covers the period 1793-1805; volume 2, 1805-11; volume 3, 1811-15.

¹¹¹ See 3 Brevard 511-552.

the rest concur, there is no indication that the one writer is speaking for the whole group. Perhaps this notation is Brevard's failing, but on the whole it appears that Brevard's reports are worth more trust than Bay's. Remember that the attempt here is to demonstrate that institutional innovations- inextricably linked to political and legal theories of the age- are at times in conflict with each other and internally inconsistent. During the crucial decades of institution building during and shortly after the revolution, some states were more radical than others. South Carolina, like other southern states generally, appears to have been a furnace of comparably lesser heat, but nevertheless sheds more light upon our inquiries.

When we have been speaking of early American law, of course, we really mean early American law and equity. In 1721, for example, the South Carolina legislature passed an act to establish and regulate a court of chancery (responsible for equity matters), holding that, "the said court shall proceed. . . as near as may be according to the known laws, customs, statutes and usages of the kingdom of Great Britain, and also as near as may be according to the known and established rules of his majesty's high court of chancery in South Britain."¹¹² English, and thus much of colonial, common law had been influenced heavily by Aristotle's first formulation in The Rhetoric, "Aequitas sequitur legem," and rigidly separated the two spheres of law and equity.¹¹³ During the revolutionary period and for some time after however, traditional notions of "law" would be seriously challenged. Professor Gary MacDowell reminds his students that in America at the time of the founding the debate was between two intellectual camps: those who followed the opinion of Sir Francis Bacon and those who followed that of

¹¹² "An act to establish a Court of Chancery in the Province of South Carolina," September 9, 1721, as found in H.W. Desaussure, Reports of Cases Argued and Determined in the Court of Chancery of the State of South Carolina, from the Revolution, to December, 1813, Inclusive, 4 vols. (Vols. 1, 2: Philadelphia: Robert H. Small, 1854; vol. 3: Columbia, S.C.: Cline & Hines, 1817; vol. 4: Columbia, S.C.: Telescope Press, 1819), 1: 65, 68 [hereinafter cited as "Desaussure"].

¹¹³ "Equity follows the law."

Henry Home, Lord Kames. Bacon wanted a rigid separation between courts of law and equity; Kames thought that separation was specious and sought a mixed jurisdiction for courts.¹¹⁴ Unlike the founders of the United States Constitution who chose to follow Kames' suggestion, states like South Carolina continued to cling to Bacon's suggestion, and South Carolina only finally merged the two jurisdictions in 1868.¹¹⁵ These sorts of reminders bear significantly on how legal institutions disseminate law.

Henry William Desaussure was the pioneer of equity reporting in South Carolina and his four volumes record cases decided by the Court of Chancery from the revolution through the year 1813. The concept of juridical equity was seen for a long time as a necessary supplement to the common law but also a potential source of great arbitrary power. No doubt an accurate collection of reports would enhance respectability for the system of equity and thus the rule of law generally. The legislature of South Carolina recognized this fact, requiring that, "the judges sitting in the courts of appeal should give their judgments and decrees in writing, and should sign the same; thereby forming a perpetual record of the judgment and the grounds thereof."¹¹⁶

Courts of equity in England were presided over by a chancellor, a person who was at one time the chaplain of the king and "keeper of the king's conscience," as well as the conduit of writs and orders that ran in his name. The historical description is important as, much like the Privy Council discussed earlier, it explains the mode of communication that was

¹¹⁴ See MacDowell, Equity and the Constitution, 4-6.

¹¹⁵ South Carolina's provisional constitution of 1776, its more lasting version of 1790, as well as legislative enactments passed in pursuance of these documents all adhered to a rigid separation of law and equity. Oaths of office were similar throughout, explicitly referring to roles of the "Judge" and never institutional fidelity. See for example "An Act for Establishing a Court of Chancery," A.D. 1784, in John Faucheraud Grimké, The Public Laws of the State of South-Carolina, from Its First Establishment as a British Province Down to the Year 1790, Inclusive (Philadelphia: R. Aitken & Son, 1790), 337.

¹¹⁶ 1 Desaussure xxvii.

employed by equity courts. Chancellors gave the “decree of the court” in deciding the cases before them. A “decree” conveys a greater sense of authority than an “opinion” of law, and rightly so considering the proximity of the source. In modern parlance, equity courts can be fairly characterized as places where a chancellor “did justice,” in comparison to a Common Law judge who “clarified the law.”¹¹⁷

Desaussure’s reports show that a single “decree of the court” is given in all cases, delivered mostly by the chancellor. Nowhere in the state’s common law reports is the term “decree” employed. Before 1776, statutes that regulated courts of equity simply pointed towards the English model as a guide.¹¹⁸ It is remarkable that after the revolution, while statutes gave judges unprecedented rule-making authority and called for written records of facts and reasons of cases to be filed for the first time, the “decree” mode of communication was still specifically cited.¹¹⁹

The first section of the third article of the South Carolina Constitution of 1790 reads plainly: “The judicial power shall be vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish.”¹²⁰ The fourth article of the document is equally straightforward, declaring that all constitutional officers take the following oath: “I do swear, or affirm, that I am duly qualified according to the constitution of this state, to exercise the office to which I have been appointed, and will to the best of my abilities discharge the duties thereof, and preserve, protect and defend the constitution of this state and of the

¹¹⁷ See MacDowell, Equity and the Constitution.

¹¹⁸ See for example, “An act to establish a Court of Chancery in the Province of South Carolina,” September 9, 1721; in 1 Desaussure 65.

¹¹⁹ “An act to establish a Court of Equity within this state,” February 19, 1791, 1 Desaussure 73. Desaussure also lists “Rules of Equity, Established by Order of the Judges,” 1 Desaussure 57-63. No where in these rules is there any mention of how the court should communicate its pronouncements.

¹²⁰ S.C. Const. of 1790, art. III, § 1.

United States.”¹²¹ There was no requirement of institutional fidelity. The exercise of judicial power, granted by the legislature, was a distinctively individual act authorized by and beholden to an oath of individual fidelity.

North Carolina:

In 1777, the newly constituted General Assembly of the State of North Carolina legislated courts of law and sought to regulate them. It should not be surprising by now to learn that North Carolina required an oath to be taken by judicial officers. Indeed, the oath of office required of judges is in many ways similar to those we have already discussed from other states.¹²² Two segments of that oath, however, deserve comment. In the middle of what is a lengthy pledge, the prospective judge would reiterate the following: “I will not delay any person of common right, by reason of any letter or command from any person or persons in authority to me directed, or for any other cause whatsoever; and in case any letters or orders come to me contrary to law, I will proceed to enforce the law, such letters or orders notwithstanding.”¹²³ This seemingly worrisome and unusual addition actually serves to emphasize the individual perspective lawmakers had of a judicial officer. No weight whatsoever is given to a corresponding institutional cognizance or respect. In addition, at the end of the oath, the appointed would promise, “in all things belonging to my office, during my continuance therein, I will faithfully, truly, and justly, according to the best

¹²¹ Ibid., art. IV.

¹²² See “An act for establishing courts of law, and for regulating the proceedings therein (A.D. 1777),” in H. Potter, J.L. Taylor, and B. Yancey, Laws of the State of North-Carolina, Including the Titles of Such Statutes and Parts of Statutes of Great Britain as are in Force in Said State; Together with The second Charter granted by Charles II to the Proprietors of Carolina; The Great Deed of Grant from the Lords Proprietors; The Grant from George II to John Lord Granville; The Bill of Rights and Constitution of the State, including the names of the Members of the Convention that formed the same; The Constitution of the United States, with the Amendments; and The Treaty of Peace of 1783; with Marginal Notes and References, 2 vols. (Raleigh: J. Gales, 1821), 1: 283 [hereinafter cited as “N.C. Laws”].

¹²³ Ibid.

of my skill and judgment, do equal and impartial justice to the public and to individuals....”¹²⁴ Do not just brush the passage aside as rhetorical flourish; again there is an emphasis on individual fidelity. As we shall soon see, these oaths were taken quite seriously at the time.

Twenty years later, Francois-Xavier Martin published a volume that included cases heard by the superior courts of the state since 1778.¹²⁵ An examination of these state reports reveals a varied style of judicial pronouncement for a court of mixed jurisdiction. There is the separate form, as well as per curiams and unanimous court opinions. Keeping in mind that the superior court was not a court of last resort, this is not that surprising. Martin tells which judges were present and how the opinions were delivered in some detail. If the court was comprised of one judge, Martin notes “alone”; if an opinion is read by one judge the others feelings are recorded as “tacente” or “tacitly assented.” In sum, there is a mixture here, but generally the distinctive separate quality of judicial proceedings was respected, or at least the option was present.

One of Martin’s cases deserves special treatment. Fifteen years before Marbury v. Madison, the superior court of North Carolina ruled that a legislative act that was contrary to the constitution was void. Bayard v. Singleton is known by legal historians for a substantive ruling that is perhaps America’s earliest precursor of the doctrine of judicial review.¹²⁶ Interestingly, just how this ruling was communicated is not as widely known. Martin’s transcript is illuminating, stating that the court, “with

¹²⁴ Ibid., 283-4.

¹²⁵ Francois-Xavier Martin, Notes of a Few Decisions in the Superior Courts of the State of North-Carolina, and in the Circuit Court of the U. States, for North-Carolina District. To Which is Added a Translation of Latch’s Cases (Newbern: Francois-Xavier Martin, 1797) [hereinafter cited as “Martin”]. In addition to state and federal cases, included is Martin’s translation of John Latch’s reports of selected cases heard at the Court of King’s Bench during the first three years of the reign of Charles I- first published in Norman-French by Edward Walpoole in 1661. Martin’s was the first English translation of Latch’s reports and demonstrates clearly the reliance upon English law at the time.

¹²⁶ 1 Martin 48 (1787).

much apparent reluctance, but with great deliberation and firmness, gave their opinion separately, but unanimously for overruling the aforementioned motion for the dismissal of the said suits.”¹²⁷ Considering the boldness of this ruling, and the year of its delivery, this is a meaningful choice of communicative style. At a time when such an assertion of power would be aided by an institutional, single-voiced, authoritativeness, the Superior Court of North Carolina maintained an individualist posture. Martin goes further and explains the rationale behind the decision:

the Judges observed, that the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject; and that notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the state, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owed the public, in consequence of the trust they were invested with under the solemnity of their oaths.¹²⁸

Even when they were testing the very bounds of their authority, judicial power as exercised by the state of North Carolina was not exhibited collectively, but rather flowed as several individual expressions in pursuance of coherence.

In 1799 the legislature acted again, creating a “Court of Conference” that would hear appeals of matters heard on newly formed circuits as well as holding an original jurisdiction in certain cases of fraud.¹²⁹ Judges of the superior courts were to come and discuss the gaps and inconsistencies of North Carolina’s law. The explicit goal of the legislation was to increase uniformity and efficiency throughout the judiciary;¹³⁰ the very purpose of

¹²⁷ 1 Martin 49.

¹²⁸ Ibid.

¹²⁹ “An act directing the judges of the superior courts to meet together to settle questions of law or equity arising on the circuit, and to provide for the trial of all persons concerned in certain frauds (1799),” 2 N.C. Laws 887-9. The Court of Conference was renamed the Supreme Court in 1806.

¹³⁰ Ibid., 887 [“Whereas great inconveniences have arisen, and much delay in the administration of justice has been occasioned, from the want of a speedy and uniform decision of all questions of law or equity arising on the circuit, either from difference of opinion in the judges, or from a desire of further consideration, or from a want of a competent number of judges as the law exists at present: to the end therefore that these

creating an additional layer at the top of the hierarchy points to this. It is all the more remarkable then that the legislature refused to abandon tenets of individual judicial accountability. The same act requires that, “each and every judge at their said meeting shall give their final opinion in every case in writing,” and for a book to be kept by the clerk to hold their views.¹³¹ In fact, the language used throughout the statute always refers to “judges” rather than any institutional nomenclature. Five years later, in a law that would continue the 1799 enactment, the legislature went further, commanding, “That the judges of the said court of conference shall not only reduce their opinions to writing, and file the same in the clerk’s office, as heretofore directed by law, but that the judges of the said court shall likewise, when their opinions are made, deliver the same viva voce in open court.”¹³² The legislature emphasized the line of thinking again in 1810 for the renamed Court of Conference, the Supreme Court of North Carolina.¹³³ It can not be highlighted too often that these demands of the legislature were made at a time when the uncertainty of the law was, as one superior court judge then put it, “the most fruitful source of contention.”¹³⁴ Even when reforming the judiciary in a “certain” or homogeneous direction, individual accountability was reaffirmed.

The judges of the Court of Conference teach more still. In a short span

inconveniences may be remedied, and that decisions shall be had on all suits and controversies at present depending or hereafter to depend in the superior courts of law and equity, with as much despatch and uniformity as possible...”].

¹³¹ Ibid., 888.

¹³² “An act to continue in force an act passed in the year one thousand eight hundred and one, entitled ‘An act to continue longer in force and to amend an act passed in the year one thousand seven hundred and ninety-nine, entitled ‘An act directing the judges of the superior courts to meet together to settle questions of law or equity arising on the circuit, and to provide for the trial of persons concerned in certain frauds (1804),’ 2 N.C. Laws 1020.

¹³³ “An act to regulate the supreme court (1810),” 2 N.C. Laws 1169-70.

¹³⁴ John Louis Taylor, Cases Determined in the Superior Courts of Law and Equity of the State of North Carolina (Newbern: Martin & Ogden, 1802), iii. Taylor was a superior court judge.

of time, there is a shift in its mode of communication that coincides with the ascendance of Chief Justice Marshall on the U.S. Supreme Court. In 1800- the year before Marshall is sworn in- there were twelve cases decided upon their merits by full opinions. Ten of these were determined via the seriatim form.¹³⁵ Just six years later, eight of nine cases that were decided upon their merits and received full opinions were communicated via “the opinion of the court.”¹³⁶ By the time John Louis Taylor publishes his Supreme Court reports in 1818, the opinion of the court is a well established norm of judicial expression.¹³⁷

What lessons can be gleaned from this brief review of early state judicial practice? There are two main themes which stand out when the actions and arguments of the legislators and judges of the period are studied. Firstly, it is abundantly clear that the new application and reconciliation of revolutionary principles was especially problematic in the case of judicial power. Legislators in many instances concluded that (in the particular construction of oaths and regulatory statutes) the individual accountability of officials acting in their judicial capacity was an essential ingredient of judicial power. This legislative concern remains present even during times of great uncertainty and disorganization concerning legal precedent and judicial system. This may seem to be a rather mundane theme to garner from

¹³⁵ See Duncan Cameron and William Norwood, Reports of Cases Ruled and Determined by the Court of Conference of North-Carolina (Raleigh: J. Gales, 1805), 3-113 [hereinafter cited as “Cameron & Norwood”]. There was a total of forty cases heard in 1800. Two of the twelve cases, Armstrong v. Beaty and Spendlove v. Spendlove, included a single combined opinion of two of the three judges present. Twenty-six cases received a per curiam or “By the Court” summary, and they were matters the court considered largely settled or unimportant. One case was dismissed before reaching the merits, and one case saw the court grant a writ cursorily.

¹³⁶ See A.D. Murphey, Reports of Cases Argued and Adjudged in the Supreme Court of North-Carolina, 3 vols. (Raleigh: J. Gales & Son, 1822), 1: 102-147. One case was delivered seriatim. Seventeen cases were disposed of via “By the Court” summaries.

¹³⁷ See J.L. Taylor, Cases Adjudged in the Supreme Court of North Carolina (Raleigh: J. Gales, 1818). Taylor’s reports cover the court from July Term, 1816 through January Term, 1818.

an effort of historical scholarship; perhaps the most obvious truths do not always receive the emphasis they deserve. Secondly, and perhaps more importantly, the judges- the actors who performed the bulk of the innovation and invention which proved central to the redefinition of the bounds of judicial power and how it will serve a new kind of constitutional democracy- are often transparent when performing their official duties in their belief that judicial power requires individual, sincere judgment. Furthermore, exceptional deviations from this pervasive judicial attitude (such as Edmund Pendleton's in Virginia) are clearly motivated by defensive concerns from legislative assaults upon this qualitatively new acquisition of judicial power. To overstate the meaning of such deviations and incorporate them into a new, different theoretical understanding of what constitutes judicial power is to declare the exception to be the rule. Again, the history presented here is far from dispositive. As I said earlier, there are great many obstacles, differences, and constraints that face a historian of this subject. Nevertheless, the overriding lessons of this review of early state judicial practice should also not be cursorily dismissed. The conventional narrative regarding American judicial power overemphasizes its institutional, coherent character. The fact remains that the essentially individual nature of judicial power was heavily emphasized, providing a more balanced, complex picture of the subject.

Chapter Two:

The National Judiciary and the Break from Sincerity

This chapter, the culmination of our historical inquiries, will be divided in half. The first part covers the federal judiciary from its inception in 1789 until 1801, when John Marshall arrives on the scene. From that point until the early 1820's is the domain of the second part.¹

John Jay and Oliver Ellsworth

There is an important (though often overlooked) aspect of the national judiciary's constitutional development, the roots of which can be traced to the Chief Justiceship of John Jay. The Jay Court early on provided a solution to the uncertain problem of in whose name judicial writs would run. Chief Justice Jay suggested and initiated the practice that writs would run in the President's name until the Court was told not to do so. Melvin Urofsky explains that Jay read Article III broadly and assumed that, when presented with a specific legislative grant of power, the Court "could use all appropriate means to execute that power in the absence of enabling legislation. The Court has, on numerous occasions since, acted or refused to act in certain ways, thus informing Congress, as it did here, that it may change the Court's procedure by statute or confirm it by inaction."² Jay acted on the assumption that Section 14 of the Judiciary Act, which gave the

¹ Few authors have addressed the issues confronted in this section. Those that have addressed them provided both valuable guidance and confirmation of my own work along the way. Generally, in addition to those noted below, I have been particularly aided by three sources, as follows: Julius Goebel, Jr., History of the Supreme Court of the United States, volume 1: Antecedents and Beginnings to 1801 (New York: The Macmillan Company, 1971), 96-142, 196-250, 457-607, 662-813; George L. Haskins and Herbert A. Johnson, History of the Supreme Court of the United States, volume 2: Foundations of Power: John Marshall, 1801-15 (New York: Macmillan, 1981), 107-204, 373-406; Donald G. Morgan, "Mr. Justice William Johnson and the Constitution," 57 Harvard Law Review 328-61 (1944).

² Melvin I. Urofsky, A March of Liberty: A Constitutional History of the United States (New York, Alfred A. Knopf, Inc., 1988), 137.

Court power to issue writs, also gave it power to determine the style of the process. Jay's reasoning in this example quite obviously has large consequences for the departmental dynamics that the Constitution encourages. This line of reasoning will be returned to later in part three of the paper.

On August 11, 1792 the Supreme Court of the United States handed down its first case that included a full opinion, State of Georgia v. Brailsford.³ The first opinion delivered was by Justice Thomas Johnson who dissented from the majority composed of Justices James Iredell, John Blair, James Wilson, and Chief Justice John Jay.⁴ For nearly the whole of the first decade of the Supreme Court's existence, the seriatim form was the established convention. The influence of England was confirmed by Jay three days earlier when he stated that, "The Court considers the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances may render necessary."⁵ When the Georgia case was later reargued on different grounds, Iredell dissented, explaining that he was, "bound to decide, according to the dictates of my own judgment."⁶ Both of these cases were examples of a "conversing" demeanor exhibited by the Court. Seriatim opinions were the mode of proceeding for some of the formative cases of American constitutional law, including Chisholm v.

³ 2 Dallas 402.

⁴ Ibid., 405. Justice William Cushing also dissented from the majority.

⁵ 2 Dallas 413-14. Dallas's notes are confirmed by Maeva Marcus, ed., 1 The Documentary History of the Supreme Court of the United States, 1789-1800, part one (New York: Columbia University Press, 1985), 582.

⁶ Georgia v. Brailsford, 2 Dallas 415 (1793). Blair, though in agreement with majority, engaged in concurring behavior due to different reasoning. Jay spoke for the others; Johnson was absent.

Georgia,⁷ Ware v. Hylton,⁸ and Calder v. Bull⁹ among others.

There are three possible rhetorical effects of any judicial pronouncement- what I term “homogeneous”, “dissentient”, and “conversing” results. Homogeneous results demonstrate unanimity in both result and reasoning, and may be communicated by a singular utterance to avoid repetition. Dissentient results occur when one member or bloc speaks against the majority. There is only one voice for each conclusion provided by the majority and the minority; by definition, dissentient results are exclusively a two-voice colloquy. Conversing results are produced by a court when those who agree on the result differ on rationale. Conversing behavior occurs only within a plural majority or minority, not between the divide. Of course, a case may be classified as both dissentient and conversing, or even “double conversing”, depending on the circumstances; homogeneous classifications are exclusive. With these parameters in mind, a review of the reported cases by Alexander J. Dallas for the years 1790-1800 produces interesting data.¹⁰ Dallas’ reports offer 43 bone fide cases which can be clearly classified. Of these, there are 30 occurrences of homogeneous behavior, 6 examples of dissentient behavior, and 12 examples of conversing behavior.

⁷ 2 Dallas 419 (1793). Decided by vote of 4 to 1; opinions by Iredell (in dissent), Blair, Wilson, Cushing and Jay.

⁸ 3 Dallas 199 (1796). Decided by vote of 4 to 0; opinions by Chase, Paterson, Wilson and Cushing. Iredell later submitted an opinion for the record, dissenting in part and concurring in part. Chief Justice Oliver Ellsworth did not participate.

⁹ 3 Dallas 386 (1798). Decided by vote of 4 to 0; opinions by Chase, Paterson, Iredell and Cushing. Ellsworth and Wilson did not participate.

¹⁰ See Appendix 2, *infra*. The cases reported by Dallas for the sixteen active terms between 1790 and 1800 are not indicative of the total number heard and disposed of by the Court. See Warren, Charles. The Supreme Court in United States History, volume one (Boston, Little Brown, 1928), 158 at note 2. The Supreme Court’s smooth docket book lists 86 or 87 appellate cases entered before 1801. The Oliver Wendell Holmes Devise History Project explains in detail how cases are to be counted and why some are excluded from this number. See Goebel, Jr., 1 History of the Supreme Court of the United States, 795-801. The Dallas material which can clearly be classified (43 cases) is a fair-sized sample (50 percent) of the total material that came before the Court at this time.

Almost no scholarship exists on the rhetorical effects of judicial pronouncement, and that which does exist tends to present such findings with a rather skewed, almost professional slant. A dissertation by Beverly Wall is a good example of this latter point.¹¹ Dr. Wall in her paper seeks to analyze Supreme Court opinions from a rhetorical perspective, choosing six well-known cases that span across American history. Two of Wall's cases, Chisholm v. Georgia and McCulloch v. Maryland, were decided by the Supreme Court early in its history and illustrate what Wall calls

the parameters of a rhetorical problem that has persisted throughout the Court's history: the conflict between the functions of the texts as deliberative forums and governmental instruments, between the individual roles of justices and their collective institutional identity, and between the justices' multiple voices and the Court's single judicial voice in a culture of argument.¹²

Many of Wall's observations are helpful. Supreme Court opinions, she explains, are generically identifiable as a certain kind of "discourse performance" because they (1) are "negotiated texts", (2) serve "fundamentally instrumental" purposes, (3) provide public forums for debate, (4) combine written and oral traits, and (5) address multiple, non-hierarchical audiences.¹³ These sorts of characteristics are important indeed, but Wall is like many who approach law from a rhetorical perspective in that she is content to approach her subject very flexibly and not concern herself with any foundational issues concerning judicial expression. For Wall and many other rhetorically-minded students, the way in which the Court communicates is one of endless possibility, unburdened by concerns that the constitutional structure of which the Court is a part might prove more effective or legitimate if one way was chosen rather than another. This is a very general criticism of rhetorical approaches to law,

¹¹ Beverly C. Wall, Supreme Court Rhetoric: Explorations in the Culture of Argument and the Language of the Law (Ph.D. dissertation, UNC-Greensboro, 1992).

¹² *Ibid.*, v.

¹³ *Ibid.*, 11-19.

one that is uncomfortable with treating legal action reduced to writing as just another form of literature. People give their lives to change the law; the same cannot be said about poetry.

But it is Wall's analysis of cases like Chisholm which is more disturbing, for it betrays an institutional prejudice that is shared by many students of the law. As noted earlier, the Court's decision in the Chisholm case was expressed via seriatim opinions; five opinions provided explanation for a decision that was unanimous save one. Wall's careful analysis of the history surrounding the case and the Justice's opinions leads to a startling conclusion. "We do get a fascinating judicial rehearsal of a variety of possible roles and generic structures for this new community of argument," Wall says of the Chisholm opinions, "but the final result is a text filled with five voices neither instrumental nor deliberative in their effect."¹⁴ This sort of response to the Court's judicial expression of Chisholm is both anachronistic and simply mistaken; the example Wall chooses actually works against her. How can a case that led directly to the push for and eventual addition of the Eleventh Amendment to the Constitution be described as lacking instrumental or deliberative effect? It is the overwhelming opinion of historians that the Eleventh Amendment was one of only two constitutional amendments (the other being the Sixteenth) ever adopted explicitly to repudiate a decision by the Supreme Court.¹⁵ The seriatim form was clearly not the obstacle to effectiveness (deliberational, instrumental, or otherwise) that Wall would have us believe.

"Hayburn's case," as it has come to be known, is actually not a case at

¹⁴ Ibid., 47. Immediately preceding this passage, Wall also suggests that the seriatim conversation of Chisholm does not "necessarily" fulfill an institutional goal. This sort of conclusion can only be acceptable by someone who holds a (now dominant) narrow conception of the institutionalism of the Court and American judicial power.

¹⁵ See, for example, The Oxford Companion to the Supreme Court of the United States, 1992 ed., s.v. "Eleventh Amendment," by John V. Orth.

all, but a controversy arising from a 1792 Act of Congress.¹⁶ Nevertheless, Hayburn's case is helpful in demonstrating early American understandings of judicial power. The law Congress enacted would have required the U.S. Circuit Courts to hear disability pension claims by war veterans. Three separate letters, as the Justices were then sitting as judges of the three circuit courts, were sent to President George Washington. Each letter explained that the legislation violated the principle of the separation of powers by imposing nonjudicial duties on the tribunals. The letters are usually cited as an early though perhaps vague example of federal courts declaring unconstitutional and refusing to enforce a statute passed by Congress. What is not usually noted is that each letter refers to the responsibilities of judges and not an institutional judiciary when discussing concerns of judicial determinations and independence.¹⁷ Like the "Remonstrance" of the Court of Appeals in Virginia discussed earlier, the letters in Hayburn's case are another indication of latent assumptions that were linked to thinking regarding judicial power. Or consider the Court's opinion in United States v. Judge Lawrence, when the Attorney General, Edmund Randolph, asked for a writ of mandamus to compel a U.S. District Judge to issue a warrant.¹⁸ Rebuffing Randolph, the Court's unanimous opinion noted that, "the District Judge was acting in a judicial capacity," and that, "we have no power to compel a Judge to decide according to the dictates of any judgment, but his own."¹⁹ Less than six years later, John Marshall's view of the "judicial capacity" of his brethren would allow for a different sort of compellance.

Before Marshall, however, Connecticut's Oliver Ellsworth comes into

¹⁶ 2 Dallas 409 (1792).

¹⁷ See *Ibid.*, 410, at note 2. Jay, Cushing and U.S. District Judge Duane signed one letter. Wilson, Blair and U.S. District Judge Peters signed another. Iredell and U.S. District Judge Sitgreaves signed the third.

¹⁸ 3 Dallas 42 (1795).

¹⁹ *Ibid.*, 53-54.

view again. After Jay left to run for Governor of New York and a one year stint by John Rutledge, Ellsworth was sworn in as Chief Justice on February 4, 1796. By the time he reached the Supreme Court Ellsworth was already a respected jurist, a member of the Philadelphia convention and, while a United States Senator, the principal drafter and steward of the Judiciary Act of 1789. His tenure was less than four years, and illness prevented him from presiding during a substantial portion of it including almost all of his first term. Ellsworth is generally credited with bringing leadership to the position of Chief Justice. The Ellsworth Court, for our purposes, is most conspicuous for its limited utilization of per curiam opinions delivered by the Chief Justice. This development of the Ellsworth Court, though not used in important cases, is rightly viewed as a transitional stage that leads to the full-blown practice of institutional opinions by the Marshall Court.²⁰ The introduction of this institutional voice led to further unprecedented behavior on the Supreme Court. During the August Term of 1796, Justice Wilson forwarded the first sole dissent from the Court's opinion in Wiscart v. D'Auchy.²¹ Less than a year later, in Brown v. Van Braam, Wilson executes another first when he delivers the opinion of the Court, the first time someone other than the Chief Justice does so.²² Further organizing the earlier data on Dallas' reports by Chief Justice, a remarkable trend emerges.

²⁰ A clear example of the Ellsworth innovation can be seen in Brown v. Barry, 3 Dallas 365 (1797).

Charles Warren was the best known scholar of the Supreme Court to assert that it was Ellsworth rather than Marshall who was the originator of the practice of having the opinion of the Court be delivered by the Chief Justice. Warren bases this claim exclusively on the words of Justice Samuel Chase in his opinion in Bas v. Tingy, 4 Dallas 37 (1800), when he said: "The judges agreeing unanimously in their opinion, I presumed that the sense of the court would have been delivered by the president; and therefore I have not prepared a formal argument on the occasion." See Warren, 1 The Supreme Court in United States History 654, at note 1.

²¹ 3 Dallas 321, 324. Ellsworth actually responds to Wilson's dissent afterwards, clarifying the rule he announced previously in the court's opinion. In Jennings v. Perseverance, 3 Dallas 336 (1797), the decision in Wiscart v. D'Auchy was affirmed, with Justice Paterson adding his subsequent support to Wilson's opinion though he was silent on the actual occasion the previous term.

²² 3 Dallas 344 (1797).

The Ellsworth Court data produces 27 examples of homogeneous behavior, 3 instances of dissentient behavior and 7 occurrences of conversing behavior.²³ Even with the limited sample set Dallas offers, these figures at least point towards a homogeneous direction while still leaving freedom of expression in important cases.

There are two elements of early American judicial practice that deserve brief comment here. The Judiciary Act of 1789 constructed a hierarchy of national courts and required the Justices of the Supreme Court to “ride circuit” and sit on these inferior tribunals. Scholars have previously pointed to the Justices’ behavior while on circuit as a purposeful quasi-judicial function intended by Federalist statesmen.²⁴ Jury charges delivered by the Justices during the infancy of the federal judiciary are especially highlighted as evidence of the intended judicial function of inculcating “constitution-thoughts” in a new citizenry. The role of “republican schoolmaster,” was an important function deliberately embedded in the judiciary by those who forged American government, so this reasoning goes. These sorts of arguments conflict with more “conventional” authors who contend that the national judiciary, unlike the legislative and executive branches, was to be fairly similar to the analogous institutions as then existed in Great Britain and the states.²⁵ Any instances of novel deportment by the members of the judiciary, these arguments follow, are purely extra-judicial and a rather grotesque intermingling of law and politics. In light of the large gaps of information regarding intention on

²³ See Appendix 3, *infra*.

²⁴ Prominent examples include the following: Ralph Lerner, “The Supreme Court as Republican School-master,” *Supreme Court Review* (1967), 127; Stephen Presser, “The original misunderstanding: the English, the Americans, and the dialectic of Federalist constitutional jurisprudence. (Roads not Taken: Undercurrents of Republican Thinking in Modern Constitutional Theory),” 84 *Northwestern University Law Review* 106-85 (1989).

²⁵ See George Anastapolo, “The Supreme Court is Indeed a Court,” in Robert A. Licht, ed., *Is the Supreme Court the Guardian of the Constitution?* (Washington D.C.: AEI Press, 1993), 22-33.

this matter (admitted by both camps) it is up to the student to decide after thoroughly engaging the existing material- including the speeches, pamphlets and treatises of the era- which view is most persuasive. Chapter seven will expend more energy on these sorts of inquiries, but it is sufficient for now to declare my belief that the judiciary was indeed intended to be “special” and different from any analogous institution then existing on either side of the Atlantic. What follows from this commitment to the distinctiveness of the judiciary is an examination into the judicial function itself and how it may comport with a conception of law and a constitutional philosophy. It is the labor of the student who attaches to this commitment to explain how the judiciary was to be distinctive and what effects that distinctiveness would be expected to produce. A preexisting genus may give rise to a new species; distinctiveness is not a license to disregard history.

John Marshall

The fourth Chief Justice of the Supreme Court was responsible for altering the form of judicial expression which prevailed upon his arrival by instituting the “opinion of the Court.” Because of this, and because no other event in the Court’s history matches it, Marshall’s ascendance is rightly identified as the point at which American judicial power decisively broke from its constitutional tradition of sincerity.

After the election of 1800, both the legislative and executive branches of the government were in the hands of Thomas Jefferson’s Republican party. One of the “midnight judges” of the outgoing president, John Adams, John Marshall found himself an inhabitant of the only federal branch controlled by his Federalist party. After taking the oath of office on February 4, 1801 Marshall quickly convinced his brethren of the threat posed by the Jeffersonians. Marshall absolutely dominated the highest court in the land; the statistics are striking. From 1801 through 1815 Marshall

delivered 209 (or 55 percent) of the 378 opinions of the court. Of 31 opinions on constitutional law over the same period, Marshall gave 12, 6 were seriatim opinions or per curiam summaries, with the remainder spread over the associate justices- each giving no more than 3. Of 127 total opinions on courts and procedure for these years, Marshall delivered 70, or 55 percent.²⁶ From 1805 until 1833, of 974 majority opinions rendered by the Court, Marshall wrote 450, in comparison with Joseph Story's 176 (who arrived in 1812) and William Johnson's 113 (who arrived in 1804).²⁷ In Marshall's 34 years, he delivered 519 of 1100 majority opinions while on the bench, and only dissented 8 times.²⁸

There are important disclaimers to keep in mind when considering figures such as these. There is some evidence to support the notion that delivery of an opinion does necessarily imply authorship.²⁹ Seniority seems to have guided who was to deliver the Court's opinion, but little documentary evidence exists to confirm the role of the individual justices in preparing opinions of the court. These admissions notwithstanding, it is abundantly clear that Marshall, "was the individual most responsible for the alteration in internal arrangements that provided a period of general unanimity after the exceptionally divisive time of the Jay Court."³⁰ Indeed, as one legal historian has shown, Marshall at times compromised his own Federalist principles substantially in order to maintain unanimity.³¹ Even with Presidents Thomas Jefferson and James Madison altering the makeup of the

²⁶ Statistics taken from Haskins and Johnson, History of the Supreme Court of the United States II, 652-64.

²⁷ As compiled in Morgan, "Mr. Justice William Johnson," 332.

²⁸ As compiled in Donald M. Roper, "Judicial Unanimity and the Marshall Court- A Road to Reappraisal," 9 American Journal of Legal History 119 (1965).

²⁹ See Haskins and Johnson, History of the Supreme Court of the United States II, 383-89.

³⁰ *Ibid.*, 388.

³¹ Donald M. Roper, "Judicial Unanimity and the Marshall Court- A Road to Reappraisal," 9 American Journal of Legal History 118-34 (1965).

Court with appointments of Johnson, Brockholst Livingston, Thomas Todd, Story and Gabriel Duvall, Marshall still channelled an ideologically divided bench toward single-voiced expression through compromise. Remember that Marshall inherited a tribunal whose place was uncertain in the overall scheme of American government.³² The political maneuvering of the early 1800's is in many ways still unmatched in American history. It makes sense that, "Marshall's quest for unanimity was, in its way, an essential part of his concept of the judicial function, which along with nationalism and the preservation of property rights, must be considered as basic non-legal tenets in the composition of his opinions."³³ Marshall believed that the best way for the Court to ward off congressional attempts at reducing the judiciary to a secondary player was to enhance its prestige whenever possible. Federalist principles, in this way, could be assured of constitutional expression. The mode of communication employed by the Court was an effective way to achieve such enhancement.³⁴

There is no doubt, in any event, that Marshall's stratagem was noticed. Jefferson's famous letter to Thomas Ritchie, written a year after the Supreme Court's nationalist decision in McCullough v. Maryland,³⁵ spoke harshly of Marshall's Court, describing its members as, "the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."³⁶ Jefferson goes on in his dispatch to Ritchie to record his feelings regarding the manner of the Court's communication specifically. The relevant portions concerning this point are worth

³² On this see generally, George L. Haskins, "Law versus politics in the early years of the Marshall Court," 130 University of Pennsylvania Law Review 1-27 (1981).

³³ Roper, "Judicial Unanimity and the Marshall Court," 119.

³⁴ See generally, John R. Schmidhauser, Judges and Justices: The Federal Appellate Judiciary (Boston & Toronto: Little, Brown & Co., 1979), 110-16.

³⁵ 4 Wheaton 316 (1819).

³⁶ Thomas Jefferson, "Letter to Thomas Ritchie, December 25, 1820," Writings, ed. and comp. Merrill D. Peterson (New York: Library of America, 1984), 1446.

reference:

They are construing our constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet, and they are too well versed in English law to forget the maxim, "boni judicis est ampliari jurisdictionem." We shall see if they are bold enough to take the daring stride their five lawyers have lately taken.³⁷

Jefferson's assault on the miners and sappers continues, hoping that other federal statesmen who are like-minded will,

lay bare these wounds of our constitution, expose the decisions seriatim, and arouse, as it is able, the attention of the nation to these bold speculators on its patience. Having found from experience, that impeachment is an impracticable thing, a mere scare-crow, they consider themselves secure for life; they sculk from responsibility to public opinion, the only remaining hold on them, under a practice first introduced by Lord Mansfield. An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning. A judiciary law was once reported by the Attorney General to Congress, requiring each judge to deliver his opinion seriatim and openly, and then to give it in writing to the clerk to be entered in the record. A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government.³⁸

So Jefferson in 1820 was clear on the issue of the "opinion of the court." His preference was for the earlier seriatim form; he attributes the rise of the "opinion of the court," to Marshall. Two years later, in a correspondence to his own appointee to the Court, Justice William Johnson, Jefferson addressed the point further. "The subject of my uneasiness," he wrote, "is the habitual mode of making up and delivering the opinions of the supreme court of the US."³⁹ Jefferson presented some of the historical trends and influences that accompanied the practice of the "making up and

³⁷ Ibid. Note that Jefferson correctly applies the erroneous maxim, "boni judicis est ampliari jurisdictionem. [it is the duty of a judge to extend this jurisdiction.]" Lord Mansfield, in R. v. Phillips, 1 Burrow 292, explained that the true maxim should substitute the word "justitiam" for "jurisdictionem." See Herbert Broom, A Selection of Legal Maxims, tenth edition (London: Sweet & Maxwell Ltd., 1939), 44-48.

³⁸ Ibid.

³⁹ Thomas Jefferson, "Letter to Justice William Johnson, October 27, 1822," Writings, 1461.

delivering” of opinions, telling Johnson,

You know that from the earliest ages of the English law, from the date of the year-books, at least, to the end of the 11d George, the judges of England, in all but self-evident cases, delivered their opinions seriatim, with the reasons and authorities which governed their decisions. If they sometimes consulted together, and gave a general opinion, it was so rarely as not to excite either alarm or notice.⁴⁰

Jefferson believed that Lord Mansfield was the true revolutionary for bringing “the habit of caucusing opinions,” to the Kings Bench. The practice was short-lived however, for upon Mansfield's retirement Lord Kenyon ended the practice, and rightly so in Jefferson’s mind.⁴¹ Jefferson then refers to what he sees as an analogous situation in post-revolutionary America, noting that,

Mr. Pendleton was, after the revolution, placed at the head of the court of Appeals. He adored Ld. Mansfield, & considered him as the greatest luminary of law that any age had ever produced, and he introduced into the court over which he presided, Mansfield’s practice of making up opinions in secret & delivering them as the Oracles of the court, in mass. Judge Roane, when he came to that bench, broke up the practice, refused to hatch judgements, in Conclave, or to let others deliver opinions for him.⁴²

However accurate Jefferson’s historical account may be, it seems clear that he grasped some of the important effects and implications that accompany the style and manner of the judiciary’s communication. “Conclaving” is referred to negatively by Jefferson in both letters. To Ritchie, Jefferson mentioned the appearance of unanimity as undesirable; to Johnson, in addition to reiterating the negative, he offered a description of what he believes to be the positive effect of seriatim opinions. Jefferson

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid. Jefferson’s post-revolutionary example, however, is noteworthy in another respect. The juxtaposition of Roane and Pendleton is not an accidental one. Jefferson wrote his letter to Johnson during a time when questions of the authoritative supremacy of constitutional interpretation- the “WHO” questions of American constitutionalism- were at the fore. Only two years after this communication Justice John Gibson- nearly an ideological twin of Judge Roane- of the supreme court of Pennsylvania would write his famous dissenting opinion in Eakin v. Raub, 12 S. & R. 330 (Pa., 1825), a straightforward argument for legislative supremacy. See generally Walter Murphy, James E. Fleming, and William F. Harris, II, American Constitutional Interpretation (New York: Mineola, 1986), 184-254.

preferred the seriatim form for good reasons, namely that,

Besides the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning, it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgement as a precedent. It sometimes happened too that when there were three opinions against one, the reasoning of the one was so much the more cogent as to become afterwards the law of the land.⁴³

In the process of castigating this new convention of Marshall's, Jefferson discussed the very nature of the requirements asked of a Supreme Court Justice. "The Judges," he continued, "holding their offices for life are under two responsibilities only. 1. Impeachment. 2. Individual reputation. But this practice compleatly withdraws them from both."⁴⁴ The opinion of the court, as Jefferson saw it operating in these new Federalist surroundings, "shielded" the Judge from each of the only two responsibilities asked of him. The surroundings are not just an aside here, as it should be remembered that the national government as a whole was still in its infancy. Indeed, the situation in which Jefferson found himself only buttressed, he thought, his criticisms:

Some of these cases too have been of such importance, of such difficulty, and the decisions so grating to a portion of the public as to have merited the fullest explanation from every judge seriatim, of the reasons which had produced such convictions on his mind. It was interesting to know whether these decisions were really unanimous, or might not perhaps be of 4. against 3. and consequently prevailing by the preponderance of one voice only.⁴⁵

Justice Johnson replied to Jefferson less than two months later. His lengthy reply speaks volumes on the working life of the early Marshall Court, explaining the impediments to free expression that he confronted:

While I was on our State-bench I was accustomed to delivering seriatim Opinions in our Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in Cases in which he sat, even in some Instances when contrary to his own Judgement and Vote. But I remonstrated in vain; the Answer was he is willing to take the trouble and it is a Mark of Respect to him. I soon however found out the real Cause. Cushing was incompetent. Chase

⁴³ Ibid.

⁴⁴ Ibid., 1462.

⁴⁵ Ibid.

could not be got to think or write- Paterson was a slow man and willingly declined the Trouble, and the other two ((Marshall and Washington)) are commonly estimated as one Judge. Some Case soon occurred in which I differed from my Brethren, and I felt it a thing of Course to deliver my Opinion. But, during the rest of the Session I heard nothing but Lectures on the Indecency of Judges cutting at each other, and the Loss of Reputation which the Virginia appellate Court had sustained by pursuing such a Course. At length I found that I must either submit to Circumstances or become such a Cypher in our Consultations as to effect no good at all. I therefore bent to the Current, and persevered until I got them to adopt the Course they now pursue, which is to appoint some one to deliver the Opinion of the Majority, but leave it to the rest of the Judges to record their Opinions or not ad Libitum.⁴⁶

Less than eight months later, Jefferson was again in contact with Johnson, the man history would deem “the first dissenter.” Towards the end of, by Jefferson’s own admission, quite a long letter to Justice Johnson the President congratulated the Republican jurist on his insistence to produce and record his own view on cases before the Court. Jefferson’s complaints were similar in this message, saying that accountability to the public and the true presentation of unanimity or not were duties owed by the Justices to the American people.⁴⁷

Some students of early nineteenth century American history and politics might want at this point to claim Jefferson was afflicted, regarding the general operation and decisions produced by the Court, by something like sour grapes. A Federalist Court led by Marshall was inhibiting Jefferson’s grand designs for the new nation. After all, history records Jefferson’s protests over the formal manipulations of the Marshall Court only after its substantive rulings. In light of this, they may wish to dismiss these comments as merely partisan pyrotechnics. If the manner and style of reaching and publishing decisions by the Supreme Court was so important, surely another besides Jefferson had attempted to address and reconcile the question before. Jefferson notes correctly that there was such an attempt.

⁴⁶ Letter to Thomas Jefferson, December 10, 1822, Jefferson Papers, Library of Congress, Washington D.C., as quoted in Morgan, “Mr. Justice William Johnson,” 333-4.

⁴⁷ “Letter to Justice William Johnson, June 12, 1823,” in Jefferson, Writings, 1476-77.

Edmund Randolph, Attorney General during the Federalist administration of George Washington, was asked by Congress to, “digest the judiciary laws into a single one, with such amendments as might be thought proper. He prepared a section requiring the Judges to give their opinions seriatim, in writing, to be recorded in a distinct volume.”⁴⁸ Actually, the section of Randolph’s Report Jefferson is referring to reads as follows: “it shall be the duty of each justice of the Supreme Court, present at the hearing of any appeal or writ of error, and differing from a majority of the court, to deliver his opinion, in writing, to be entered as aforesaid; and that each judge shall deliver his opinion in open court.”⁴⁹ Jefferson goes on to explain regretfully that “Other business” stymied the progress of the bill. Federalist and Republican alike, it seems, had thought carefully about the cultures within the institutions they created and swore to uphold.

The Ascendance of Strategy

Competing historical and theoretical visions of judicial review have been the touchstones of constitutional inquiry for quite a long time. With the subject of judicial expression, I propose a new one. Chief Justice John Marshall’s replacement of the traditional seriatim opinion with the “opinion of the court,” in 1801 seems to contain similar properties as judicial review.

⁴⁸ “Letter to Johnson, 1822,” *ibid.*, 1462. Randolph’s Report has received a limited treatment so far. Exceptions include Wythe Holt, “Federal courts as the asylum to federal interests: Randolph’s report, the Benson amendment, and the ‘original understanding of the federal judiciary,’” 36 Buffalo Law Review 341-72 (Spring, 1987); Akhil Reed Amar, “The two-tiered structure of the Judiciary Act of 1789,” 139 University of Pennsylvania Law Review 1499-1567 (1990). Even these imaginative efforts do not mention his concern for the style and manner of the Court’s communication.

⁴⁹ H.R. Rep., 1st Cong., 3d Sess. (December 31, 1790), reprinted in American State Papers, W. Lowrie & W. Franklin eds., 1: 31 (1834). Furthermore, Randolph leaves the oath of office to be taken by a Supreme Court Justice as required by the Judiciary Act of 1789 unchanged. The 1789 wording of the oath follows: “I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent upon me... according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States.”

Moreover the institutional opinion was created for clear partisan political reasons by a single actor. This switch in the method of judicial communication is an exemplar for the belief that institutions, and the rules that regulate them, matter.

Some may wish to declare that my own rendering of the history surrounding issues of the style and manner of the Court's utterances serves as an indicator just why the touchstone of Talbot v. Seeman⁵⁰ (the first case where Marshall delivers an institutional opinion) has not been taken as seriously as the touchstone of Marbury v. Madison.⁵¹ Firstly, this case was not in fact the critical break for the practice of seriatim opinions. Jefferson's own testimony reflects that there were occasions that pre-dated Marshall's tenure when an opinion of the court was used. How can a touchstone be proclaimed if its own historical practice is uncertain? The most succinct reply to this charge would be to note that other practices instituted by the court that claim to emerge from definite moments in history- clearly invoked as touchstones by those who study them- are in fact just as nebulous as the one I have proposed. A great deal of scholarship on judicial review makes this abundantly clear. Marbury v. Madison as touchstone is invoked because the practice: (1) was detailed more clearly at that time than it had been previously, and (2) that decision represented, with the benefit of history as a guide for comparison, a distinct departure from the known meaning and range of exercise the convention had possessed to that point.⁵² Marshall's instituting the "opinion of the Court"

⁵⁰ 3 U.S. (1 Cranch) 1 (1801).

⁵¹ 5 U.S. (1 Cranch) 137 (1803).

⁵² Sylvia Snowiss makes clear the importance of these two criteria in her work on the development of judicial review. See Snowiss, Judicial Review. More directly, it is commonly accepted that the doctrine of judicial review was "proclaimed" before Marbury, only that Marshall had done so most firmly. See, among others, Hayburn's Case, 2 U.S. (Dallas) 409 (1792), and Calder v. Bull, 3 U.S. (Dallas) 386 (1798). Finally, Alexander Hamilton's Federalist no. 78 is the classic formulation of judicial authority over unconstitutional legislation. Madison, Hamilton, and Jay, Federalist Papers, 436-42.

then, with the aid of historical comparison, fulfills the criteria to be invoked as a touchstone in its own right. The more powerful objection to something like Talbot v. Seeman as touchstone is that the practice under discussion is just a small segment of a larger institutional sphere. Per curiam decision-making, so the argument goes, is just one of many conventional rules with which the Supreme Court must concern itself if it seeks to be an institution worthy of the powers bestowed upon it and the admiration and respect of the people who ultimately ratify its maintenance. My inquiries now turn to respond to these sorts of challenges.

PART II

Chapter Three: Sincerity and Judicial Power

On the one hand there is the duty placed upon the Supreme Court to instruct, educate, and guide; this is the “ideal” or “principled” position. On the other hand there is the need for the Court- as a constitutionally mandated institution- to present an edifice of strength and unity that will contribute to the support of its very authority and legitimacy; this is the institutional side, or the position of “realism” or “expediency” in American law.¹ It is in the reconciliation of this tension where the duly constituted, “judicial Power of the United States. . . vested in one Supreme Court,” derives its actual meaning.² To put it another way, if it is true that “It is emphatically the province and duty of the judicial department to say what the law is,” then the institutional conventions and constraints within which the Court operates that are significant in formulating the Court’s utterances deserve our full attention. I also would contend that these institutional procedures should comport with those fundamental principles and forms that comprise our constitutionalism, since the powers assigned to those branches are granted through the vehicle of an admittedly openly textured document.

I am by no means the first to expound upon the tensions faced by the Court as communicator, though the subject has not received the treatment it deserves.³ An effort by Joseph Goldstein is something of an exemplar for my own work. The principal question of his book, The Intelligible Constitution,

¹ I borrow the continuum between principle and expediency from Alexander Bickel. Bickel, Least Dangerous Branch, 65-72.

² U.S. Constitution, Article III, § 1.

³ See, for example, Richard Hodder-Williams, The Politics of the US Supreme Court (London: George Allen & Unwin Ltd., 1980), 93-108; David M. O’Brien, Storm Center: The Supreme Court in American Politics, 3rd edition (New York: W.W. Norton & Co., 1993), 272-410. For similar treatment of the British judiciary, see J.A.G. Griffith, The Politics of the Judiciary, fourth edition (London: Fontana Press, 1991), 38-41, 42-73, 251-329.

is one of mine: “By what criteria, by what canons of style, should [the Court’s] opinions be assessed as communications about the Constitution, whether they be majority, concurring, or dissenting?”⁴ Like Goldstein’s book, this paper is not concerned with whether a Justice “finds” or “makes” law. Indeed, it is one aim of this paper to show that, no matter what view one takes of judging or the enterprise of law, issues of judicial communication will be conspicuous and sincerity remains a critical behavioral postulate. The message here is that these problems should not be dismissed, as one well known American judge has suggested, as “time and motion” studies that do not warrant the same level of attention as those expositions dealing with interpretive theory or doctrinal/historical analyses of certain particles of the Constitution’s text.⁵ Latent practices and purposes of constitutional institutions deserve careful interrogation and demand our consideration.

The Supreme Court of the United States, then, is an institution that includes latent conventions and strives toward latent objectives that are in tension. For quite a long time, the existence of these latent procedures have been noticed and discussed. For the most part, their existence and value has been received warmly by those who studied such matters. Karl Llewellyn,

⁴ Joseph Goldstein, The Intelligible Constitution: The Supreme Court’s Obligation to Maintain the Constitution as Something We the People Can Understand (New York: Oxford University Press, 1992), 3-4. Goldstein is clearly inspired by what he sees as the confusing ramifications of the style and manner of certain modes of communication chosen by the Court. His citation of the headnote of the case, Webster v. Reproductive Health Services, 492 U.S. 490 (1989), is a telling motivation for Goldstein. I cannot resist in reproducing it here:

“REHNQUIST, C.J., announced the judgement of the Court and delivered the opinion for a unanimous Court with respect to Part II-C, the opinion of the Court with respect to Parts I, II-A, and II-B, in which WHITE, O’CONNOR, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts II-D and III, in which WHITE and KENNEDY, JJ., joined. O’CONNOR, J., . . . and SCALIA, J., . . . filed opinions concurring in part and concurring in the judgement. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined. . . . STEVENS, J., filed an opinion concurring in part and dissenting in part. . . .” Webster, *ibid.*, at 498, quoted in Goldstein, Intelligible Constitution, 17-18.

In the same vein, see Burke Marshall’s foreword where his citation of the headnote in Arizona v. Fulminante, 499 U.S. 279 (1991), demonstrates a similar motivation. Burke Marshall, foreword to *ibid.*, xi.

⁵ See Frank Easterbrook, “Ways of Criticizing the Court,” 95 Harvard Law Review 802 (1982).

the well known legal realist, in his monograph The Common Law Tradition, for example, includes a list of “Steadying Factors,” which courts should consider when deciding appeals, and he clearly imparts a positive tone regarding the worth of such devices.⁶ I choose Llewellyn's discussion of “Steadying Factors” because I believe the tone and explicit defense of such strategic devices is emblematic of the consensus among the legal community today. With instructing fellow lawyers in mind, Llewellyn offered fourteen clusters of factors that, as he claimed, “bear with much regularity on the way in which appellate cases get decided, and which combine to produce a significant steadiness in the work of a court.”⁷ Of these fourteen steadying factors, I only wish to briefly note three. These are as follows: an opinion of the court, group decision, and what Llewellyn calls general period-style.

It is heartening for someone who proposes the manner and style of communication as a sort of touchstone for constitutional inquiry that Llewellyn's sixth steadying factor is an opinion of the court. The opinion of the court, according to Llewellyn, has traditionally been characterized by four features. The first of these is the tendency of another steadying factor- “the single right answer”- to dominate the form of the opinion. Next is a “forward-looking function,” where an opinion's content must include some demonstration as to how similar cases in the future are to be decided. Third, an opinion of the court is an effort of group expression, and as such it aids in

⁶ See Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (Boston: Little, Brown and Co., 1960). See also William Twining, Karl Llewellyn and the Realist Movement (London: Weidenfeld and Nicolson, 1973), 203-69; Arno C. Becht, “A Study of ‘The Common Law Tradition: Deciding Appeals,’” Washington Law Quarterly (February, 1962): 1-34.

In The Common Law Tradition, Llewellyn admittedly exerts his energies in uncovering and explaining institutional factors of the judiciary with the hope of imparting to a colleague just how, “. . . this appellate tribunal arrive[s] at the particular and concrete answer which it reaches in the particular and concrete case... in order that he may apply the knowledge in advance to a particular concrete tribunal in the next specific appeal with which he will be concerned.” [original emphasis] Llewellyn, Common Law Tradition, 16.

⁷ *Ibid.* For a list of the “Major Steadying Factors in Our Appellate Courts,” see *ibid.*, 19.

levelling, “the unevenness of individual temper and training into a moving average more predictable than the decisions of diverse single judges.”⁸ This third feature then, by extension, leads to the fourth. The possibility for the failure of group expression conveys an added mechanism embodied in the dissent. “In real measure,” Llewellyn explains, “if breach threatens, the dissent, by forcing or suggesting full publicity, rides herd on the majority, and helps to keep constant the due observance of that law.”⁹ One other note on this factor: Llewellyn, in 1960, noted with some regret, “the growing tendency of our busiest courts to substitute in many cases memoranda or mere announcements of result for the old-style full opinion.”¹⁰ I would suggest that this development is best understood as a furtherance of the continuum described to this point regarding the manner and style of communication for the judiciary. Quite obviously, the same motivations that inspire a sacrifice of sincerity are at work in the increase of such summary dismissals. If a single institutional voice makes the law appear inexorable, a summary memorandum goes one step further by implicitly bringing into question whether the dispute was all that controversial in the first place.

On the second factor, group decision, Llewellyn really stresses only one admittedly trite feature. Succinctly, “wider perspective,” and “fewer extremes,” are more likely to result in a group than the individual.¹¹ It is Llewellyn’s additional observations that are remarkable—those instances when courts have been dominated by one individual whose exploitation of those institutional conventions has harmed the “reckonability-effects” of the bench.¹² Llewellyn here seems to be highlighting some of the

⁸ *Ibid.*, 26.

⁹ *Ibid.*

¹⁰ *Ibid.*, 27.

¹¹ *Ibid.*, 31.

¹² *Ibid.*, 32. I will not go into the definition and import of the Llewellyn’s term, “reckonability,” here. For a concise discussion, see *ibid.*, 17.

consequences for straying far along the “expedient” end of the continuum.

General period-style is a large subject for Llewellyn; a large portion of his energies are devoted to its exegesis and application. Analogous to economy types or sociological spirals, period-style,

is the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing the men of law are sensitive to and strive for, the tone and flavor of the working and of the results.¹³

Llewellyn speaks of two distinct period-styles: the Grand style and the Formal style. John Marshall is cited as a practitioner of the Grand style, whose “type-thinking,” was identified by a “constant re-examination and reworking of a heritage,” where precedents were viewed as persuasive though not inviolable.¹⁴ Llewellyn sought a return to the Grand style for the bench. For our purposes, this very brief review of period-style, as well as the steadying factors of group decision and an opinion of the court, is valuable if only for its candor. The acknowledgement or disregard of such institutional conventions carries substantial consequence. Professional or political motivations are embedded in the fabric of factors such as those Llewellyn describes. While these concerns may seem desirable for certain important realms of the legal universe, they seem altogether unsatisfactory when invoked virtually without challenge in matters of constitutional importance in a court of last resort.

Whether or not these mechanisms are effective is a question that must be secondary to the critical inquiry of whether or not such mechanisms do indeed comport with the American conception of constitutionalism. Lawyers and judges may appreciate Llewellyn for helping to guide their present and future conflicts with some degree of predictability and routinization. However important professional duties may be, they must be subordinate to the responsibility to preserve the foundations upon which the American

¹³ *Ibid.*, 36.

¹⁴ *Ibid.*

polity rests. The style and manner of the Court's communication needs to comport with American values that animate our particular version of constitutionalism before it responds to the needs and desires of lawyers and judges. Authority and prestige are important institutional interests no doubt, but these need to be weighed against equally important values of judicial accountability and law as principle.

Indeed, the success and influence of movements like legal realism and political behavioralism lies primarily in the fact that the scholars who filled its ranks provided a clear sense of direction for inquiries about law and political institutions. The trappings and theoretical justifications of law and politics, in the main, were to be eschewed; the tangible and visible products of these enterprises were the primary material for the realist/behavioralist. The realists, in fact, were reacting to the formalist justifications that dominated these disciplines, and their measured retrenchments were a welcome corrective. In 1964 Walter Murphy published The Elements of Judicial Strategy, a book that has come to be regarded as a classic in the realist tradition.¹⁵ Murphy sought to understand, given a realistic appraisal of the limitations imposed by American legal and political systems, how the behavior of a Supreme Court Justice could be legitimately maximized so as to further his policy objectives. Murphy's project was a study of judicial power, "in the sense of the capability of an individual Justice of the Supreme Court of the United States to shape, through the peculiar kinds of authority and discretion inherent in his office, the development of a particular public policy or set of public policies."¹⁶ Examining the internal practices of the Court, Murphy's Elements provides a sophisticated plan for any Justice to

¹⁵ Walter F. Murphy, Elements of Judicial Strategy (Chicago: University of Chicago Press, 1964). Four years earlier, E.E. Schattschneider published his sophisticated realist view of party and interest group conflict in America. In fact, Murphy's Elements is really an application of similar insights to the politics of the judiciary. See The Semi-Sovereign People: A Realist's View of Democracy in America (New York: Holt, Rinehart and Winston, 1960), especially, 47-61, 62-77, 97-113.

¹⁶ *Ibid.*, 2.

better realize his own agenda. Murphy's book was a capability analysis only; his analysis was careful not to profess that such capabilities were morally or philosophically right for a judge to exercise.¹⁷ Unfortunately, a great many of the descendants of the realist tradition have elevated Murphy's capability analysis into a normative standard. Law, on this pervasive neo-realist view, is no different than politics, so judges should behave strategically like any other political official.

Tensions between principle and expediency are further complicated by allotted room for evolution within the institutions constructed by the Constitution. A branch of the federal government one day may be called upon to meet demands that at an earlier time may have been considered beyond the scope of exercise for that institution. To rephrase the point, "The judicial Power of the United States," today may not today envision the same bounds surrounding its exercise that it once did; it may not (nor is it required to) mean the same thing at two different points in time. Some of the best thinking on such temporal considerations for constitutionally mandated institutions can be found in a concise treatise by Jeffrey Tulis, The Rhetorical Presidency. Tulis' work is also uncommonly helpful here since it takes on board the importance of communication, though differing both in degree and kind with the judiciary's brand of communication, in the history of the institution being studied- in this case the executive.¹⁸ Perhaps most fundamental to Tulis is the insistence that ideas are not epiphenomenal, that thought constitutes politics. Indeed, though his central claim is that shifts in uses and occasion of rhetoric by the chief executive represents a transformational break rather than developmental shift of the institution, Tulis makes it plain that, "To comprehend this sort of change- indeed, to identify it as a change- one must be prepared to treat the political order as an

¹⁷ Ibid., 202.

¹⁸ Jeffrey K. Tulis, The Rhetorical Presidency (Princeton: Princeton University Press, 1987).

arena where ideas matter.”¹⁹ That is precisely why dealing with subjects of constitutional communication are so complicated. Tulis explains that,

The relation between fundamental doctrines of governance and presidential rhetoric is more complex than simple cause and effect because rhetoric is not only the result of various ideas, but also the medium for their expression. Rhetorical practice is not merely a variable, it is also an amplification or vulgarization of the ideas that produce it.²⁰

In sum what I am suggesting here is that Tulis’ observation need not be confined to presidential rhetoric; it holds equally for the style and manner of communication employed by the judiciary. Indeed, Tulis’ observation applies to any communicative practice conducted by a constitutionally mandated institution, and is a very good fit for an institution so closely linked to the law.²¹ Judge Richard Posner supports the variation I am suggesting when he explains that, “The reason why rhetoric or style is important in law is that many legal questions cannot be resolved by logical or empirical demonstration. . . . Maybe the art of judging is inescapably rhetorical, and a failure to appreciate this fact is a shortcoming of the school

¹⁹ Ibid., 16-17.

²⁰ Ibid., 13.

²¹ Tulis also employs a second vehicle in his book, reducing his explanation of an institution founded by a text but expected to govern for generations as being, “buffeted by two ‘constitutions.’” Ibid., 17. As this is a major component of Tulis’ work however, the theme is expressed throughout. Also see generally on this and other observations, Joseph M. Bessette and Jeffrey K. Tulis, eds., The Presidency in the Constitutional Order (Baton Rouge: Louisiana State University Press, 1981). This expansion or duplication is a device employed by many who ponder constitutional matters. David P. Franklin, for example, argues for a constitution as both “concept and construct.” See Franklin, Extraordinary Measures: The Exercise of Prerogative Powers in the United States (Pittsburgh, PA.: University of Pittsburgh Press, 1991). Chief Justice Vinson’s dissent in the famous steel seizure case also reflects the application of something like a theory of duality. Vinson in this case read the Constitution as a document coated with litmus, where certain portions of the text may become highlighted depending upon the elements in which it finds itself surrounded. Youngstown Sheet & Tube Co. v. Sawyer (C.J. Vinson, dissenting), 343 U.S. 579 (1952).

At some point, duality or not, students of the Constitution on this subject are all trying to legitimate latent institutional practices by demonstrating their adherence (or lack thereof) to those principles and forms that animate the American version of constitutionalism.

of legal formalism.”²²

American Constitutional Power: Illustration and Definition

Viewing the Constitution as a plan of government that was overwhelmingly concerned with organizing and regulating power is a difficult proposition. How is one to identify such powers or to assess their meaning or import? This kind of inquiry is ultimately tied to the basic query of what kind of thing a constitution is. Most of the formalism that pervades much of American legal education is unhelpful. It is now assumed that the Constitution has an obvious and precise utility; early in our constitutional history, this was not the case. Moreover, what counts as constitutional “material” is still not a settled question. Zeroing in on a specific clause of the constitutional text, a pervasive tactic today, operates under the assumption that these sorts of questions be reconciled.

A 1798 case, Calder v. Bull,²³ offers important lessons for students of the Constitution in these respects. The legislature of the state of Connecticut enacted a law granting a new hearing in a probate trial, setting aside a decree of a court which had refused to record a will. The new hearing resulted in an approval and recording of the will. The Calder family, who would have inherited the property had the will been disapproved, challenged the legislature’s action as a violation of Article I, Section 10 of the U.S. Constitution, which banned ex post facto laws. The state superior court and the Connecticut Supreme Court of Errors rejected Calder’s

²² Richard Posner, Law and Literature: A Misunderstood Relation (Cambridge, Mass.: Harvard University Press, 1988), 286, 292. Posner’s sixth chapter, “Judicial Opinions as Literature,” as a whole elaborates this point. To only apply ‘scientific’ standards to judicial expression, for Posner, would result in consigning Justices Marshall and Holmes to the dustbin.

²³ 3 U.S. (Dallas) 386 (1798). Facts of this case and subsequent citations are taken from the selected portions of the opinions in Murphy, Fleming, and Harris, American Constitutional Interpretation, 82, 86-90. For a brief summary of the historical importance of Calder, see Kermit L. Hall, ed., The Oxford Companion to the Supreme Court of the United States (New York: Oxford University Press, 1992), 114-15.

argument. Calder then obtained a writ of error from the U.S. Supreme Court.

The legacy of Calder has been controversial, but most agree that those participating in the case are divided by the rationales illustrated in the opinions of Justices James Iredell and Samuel Chase. For Iredell the text of the state and federal constitutions was paramount, for a textual manifestation of constitution allowed the people that comprise the United States, “to define with precision the objects of legislative power, and to restrain its exercise within marked and settled boundaries.”²⁴ The nature of social contracts and republican principles notwithstanding, the corollary to Iredell’s rationale of textual paramourance was that if products of legislatures were passed, “within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgement, contrary to principles of natural justice.”²⁵ When Iredell looked at the Constitution, he saw a document.

For Chase, on the other hand, the text was epiphenomenal; where Iredell saw the Constitution as a document, Chase saw it as a polity. “There are certain vital principles,” Chase explained, “in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power.”²⁶ Chase saw the Constitution as including a kind of codification of certain principles of natural justice. The next immediate move for Chase was to proclaim the clear paramourance of principles over the forms that enshrine them. To put it tersely, when you codify principles of natural law, what is it that binds you- the codification, or those principles? Chase voiced his preference towards the latter, declaring, “An act of the legislature (for I can not call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative

²⁴ Murphy, Fleming, and Harris, American Constitutional Interpretation, 89.

²⁵ *Ibid.*

²⁶ *Ibid.*, 87.

authority.”²⁷ If the Constitution (momentarily) was seen as a dollar bill, then Iredell preferred a gold standard while Chase was more comfortable with monetary instruments gaining their value by fiat.

Whatever one may think of these two views, it is clear that with respect to constitutional interpretation, they are nearly polar opposites. For those not familiar with the case, it may then be surprising to learn that on August 8, 1798, the Supreme Court decided unanimously to affirm the decree of the Connecticut Supreme Court of Errors. Justices William Paterson and William Cushing along with both Chase and Iredell (Chief Justice Oliver Ellsworth and Justice James Wilson did not participate) rejected Calder’s argument. The brand of formalism that pervades American legal institutions might approach Calder with this unanimity in mind, holding that all four agreed that the Constitution’s Ex Post Facto Clause was limited to criminal statutes. The response must be made here that Calder v. Bull was not only about matters ex post facto, perhaps not even chiefly. Chase and Iredell both vote the same, but the visions and rationales that compelled their decision were radically dissimilar. Indeed, the argument could be put rather cogently that Chase’s reasoning does not even require the existence of an Ex Post Facto Clause.²⁸ It is one of the central claims of this paper that the sort of competition and juxtaposition of reason that took place between Chase and Iredell in Calder v. Bull was, distinctively, “The judicial Power of the United States.” In matters constitutional, both lawyers and laymen alike know that reasons bind the future even more firmly than the votes that are compelled

²⁷ Ibid.

²⁸ I am not here finding a superior position for Chase’s opinion, as some may fairly add that a rationale like Chase’s does not even have need for a constitutional text. Both Iredell and Chase have difficulty reconciling the tension that seems to exist a priori in the world of American constitutionalism- between competing values of “positivism” and “structuralism.” I borrow these terms from William F. Harris, II, “Bonding Word and Polity: The Logic of American Constitutionalism,” 76 American Political Science Review, 34-45 (1982). Also see idem, The Interpretable Constitution (Baltimore: Johns Hopkins University Press, 1993).

by them. At a more macroscopic level than most legal commentary appears to countenance, the tension between principle and expediency reveals itself plainly in the conversation between Chase and Iredell; their colloquy is the underemphasized, principled end of judicial power.

The seemingly inexorable way to view judicial power and law today is to pursue an expedient claim of institutional protection and supremacy for the judiciary. The Court speaking whenever possible in one voice surely addresses this expedient end, in one way lending a weight of legitimacy by displaying a minimum of dissent as to both result and the rationale which “compels” it. The cost of this, however, is to the principled half of the tension. This sort of sacrifice is not to be taken lightly, nor in my view does it serve the Court’s best interests. The conventional wisdom seems to operate according to a principle that a minimum of dissent conveys a reciprocal sense of consent for the institution. This sort of thinking is flatly misguided; it fails to comprehend the different qualities that generate legitimacy for specific governmental institutions. Owen Fiss highlighted this distinction, explaining that, “The legitimacy of particular institutions, such as courts, depends not on the consent- implied or otherwise- of the people, but rather on their competence, on the special contribution they make to the quality of our social life.”²⁹ If Fiss is right about this, then the competent judge should prepare himself for the task of adjudication. Undoubtedly, fashioning a vision of just what law is and acquiring knowledge of the qualities that characterize adjudication would be important parts of that judge’s preparation.³⁰ These are subjects to which we shall now turn.

²⁹ Owen M. Fiss, “The Supreme Court 1978 Term- Foreword: The Forms of Justice,” 93 Harvard Law Review 38 (1979). This comment has special relevance for the judiciary and style and manner of its communication. Fiss makes plain that, “the judge’s obligation to participate in a dialogue,” is one of two special traits that lend to the judicial branch the weight that gives it the authority to, “constantly strive for the true meaning of the constitutional value.” *Ibid.*, 12-13.

³⁰ Another component of that preparation might be for the judge to gain an understanding of the relationships and dynamics of power within the legal-political system in which he finds himself. The phenomenon of power is a topic that deserves,

Visions of Law

Many of the disputes in jurisprudence that concern lawyers and academics in the United States and Great Britain stem from a dichotomous

and has received, far more treatment than I will give here. Power has proved itself so unwieldy as a topic of discussion precisely because in the language of science, discussions of power tend toward circularity. Roderick Bell explains that, to overcome the obstacle of circularity, "At least one of the factual words must be 'primitive,' in the sense that is undefined within the theory. Its meaning must be given ostensively; it must be part of our experiential vocabulary." Furthermore, these primitive words must offer as "unequivocal" an experiential meaning as possible; otherwise, the "intersubjectivity of the theory is threatened." See Bell, "Political Power: The Problem of Measurement, in Roderick Bell, David V. Edwards, and R. Harrison Wagner, Political Power: A Reader in Theory and Research (New York: The Free Press, 1969), 13-27.

Keeping this in mind, the following restatement here of the formulation of power put forth by Robert A. Dahl is helpful: "A has power over B to the extent that he can get B to do something that B would not otherwise do." "The Concept of Power," Behavioral Science 2 (July, 1957): 202-3. Dahl's idea of power is a relation among people, and as it is really a view of political power it is more precisely a relation among certain political actors. Moreover, Dahl's view informs the student of power of one of the pluralist school's central guidelines: power means "participation in decision-making," and studies of power should be focused on specific issue areas and actual behavior.

Dahl's formulation seems to overcome the difficulty of circularity. Dahl's formulation of political power, however, is unsatisfactory in an important way. Basically, Dahl's theory of power carries with it the assumption that the American polity is explained accurately by a theory of representative democracy, and this is its crucial flaw. This sort of criticism is levelled at Dahl most succinctly by Peter Bachrach and Morton Baratz, who posit an additional component of power that seems to fit the constitutional democracy of the United States quite well. Actual decision-making can not be viewed as a proper indicator of power because there are institutional constraints that limit the scope of such decision-making. Certain mechanisms exist that may be at work before such actual participation in decision-making takes place. Bachrach and Baratz suggest that a student consider, "the dynamics of non-decisionmaking; that is he would examine the extent to which and the manner in which the status quo oriented persons and groups influence those community values and those political institutions. . . which tend to limit the scope of actual decision-making to 'safe' issues." By asking first about the particular "mobilization of bias," in the institution under scrutiny, as Bachrach and Baratz suggest, the student of power can distinguish between "key" and "routine" political decisions. See Peter Bachrach and Morton S. Baratz, "Two Faces of Power," 56 American Political Science Review 952 (1962).

Finally, with these notes and recommendations in mind, I would posit a formulation of political power that is best suited for American constitutionalism. This is an idea of power based upon the relations among constitutionally mandated institutions of government:

"A' has power over 'B' to the extent that 'A' can alter the limits of thought and action that represent 'B's' functions and purposes."

Where "democracy" was Dahl's "primitive term," of choice, this view of power would choose "constitution" as the place where our empirical vocabulary provides the ultimate source of scientific meaning. It follows naturally that a theory of power that places the source of its empirical meaning in such a term suffices only for the regime under which those empirical perceptions exist. This theory above is therefore best described as a theory of American power, or American constitutional power. This conception of power lies behind the arguments of the pages that follow.

view concerning the genre of law.³¹ This split occurs both between and among various schools of legal theorists. The first view- forwarding an essentially external view of law- is concerned primarily with the certainty and stability of law. On this view law is a phenomenon that dispassionately and impartially acts upon some individual or group. Penal laws are often a favorite example of the externalist, though other types of law also serve. The law for the externalist is distinct from other forms of social coordination because it is generated by an institution which, during singular moments when the procedures of the law are properly in motion, is detached (even if only fictionally) from the persons who are subject to it and engages in unilateral communication. This detachment is critical to the externalist; it provides the theory with a solution to the possible conflation of law with other influences upon human behavior and in that way bounds law's content. There is also an important correlative property of the law according to this view: just as action upon a subject is a necessary condition for confirmation of law, the absence of such action necessarily confirms law's non-existence.

The opposing view- recognizing law as essentially an internal sense - is mainly concerned with the integrity and aspiration of law. Seen in this way law is not essentially an event but rather an enduring practice or enterprise for both the individual practitioner and the community. The inevitable penumbral emanations which accompany the historical and empirical substance of "externalist" law are the internalist's primary material (with Common Law principles being a good example). The internalist seems to thrive from the fact that efforts of social coordination have never been able to completely and systematically write down- that is,

³¹ This encapsulation is much indebted to debates among scholars of legal theory at various points in time. See for example H.L.A. Hart, The Concept of Law, second edition (Oxford: Clarendon Press, 1994), 56-7, 88-91, 242-3; L.L. Fuller, The Morality of Law, revised edition (New Haven: Yale University Press, 1969), 3-9, 33-38, 41-44, 95-118.

prospectively plan and announce- the rules of the ensuing social coordination. Even further, the internalist would view such effort as detrimental to the very purposes of law. An inherent participatory and interactive quality of all legal communication is the hallmark of the internalist. Whereas the external view seems well suited to deal with problems of legal identification, the internal view seems more capable of answering questions of legal adaptability.³²

The heart of the matter, of course, is that in disputes about law both identification and adaptability are problems of a similarly high rank. Human societies use law both to identify the relationship and regulation of their social coordination as well as adapt that same relationship and regulation to novel and fluid conditions. This is why specific concepts of law forwarded by purely external and internal proponents are ultimately equally unsatisfactory. "Law inherently has an open texture which leaves a discretion," as a pivotal notion within an externalist's theory is as conceptually indeterminate and unpalatable as the essential internalist position that, "law is created by elements of purposive interaction."³³ In fact, it is the reconciling of these two views that is the basic task of our legal institutions. Indeed, there is a great deal of promise for legal theory if the underpinning assumptions and animating principles of these institutions are uncovered and philosophically explained. For it seems clear that a legal system (and particularly the legal system of the United States) sets up different institutions to perform this reconciliation precisely because each institution performs different tasks and starts from a distinct authoritative

³² John Finnis provides a similar description to mine: "So it is that legal order has two broad characteristics, two characteristic modes of operation, two poles about which jurisprudence and 'definitions of law' tend to cluster. They are exemplified by the contrast between Weber's formal definition of law and his extensive employment of the term 'legal'; and they can be summed up in two slogans: 'law is a coercive order' and 'the law regulates its own creation'." John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980), 270.

³³ I am, of course, paraphrasing two pivotal distinctions made by H.L.A. Hart and L.L. Fuller, respectively. See Hart, Concept of Law; Fuller, The Morality of Law.

basis. As the opening salvos of this thesis will indicate, the legal function under analysis here is adjudication. Basically, the larger conceptual claim being argued is that judicial authority is not compatible with certain behavior and in fact requires adherence to a specific culture of conduct that flows from the foundation of that authority. This culture can be elicited from the nature and function of adjudication itself, and may vary according to the general view of law to which one adheres.

The Qualities of Adjudication

There are five main distinguishing characteristics of adjudicative behavior which present themselves when analyzing Anglo-American judges and the institutions in which they reside. The first of these is the particularity of adjudication. Judges, though they are indeed law-makers, must make law gradually, within the confines of a set of particular facts (“interstitially,” Oliver Wendell Holmes explained). Unlike the generality that may characterize other executive or legislative tasks of law, judicial officers deal with matters inherently contextual. Secondly, adjudication is a function that resolves actual, that is to say “live” disputes. As opposed to the abstract theorizing and assumption-making that may accompany any sort of legislative or executive decision, the “liveness” of adjudication is central. This does not deny the existence of such theorizing by judges, only that they must immediately apply such visions to an actual set of disputants. These two characteristics then combine to produce a third: the mandatory hearing (and, as will be developed more fully, the corollary of an articulate response) a judge must provide in any case that comports with the criteria of adjudicative forms. It is often taken for granted that, excepting issues of a prejudicial nature, judges may not “skip” or otherwise rule themselves out of a case because of its difficulty or explosiveness. Indeed, this is a very sharp double edge that judges must traverse. On the one hand, a judge who recuses

himself unnecessarily is viewed to have shirked his judicial responsibility; on the other, participating in cases where a conflict of interest or similar circumstances may be present is also cause for criticism because of the importance of impartiality in judicial behavior. Fourth, adjudication (and especially appellate adjudication) provides guidance for other (and especially lower) courts. The fact that a superior tribunal decided a similar case in a certain way for certain reasons provides a reason for other courts to do same. Finally, and perhaps most importantly, it is the hallmark of adjudication that it is not enough to only produce a result when deciding a case; a judge must also provide a rationale. When a legislator casts his vote on a matter of public policy he may defend his behavior by simply saying, "I felt like it," or, "it was incumbent upon me to do so," or even make no defense at all. There is no penalty (except, perhaps, the future wrath of the constituency he serves) for simply producing a legislative result exclusive of any animating rationale. A judge qua judge must meet an additional requirement.³⁴

These five qualities of adjudication are essential; in their absence, a judge is no longer adjudicating but doing something else. Different authors emphasize different consequences of these qualities, and I no doubt will continue that tradition here. "The Forms and Limits of Adjudication," by Lon Fuller for example, is an analysis of adjudication which originates from the proposition that, "the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."³⁵ Rather than place primary focus on the manner of

³⁴ This characteristic of adjudication is a controversial one for the legal academy, as it marks a divide between those who believe (like Fuller) that law is a reasoned process and those who claim law is merely fiat (like the Critical Legal Studies movement). See generally Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," 73 Harvard Law Review 1-35 (1959), 15-16.

³⁵ Fuller, "Forms and Limits," 364. [emphasis added]

participation engaged by the affected parties, I would designate the office of the judge as the distinguishing characteristic of adjudication. Fuller anticipated students who would do this, and offers a reply to the judge-centered view. The problem with placing the central focus upon the office of the judge for Fuller is the slipperiness of the term “judge.” “[T]here are people who are called ‘judges’ holding official positions and expected to be impartial who nevertheless do not participate in an adjudication,” Fuller explains, and he gives examples of so-called “judges” at an agricultural fair or art exhibition as examples.³⁶ The key distinction between these “judges” and true adjudicators is that, “their decisions are not reached within an institutional framework that is intended to assure the disputants an opportunity for the presentation of proofs and reasoned arguments.”³⁷

There are two basic replies to Fuller’s objection I would enter at this juncture. Firstly, Fuller’s strict reliance on the conventional language of “judge” is troubling. It is true that instances of decisionmaking may be performed by someone called a “judge” who does not engage in “adjudication,” as either Fuller or I would use the term. This may be due to the fact that the contestants are not in need of an actual judge, but still might refer to the decision-maker as a “judge” because the behavior of that individual may closely approximate that of an actual judge. There are many types of behavior that characterize the role of a judge that are not essential or even necessary to the process of adjudication. Fuller simply casts his net too widely; this is unnecessary and actually confuses the issue.³⁸

A second response that I believe is more important directly attacks Fuller’s adherence to the key distinction of participating in an

³⁶ Ibid., 365.

³⁷ Ibid.

³⁸ I draw a formal distinction between adjudication represented by a delegated governmental power and adjudication derived from the consent of the litigants, like arbitration. I believe these are two generically different forms of adjudication, whereas Fuller for the purposes of his discussion does not.

“institutionally defined and assured” decision. Where is one to find the institutional definition and assurance that a court provides? There is only one storehouse of institutional accretion, context and history (or “tosh” as Fuller calls it) that can provide even the genesis of an answer: the office of the judge.³⁹ Fuller seems content to ground his definition of adjudication in instrumental terms. As he puts it, adjudication is a “device which gives formal and institutional expression to the influence of reasoned argument in human affairs.”⁴⁰ It should be clear by now that this bedrock of formal and institutional expression in fact rests upon the acceptance of parameters of acceptable judicial behavior. Fuller himself reveals the accompanying context of his grounded definition when he later exclaims that, “The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.” At bottom then, Fuller’s “proper province” for adjudication is partial, emphasizing its authoritative aspects while obscuring the discursive, educational elements.

In fact, Fuller’s entire analysis provides only a vague distinction between the office of the judge and that of the parties. The article as a whole seems to nearly equate the importance of the two, since both are necessary to provide the essential characteristic of institutional expression of reasoned argument. The parties offer a “reasoned argument;” the judge a “principled decision.” But, from these assumptions, where does the judge (for Fuller) acquire what is a qualitatively different sort of authority? Initial authority may be conferred upon a judge by an act of appointment or election, but how is his authority continually maintained? Indeed, an answer to these kinds of questions must (and Fuller in fact does) rely on expectations of proper judicial behavior. Fuller, for one, posits the valid argument that even in the

³⁹ See generally Owen M. Fiss, “The Supreme Court 1978 Term- Foreword: The Forms of Justice,” 93 Harvard Law Review 1-58 (1979). This point carries even greater weight within a government characterized by, to borrow Professor Neustadt’s phrase, separated institutions sharing powers.

⁴⁰ *Ibid.*, 366 [emphasis added].

absence of clear, definite rules, adjudication can still be initiated and effective. Surely this must point towards a social consensus that exists apart from the formal, institutional expression of adjudicative ideals.

To place the primary emphasis of adjudication in the role of the judge means that the analysis must turn to an elucidation of judicial conduct. Most scholars (and Fuller, for one, is no exception)⁴¹ point out that the ideal of impartiality very quickly surfaces as essential adjudicative behavior. Fuller asks some basic questions of adjudication, each of which reveals the centrality of impartiality. Those relevant inquiries, followed by his basic responses to them, may be paraphrased as follows:⁴²

1. May the judge act to initiate a case on his own? No.
2. Must the decision be accompanied by a rationale? Not necessarily.
3. May the judge rest his decision on a rationale not argued by the parties? No.

Fuller's argument for each of these questions points toward the central ideal of impartiality. The problem with this argument as a whole is that it is conventionally unsatisfactory and that it in the end demonstrates that "impartiality" proves to be too rigid a term to perform its central task. Take Fuller's first question. "It is generally impossible to keep even the bare initiation of proceedings untainted by preconceptions about what happened and what its consequences should be," Fuller explains, and therefore the judge should not initiate an adjudication.⁴³ How can Fuller reconcile this animating rationale with the current practices of the United States Supreme Court, for example? The reality of an almost wholly discretionary agenda-setting capability of the Court seems at odds with this view, and hence even

41 *Ibid.*, 365.

42 *Ibid.*, 385-391.

43 *Ibid.*, 387.

the possibility of “impartiality.”⁴⁴ What good is it to be “impartial” on the merits if the large majority of high-level appellate adjudication is activated by a discretion which must inevitably “taint” the proceedings on Fuller’s terms?

On the second question, Fuller does not fully subscribe to the idea that a judge qua judge must provide a rationale in addition to a result. This largely can be attributed to the fact that Fuller includes matters of arbitration derived from relationships of reciprocity as falling within matters of “adjudication,” a broader definition which, as discussed previously, does more harm than good. Though this may preserve the characteristic of “impartiality,” the role of the judge in its ideal sense still seems to suffer. Not providing a rationale allows for an unacceptable discretion for the parties when future actions are considered and gives the appearance of adjudication as operating on the basis of a judge’s preferences rather than her judgments.⁴⁵ It is most surprising that Fuller- who seems elsewhere to prize lawfulness as an ideal we continually strive towards⁴⁶- would ever permit the judge to command a result without providing a motivational standard.

Finally, Fuller maintains that only the arguments of the parties should (ideally) realize the rationale of a judge. This ideal, however, is problematic as well, and Fuller realizes this when he provides the observation that, “An issue dealt with only in passing by one of the parties, or perhaps by both, may become the headstone of the arbiter’s decision.”⁴⁷ Indeed, judges often

⁴⁴ It should be inserted here that Fuller is aware of, and the whole of the previous chapter points out, a useful distinction between matters of law and equity. But this distinction is not consistently heeded by Fuller for the problems of “equity adjudication” seem to unravel any workable concept of “impartiality.”

⁴⁵ There will be more to be said of the distinction between preferences and judgments later. See text *infra*.

⁴⁶ See generally Fuller, “Positivism and Fidelity to Law- A Reply to Professor Hart,” 71 Harvard Law Review 630 (1958).

⁴⁷ *Ibid.*, 387.

provide lawyers with a ratio decidendi neither expressly nor even remotely tied to their arguments. At times these holdings are characterized as random because of this- at others, brilliant. Either way these instances do demonstrate that judges are indeed “partial” as to emphasis, at the very least.

What I am trying to show (and what Fuller at times appears to concede) is that “impartiality” as our essential standard of conduct for appellate judges is a failure. We do not ask our judges to attain this quite rigid ideal. For a constitutional democracy like the United States, that seems to pride its awareness of all the ingredients that must be considered in matters of government, this undue emphasis and lack of realism will not do.⁴⁸ More recent trends in the field of jurisprudence seem to acknowledge this, as they point to emblems of “integrity,” or “fidelity” when characterizing the nature of law. If we are going to critique our judges, we should at the very least be clear as to what we demand of them. Our next task then is to formulate more precise demands. The actual process of appellate adjudication is a good place to begin.

Just as with Fuller’s discussion of adjudication in “Forms and Limits,” most views do not account for the fact that appellate adjudication is essentially a process of group decision-making. In 1982 professor (now Judge) Frank Easterbrook, by drawing upon Kenneth Arrow’s Impossibility Theorem, suggested that because of its inherent collective properties of decisionmaking, the Supreme Court should not be expected to behave consistently.⁴⁹ Before embarking upon a discussion of group adjudication

⁴⁸ Fuller is aware of this too. He comments in another section that “partiality” is all too common in adjudication: “I refer to the situation where the arbiter’s experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from some single vantage point.” Fuller goes on to criticize the court decisions in commercial cases for such a “lack of judicial ‘feel’ for the problems involved.” *Ibid.*, 391.

⁴⁹ Frank H. Easterbrook, “Ways of Criticizing the Court,” 95 Harvard Law Review 802 (1982). I am indebted to Sanford Levinson of the University of Texas at Austin for pointing out Easterbrook’s article to me. For the original explanation of the Impossibility Theorem, see Kenneth J. Arrow, Social Choice and Individual Values (New York: John Wiley & Sons, Inc., 1951).

according to Arrow via Easterbrook, I should disclose at the start that my entire argument about judicial behavior rejects at a very basic level the approach taken by public choice theorists. This rejection will become very plain shortly, but for the moment I suspend my rejection in order to explain that, on their own terms, public choice theorists place an extremely high value upon individual decisionmaking, given certain realistic institutional conditions that are evident in appellate judicial decisionmaking.

Easterbrook's discussion was the first to discuss in detail the ramifications of collective decisionmaking for appellate adjudication if appellate adjudication is conceptualized as an exercise in preference aggregation. Because of Easterbrook's cogency, below I lay out verbatim his brief explanation of Arrow's Theorem:

Arrow's Theorem, for which he won the Nobel Prize, considers a system of pooling individuals' conclusions to produce a collective decision that obeys the following five conditions:

1. Unanimity: If all people entitled to a say in the decision prefer one option to another, that option prevails.
2. Nondictatorship: No one person's views can control the outcome in every case.
3. Range: The system must allow every ranking of admissible choices, and there must be at least three admissible choices with no other institution to declare choices or rankings out of bounds at the start.
4. Independence of Irrelevant Alternatives: The choice between options A and B depends solely on the comparison of those two.
5. Transitivity: If the collective decision selects A over B and B over C, it also must select A over C. This is the requirement of logical consistency.

The theorem proves that no voting system can satisfy the five conditions simultaneously.⁵⁰

Easterbrook's application of the theorem to judicial behavior leads him to the conclusion that the condition of Transitivity must "drop out" because the other four conditions are each highly desirable for the Court to satisfy. Indeed, for Easterbrook, the first two conditions "appear to be essential parts of any method of judicial decisionmaking."⁵¹ They may

⁵⁰ Ibid., 823.

⁵¹ Ibid., 824. Easterbrook does remark that the Supreme Court, as per Article III of the Constitution, could only have one Justice. If this were the case, the Nondictatorship condition would not hold and the other four conditions could be satisfied. In the same vein, Easterbrook also later adds that a critic could expect

appear to be, but does the second condition of Nondictatorship in fact hold for the Supreme Court when considering appellate adjudication in its fullness as producing both outcome and rationale? The presence of conventions such as opinion assignment must negate this condition, at least on the “rationale aspects” of judicial power. A Chief Justice (and John Marshall’s career, for one, is proof of this) could control or at least significantly manipulate the rationale outcome in every case by strategically placing himself in the majority so as to manipulate such conventions. Easterbrook commits himself to a rather “result-oriented” view of the subject in his declaration.

The third condition is explained as holding (persuasively) because most legal disputes do conform to a multi-peaked ordering of at least three broad choices. Also, the appointment process of Justices as well as our normative view of the Supreme Court as a “parameter-setting” institution implies that the institution itself should not rule certain (or most) choices out of bounds from the start.⁵² The fourth condition is as basic a requirement for Easterbrook as the first two: “In any judicial system, irrelevant alternatives should be disregarded.”⁵³ Easterbrook treats this condition rather summarily and again without a great deal of realism. A case can surely be made that there are many instances where the Court is accounting for irrelevant alternatives in Arrow’s sense. Specifically, “institutional considerations” such as prestige and appearance are most definitely irrelevant alternatives in light of the essential characteristics of adjudication. The fourth condition in many instances of Supreme Court history has not held. Easterbrook is right that it should; that is exactly the

consistency from an individual Justice for the same reason. For Easterbrook then, by adding Justices to the Supreme Court there is a commitment to collective choice. See *Ibid.*, 824 at note 51, 832.

⁵² For Easterbrook’s specific discussion of why the Range condition does and should hold, see *ibid.*, 825-30.

⁵³ *Ibid.*, 825.

point!⁵⁴ The question in light of this realization is to ask how a process can be “institutionalized” without the ensuing institution itself becoming a “relevant alternative” or consideration?⁵⁵

We leave this last question for later, for in any event, Easterbrook’s analysis is quite persuasive on the applicability of Arrow’s conditions to the Supreme Court if his assumptions are allowed to stand momentarily. This leaves the student in the disappointing position that the Court should not be expected to meet the Transitivity condition; “cycling,” “path dependence,” and “strategic voting” are unfortunate but probable consequences of collectivizing adjudication.⁵⁶ Does this mean that the Court can not behave consistently? Easterbrook’s answer to this, again with help from Arrow, is plain: “Transitivity is the condition of logical ordering plus path dependence: if value A dominates B and B dominates C, then A must dominate C. Without transitivity, consistency is impossible.”⁵⁷ Now this is a serious charge, and- as Easterbrook himself recognizes- if true would disarm not only many of the Court’s critics but also prominent legal theorists who seemingly depend upon the transitivity condition for their explanations of adjudication and law.⁵⁸ Fortunately for them, Easterbrook’s connection between transitivity and consistency, and thus between collectivity and

⁵⁴ Easterbrook specifically notes that forms of “strategic voting” such as logrolling could negate the fourth condition. *Ibid.* There is no reason to exclude considerations of coalition-building generally from such a list.

⁵⁵ It is my contention that a proper philosophical understanding of common law adjudication achieves this end if it is permitted to do so. As will be discussed later, the genius of American political theory was to incorporate this understanding into a polity characterized by many-voicedness.

⁵⁶ Cycling: “Majority voting systems may be unstable when there are more than two possible outcomes and different voters do not rank the outcomes in the same order.” Path dependence: “the sequence in which issues are decided frequently controls the outcome of the process.” Strategic voting: “any voting system can be manipulated by people who do not honestly state their positions.” See “Criticizing the Court,” 815-23.

⁵⁷ *Ibid.*, 830.

⁵⁸ Easterbrook in a footnote names Ronald Dworkin and Lon Fuller as two such theorists whose work would be undermined if the “no consistency without transitivity” proposition were to hold.

consistency, was shown to be erroneous. Cursorily citing additional public choice literature Easterbrook contends that, “no voting system can be designed that is proof against strategic voting and the problems it causes.”⁵⁹ The inevitable result is that- as many a social scientist has learned- there is no ideal voting procedure. Easterbrook, it would appear, leaves a critic of the Court in an awkward position; the force of any charge of institutional inconsistency is diminished because inconsistency is inevitable in any such institution.

Fortunately, there is a rebuttal to Easterbrook’s rather grand manoeuvre. In 1986, Lewis Kornhauser and Lawrence Sager sought to address the ramifications of collective choice on consistency and authored an article on group adjudication.⁶⁰ In “Unpacking the Court,” Kornhauser and Sager distinguish three types of group decisionmaking, termed “preference aggregation,” “judgment aggregation,” and “representation.” For our purposes, the notable claims of Kornhauser and Sager are as follows: (1) appellate adjudication is an enterprise in “judgment aggregation,” and (2) a court of multiple judges can behave consistently- if not coherently. Both claims directly respond to Easterbrook, as the authors intend. To understand the force of either of these claims however, a brief review of Kornhauser and Sager’s arguments is necessary.

Preferences are defined concisely by Kornhauser and Sager as “limited and sovereign claims,” which means that they are value-laden and final when pronounced. Judgments, on the other hand, forward “a proposition to which all other right-thinking persons who confront the issue must adhere.” Judgments, unlike preferences, are neither limited nor sovereign. The two individual preferences, “I [person A] prefer skiing; I

59 “Criticizing the Court,” 822.

60 “Unpacking the Court,” 96 Yale Law Journal 82 (1986). I am indebted to professor Ronald Dworkin of Oxford University for pointing out Kornhauser and Sager’s work on multi-judge appellate adjudication to me.

[person B] prefer football,” are thus different from those same two individuals’ judgments, “[A:] skiing is the healthier activity; [B:] football is the healthier activity.” The latter claims are incompatible and give the speakers reasons to reconsider their judgment, whereas the former claims can rest finally and unproblematically in opposition to one another. “At the core of the distinction between expressing a preference and rendering a judgment,” Kornhauser and Sager explain, “lies the proposition that some questions have ‘right’ or ‘correct’ answers.”⁶¹ This firm separation of preferences and judgments is of course at odds with philosophical schools which claim more or less of a fusion of the two. The separation is vital for a theory of adjudication and is well defended by Kornhauser and Sager.⁶²

Representation, to complete the triad even though it is not especially relevant for us here, as a type of group decisionmaking overlaps the previous two types, and is characterized by an active group making decisions for a (usually larger) reference group. Representative decisions can be either preferences or judgments.

These three types of group decisionmaking have, as Kornhauser and Sager explain, different principal measures of performance because of their

⁶¹ Ibid, 85. This “correctness” as Kornhauser and Sager point out, “need not be objectively true or depend upon some ultimate view of the real world; it may depend only upon intersubjective agreement over criteria for resolving disputes.” Ibid., 85-6.

⁶² Kornhauser and Sager anticipate and effectively respond to two objections specifically: (1) “that preferences are simply a common subspecies of judgment, distinguished only by their personal subject matter,” and the nearly opposite rebuttal, (2) “that normative ‘judgments’ are, at their roots, matters of preference.” They cite, respectively, R. Guess, The Idea of a Critical Theory 45-54 (1981), and J.L. Mackie, Ethics 15-49 (1977) as proponents of these objections. A great deal of ink has been spilled by sceptics and relativists advancing these arguments, and I will not add to that debate here. Even if the reader is uncomfortable with the somewhat rigid separation of preferences and judgments, at the very least the arguments of this thesis require adherence to a “middle road” view which Kornhauser and Sager describe as follows: “If some or all normative discourse is understood to rest upon a foundation of presupposed, arbitrary values, it remains the case that such root normative preferences can support large structures of contingent truths of the form ‘Given my presupposition A, it follows that B.’ Such contingent truths, of course, are matters of judgment, despite their preference-based predicates, because they claim the assent of all right-thinking persons, persons who share criteria for evaluating the truth of such contingent claims.” Ibid., 87.

distinct purposes. For preference aggregation, the principal measure of performance is “authenticity,” defined by Kornhauser and Sager as, “the ability of a particular process to reflect correctly the preferences of the members of the decisionmaking group.” “Accuracy,” or more precisely, “the tendency of a group decisionmaking process to reach ‘correct’ results,” is the principal measure of performance for judgment aggregation. Lastly, the principal measure of performance in a representative decisionmaking process is termed “fit” by Kornhauser and Sager: “By fit we mean the tendency of the active decisionmaking group to arrive at results that would have been reached by the process’ reference group.”⁶³ Viewing these purposes and measures then, Kornhauser and Sager view adjudication as an enterprise of judgment aggregation and “understand most plausible schools of jurisprudence to embrace this view.”⁶⁴ This recognition is crucial and I entirely agree. In fact, the aim of this paper is to demonstrate the widespread adherence to judgment aggregation and explain what- on their own terms- the implications of this embrace must mean for various schools of jurisprudence. In the most straightforward terms, a view of appellate adjudication as judgment aggregation opposes strategic behavior by judges.⁶⁵ Furthermore, when included within a system of government characterized by the forms and principles of American constitutionalism, this view of adjudication prohibits such conduct by judges.

Kornhauser and Sager then ask, given this view, how does increasing

⁶³ Ibid., 91. It is important to note that these measures are not the only ones. Kornhauser and Sager also discuss the qualities of “reliability” and “appearance.” For our purposes here however, the principal measures are sufficient.

⁶⁴ Ibid., 89, 96. [“We understand that prominent, competitive views of the judicial decisionmaking process- legalism, positivism and legal realism- unite in demanding or at least encouraging the judgment aggregation view of adjudication.” Ibid., 116.]

⁶⁵ Kornhauser and Sager agree with this, though they admit their article does not treat the subject directly: “We think that, while strategic voting and vote trading may well occur, they are at odds with a judgment aggregation view of adjudication.” Ibid., 114 at note 41.

the number of judges in the enterprise improve the product? Accessing the lessons of Condorcet among others, a strong case is made for the positive relation between the number of judges and improved accuracy- the stated principal measure of judgment aggregation.⁶⁶ To this point I am in complete agreement with Kornhauser and Sager, but it should be remarked that their discussion and demonstration to this point is still rather “outcome-oriented.” For it is the addition of the rationale which allows for a public maintenance of that essential feature of adjudication, “a particular, substantive relationship between the decisions of individual cases.”⁶⁷ Kornhauser and Sager provide a careful description of this relationship, and in so doing respond to Easterbrook’s work in this area. For the relationship aspires to achieve two ideals, “consistency,” as well as “coherence.” “Consistency is simply the state of non-contradiction,” the authors explain, whereas, “coherence is a quality of conceptual unity.”⁶⁸ Let us consider each of these traits in turn.

There are two ways for a court to be inconsistent, Kornhauser and Sager explain. Concurrent inconsistency is when two contradictory rules exist simultaneously; consecutive inconsistency occurs when a later rule which is contradictory to an already existing rule is introduced.⁶⁹ Kornhauser and Sager explain that consistency is a value that is both

⁶⁶ See *ibid.*, 97-100. Kornhauser and Sager utilize Condorcet’s theorem given a set of reasonable circumstances for adjudicated controversies. These are, briefly, that (1) only two possible outcomes exist, (2) each judge’s mean competence exceeds fifty percent, (3) all judges are equally likely to choose the correct outcome, (4) the voting procedure in effect is simple majority rule and (5) the aggregation procedure is non-deliberational. “Adjudication” under these circumstances then resembles a marble bag draw with marbles of two colors mixed in proportion to the mean competence value. Adding judges then “adds draws,” which increases the likelihood that more than half of the “correct” marbles will be drawn.

⁶⁷ *Ibid.*, 102.

⁶⁸ *Ibid.*, 103, 105.

⁶⁹ *Ibid.*, 105. Kornhauser and Sager also point out here that concurrent inconsistency, “presumably can only be the product of error,” while consecutive inconsistency, “can well be intentional,” and can be done to aid in achieving greater coherence.

desirable and not that difficult to achieve for multi-judge courts. This is in opposition to Easterbrook's claim that multi-judge courts could not behave consistently due to the application of Arrow's Theorem. Now this refutation of Easterbrook by Kornhauser and Sager is important because the authors rely upon a premise that is central to our inquiries. Kornhauser and Sager demonstrate that, "Assuming that each judge on a multi-member court decides cases consistently, then the court as a whole will decide cases consistently."⁷⁰ The example they provide is a three-judge court with each judge being "firmly committed to a different rule," of interpretation of the First Amendment. The court is faced with three separate First Amendment challenges to state laws banning speech in different ways. I have reproduced Kornhauser and Sager's hypothetical situation below:⁷¹

3 JUDGES:

Judge A: commercial speech is unprotected by the First Amendment; regulations of other speech are constitutional only if they are content-neutral and supported by legitimate governmental concerns.

Judge B: all speech is absolutely protected.

Judge C: non-commercial speech of natural persons is absolutely protected; commercial speech is subject to reasonable regulation; speech of juridical entities is unprotected.

3 LAWS:

Law 1: bans "false or misleading" advertisements.

Law 2: bans leaflets in any public place (because of litter).

Law 3: bans corporate participation in legislative referendum campaigns.

VOTING PATTERN:

LAW: False Advertising Public Places Referenda

JUDGE:

A	OK	OK	BAD
B	BAD	BAD	BAD
C	OK	BAD	OK
PANEL	OK	BAD	BAD

The court's rule, Kornhauser and Sager's example shows, is perfectly consistent. It will approve of laws banning false advertising, hold unconstitutional those banning leafleting in public places and corporate participation in referendum campaigns. Kornhauser and Sager note that if

⁷⁰ Ibid., 108.

⁷¹ Ibid., 108-9.

any similar laws should come before this court, the court will decide the same consistent way. All that is needed is for each judge to apply her own rule consistently for the court to do so.⁷² What is important to notice for our purposes is that Kornhauser and Sager's example assumes that the ratio of each judge is one of definitive singular meaning. There is no compromise on this, no "purchasing" of rationales, no purposefully vague language or other strategic behavior. Interestingly, the authors themselves reveal that, "though this court lacks a majority rationale, it has a consistent rule."⁷³ Both Kornhauser and Sager and Easterbrook in their discussions of consistency are plain about ignoring strategic behavior by judges. Indeed, this prior assumption is important for the whole of their analyses that follow.

Coherence, the requirement that the premises of a system "form or reflect a unitary vision of that portion of the world modeled by the system," is more difficult for multi-judge courts to achieve across time. Like consistency it is a desirable goal for adjudication towards which to aspire. A coherent legal system, Kornhauser and Sager explain, "serves the same goals as treating persons subject to the adjudicatory process fairly and enabling such persons to anticipate legal outcomes," and thus allows for a more sophisticated settling of expectations.⁷⁴ Unlike consistency, Kornhauser and Sager explain that court coherency will not result just because each of the individual judges (like in their hypothetical example) act coherently.

Not only is coherence difficult to achieve, but once incoherence is present in a system of adjudication, coherence and consistency are

⁷² Ibid., 109 ["If each of our three judges applies her rule consistently, the court will apply its amalgamated rule consistently."].

⁷³ Ibid., 108.

⁷⁴ Ibid., 105.

potentially in conflict.⁷⁵ Because of this unavoidable fact, Kornhauser and Sager conclude that, “adjudication that seeks to be faithful to the requirements of consistency and coherence will display the quality of path-dependence; that is, adjudicated outcomes may vary depending on when they are decided.”⁷⁶ Path-dependence is “endemic” to systems of adjudicated outcomes according to Kornhauser and Sager because of this “trade-off” between coherence and consistency. Deciding on the type of voting procedure itself will cause a different result in many cases. The dominant “outcome-voting” procedure, where a court sums the votes of its members as to the outcome of the case overall, will in many instances provide a different result than “issue-voting,” which is done by summing the votes of the members on each recognized issue within a case and then combining those results. Legal scholars will confront a “doctrinal paradox” where depending on how the relationship between outcome and rationale is viewed (and what voting procedure is chosen to reflect this) will determine the result of the vote. The “doctrinal paradox” is the result of an imprecision as to adjudication’s fifth defining characteristic; deciding a case “on the merits” does not sufficiently refine the relationship between outcome and rationale.

It is at this point- deciding what to do about the doctrinal paradox- that Kornhauser and Sager begin to look as dismal as Easterbrook. The fact of the matter is that there is a simple way out of the endemic path dependence of voting systems that both Easterbrook (because of Arrow) and Kornhauser and Sager (because of the tension between consistency and coherence) decry. The solution is not to “vote” or act strategically with the rationales that animate the results of adjudication. If the rationales to be promulgated

⁷⁵ Kornhauser and Sager cite Judge Skelly Wright’s opinion in Javins v. First National Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970), as an example of aspiring towards coherence at the cost of consecutive consistency. *Ibid.*, 105-6 [“In Javins, Skelly Wright could be consistent by following well-established precedent in landlord-tenant law, or coherent by bringing landlord-tenant law into line with promissory relationships generally. He could not be both.”].

⁷⁶ *Ibid.*, 107.

are individualized, then the problematic effects of the tension between consistency and coherence are mitigated in two important ways. Firstly, both inconsistent and incoherent positions are easily identifiable and accountable. Secondly, there is a temporary dilution of the impact of the ratio which lower courts can decide later, though a result for the live disputants is still rendered immediately. Or to put this second point another way, for the moment the legal impact of the total adjudicated product is fully consistent and coherent though no longer institutionalized. Easterbrook himself writes that path-dependence can be avoided through plurality decisions, but that cycling is still unavoidable.⁷⁷ But Kornhauser and Sager dispel that claim of Easterbrook by properly viewing adjudication as an enterprise in judgment-aggregation (rather than Easterbrook's "preference-aggregation" view) which is fundamentally at odds with strategic behavior.

Later efforts have tried to reconcile the "doctrinal paradox" of coherence and consistency by arguing for adherence to "outcome-voting," (also referred to as "case-by-case voting") "issue-voting," or even the introduction of a "metavote" to decide between the two voting types.⁷⁸ The Supreme Court's own recent behavior has brought the paradox more to the forefront, by more explicitly opting for one or the other approach in cases such as Pennsylvania v. Union Gas Co., where it engaged in issue-voting.⁷⁹

⁷⁷ "Criticizing the Court," 820.

⁷⁸ See John M. Rogers, "I Vote This Way Because I'm Wrong": The Supreme Court Justice as Epimenides," 79 Kentucky Law Journal 439-75 (1990-91) [arguing for "outcome-voting"]; David Post and Steven C. Salop, "Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels," 80 Georgetown Law Journal 743-74 (1992) [arguing for "issue-voting"]; Lewis A. Kornhauser and Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts," 81 California Law Review 1-59 (1993) [arguing for a "metavote," where a member of the court would vote for a particular method after discussing various factors of the case- like whether the outcome or rationales are more important].

⁷⁹ 491 U.S. 1 (1989). There are many examples of such behavior. See, for example, National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) [outcome-voting]; NLRB v. Wyman-Gordon, 394 U.S. 759 (1969) [issue-voting]; United States v. Vuitch, 402 U.S. 62 (1971) [issue-voting]; North Dakota v. United States, 495

The Court itself has not straightforwardly recognized the existence of the paradox though, and this only provides fuel to the arguments of legal realists and indeterminists.⁸⁰ But this, generally speaking, is a debate where the assumptions which support the dominant arguments are not fully appreciated. The problem stems from a rather biased assumption about our fourth characteristic of adjudication- providing guidance. American jurists and legal academics take (and for quite some time, have taken) a very hierarchical, almost authoritarian view of this adjudicative quality. There is nothing about appellate adjudication that requires coherence to be achieved immediately upon the case's disposal. John Rogers, in his defense of an outcome-voting approach, begins to reveal this when he notes that, "it is not difficult for lower courts to apply 'incoherent' law."⁸¹ A less hierarchical view may lead to further questions of how to decipher the ratio of a court characterized by plurality opinions, and no doubt it does leave greater "discretion" for lower tribunals than they would otherwise have. But this is not a dispositive reason for taking such a hierarchical view of the dissemination of legal rationales, or even a very persuasive one.

There is another assumption at work here as well, one that rests upon a more solid foundation. But it should be stated rather more straightforwardly than it usually is in the literature. Adjudication in the United States (as evidenced by the dominance of case-by-case or outcome-voting) respects the primacy of judicial result or verdict over rationale.⁸² To

U.S. 423 (1990) [outcome-voting].

⁸⁰ See Kornhauser and Sager, "The one and the Many," 57 ["The Supreme Court, in particular, has been unmindful of the paradox, even when confronted with cases whose dispositions turn on the choice of alternative voting protocols. . . . When individual Justices have departed from case-by-case voting, their decisions to do so have been left unexplained and have gone largely unremarked upon by their colleagues."].

⁸¹ Rogers, "Supreme Court Voting," 470.

⁸² Post and Salop, "Voting by Multijudge Panels," 758-9 ["According to this [outcome-voting] view, courts fundamentally are in the business of deciding individual cases for the individual litigants before them, and only as a secondary matter are they

say this is to put more flesh on the bones of the second (“liveness”) and fifth (“rationale-providing”) qualities of adjudication discussed earlier. This assumption then combines with the hierarchical view of the fourth assumption to produce a kind of fusion between adjudicative result and rationale which provides for a more strategic culture of conduct for the individual Justice. This primacy of result over rationale seems to give an edge to outcome-voting processes, but these processes result in a path-dependence that is undesirable.

A “metavote” that would decide which type of voting procedure the Court would engage in would be clearly unsatisfactory.⁸³ Allowing a Justice to weigh the different results of the two possibilities only invites further strategic behavior that undermines a judge’s authority. Moreover, the introduction of this type of institutional practice would invite the parties to the dispute to argue the merits or demerits of an otherwise irrelevant consideration and provide an immediate excuse for defeat. Imagine if some of our landmark cases were subjected to a metavote. The instability and lack of confidence that would result from the decisions of the final constitutional interpreter would be alarming. All of the benefits of the metavote could be

concerned with creating legal precedent or resolving abstract issues of law. A preference for outcome-voting captures this functional hierarchy by refusing to ‘sacrifice’ the rights of the individuals in the case to the ‘abstraction’ of the issues raised.”].

Post and Salop’s article is a defense of issue-voting, and respond to this premise of “result primacy” in a number of ways. See *ibid.*, 758-62. Ultimately, issue-voting positions must rely on arguments of long-term coherence and the view that appellate adjudication’s basic function is to clarify the legal doctrine of a system. David Leonard even goes so far as to argue that, in certain cases, to give primacy to majority reasoning over majority result would violate the requirement of due process. David P. Leonard, “The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation,” 17 *Loyola Law Review* 299, 326-36 (1984).

Finally, there is another argument that a deviation of outcome-voting by an individual Justice in deference to a differing majority is proper when the Court’s jurisdiction is the issue. See *U.S. v. Vuitch*, 402 U.S. 62 (1971) [Harlan and Blackmun, *Js.*, concurring]. But this sort of position has difficulty discriminating between “jurisdictional” and “non-jurisdictional” issues. See Rogers, “Supreme Court Voting,” 473 at note 122; *Crowell v. Benson* 285 U.S. 22, 92-93 (1932) [Brandeis, *J.*, dissenting].

⁸³ Kornhauser and Sager, “The One and the Many,” 1-59, argue for a “metavote” to resolve problems of the doctrinal paradox.

accrued by simply stipulating (and manufacturing the Court's institutional rules to reflect) proper- that is sincere- judicial behavior in its plainest sense. For some reason, most lawyers who discuss judicial behavior allow "institutional considerations" to count as sincere conduct. Easterbrook and Kornhauser and Sager both allow for a definition of sincere behavior to include institutional considerations such as deference to join a majority opinion.⁸⁴ "A judge is entitled, indeed obliged, to deflect her conduct in deference to her colleagues," Kornhauser and Sager contend. They are right to describe strategic behavior as, "a transgression of the underlying aim of the voting enterprise," but maintain such a "conclaved," broadly collegial view of the enterprise that their definition is in effect a net with gaping holes.⁸⁵

The primacy of place accorded to the result is certainly defensible; any system of adjudication is ultimately judged by what that system actually does to people rather than the theoretical abstractions that serve to maintain it. If this primacy of result is desirable though, then the only way to avoid the evils of outcome-voting such as path dependence is to strictly monitor the behavior of judges. Sincere behavior of judges is the only way to achieve both consistent and- over time- coherent adjudication. More fundamentally than that, sincere judicial behavior is a necessary prerequisite in order for essential adjudicative ideals as well as the political ideal of accountability to have any purposeful and significant meaning.

Furthermore, sincerity as a fundamental value of judicial behavior has been emphasized by many of the great legal thinkers of the Anglo-American tradition. Each of the major schools of Anglo-American

⁸⁴ See Easterbrook, "Criticizing the Court," 821; Kornhauser and Sager, "The One and the Many," 52-3.

⁸⁵ "The One and the Many," 53. Any judge who sits on a panel for Kornhauser and Sager are a priori collegial officials. This broad-based assumption is ultimately rooted in controversial if not erroneous history. See *ibid.*, 12-13, at notes 23-24. Cf. chapters one and two, *supra*.

jurisprudence rely upon or presuppose the value of judicial sincerity. In chapters four through six, this common concern will be demonstrated. Before this is done though, there is one last colloquy among legal theorists that sheds more light upon the subject of judicial sincerity and is worth including in these remarks. Easterbrook was careful in his presentation not to foreclose arguments based upon “first principles” even though he sought to challenge “the performance of the Court as an institution.” This bright line between these two general ways of criticizing the Court is actually not as luminous as Easterbrook would have us believe. To criticize institutionally is to criticize from first principles.

Principled Process and Institutional Virtues

In 1959, a very important article on constitutional law was based upon the following premise: “the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.”⁸⁶ This formulation was Herbert Wechsler’s, and his demand for a “principled” judicial process has had a great impact upon American constitutional law. By principled process Wechsler had in mind the idea that the judicial process should represent and personify the essential qualities of law and adjudication. “A principled decision,” Wechsler explained, “is one that rests on reasons with respect to all issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”⁸⁷ For Wechsler then, generality and neutrality were essential legal qualities that the judicial process must strive to embrace when performing its (inevitably) value-laden function.

⁸⁶ Herbert Wechsler, “Toward Neutral Principles of Constitutional Law,” 73 Harvard Law Review 1-35 (1959), 15.

⁸⁷ *Ibid.*, 19.

Wechsler's argument for the application of "neutral principles" in constitutional law was the product of a colloquy between himself and Judge Learned Hand. Hand doubted that the power of judicial review was purposefully included or intended to be a part of the constitutional scheme of distributed powers. Judicial review, on his reading of the Constitution, was not a "logical deduction" that could be plainly discerned from the text. Rather, he saw judicial review as a "practical condition," a plausible mechanism to help ensure that the operation of the scheme as a whole would succeed.⁸⁸ As Wechsler points out, Hand's particular understanding of judicial review led directly to his view of how judicial power should be exercised. Hand declares plainly that the judicial power of the United States, "need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. It is always a preliminary question how importunately the occasion demands an answer."⁸⁹ It is at this point where Wechsler deviates from Hand, believing that Hand's "preliminary question" is not properly "judicial" at all because of its lack of principle. Hand's discretionary preliminary step would introduce "policy" into a forum where principle should reign. Wechsler's understanding of judicial review and of judicial power generally is taken from many sources (including the authors of The Federalist), but the position he settles on is best compared with Marshall's famous passage in Cohens v. Virginia:⁹⁰

It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The

⁸⁸ See Hand, The Bill of Rights (1958), 15, quoted in Wechsler, "Principles of Constitutional Law," 5.

⁸⁹ *Ibid.*

⁹⁰ 19 U.S. (6 Wheat.) 264, 404 (1821). Marshall quotes Federalist 80 in his opinion, where Hamilton contends that "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusions can proceed." Federalist 80, at 535. No doubt Marshall pictured the Court (as did Hamilton) as a vehicle for national legal uniformity. There is no willful manipulation of Publius or the Constitution on this point. But it is quite a different matter to assert that same desire for uniformity within that single tribunal.

judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Marshall in Cohens stated a “principled” characterization of judicial power in the plainest words, denying that the Court- in cases properly within its jurisdiction- could include an agenda-manipulating adjunct as within the ambit of judicial power. This assertion does not deny to the Court the discretion to either accept or deny cases by judicial grace. Nor does it mean that the Supreme Court does not have the option to defer decision-making to another branch; there are no problems with a doctrine of “political questions.” The distinction that is essential here is that these sorts of decisions are wholly different than a broad discretion that would enable the Court to withhold judgment.⁹¹ The exercise of judicial power, in cases which satisfy jurisdictional requirements, is an inescapable obligation for Marshall- and for Wechsler as well. “For me, as for anyone who finds the judicial power anchored in the Constitution,” Wechsler insists, “there is no such escape [as Hand suggests] from the judicial obligation; the duty cannot be attenuated in this way.”⁹²

It is not all that difficult to see how Wechsler’s principle of “neutral principles,” can be adapted and extended more generally to fit a study of judicial expression such as this. Wechsler’s argument presupposes sincere, individual judicial behavior. By his own terms, for adjudication to be “principled” it must be founded upon reasons, reasons which can not be selectively avoided or enhanced because of extra-judicial concerns. Reasons

⁹¹ See Wechsler, “Principles of Constitutional Law,” 9 [“the only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.... what is involved is in itself an act of constitutional interpretation, to be made and judged by standards that should govern the interpretive process generally. That, I submit, is toto caelo different from a broad discretion to abstain or intervene.”].

⁹² *Ibid.*, 6.

for Wechsler are not elements of judicial strategy. Reasons are the tools of obligation for any judicial exercise properly so called. Furthermore, Wechsler's argument only makes practical sense if principled judicial behavior is demanded of individual judges, not institutions. How can any multi-judge appellate court act in a principled fashion if the selection, emphasis, and overall expression of those neutral principles are compromised or negotiated? How can such a court fashion anything resembling a "neutral" (read: consistently applied) principle that accounts for such a decision? It can not, because these sorts of concerns by definition do not "transcend" the immediate result of the case. There is no "generality or neutrality" to those institutional conventions and norms which generate institutional expressions. Of course, one can imagine a case where a multi-judge bloc or even a unanimous court acted in a principled fashion. Again, agreement alone does not imply a lack of principle. But there is a thin line between principled persuasion or agreement and a judicial pronouncement which is inextricably tied to the immediate result, and therefore unprincipled.

Wechsler's suggestion that, at bottom, judicial power must be principled has attracted many adherents and opponents. Legal formalists of different stripes tend to fall into the former category, and various neo-realists (such as those within the Critical Legal Studies movement today) congregate in the latter group. Alexander Bickel, in his seminal book on the Supreme Court and judicial review, The Least Dangerous Branch, insisted upon taking a third route.⁹³ Bickel was certainly not a neo-realist; he spent a good deal of time attacking their methods and beliefs, accusing them ultimately of "overkill."⁹⁴ Neither, though, was he a formalist; he was transparent that the early realists who exploded the notion that judges

⁹³ Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Indianapolis: Bobbs-Merrill, 1962).

⁹⁴ *Ibid.*, 75-84.

merely “find” the law provided an important correction.⁹⁵ Bickel situates the Court squarely in the middle of what he perceives to be the emblematic dilemma of American democracy. American democracy is indeed committed to principle, and in those instances when the Court invalidates legislative policy Bickel insists that it “must act rigorously on principle, else it undermines the justification for its power.”⁹⁶ Bickel continues in the same vein later in the book when he says that, “the integrity of the Court’s principled process should remain unimpaired, since the Court does not involve itself in compromises and expedient actions.”⁹⁷ Inasmuch as these sentiments reflect a commitment to principle, Bickel very much resembles Wechsler.

Bickel also contended that Wechsler’s insistence to abide strictly by principle could prove disastrous as well. He declared that, “No society, certainly not a large a heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through.”⁹⁸ Wechsler’s vision, according to Bickel, is flawed because it offers two rigid and equally unpalatable alternatives for the role of the Supreme Court. The Court for Wechsler is either, “a third legislative chamber or is imposing on the country an absolute rule of absolute principle,” Bickel explains.⁹⁹ Bickel finds Wechsler’s formulation problematic because, in short, it is unrealistic. Given that Wechsler and most of his partisans find the first choice unattractive, the second choice for Bickel is an unrealistic picture of American democracy, as it constructs an

95 Ibid., 74-75.

96 Ibid., 69.

97 Ibid., 95. Bickel also sharply criticizes the Court for its decision in Shelton v. Tucker, 364 U.S. 479 (1960), precisely because of its unprincipled character. See *ibid.*, 54.

98 Ibid., 64

99 Ibid., 64.

illusory division between matters left to the neatly separated realms of principle and expediency. Bickel instead employs a kind of pragmatism (he attributes this philosophy to Abraham Lincoln) which he believes best describes American constitutional practice. It is his foundation for all that follows; Bickel: "Our democratic system of government exists in this Lincolnian tension between principle and expediency, and within it judicial review must play its role. Mr. Wechsler's dilemma is a false one."¹⁰⁰

To this characterization of American democracy Bickel adds his perception of judicial review. Bickel notes that the Court, by the exercise of judicial review,

wields a threefold power. It may strike down legislation as inconsistent with principle. It may validate, or in Charles L. Black's better word, "legitimate" legislation as consistent with principle. Or it may do neither. It may do neither and therein lies the secret of its ability to maintain itself in the tension between principle and expediency.¹⁰¹

Following Hamilton's observation that the judiciary lacks both the force and will to enforce its principled institutional product, Bickel places the Court in a position where it should act according to principle only in those instances when such action will gain public acceptance. On his own terms then, Bickel's task is to shore up this third aspect of his conception of judicial power- "doing neither"- so that the Court can maintain its important position in American democracy. To do this, Bickel introduces and explains "The Passive Virtues," a set of strategic techniques that the Court may employ to avoid constitutional adjudication on the merits of a case. Examples of these tools and artifices include jurisdictional procedures, doctrines of vagueness, delegation, and political questions, concepts like desuetude and methods of statutory and constitutional construction. Bickel's passive virtues, by providing the Court acceptable reasons for "staying its hand," and thus letting it neither "invalidate" nor "legitimate", serve his ultimate

¹⁰⁰ Ibid., 68.

¹⁰¹ Ibid., 69 [original emphasis].

objective of avoiding the Scylla and Charibdis of unprincipled and principle-ridden adjudication.¹⁰²

As Gerald Gunther points out, Bickel's "third way" is more an illusion than a solution, for he is more like Wechsler than he admits.¹⁰³ Moreover, Gunther's evaluation ultimately concludes that Bickel's theory of judicial review and judicial behavior is unacceptable because of its intrinsic insincerity. Gunther's article makes two main points: (1) Bickel's conception of American democracy (as a Lincolnian tension) and his vision of the Supreme Court's role within that conception are questionable; (2) Bickel's ultimate commitment (like Wechsler) to principled process is undermined irreparably by his passive virtues.¹⁰⁴ From these two observations Gunther neatly sums up Bickel's thesis with the unsatisfactory slogan, "100% insistence on principle, 20% of the time."¹⁰⁵ On the first charge, there is no question that Bickel proceeds from a Hamiltonian point of view and places the Court in a position of supremacy. This position often contradicts other statements Bickel makes about the importance of institutional colloquy. These sorts of criticisms are important, but it is Gunther's second charge which is most relevant for a study of judicial behavior.

Gunther's second charge, that the passive virtues are really "a surrender of principle to expediency," rests on two claims. Firstly, Gunther accuses Bickel of willfully enlarging certain techniques so as to serve his "underlying premises and overriding purposes."¹⁰⁶ Jurisdictional techniques like the handling of appeals and certiorari writs are examples of

¹⁰² Ibid., 111-198.

¹⁰³ Gerald Gunther, "The Subtle Vices of the 'Passive Virtues': A Comment on Principle and Expediency in Judicial Review," 64 *Columbia Law Review* 1-25 (1964).

¹⁰⁴ Gunther, "Judicial Expediency," 5.

¹⁰⁵ Ibid., 3.

¹⁰⁶ Ibid., 9.

this.¹⁰⁷ Gunther explains that Bickel's explanation of these devices is plagued by one serious error, "a tendency to blur the fact that jurisdiction under our system is rooted in Article III and congressional enactments, that it is not a domain solely within the Court's keeping."¹⁰⁸ More importantly, Gunther faults Bickel for falling prey to "the neo-Brandeisian fallacy" in his discussion of his passive virtues.¹⁰⁹ In Ashwander v. Tennessee Valley Authority, Justice Louis Brandeis explained that the Court had developed "for its own governance... a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."¹¹⁰ Brandeis listed seven such rules.¹¹¹ The general purpose of Brandeis' "Ashwander rules," Gunther explains, "go to the choice of the ground of decision of a case."¹¹² Even though Brandeis says that the Ashwander rules are for the Court's own institutional governance, they are clearly questions which must be considered and resolved individually. The Ashwander rules, as Gunther makes plain, are inextricably connected to the ground of decision chosen; they are in this way "internal" considerations that generate the very rationale of an opinion. Brandeis put forth the Ashwander rules in a concurring opinion which differed from Justice Frankfurter's opinion of the Court because he (and those who agreed with

107 Ibid., 11-16; Bickel, Least Dangerous Branch, 126-127, 132-143.

108 Ibid., 16.

109 Ibid., 10, 16-20.

110 297 U.S. 288, 346 (1936) (J. Brandeis, concurring).

111 The "Ashwander rules" are, briefly, as follows: (1) the Court "will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding"; (2) it will not "anticipate a question of constitutional law in advance of the necessity of deciding it"; (3) it will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"; (4) it will not rule on constitutionality if there is another ground for deciding the case; (5) it will not determine a statute's validity unless the person complaining has been injured by it; (6) it will not invalidate a statute "at the instance of one who has availed himself of its benefits"; and (7) the Court will always ascertain whether any reasonable interpretation of a statute will allow it to avoid the question of constitutionality. See Ibid., 346-48.

112 Gunther, "Judicial Expediency," 17.

him) resolved these sorts of questions in such a way. Of the seven rules, Gunther rightly explains that four them (rules 2, 3, 4, and 7) permit avoidance of some or all of constitutional questions argued.¹¹³ The other three simply detail situations where there is no “case” or “controversy” and so are merely heuristics for judges so that they may better comport with Article III.¹¹⁴ Bickel instead employs the Ashwander rules “to assert an amorphous authority to withhold adjudication altogether,” and to stake out “a general discretion not to adjudicate though statute, Constitution, and remedial law present a ‘case’ for decision and confer no discretion.”¹¹⁵ Bickel’s move here is what Gunther terms the neo-Brandeisian fallacy.

Bickel’s enlargement of the scope of devices like the Ashwander rules is an ingenious attempt to outline and detail Judge Hand’s “preliminary question”; the passive virtues would enable the Court to ask “how importunately the occasion demands an answer.” Like Hand’s question, Bickel’s virtuous formulation is not principled. Bickel constructs a discretion so broad that it undoes any insistence that constitutional adjudication must be principled. Gunther’s concluding observation of Bickel’s passive virtues illuminates the matter further. Using Bickel’s own words, he explains of Bickel’s prescriptions that they “lead either to a manipulative process, whose inherent, if high-minded, lack of candor raises issues of its own, or to the abandonment of principle.”¹¹⁶ In short, Gunther faults Bickel precisely because his theory of judicial review and judicial behavior is purposefully insincere.

Early in his book Bickel articulates an important conception of American constitutional practice that differs markedly from most of the

¹¹³ Ibid., 16.

¹¹⁴ Ibid., 17.

¹¹⁵ Ibid., 10, 16; see Bickel, Least Dangerous Branch, 70-72, 111-13, 119-20.

¹¹⁶ Ibid., 25, quoting Bickel, Least Dangerous Branch, 200.

assertions that dominate his project. Describing the institutional dynamics of American constitutionalism, Bickel writes:¹¹⁷

In the interplay between the Supreme Court and the political institutions, all is or should be in the open. Men are not required to disguise to themselves or to others what each is doing. The system justifies and encourages each institution in acting as it does- on principle in one institution, often on interest and expediency in the others- for it thrives on the tension among them. And the integrity of the Court's principled process should remain unimpaired, since the Court does not involve itself in compromises and expedient actions.

This passage is striking as it is one of the most accurate normative descriptions of American constitutional practice given an essential institutional trait of the judiciary. That essential institutional trait is what I have been calling judicial sincerity. In conveying the nature of the Court's principled process here, Bickel reveals a normative commitment to judicial sincerity. Bickel, of course, did not write the above passage to highlight the importance of matters of "voice" in judicial decision-making, and his passive virtues- each of them disguises- blunt the force of his own ideal vision. Bickel attempts to operationalize a theory of principled and strategic judicial behavior; the attempt fails because his ideal of principled judicial power is frustrated by elements of strategy. If "disguising" is institutionalized, constitutional interplay is harmfully unbalanced.

Cass Sunstein in a recent article has provided more shape and perspective to the project of judicial prudence which so interested Bickel.¹¹⁸ Sunstein observes that judges sometimes deliberately leave things unsaid; they choose to traverse a course of "decisional minimalism."¹¹⁹ The premeditated employment of the "constructive uses of silence" can promote democratic goals. Sunstein explains: "minimalism can be democracy-

¹¹⁷ Bickel, Least Dangerous Branch, 95 [emphasis added].

¹¹⁸ Cass R. Sunstein, "The Supreme Court, 1995 Term - Foreword: Leaving Things Undecided," 110 Harvard Law Review 4-101 (1996).

¹¹⁹ *Ibid.*, 6-7 ["We might describe the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided, as 'decisional minimalism.'"].

forcing, not only in the sense that it leaves issues open for democratic deliberation, but also and more fundamentally in the sense that it promotes reason-giving and ensures that certain important decisions are made by democratically accountable actors.”¹²⁰ Sunstein also suggests that the path of minimalism also (usually) makes sense when legal issues are presented which possess (legally relevant) moral uncertainty or a substantial deficit of information because the costs of “decision” and “mistake” are at levels which judges should not risk.¹²¹ Of course there is much to be said in response to the minimalist position, and Sunstein supplies much of the needed counterargument against minimalism,¹²² but it needs to be emphasized that the recognition of the legitimacy of judicial minimalism does not in any way oppose or weaken the postulate of judicial sincerity.¹²³ Moreover, an argument for sincerity is not at all an endorsement of judicial “maximalism,” where a judge provides full theoretical grounding and a complete statement of the governing rule of decision in a case. Maximalism, as Sunstein rightly contends, can also be “democracy-forcing,” but either of these two ends of the spectrum require beforehand that the judge sincerely deliver a singular judgment.¹²⁴ Sunstein is right to point out that sometimes

120 Ibid., 7.

121 Ibid., 7-9, 15-28.

122 Ibid., 28-33. Cf. Michael Foley, The Silence of Constitutions: Gaps, ‘Abeyances’, and Political Temperament in the Maintenance of Government (London: Routledge, 1989). Foley’s argument proposes that American constitutionalism itself contains a general commitment to minimalism or even subminimalism, where controversies are left “in abeyance,” and purposefully opaque.

123 Sunstein admits as much from the outset of his article. “Minimalists enthusiastically respect the obligation to offer reasons; they attempt to offer reasons of an unambitious kind.” Ibid., 7 at note 2. Furthermore, Sunstein also appears to concede early on that the standards of minimalism and maximalism are individually determined. Ibid., 6 at note 1.

124 Actually, Sunstein’s “rough continuum” is as follows:
Reasonlessness—►Subminimalism—►Minimalism—►Ambitiousness—►Maximalism. Reasonlessness and subminimalism are not available, consistent options for an appellate judge in the American constitutional tradition. Ambitiousness is a vague and largely unhelpful term, serving only to better designate by distance the opposing choices of minimalism and maximalism. Ibid., 15.

there may be instances when an individual judge may be justified in saying the equivalent of “I don’t know,” or even “I see it more than one way” in response to difficult legal questions. There is also something to be said for the individual judge who, in effect, says “I know the answer and here is the full theory and complete rule which animates it.” In both cases, the common, more fundamental ingredient of all these responses is the presence of the first-person singular pronoun. Minimalism certainly may be employed in the service of strategy, but the judge that does so within an institution which prizes sincerity will do so in the light of day and will face comparison with other sincerely expressed judgments.

For a very long time, a single question has divided many students of government: what is the difference, if any, between a judge and a legislator? When doctrines of legal formalism were dominant, the answer to this question was a “what-centered” reply. The difference between the two, the response would go, is that what these respective officials did was distinctive. The products of their efforts- the legislator made law, the judge applied or interpreted law- were different. With the coming of legal realism and its progeny, the “what-centered” answer has lost traction. Judges indeed make law, even if interstitially, so there is little difference between the two products. Both are law-makers. “Who-centered” responses have had some adherents, and legal formalism as well tried to provide a firm grounding for such claims by focusing on the professionalism and training of the judge. The role of legal education itself was an important contribution. But, on the whole, the “Who-centered” reply has been secondary to the “What-centered” and never established itself as enough of a justification. What alternative, then, is left to provide an answer? The most promising route- in light of the climate of neo-realism and the apparently dominant consensus among the legal academy that law simply is politics- is to focus on “How-centered”

distinctions. The fundamental difference between a judge and a legislator, on this explanation, is the way in which they arrive at and express their (admittedly, sometimes creative) legal decisions.

Chapter Four: Classical Natural Law & Common Law Theory

The next three chapters will each analyze the viewpoints of four distinct strains of legal theory. Important expositors of natural law theory, Common Law theory, legal positivism, and a melange of “post-positivist” theorists will be the foci. Each of these reviews will emphasize those aspects of legal and judicial communication which are relevant to our inquiries and in that way will appear considerably different than orthodox reviews of these schools. The main point of the next three chapters is to suggest that, in the way in which prominent legal theorists discuss and depict the nature of adjudication and judicial power, highly influential variants of legal theory assume or implicitly depend upon what I have been calling the ethic of judicial sincerity. The fact that an ethic of judicial sincerity lies at the heart of theories which often stand in opposition to one another in academic debate is an important characteristic of Anglo-American law. Furthermore, this analysis will show that allegiance to a particular conception of law has consequences for how tolerant (or intolerant) the adherent would be to the presence of judicial strategy. This chapter will analyze two strains of legal theory which have been strongly influential in the development of Anglo-American legal doctrine and institutions. Natural law and Common Law views are naturally compatible because of the former’s direct influence upon the latter, and their combination will highlight important underlying characteristics about judicial behavior. Furthermore, the two are best viewed together because they both stand in opposition to the twin theses of legal positivism, which will be examined in the next chapter.

The bold assertion that there are “basic forms of human flourishing,” and “basic methodological requirements of practical reasonableness,” both of which being self-evident from the nature of our universe and discernible

by the reasoning ability of man has proved to be the ultimate bedrock upon which natural law theories have rested for more than 2,500 years.¹ Since the time of the ancient Greeks at least, a rational foundation for moral judgment has buttressed many an argument about law and justice. This section will explore those lessons of natural law theorists that are relevant to our inquiries into the style and manner of judicial expression. In the next chapter, a similar review of important common law theorists will be conducted because of their extension of natural law theory as well as their historical importance to the constitutional evolution of the colonies and eventually the United States. Our investigation here focuses on the two towering figures of the natural law tradition- Aristotle and Thomas Aquinas- and therefore can be said to be concerned exclusively with “classical” natural law theory. A good portion of this chapter is an exploration of John Finnis’ philosophical reconstruction of the insights of these two writers. First, though, I wish to highlight some brief observations Aristotle makes about the subjects of law and rhetoric.

A great deal of scholarship has been devoted to Aristotle, and I do not intend to add substantially to that sum. There are, however, some important comments of Aristotle’s which deal with judicial behavior which have not had (to my knowledge) a proper airing. Aristotle is well known for his thoughts on subjects of politics, law and justice. Aristotle also wrote a seminal treatise on the subject of rhetoric, however, and this will be our starting point.² It should be remembered that the subject of rhetoric was first given serious consideration by Aristotle, who thought it was a part of the master subject of politics and fit into each of Aristotle’s four subdivisions

¹ The key phrases used here are stated and developed in John Finnis, Natural Law and Natural Rights (Oxford: Oxford University Press, 1980).

² Aristotle, On Rhetoric, trans. George A. Kennedy (Oxford: Oxford University Press, 1991).

of intellectual activity.³ Later Roman writers largely adopted Aristotle's observations on the subject, and it has been persuasively argued that rhetoric was an unchallenged humanist segment of the western curriculum until the emergence of a more purely rationalist response evidenced in the work of Hobbes.⁴ Aristotle divided rhetoric into three species: deliberative, judicial and demonstrative. The species is determined by the class of the audience and it is judicial rhetoric that we will be briefly concerned with here. Towards the end of a treatise devoted to the subject of judicial rhetoric, Aristotle interestingly reveals that "Speaking in the law courts requires more exactness of detail, and that before a single judge even more, for it is least of all a matter of rhetorical techniques; for what pertains to the subject and what is irrelevant is more easily observed [by a single judge], and controversy is gone, so the judgment is clear."⁵ Now this is an important though admittedly indirect view of proper judicial behavior. A lawyer's success is predicated least of all upon techniques of rhetoric because the recipient of the rhetorical output (the judge) is to be a singular source of fact and law. This singularity of source provides the best chance of avoiding strategic behavior like Aristotle's rhetorical techniques. Towards the beginning of On Rhetoric Aristotle also forwards the notion that a practitioner of judicial rhetoric needs to "gain over the hearer; for the judgment is about other people's business and the judges, considering the

³ See Nic. Eth., I, 2: 1094a19- b12; VI: 1138b15- 1145a11. Aristotle, The Nicomachean Ethics, trans. David Ross, rev. J.L. Ackrill and J.O. Urmson (Oxford: Oxford University Press, 1980).

Aristotle divided intellectual activity into the theoretical sciences (examples of which include physics and theology), practical arts (politics, ethics), productive arts (medicine, fine arts) and methods (logic, dialectic). George Kennedy explains and demonstrates that Aristotle viewed rhetoric as falling within all four of these, shifting his focus throughout On Rhetoric. Different scholars at different times emphasized one over the other. See G.A. Kennedy, trans., On Rhetoric, 7-13.

⁴ See generally Quentin Skinner, Reason and Rhetoric in the Philosophy of Hobbes (Cambridge: Cambridge University Press, 1996). Also, see section dealing with Hobbes in chapter five, *infra*.

⁵ On Rhetoric, III, 12, 5: 1414a.

matter in relation to their own affairs and listening with partiality, lend themselves to [the needs of] the litigants but do not judge [objectively].”⁶ So a lawyer’s success is least of all a matter of rhetorical technique, yet the lawyer would do well to “gain over” the judge or judges involved. These opposing pieces of advice are reconciled only by returning to the principle of singularity of source in matters judicial. Aristotle assumes this for his suggestions dealing with judicial rhetoric depend upon the unity of mind that only an individual judge can bring to a case.

The lessons of On Rhetoric certainly do not end the inquiry; in fact, they only sharpen it. What standards should we expect in matters of adjudication? Are judges somehow different than other law makers? In the fifth book of his Nicomachean Ethics, Aristotle explains of adjudication generally that,

when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice; and they seek the judge as an intermediate, and in some states they call judges mediators, on the assumption that if they get what is intermediate they will get what is just. The just, then, is an intermediate, since the judge is so.⁷

Now on first glance it may appear to some that Aristotle seems to be conveying a sentiment that would approve of a “compromised” ratio in deciding adjudicative matters. If getting “what is intermediate” is getting “what is just,” it might seem logical to accept a single compromised, moderated ratio from a bank of judges. This interpretation is misleading and ignores the key lesson to be derived from Aristotle here. Notice that Aristotle first equates the position of judge and justice for the disputants; both are found in the same place. Next, Aristotle’s clearest description of a judge’s nature is to be “a sort of animate justice.” Now these two points take our

⁶ On Rhetoric, I, 1, 10: 1354b. It is worth inserting here the reminder that in Aristotle’s time, “in democratic states there was no official judge in the modern sense of one who presided over a trial and instructed the jury about the law; thus, in most legal procedure judge and jury were identical.” G.A. Kennedy, trans., On Rhetoric, 109.

⁷ Nic. Eth., V, 4: 1132a2-25.

inquiries some distance. Remembering that throughout his writings the just for Aristotle is a sort of mean to be striven for, and a mean itself being a singular point of balance between two extremes rather than a mixture of several points, it becomes clearer that Aristotle is placing considerable importance upon the singular quality of judging. The final passage then goes most of the way to answering the preliminary objection we started with: the just is an intermediate since the judge is so. The essential focus of justice for Aristotle is located in the office of the judge.

But there is more to judgment than justice for Aristotle. In fact, many times “the just” stands in need of correction by “the equitable.” Equity for Aristotle is simultaneously the same as and superior to legal justice. Aristotle’s notion of equity of course is fundamentally influential to later legal systems and his discussion of it deserves some review. He explains that where the law is “defective owing to its universality,” equity is required. “In fact,” Aristotle continues, “this is the reason why all things are not determined by law, viz. that about some things it is impossible to lay down a law, so that a decree is needed.”⁸ This is an important passage and deserves some probing. Firstly, the word “decree” is not trivial; Aristotle’s term is the same word used to describe the pronouncements of chancery courts both in England and America throughout their histories. A decree is to be distinguished from an opinion.⁹ The very essence of the word’s meaning conveys a sense of its content being foreordained or, simply, given. If equity is to be a corrective of law owing to defects in the law’s quality of universality, that correction for Aristotle must be made by decree. A device containing foreordained, self-evident qualities is needed to override the universal characteristic of law- law that is not only desirable but for the most part fully capable of serving the requirements of justice.

⁸ Nic. Eth., V, 10: 1137^b8-34.

⁹ See chapter one, *supra*.

Interestingly, at the same time he describes the qualities of equity, Aristotle here also offers a clue as to the very nature of law and its mode of operation. An equitable decree is needed in those cases where “it is impossible to lay down a law.” It follows from this that for Aristotle the law, when it is laid, does not include “decree-like” qualities. A positive portrayal of “law-laying” is not altogether clear from this passage, but it is plain that it is not done by decree, that is by presenting the law as foreordained or self-evident.

Later in the Nicomachean Ethics Aristotle discusses the intellectual virtue of “judgement” and provides some further clarification of our subject. “What is called judgement, in virtue of which men are said to ‘be sympathetic judges’ and to ‘have judgement’, is the right discrimination of the equitable.”¹⁰ Now when this sort of statement is combined with our previous discussion, a reasonably clear picture of judgement emerges. Just as equity is characterized by a singular “decree-like” quality, so too should judgement. This is a crucial point; the failure to appreciate it results in conflating the essentially separate implications for law and judgement. Judgement for Aristotle is an intellectual virtue which proceeds and concludes as though foreordained or self-evident. Indeed, Aristotle shortly after this passage explains that judgement is a natural endowment.¹¹ Law, again, is neither judgement nor equity. This foreordained quality is not conferred upon law. Law for Aristotle is best viewed as “a rule proceeding from a sort of practical wisdom and reason,” while at the same time having compulsive power.¹² Because law emanates from these areas, it contains a natural comprehensiveness which is accessible to the human mind and is

¹⁰ Nic. Eth., VI, 11: 1143^a13-31.

¹¹ Like the intellectual virtues of understanding and intuitive reason, Aristotle includes judgement as a natural endowment: “while no one is thought to be a philosopher by nature, people are thought to have by nature judgement, understanding, and intuitive reason. This is shown by the fact that we think our powers correspond to our time of life, and that a particular age brings with it intuitive reason and judgement.” Nic. Eth., VI, 11: 1143^a31- b17.

¹² Nic. Eth., X, 9: 1180^a14- b3.

not as burdensome or obscure as a more rigid, self-evident object which is characteristic of both equity and judgment.

In the thirteenth century St. Thomas Aquinas sought to reconcile the teachings of Aristotle with the lessons of Christian Scripture and in so doing provided an important extension of natural law theory. Together Aristotle and Aquinas form the bedrock of classical natural law theory. Because of later critiques by primarily positivist commentators (a school we will examine later) of contemporary versions of natural law theory, a great deal of the original wisdom of Aristotle and Aquinas became distorted. The most regularly cited example of this is the “is/ought distinction” articulated by David Hume in 1740. A recent restatement of classical natural law theory by John Finnis sought to remedy these distortions and put forward an account of the classical theory in modern language.¹³ Much of Finnis’ restatement finds its basis in Aquinas, though Aristotle is also utilized heavily. Because of the quality of Finnis’ account and the difficulty of discerning Aquinas’ teachings from the original texts, Finnis’ Natural Law and Natural Rights will be examined as a substitute and will further clarify our focus on proper judicial behavior according to classical natural law theory. I do not pretend that there is a kind of identity between Finnis and Aquinas or Finnis and Aristotle. Finnis’ rendering of these thinkers is the most sophisticated, most operational theory of classical natural law that exists in the field. For a student of this tradition, there is no better secondary text.

First Finnis’ basic argument will be reviewed, for his task is to present “the first principles of natural law.” It is Finnis’ belief that these principles do in fact “lay down for us the outlines of everything one could reasonably want to do, to have and to be,” and in so doing presuppose no moral

¹³ John Finnis, Natural Law and Natural Rights (Oxford: Clarendon Press, 1980).

judgements whatsoever.¹⁴ For Finnis discovering such principles is a two-step process. Firstly, Finnis asks the practical (as opposed to Aristotelian “speculative” reason) question of what are the basic forms of human flourishing? Finnis explains that these forms are essentially “pre-moral,” or self-evident for human beings. The seven forms listed by Finnis are as follows: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and “religion.”¹⁵ These seven for Finnis are “basic” human goods because they are (1) each “self-evidently a form of good,” (2) unable to be “analytically reduced to being merely an aspect of any of the others,” and (3) each basic good, “when we focus on it, can reasonably be regarded as the most important. Hence there is no objective hierarchy among them.”¹⁶

The sixth basic good, practical reasonableness, then ushers in the second step toward discovery of a derived foundation of morality. Practical reasonableness is defined by Finnis as, “being able to bring one’s own intelligence to bear effectively... on the problems of choosing one’s actions and lifestyle and shaping one’s own character,” and is a complex value toward which Finnis devotes much attention.¹⁷ There are “basic requirements of practical reasonableness,” that aid human beings in determining that a decision is practically reasonable and in so doing aid in pursuing or “participating in” the basic human goods. In sum, Finnis’ second step is to, “express the ‘natural law method’ of working out the (moral) ‘natural law’ from the first (pre-moral) ‘principles of natural law.’”¹⁸ Finnis discusses nine methodological requirements of practical

¹⁴ Ibid., 97. Finnis’ subject, in perhaps the most succinct description made by the author, concerns “the evaluative substratum of all moral judgements.” Ibid., 59.

¹⁵ Finnis, Natural Law and Natural Rights, 85-90.

¹⁶ Ibid., 92.

¹⁷ Ibid., 88.

¹⁸ Ibid., 103.

reasonableness, including “commitment, reasonable efficiency, and following one’s conscience.” The limits of space do not permit a full treatment of them here.¹⁹

What then does all this have to do with law, or even those authoritative conventions that regulate judicial behavior that are our subject? The two preceding paragraphs were laid out because for Finnis- in a philosophical reconstruction of the Thomistic position- morality not only affects the law but its “substratum” as well, which can be reasonably discerned to provide an ultimate foundation for both rulers and ruled.²⁰ The requirements of practical reasonableness are the source from which positive law derives part of its force; as such, they are the standards with which legal systems must comport. Finnis understands that to settle social coordination problems, a community has two choices only: unanimity or authority.²¹ Since the former is often difficult to achieve, the requirements of practical reasonableness are helpful in locating authority.²² Authoritative coordination is then legally authoritative for Finnis when certain distinctive features are present. Jumping off from Max Weber’s definitions of legal coordination (but showing how these are really just extensions of Aristotle’s

¹⁹ They are, briefly, as follows: (1) a coherent plan of life, (2) no arbitrary preferences amongst values, (3) no arbitrary preferences amongst persons, (4) detachment, (5) commitment, (6) reasonable efficiency, (7) respect for every basic value in every act, (8) favouring and fostering the common good of one’s communities, and (9) following one’s conscience. On these, see *ibid.*, 100-127.

²⁰ *Ibid.*, 290: “The act of ‘positing’ law (whether judicially or legislatively or otherwise) is an act which can and should be guided by ‘moral’ principles and rules; that those moral norms are a matter of objective reasonableness, not of whim, convention, or mere ‘decision’; and that those same moral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that institution (e.g. separation of powers), and (c) the main institutions regulated and sustained by law. [emphasis added]”

²¹ *Ibid.*, 232.

²² “Authority (and thus the responsibility of governing) in a community is to be exercised by those who can in fact effectively settle co-ordination problems for that community. This principle is not the last word on the requirements of practical reasonableness in locating authority; but it is the first and most fundamental.” *Ibid.*, page 246.

notions), Finnis' features of legal order enable his students, "to distinguish law from politics, conventions, manners, etiquette, mores, games, and indeed from every other form or matrix of communal interaction- and to distinguish it with complete adequacy even in the absence of any problem of recalcitrance and hence of any need for coercion or sanctions."²³ There are five such distinctively legal features which can be summarized as follows:²⁴

(1) Law brings definition, specificity, clarity, and thus predictability into human interactions, by way of a system of highly interrelated rules and institutions.

(2) Whatever legal rule or institution has been once validly created remains valid, in contemplation of law, until it determines according to its own terms or to some valid act or rule or repeal.

(3) Rules of law regulate not only the creation, administration, and adjudication of such rules, and the constitution, character, and termination of institutions, but also the conditions under which a private individual can modify the incidence or application of the rules.

(4) The law brings what precision and predictability it can into the order of human interactions by a special technique: the treating of past acts as giving, now, sufficient and exclusionary reason for acting in a way then "provided for".

(5) As a reinforcement of the other four characteristics of law already mentioned, there is the fictitious working postulate that every present practical question or co-ordination problem has, in every respect, been so "provided for" by some such past juridical act or acts.

Importantly, Finnis realizes that these five distinctive features of law do not convey their true worth without a simultaneous reckoning of "the relation between these formal features and the requirements of justice and the common good."²⁵ The further requirements of what is commonly referred to as the Rule of Law serve to "instantiate" the five formal features. Borrowing from scholars such as Fuller and Joseph Raz, Finnis lists eight

²³ Ibid., 267. It is in statements like these where Finnis reveals his estrangement from others in the natural law tradition. By distilling the core lessons of Aristotle and Aquinas, Finnis is right to put to one side matters of recalcitrance. What counts for Finnis are those distinctive qualities of the authoritative coordination under examination. "It will be evident from the list [of distinctive legal features] that the ways in which law shapes, supports, and furthers patterns of co-ordination would be desirable even in a society free from recalcitrance." Ibid.

²⁴ Ibid., 268-69.

²⁵ Ibid., 270.

“desiderata” of the Rule of Law which must be fulfilled.²⁶ The Rule of Law desiderata for Finnis serve to remind us that a legal system “subsists in time, ordering the affairs of subsisting persons.” What this means is that each of the desiderata “involve qualities of institutions and processes.”²⁷ When Finnis further probes the requirements of the Rule of Law, they ultimately reveal a primacy of place to be accorded to the judiciary. Each of the desiderata, as Finnis concludes, “involves certain qualities of process which can be systematically secured only by the institution of judicial authority and its exercise by persons professionally equipped and motivated to act according to law.”²⁸ This is an important claim Finnis makes, and should be examined carefully. For upon closer examination Finnis is on to something that- if formulated in a more refined manner- touches on basic requirements of “practical judicial reasonableness.”

Take “coherence,” for example- the fifth desiderata of the Rule of Law. Finnis explains that “coherence” can not simply mean that there be an, “alert logic in statutory drafting.” More comprehensively, the value of coherence demands, “a judiciary authorized and willing to go beyond the formulae of intersecting or conflicting rules, to establish particular and if need be novel reconciliations, and to abide by those reconciliations when relevantly similar cases arise at different times before different tribunals.”²⁹ Now in a way the problem we are confronting throughout the whole of this paper can be reposed to ask just how a judiciary should

26 A legal system comports with the Rule of Law to the extent (and only in a matter of degree) that its rules are (1) prospective not retroactive, (2) not impossible to comply with, (3) promulgated, (4) clear, (5) coherent one with another, (6) sufficiently stable, (7) applied in limited situations with relative generality, and (8) made and administered by officials who (a) are accountable for their compliance with rules applicable to their performance and (b) actually administer the law consistently and in accordance with its tenor. *Ibid.*, 270-71.

27 *Ibid.*, 271.

28 *Ibid.*

29 *Ibid.*

perform the task of meeting this comprehensive demand of coherence. For if Finnis means that a judiciary should provide an institutional (univocal, homogeneous) response when performing such reconciliations, then I believe he is mistaken. Just because the coherence of the law is to be striven for does not mean that the appearance of incoherence should be rapidly obliterated.

In fact, Finnis does not mean to convey this, for if he did it would be directly at odds with the very reason why he finds the Rule of Law to be a “virtue of human interaction and community.” The five formal features of law as well as fundamental notions which underlie constitutional government have a positive goal as well as the avoidance of negatives like tyranny or despotism. “Individuals,” Finnis declares, “can only be selves- i.e. have the ‘dignity’ of being ‘responsible agents’- if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a ‘lifetime’.”³⁰ A reciprocal relationship between ruler and ruled as both a means to certain ends and for its own sake- this is at bottom the only plausible way to make sense of slogans like “a government of laws and not of men.”³¹ There can be no doubt that a rigidly hierarchical and “institutionalized” view of the judiciary must at the very least work against the improvement of this relationship if not transform it beyond recognition. Or, to put this idea positively, a human community is enhanced the more we allow for the individual self to take part in the naturally interactive identity-creation that is law.

Classical Common Law Theory

³⁰ Ibid., 272.

³¹ Interestingly, Finnis writes that often times establishing and maintaining this sort of relationship comes, “at the expense of some certainty about the precise location of authority.” Ibid.

Common Law theory is of course the place where what is today called the school of legal formalism draws its lifeblood. Writing about Common Law theory as the twenty-first century approaches is often cursorily dismissed or not taken very seriously by critics because of the present influence (or perhaps more accurately, dominance) of legal realism. This is a mistake for two reasons. Attempts at a comprehensive understanding of the philosophical underpinnings of the Common Law have shown much criticism to be misplaced or at least an exaggeration of its fundamental premises. One commentator has even argued recently that only Common Law theory (and not modern jurisprudential trends which utilize economics or moral philosophy) can explain the elaboration of private law principles.³² More importantly in the present context, Common Law theory was undoubtedly one of the major strands of thought which influenced the political science of the United States.³³ The Constitution, a text considered so revolutionary because of its public accessibility, so relies upon the Common Law strand that its ability to be even superficially understood requires the reader to be basically acquainted with the Common Law.

It is not surprising that Common Law theory as classically expounded by English jurists promotes the thesis that is being presented. The Common Law jurists we will examine here each support a theoretical position that requires a certain institutional "structure" as well as specific philosophical underpinnings, such as the role of custom in Common Law thinking. What is surprising is that, of the seminal explanations of Common Law theory, no previous author has explicitly adopted the position that this institutional "structure" is in fact a necessary component to fulfill the philosophical aspirations of Common Law theory. There is a good reason for this, for as we

³² Charles Fried, "The Artificial Reason of Law or : What Lawyers Know," 60 Texas Law Review 35-58 (1981).

³³ See Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass., Harvard University Press, 1967).

shall soon see the “institutionalism” constructed by Common Law theory is purposefully incomplete.

Because of the range and difficulty of the materials of the period, I will be relying substantially upon two secondary texts which can be treated as complementary to each other. Brian Simpson’s 1973 essay on Common Law theory was considered by him to be a first attempt to analyze the Common Law through the lens of legal theory and develop what he saw as its theoretical commitments.³⁴ Professor Gerald Postema admits to Simpson’s essay being of great influence in his widely acclaimed monograph, Bentham and the Common Law Tradition; part one of Postema’s book will serve as a guide for a basic review of those elements which are central to Common Law theory.³⁵ This reliance is certainly not exclusive,³⁶ but I do believe that these two authors provide in a sophisticated manner the basic lessons of Common Law theory and a reconstruction from scratch on my part would only diminish the force of the arguments I wish to convey.

The portion of Common Law theory that concerns our inquiries is referred to by scholars as “classical Common Law” and can be said to begin with Sir Edward Coke in the sixteenth century. Before Coke the Common Law of England was dominated by the tradition of natural law, with Fortescue and St. German being leading expositors. There are two general conceptions of

³⁴ A.W.B. Simpson, “The Common Law and Legal Theory,” in Oxford Essays in Jurisprudence, 2nd Series (Oxford: Clarendon Press, 1973), 77-99.

³⁵ Postema, Gerald J. Bentham and the Common Law Tradition (Oxford: Clarendon Press, 1986), 3-143. Postema’s book received more attention for his treatment of Bentham than the first part devoted to Common Law theory. His analysis of the philosophical underpinnings of Common Law theory is more detailed than Simpson’s and I believe is unrivalled in the literature. On his recognition of Simpson’s influence, see *ibid.*, 7 at note 11. Postema’s book, upon which I rely heavily both in this section and the following one on legal positivism, was brought to my attention by Alan Beattie of the London School of Economics.

³⁶ Also very helpful were J.G.A. Pocock, The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century (Cambridge: Cambridge University Press, 1987); James R. Stoner, Jr., Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism (Lawrence, KS: University Press of Kansas, 1992); D.E.C. Yale, “Hobbes and Hale on Law, Legislation and the Sovereign,” Cambridge Law Journal 121-56 (1972B).

the Common Law that begin with Coke that are central. These two conceptions are intimately related to one another but the tasks performed by each are distinct enough to warrant such a separation. The first conception concerns itself, in the main, with identifying the contents of the Common Law. Coke provides the “contents conception” of the Common Law with perhaps his most famous excerpt from his Institutes of the Laws of England:

For reason is the life of the Law, nay the Common Law it selfe is nothing else but reason, which is to be understood of an artificiall perfection of reason gotten by long studie, obseruation and experience and not every mans naturall reason, for *nemo nascitur artifex* [no one is born skillful]. This legall reason *est summa ratio* [is the highest reason]. And therefore if all the reason that is dispersed into so many severall heads were united into one, yet could he not make such a Law as the Law of England is, because by many succession of ages it hath beene fined and refined by an infinite number of graue and learned men, and by long experience grown to such a perfection for the gouernment of this Realme, as the old rule may be justly verified of it *Neminem oportet esse sapientiore[m] legibus*: No man (out of his owne private reason) ought to be wiser than the Law, which is the perfection of reason.³⁷

The contents or material of the Common Law according to Coke are the result of an artificial method- the “perfection of reason”- which is only discernible through a certain kind of experience. It is perhaps such an obvious point that commentators have not stressed it, but it is worth stressing that Coke’s conception is intrinsically individualistic. Coke’s conception does not explain a collective “artificial reason”; courts or other collectives are not mentioned at all in connection with this central idea. It is precisely because the Common Law is built upon the successive wisdom of an “infinite number” of individual human minds that sees it prevail over a momentary concentration of (individual or collective) reason. Both Postema and Simpson provide useful supplements to aid in understanding Coke’s contents conception. Common Law principles, Postema explains, “are the products of a process of reasoning, fashioned by the exercise of the special, professional intellectual skills of Common Lawyers over time refining and coordinating

³⁷ Sir Edward Coke, 1 Institutes 97b, as in Stoner, Common Law and Liberal Theory, 23.

the social habits of a people into a coherent body of rules.”³⁸ Because the Common Law is conceptualized this way, the distinction between legality and rationality becomes blurred. Simpson noticed this when he remarked that, “In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.”³⁹ This close proximity of the legal and the rational or the just may look somewhat problematic to the modern reader. Indeed, Hobbes is rightly seen as a kind of positivist challenger to Coke’s ideas on precisely this point, but Coke himself accepts this near-identity because he believes that the reasonableness of the law is why people should obey it, rather than what may be its social utility or foundations of consent.⁴⁰

This leads to the second conception of Common Law and is best expressed by a later luminary of the tradition, Sir Matthew Hale. This is the genre conception of the Common Law, or what kind of thing the Common Law is. The second conception provides that the Common Law is best understood as immemorial custom.⁴¹ As Hale, referring to the Common Law as “Leges non Scriptae,” wrote:

[T]heir Authoritative and Original Institutions are not set down in Writing in that Manner, or with that Authority that Acts of Parliament are, but they are grown into Use, and have acquired their binding Power and the Force of Laws by a long and immemorial Usage, and by

³⁸ Postema, Bentham and the CLT, 7. Coke’s idea that law was a product of intellectual reason was in conflict with the Hobbesian notion that law was a product of an authoritative will. See D.E.C. Yale, “Hobbes and Hale on Law,” 124-6. More on this difference and the consequences for the proper administration of judicial power will be said below. See text *infra*.

³⁹ Simpson, “Common Law and Legal Theory,” 79.

⁴⁰ I am fully aware of the differences that existed among prominent Common Law theorists (such as Coke and Blackstone) concerning this conception of reasonableness. The Cokean version is what Postema refers to as the “particularist” version of reasonableness found in Common Law theory. See Postema, Bentham and the CLT, 30-38. Also see text *infra*.

⁴¹ See generally Pocock, Ancient Constitution, 30-55.

the Strength of Custom and Reception in this Kingdom.⁴²

The very existence and authority of the Common Law is dependent upon both its historical pedigree and its having been generally used, accepted and adapted. The contents and genre conceptions of the Common Law mutually support each other. The only legitimate test of reasonableness- the heart of the Cokean contents conception- for Common Law theory is to stand the test of time. The notion of “time” varied among Common Law thinkers, and the views of Coke and Hale diverged markedly on this point. For Coke, the authority of the Common Law rested on what he believed the ability to trace specific Common Law provisions back to ancient Saxon eras. Hale- who is credited with forwarding the dominant view- focused instead on the continued reception of a Common Law that was in a state of perpetual development. “The key,” Postema says, clarifying Hale’s idea of time, “is not identity of components but a steady continuity with the past.”⁴³

There is an additional point worth making about the combination of these two conceptions. Common Law theory, as constructed by the two central conceptions of Coke and Hale, is a practical theory in the sense that it ultimately concerns itself with and is shaped most by the practice of its rules. Coke’s notion of reasonableness is, as Postema describes, “entirely concrete and particular, inseparable from the particular situations brought to the law and resolved by it.... the reason of the law is guaranteed not by any external principles or criteria of rationality to which it allegedly conforms, but

⁴² Sir Matthew Hale, The History of the Common Law of England, Charles M. Gray, ed. (Chicago: University of Chicago Press, 1971), 17. Hale’s History of the Common Law was published posthumously and received three printings (1713, 1716, and 1739). The Gray edition is a reproduction of the third printing of 1739.

William Blackstone in his well known Commentaries also echoes these conceptions of Coke and Hale and cites them often. See Blackstone, Commentaries on the Laws of England, 4 vols. (Chicago: University of Chicago Press, 1979), vol. 1: 17, 18, 63-86 [hereinafter cited as, for example, “1 Blackstone 17.” 1 = volume 1, 17 = page 17.].

⁴³ Postema, Bentham and the CLT, 6. Also see James Boyd White’s treatment of Hale’s “Time” in Acts of Hope: Creating Authority in Literature, Law, and Politics (Chicago: University of Chicago Press, 1994), 124-152.

rather by its own internal coherence and completeness.”⁴⁴ This is why the Common Lawyer makes such use of analogical reasoning.⁴⁵ This practical quality grips Hale’s conception at least as firmly, for the historical pedigree of the law is not enough without the continued acceptance of it; “the immediately evident formal or institutional aspects of law [including adjudicative bodies, judicial decisions, resolutions and practices]... have their legal significance because they are grounded in an invisible substratum, the custom and practice, the common life, of the community at large.”⁴⁶

Indeed, Hale’s practical view may seem to pose problems for the thesis of this paper with his suggestion that the judicial power should be wielded only in certain ways. If a community having continually accepted a conventional practice is the most important basis of authority for the Common Law, then an institutional accretion like the “opinion of the Court,” appears to pass the test. The traditional biases of Common Law theory that so irritated positivist writers seems to thwart any movement for reform in this area. This appearance, though, is in fact illusory. The “opinion of the Court,” and the institutional practices of an appellate tribunal which undermine the sincerity postulate are not legally significant according to Common Law thinking precisely because they are not in any sense “grounded” in the community’s common life. Indeed, the adherence of judges to the sincerity postulate ensures that any such decision or practice

44 Ibid., 31. Postema also adds that Hale “seems to endorse” Coke’s “particularist” conception of reason. Coke’s conception is contrasted by Postema against what he calls Blackstone’s “rationally scientific” conception of reason. See generally *ibid.*, 30-38.

45 See generally Fried, “Artificial Reason of the Law.”

46 Postema, Bentham and the CLT, 27. Hale, in conveying his idea that pedigree is really only secondary to the continued practice of Common Law, compares English law to the voyage of the Argonauts: “But tho’ those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho’ in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials.” Hale, History, 40.

has the opportunity to take root in the “invisible substratum,” by allowing for (or, equally as important, not allowing for) a certain kind of continued acceptance that Common Law theory demands. Hale’s use of organic metaphor is unexceptional in Common Law writing but signals something noteworthy. In contrast to the mechanical and deductive passages of positivism, the Common Law is essentially organic. Just how the Common Law does grow, or what Postema calls “the texture” of the Common Law’s acceptance, is as important for our inquires as these two central conceptions of the Common Law. Fundamental to Common Law theory is that the two above conceptions (what Postema calls notions of reasonableness and historical appropriateness and what I term conceptions of content and genre) ultimately reside within a culture of public participation. Postema explicates this idea most clearly:

the use and acceptance of the Common Law rests on a shared sense of its reasonableness and historical appropriateness. The fact that it is shared, mutually recognized, is essential. It is not enough that each member of the community believes that the rules are reasonable, good, or wise; they must also believe that others in the community believe this as well... For it is only the public demonstration of the suitability of the rules over time that qualifies them for status as law.⁴⁷

This shared sense is what appears to be at work when some of the historical and institutional properties of the Common Law are considered. It is important to remember that Common Law theory arose as a response to the ideologies of royal absolutism and rationalism that were in vogue both in England and on the Continent. Common Law theory was a decentralizing political force.⁴⁸ Jurists like Coke were initiating what was in essence a reassertion of a medieval idea which held that law, “is the expression of a deeper reality which is merely discovered and publicly declared by,” legal officials.⁴⁹ The judiciary is thus a critically important means of expressing

⁴⁷ Ibid., 8 [original emphasis].

⁴⁸ See generally, Pocock, Ancient Constitution.

⁴⁹ Postema, Bentham and the CLT, 4.

law, but it does not create law. Coke's oft-cited adage in Calvin's Case, *judex est lex loquens*, only conveys its true force if we remember that, "the judge is the mouthpiece of a law which transcends the judiciary."⁵⁰ The only reason why judges' opinions are to be accorded authority is because the judge is to be seen as "an expert reporting his or her findings, not the final or formal authority of an official whose saying makes it so."⁵¹ The opinion of a judge should be respected and treated as authoritative because the judge, within the bounds of the law, is privy to the numerous situations, analogies and conversations that are material to the present dispute before her.⁵²

It is remarkable how many scholars- almost without noticing- discuss this aspect of Common Law theory by employing the individual term "judge" and not "court" or "judiciary" or the like. Simpson, for one, noticed the inherent quality of the Common Law that resisted a singular authoritative statement of law but instead thrived upon the "many-voicedness" of the law: "[T]he common law system [does not] admit of the possibility of a court, however elevated, reaching a final, authoritative statement of what the law is in a general abstract sense. It is as if the system placed particular value upon dissension, obscurity, and the tentative character of judicial

⁵⁰ Ibid., 9 [emphasis added]. See also Hale, History, 45-46; 1 Blackstone, 69, 71.

⁵¹ Ibid. Postema also adds parenthetically: "The holding has such final authority, but the formulation of the law on which the holding is supposed to rest does not." Ibid. See also 1 Blackstone 71 ["the law, and the opinion of the judge are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law."].

⁵² See generally *ibid.*, 31-33 ["The judge, through the long study and practice within this fund of concrete knowledge and experience, is able to situate the dispute or problem at hand in the complex body of experience."]. See also Hale, "Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes His Dialogue of the Lawe," in William Holdsworth, 5 A History of English Law 499-513 (London: Methuen & Co. Ltd., 1924), 501-6. The idea that the foundation of a judge's authority lies in the fact that he is a type of "deeply situated agent" resembles closely some thoughts of modern "post-positivist" legal theorists. See text *infra*.

utterances.”⁵³ Postema makes a similar point when he says that, “Common Law is a form of legal thought and practice which vigorously resists regimentation to a structured system flowing logically from a set of first principles.”⁵⁴ This is perhaps the most important theoretical explanation for the rather chaotic jurisdictional and appellate “structure” that has always (at least relatively) characterized the English system of adjudication. “What is involved,” Simpson explains of Common Law study, “is basically an oral tradition, still only imperfectly reduced to writing.”⁵⁵ Adjudication for the Common Law judge is an inescapable, inexorable search and struggle for authenticity. This is the only kind of participation which can provide the best expression of law.

There is good reason for the emphasis I have insisted upon here, focusing on the classical conceptions of Coke and Hale. But a section on Common Law theory with an eye towards application to our problem of judicial behavior would be incomplete without at least a brief mention of William Blackstone. Blackstone’s influence upon the revolutionaries and constitution-makers in late-eighteenth century America was second to none. Back at home, his Commentaries on the Laws of England placed legal training for the first time within reach of university gentlemen in addition to the Inns of Court. The Commentaries rely heavily upon Coke and the classical

⁵³ Simpson, “Common Law and Legal Theory,” 90. Simpson also cites the Law Lords practice of seriatim opinions in a telling illustration of the Common Law’s inherent vagueness: “When, after long and expensive argument the Law Lords deliver themselves ex cathedra of their opinions- and this is the best we can do- they either confine themselves to laconic agreement or all say different things, and this even when they claim to be in complete agreement. It would hardly be worth their while to deliver separate opinions if this were not so.” Ibid [original emphasis].

⁵⁴ Postema, Bentham and the CLT, 10. Postema here is cogently presenting the implications of Simpson’s observation that Common Law formulations are best comprehended as “grammarians’ rules, which both describe linguistic practices and attempt to systematize and order them.” Because of the genre of Common Law formulations, “there is no way of settling the correct text or formulation of the rules, so that it is inherently impossible to state so much as a single rule in what Pollock called ‘any authentic form of words’.” Simpson, “Common Law and Legal Theory,” 94, 89.

⁵⁵ Simpson, “Common Law and Legal Theory,” 97.

conceptions of Common Law. They also, however, make an attempt to reconcile classical liberal politics and the sovereignty of Parliament within the confines of that “system” (or, as some have argued, to alter the Common Law so as to serve an agenda of liberal thought and the ascendancy of the House of Commons).⁵⁶ Consequently, his outlook is more starkly positivist than his predecessors and sought to paint Common Law as more of a rational science.⁵⁷ This aspect of Blackstone may seem to damage much of the discussion of Common Law theory to this point, especially considering his influence. This sort of objection, though, is in truth a red herring. As Postema explains, the Cokean conception, even for Blackstone, remains in a position of primacy because of the nature of judicial power. Even if Blackstonian views are accepted and the Common Law is to be made into a science based on first principles, “the principles are uncovered through reflection on the particular cases... and not through a priori reasoning.... General principles- ‘theory’ we might say- are needed in adjudication, but ‘theory’ is always driven by cases, and not decisions and cases by theory.”⁵⁸ Hale’s customary conception comes into view here as well in this explanation by Postema, as the particularity that unavoidably characterizes judicial power produces a reason that is time and context-sensitive. The peculiar institutionalism of the Common Law, it would appear, is emblematic of the “theory” which “generates” it.

⁵⁶ The best analysis and discussion of Blackstone and his Commentaries is still Daniel Boorstin’s 1941 dissertation. See Boorstin, The Mysterious Science of the Law: An Essay on Blackstone’s Commentaries Showing How Blackstone, Employing Eighteenth-Century Ideas of Science, Religion, History, Aesthetics, and Philosophy, Made of the Law at Once a Conservative and Mysterious Science (Chicago: University of Chicago Press, 1996).

⁵⁷ See “Blackstone’s Liberalized Common Law,” in Stoner, Common Law and Liberal Theory, 162-175; Postema, Bentham and the CLT, 33, 34.

⁵⁸ Postema, Bentham and the CLT, 36.

Chapter Five: Legal Positivism

Ever since Thomas Hobbes published his Elements of Law in 1640 there has been a strong scholarly response to the philosophical underpinnings of both natural law and Common Law theory. Followed by the expositions of Jeremy Bentham, John Austin and Herbert Hart, legal positivism has always first emphasized the social thesis of law while trying secondarily to incorporate or explain away the normative thesis. For a positivist, the answer to the question “What is law?” is almost wholly captured by the term “Rules.” These rules are determinate, clear; a legal practitioner is either acting in accordance with these clear rules or is acting “extralegally” or employing her own “discretion.” It should not be surprising that because of this fundamental assumption legal positivism prefers to explain law on the model of legislation rather than adjudication; still less so when considering the historical roots of British positivism as a reaction to Common Law theory and its adjudication-based model. To the extent that positivism does grapple with adjudication, more than any other school of legal theory it tends toward a strategic explanation of legal officials and, thus, is of great importance for our inquiries. It tends toward such an explanation both because of the “natural” consequences which flow from its commitments and because of unnecessary extensions of these commitments made by legal positivists. Legal positivism then is correctly understood to lend itself to a strategic explanation of official legal behavior and has been manipulated by its adherents so that this feature is exaggerated even further. These are crucially important characteristics of positivism, and especially so when one considers that legal positivism is considered by many scholars and commentators of legal theory today to be the “ruling theory of law,” in both the United States and Great Britain.

Hobbes is commonly regarded as the originator of many ideas. The first important philosopher to write in English, Hobbes is accorded the distinction of being the original liberal, rationalist and legal positivist. Hobbes' work is a natural attraction for those interested in American law and government because of his explicit claim to be laying out a scientia civilis, or civil science. This sort of claim rings familiar to those who have read important authors of American constitutionalism such as Publius.¹ Much of what Hobbes explicitly says about law we will wait to discuss later in this section, when we come to the writing of John Austin who rigorously expounds upon Hobbes' original imperative theme. Our principal concern with Hobbes here really concerns his providing an alternative to the dominant classical mode of moral and political (and, by extension, legal) reasoning. Hobbes throughout his writing seeks to transform language generally into a more certain and deductive form, eschewing its inherent indeterminacy. This point is not a very controversial one among students of Hobbes, so a few short examples should suffice. Chapter five of the first part of The Elements of Law, for instance, is devoted almost exclusively to such linguistic considerations. Hobbes notes that many names we give to objects "bring into our minds other thoughts than those for which they were ordained. And these are called EQUIVOCAL." This equivocation was not desired by Hobbes, who believed it was, "a great ability in a man, out of the words, contexture, and other circumstances of language, to deliver himself from equivocation, and to find out the true meaning of what is said."² To successfully perform this feat, for the receiver to gain the proper conception caused by the speech, was Hobbes' very definition of

¹ Publius' aspiration to devise a science of politics was typical of writers who shaped the founding era. For other such authors, see generally Adams, Willi Paul. The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era, trans. Rita and Robert Kimber (Chapel Hill: University of North Carolina Press, 1980).

² Hobbes, The Elements of Law Natural and Politic, J.C.A. Gaskin, ed. (Oxford: Oxford University Press, 1994), 37, 38.

understanding.³

Later, in chapter thirteen, titled “How By Language Men Work Upon Each Other’s Minds”, Hobbes visits the subject again, this time showing a bit more of a normative inclination. Hobbes sees language as having a primary purpose, namely, “the expression of our conceptions, that is, the begetting in another the same conceptions that we have in ourselves.”⁴ This edifying, instructive use of language is what was essential for Hobbes, and to defeat this purpose as a speaker is to deny an essential component of your own humanity. Hobbes is plain that he has little taste for such a speaker:

Forasmuch as whosoever speaketh to another, intendeth thereby to make him understand what he saith; if he speaketh unto him, either in a language which he that heareth understandeth not, or use any word in other sense than he believeth is the sense of him that heareth; he intendeth also to make him not understand what he saith; which is a contradiction of himself.⁵

Hobbes is even clearer about the “abuses” of speech in his fourth chapter of Leviathan; he lists four principal abuses, as follows:

[1] when men register their thoughts wrong, by the inconstancy of their signification of their words... [2] when they use words metaphorically; that is in other sense than that they are ordained for; and thereby deceive others... [3] when by words they declare that to be their will, which is not... [4] when they use them [words] to grieve [harm] one another... it is but an abuse of Speech, to grieve him with the tongue, unlesse it be one whom wee are obliged to govern; and then it is not to grieve, but to correct and amend.⁶

Hobbes, in short, is transparent throughout all of his important philosophical work that he is deeply concerned about how to advance moral and (in the broadest sense) political propositions. The important writers of

³ Ibid.; also see Hobbes, Leviathan, C.B. Macpherson, ed. (Harmonsworth, England: Penguin Books, 1968), part I, ch. 4, pp. 108-9.

⁴ Hobbes, Elements of Law, ch. 13, no. 2, page 73. See also Leviathan, part I, ch. 4, pages 100-110.

⁵ Hobbes, Elements of Law, Ch. 13, no. 10, page 77. Also see Leviathan, part I, ch. 5, page 116-7. Cf. Cooke, ed., Federalist 37, at 236-7 [Madison decrying the insurmountable problem of the opacity of language for any speaker].

⁶ Hobbes, Leviathan, part I, ch. 4, page 102. Hobbes continues on the same theme in the next chapter when he discusses the “cause of Absurd conclusions,” one of these being “the use of Metaphors, Tropes, and other Rhetorical figures, in stead of words proper.” Ibid., ch. 5, page 114.

classical antiquity as well as Common Law theorists all forwarded the notion that a dialogical mode of inquiry and proceeding was the best way to advance moral and political propositions. By a dialogical mode I mean that the way public decisions were made was to deliberately engage in a dual conversation or argument of the issue at hand. Moreover, both Common Law theory and practice suggest that this dialogical mode should hold not only for the arguing of a case but even as a possibility of that case's resolution. That the possibility existed for a "conversing" or dialogic form of resolution is something central and perhaps emblematic of the theory; the possibility was not to be foreclosed. In fact, a fair reading of Common Law theory even suggests further that it was this dialogical mode that was so highly valued that it was "institutionalized" for adjudicated disputes. The dialogical mode was considered the best way to advance moral and political arguments (and even legal arguments and resolutions) within a polity.

What Hobbes did most fundamentally in his writings was to challenge the dominance of the dialogical mode for advancing moral and political propositions and provide an alternative, monological mode for doing this. This is the central thrust of Quentin Skinner's detailed assessment of Hobbes in his recent monograph, Reason and Rhetoric in the Philosophy of Hobbes. Hobbes, while he was positing a rather sophisticated political philosophy, was choosing a side in a debate that had consumed writers since classical antiquity: whether or not it was possible to separate the content and form of human speech. The classical authors conceived of scientia civilis as composed of the two essential ingredients of reason and rhetoric. Skinner explains how Cicero- the archetypal expounder of the classical notion of scientia civilis- insisted in his De inventione that what was required of a vir civilis (the ideal image of the citizen for classical writers), "is ratio atque oratio, powerful reasoning allied with powerful speech. We can thus be sure that cities were originally established not merely by the ratio of the mind

but also, and more readily, by means of eloquentia.”⁷ Skinner explains of the classical writers’ conception of the dialogical mode that it was grounded in a commitment (and illustrated by such examples as the Roman orator Carneades) that, “in moral and political debate, it will always be possible to speak in utramque partem [on either side of the case], and will never be possible to couch our moral or political theories in deductive form.”⁸

By contrast, Hobbes, on Skinner’s view, had great faith in man’s ability to distill the certainty and transparency of language and sought to present a sophisticated political theory in purely deductive form, without using the classical accoutrements of rhetoric or eloquence which were usually employed to advance such theories.⁹ Hobbes then, on Skinner’s view, was initially opposed to a fundamental conception of moral and political debate which was first forwarded by the classical writers and practiced by the Renaissance humanists of Hobbes’ childhood. This position characterizes Hobbes’ early efforts in matters of scientia civilis, with Elements of Law being Skinner’s prime example. However, by the time Hobbes writes Leviathan, Skinner tells us, he had come to believe that rhetoric should be employed in the service of advancing science; science alone could not take root in the minds of men due to their prior interests.¹⁰

⁷ Quentin Skinner, Reason and Rhetoric in the Philosophy of Hobbes (Cambridge: Cambridge University Press, 1996), 83-4; see also *ibid.*, 2, 106-7, 351-62.

⁸ Skinner, Reason and Rhetoric, 15. For the example of Carneades, see *ibid.*, 98.

⁹ *Ibid.*, 298. Indeed, Skinner tells how the title of Hobbes’ first major work, The Elements of Law, intentionally followed that of the English translation of Euclid’s deductive treatise, The Elements of Geometrie.

¹⁰ See generally Skinner, Reason and Rhetoric, 1-18, 250-375, 426-437.

On the separate issue of how we should read history, I am fully aware of the controversy caused by Skinner and other practitioners of “Cambridge contextualism.” By asking “what he was doing” when Hobbes sat down to write, Skinner is seeking to situate Hobbes’ texts in its intellectual and historical context, noting that he may not have been just acting but reacting as well. See Quentin Skinner, Meaning and Context: Quentin Skinner and His Critics, ed. James Tully (Cambridge: Cambridge University Press, 1988), 259-88.

Many who are interested in philosophy or historiography would argue that Skinner’s question is unnecessary and even dangerous, as it displaces attention from what they see as the crucial (and perhaps only) use of writers like Hobbes: the

In the end, Hobbes concluded, form was needed to supplement the content of speech. This change of mind by Hobbes is important. If students of American history and government emphasize the Hobbesian aspects of the American founding (as many in fact do, usually in contrast to the Lockean nature of the periods of revolution and confederation), then Hobbes' ultimate (though begrudging) commitment to the necessity of eloquence in matters of scientia civilis must also be underscored. If rhetoric is essential to convey propositions of politics and law then the rhetorical environment is inescapable; the presence of rhetoric can not legitimately operate without the opportunity to speak in ultramque partem. This line of analysis leads further to a more immediately relevant question: in light of this understanding, which mode(s) of expression were envisioned for (American) constitutional institutions?

An extension of Skinner's observations can now even be stated more positively than has been done so far; one that applies to our principal concern of judicial behavior. Hobbes' initial commitment to a monological mode of advancing political propositions allows for- much more readily than the dialogical model- a strategic inclination on behalf of legal officials. There are two basic reasons why I believe this is so, and both of these are reflected in the working practice of the United States Supreme Court today. The first reason is that a monological mode of expression places central importance on who is doing the speaking, even more so than the dialogical mode. With the dialogic approach, the intended audience of a speech act which seeks to resolve a plurally faceted problem will expect to hear counter-arguments. Because of this, there is greater opportunity to ensure

distillation, refinement and understanding of philosophical propositions that owe no debt to context. Whatever view one takes regarding this controversy, Skinner's work is undoubtedly relevant here, as it highlights the crucial importance placed on the method of political argument. Skinner himself underlines this relevance when he says that, "by focusing on the historical juncture at which the shift from a dialogical to a monological style of moral and political reasoning took place, I may have succeeded in raising anew the question of which style is more deserving of our intellectual allegiances." Reason and Rhetoric, 16.

that the diversity of a problem is covered more completely. In contrast, within a monological mode of political or legal or moral discourse there is greater urgency to be in control of the means of expression for that singular utterance, so there is more incentive (interest) to strategically acquire that control. In this way, a monological mode of legal/political discourse will probably produce concerns of being heard at all and will encourage strategic action if such options present themselves. No doubt the ability to dissent in matters of appellate adjudication is reflective of just these kinds of concerns. To only focus on cases of substantive, resultant disagreement, however, would miss the larger point, which brings us to the second reason why strategic behavior would be more likely to occur within an environment of monological expression. If the mode of discourse is monological, and if the officials within that system entertain any notions at all about the opacity of language, than the later phases of application and incorporation of legal rationales will almost certainly encourage strategic behavior by those officials responsible for such tasks. A dialogical mode of advancing legal propositions, by contrast, has the possibility of foreclosing some or much of this strategic action, especially when the speakers are in agreement as to the legal result or intended legal objective at issue. Furthermore, in matters of appellate adjudication- a task which is essentially distinguished from other law making activity by a concern for not only right results but right rationales- agreement as to result does not settle agreement as to rationale. In a rigid hierarchy of courts adhering to a monological mode of "rationale-giving," there is clear incentive for officials within that system to affect the rationale which animated the result.

More than a century after Hobbes wrote, in 1776 Jeremy Bentham set out upon what appears to be a similar project: "to construct an account of law and government from independent rational principles, as opposed to

relying on the particular local traditions of authority which a group or country might happen to possess.”¹¹ Frustrated and unsatisfied with the explanations of government by common lawyers like Blackstone, Bentham would prove (and is still proving) to be one the most sophisticated expositors of legal positivism. Bentham, of course, was primarily arguing (and would continue to argue consistently throughout his life) for a utilitarian calculus to be applied to matters politic, and in fact Bentham’s legal positivism is really in the service of the principle of utility. He explains immediately at the start of his Fragment on Government is that utility is defined simply by, “this fundamental axiom, it is the greatest happiness of the greatest number that is the measure of right and wrong.”¹² Much has been written about this connection, but Bentham’s work serves a purpose somewhat less grand as well. Notwithstanding his prolific, diffuse, and often strained writing on subjects of law and adjudication, Bentham’s thoughts on judicial behavior are important for any review of the subject. In fact, as will be seen shortly, Bentham presented a serious and sophisticated utilitarian, positivist theory of law and a close reading of certain aspects of his theory will reveal an acknowledgement that a large danger of judicial power lies in its strategic exercise. This recognition led Bentham to seek and construct structural constraints on judges to prevent strategic behavior. In the simplest terms Bentham, perhaps consciously, took steps to ensure judicial behavior was more sincere.

Before we begin, there is an important fact of studying Bentham which should be admitted. Bentham is a relatively new discovery for legal

¹¹ Jeremy Bentham, A Fragment on Government, J.H. Burns and H.L.A. Hart, eds., Ross Harrison, intro. (Cambridge: Cambridge University Press, 1988), xiii-xiv.

¹² *Ibid.*, 3 [original emphasis]. Bentham credits David Hume with having invented the doctrine of utilitarianism, and intervening utilitarians Beccaria and Helvetius are referred to by Bentham in his Fragment. See *ibid.*, xiv, 51. “[I]t is not the invention of utilitarianism for which Bentham is important,” Ross Harrison explains in an introduction to the Fragment, “Rather, it is for showing in much greater detail than before how it might be applied.” *Ibid.*, xiv.

theorists and his work has not yet received the wide secondary treatment it deserves because a good deal of it remains in original manuscript form. This obstacle to accessibility is being overcome presently, but the fact remains that there are very few scholars who have painstakingly studied Bentham's work in a fullness which would permit general observations to be confidently made. And even when devoted students take the time to sift through the manuscripts, on some subjects Bentham was what Tolstoy would call a fox, not a hedgehog. "Nowhere," Gerald Postema says for example, "do we find a complete, unified statement of his [Bentham's] theory of adjudication."¹³ In fact, Bentham's writings on adjudication, judicial behavior, and law generally highlight different things at different times in his career and even conflict. Fortunately, Postema has provided what is perhaps the authoritative explanation of Benthamite legal theory; his 1986 volume, Bentham and the Common Law Tradition, will be relied upon heavily in this section. Let me be clear: Postema's work is only one possible philosophical reconstruction of Benthamite legal theory, but it is the best comprehensive rendering of his thinking available and presents a unified "Benthamite" position which (regardless of authenticity) offers excellent insights for our particular inquiries.

There are some rather large assumptions that accompany Benthamite legal theory which must be laid out before our review can proceed. First, there should be further emphasis on the notion of utility; for Bentham it is the only legitimate principle of decision. "Justice and utility are not in deep conflict, in Bentham's view," Postema explains, "because justice properly understood is reducible to utility."¹⁴ This principle of utility permeates all of Bentham's discussion of law and adjudication; it is the bedrock of his legal project, and the fundamental tool of legal practice. "Bentham's strategy,"

¹³ Postema, Bentham and the CLT, 340.

¹⁴ *Ibid.*, 155.

Postema writes towards the end of his detailed analysis, “was to maintain the principle of utility as the basic decision principle for both the lawmaking and the adjudicating functions.”¹⁵ Because of the central importance of utility for Bentham, he believed that the law should firstly and foremostly secure the expectations of people who come together to interact and coordinate their actions with each other and lay the foundations of civilized society. Postema writes that security of expectations is a sort of “primary good” for Bentham, that, “security is the primary focus of his utilitarian theory of law, and the first deputy of his sovereign principle of utility.”¹⁶ Bentham suggests two main ways the law secures expectations. The law is an “expectation-creator” by providing a set of clear public rules, and the law is also an “underwriter” of expectations already in existence (by earlier agreements or custom for example) by making these expectations more public, by elucidating and enforcing them.¹⁷ But it would be a mistake to read Bentham as viewing law only instrumentally. “In Bentham’s theory,” Postema says, “law plays the social role that [David] Hume assigns to property. Its task is to lay the foundations of society, to constitute a people.”¹⁸

Flowing from these sorts of commitments is the further Benthamite drive to view law on the model of legislation and to view the legislature as the central institution to perform the tasks of law. A clear code of rules would best focus the expectations of the community, Bentham believed. The law of common law judges, Bentham believed, was incapable of properly focusing and channelling rules of coordinated action so that expectations could be secured. Even more generally, Bentham believed that the

15 Ibid., 407.

16 Ibid., 162, 168.

17 Ibid., 188.

18 Ibid., 160; also see *ibid.*, 183, 189.

legislature was the place for true legal reform to emerge, a radical notion at the time Bentham wrote. Most conservatives and progressives of Bentham's era thought that the needed legal reforms could only come from the courts and that Parliament was a helpless and incompetent institution.¹⁹

This view of Bentham as pitted against an established clique is itself an important contextual fact to remember as well. Bentham was first motivated to write against Blackstone and the Common Lawyers because he felt their lessons instilled a, "submission to authority... in judgment," which Bentham found intolerable.²⁰ Bentham felt that "the right of private judgment" was fundamental, the "basis of every thing that an Englishman holds dear."²¹ The importance Bentham ascribed to private judgment and the idea of the self that is "rationally self-directed" really cannot be overstated, as it actually forms the seedbed out of which Bentham's conception of law can be best understood. Contrary to the standard appraisal of a Benthamite conception of law as "managerial" or "hierarchical," Postema explains that Bentham's conception of law more closely approximates the "interactive" theory articulated by Lon Fuller in the mid-twentieth century.²²

Finally, before we go over certain points of Bentham's legal theory in more detail, it is worthwhile to keep in mind the basic outline of Bentham's theory of adjudication, according to Postema's reading of his dispersed thoughts on the subject. This summary highlights five main points, and I

¹⁹ Ibid., 197-8.

²⁰ Ibid., 165 ["His aim," Postema adds of Bentham in this same vein, "in these works, and throughout his life, was to emancipate 'the judicial faculties' of the public from the shackles in which the established legal and political tradition had bound it."].

²¹ Bentham, Fragment, 16. Also see Postema, Bentham and the CLT, 165-7.

²² Postema, Bentham and the CLT, 168. Fuller believed that the existence of enacted law itself depended on the development of "stable interactional expectancies" between lawgiver and subject. For a thorough discussion of Fuller's "interactive" and "facilitating" view of law, see Kenneth I. Winston, ed., "Human Interaction and the Law," in The Principles of Social Order: Selected Essays of Lon Fuller (Durham, N.C.: Duke University Press, 1981), 211-246. Also see Fuller, The Morality of Law, revised edition (New Haven: Yale University Press, 1969), passim.

include a paraphrased version of it in a footnote below.²³

With a good deal of equipment now on board, we can proceed. Two of the areas which illuminate some of Bentham's thinking on judicial behavior are the matters of judicial legislation and the importance of the doctrine of stare decisis. On the latter, Bentham's view of precedent looks very similar to that of the Common Lawyers. Bentham values stare decisis for two reasons: (1) "to keep the judge from assuming the province of the Legislator," and (2) so "that men may have a certain rule to guide them and know what they have to expect."²⁴ But Bentham's notion of precedent is far different from the Common Lawyers' because of his positivist inclination. Judicial decisions should strive for uniformity and thus prior judgments should be given a degree of deference because of their authority, not their wisdom.²⁵ This is in

²³ For Postema's complete text, see *ibid.*, 405-7. The five-part outline of Bentham's complete theory of adjudication follows:

- (1) The legislature is the ultimate source of lawmaking. Laws are to be expressed in the form of a completely systematic, comprehensive code. The code must meet standards of publicity, simplicity and completeness.
- (2) The judge's duty is to resolve all disputes that arise in the jurisdiction once the code is promulgated. Decisions about whether to proceed from mediation to adjudication and such decisions on the merits are to be made by balancing utilities in the case at hand. In this way, the code is treated as the best guide to the relevant utilitarian considerations to be taken into account, but utilitarian considerations may "trump" the code.
- (3) In no circumstances will any judicial decision be deemed to have precedential effect. The judge is a particular "justice-doer," not a general "law-clarifier."
- (4) Discretion is checked by maximizing responsibility of judges. Attention to utilitarian considerations are focused by procedural and constitutional arrangements which maximize the publicity of both their decisions and the reasoning for them.
- (5) Judicial lawmaking by interpretation or "emendation" of the code is allowed, but as a separate operation from the original adjudication and according to the process set out by the legislature, which retains veto power. There is thus, a "two-stage" process for any case which raises a serious interpretational question of the law.

²⁴ Bentham Manuscripts in the University College, London Library, box lxiii, 49, and box l, 124, respectively, quoted in Postema, Bentham and the CLT, 193 [hereinafter University College manuscripts notes written as "UC, lxiii, 49." lxiii = box 63, 49 = page 49].

²⁵ See Bentham, A Comment on the Commentaries and a Fragment on Government, eds., J.H. Burns and H.L.A. Hart (London: University of London, 1977), 196. Cf. 1 Blackstone 71.

A quick note on the positivist inclination of Bentham: Postema writes that (with only one exception in Bentham's entire corpus) Bentham "never inclined to conceive of law in any way except as the expression of will of a sovereign lawgiver." Postema, Bentham and the CLT, 189.

marked contrast to the Common Law theory that says, as Postema puts it, “judges are bound, not to past decisions, but to the rules and principles implicit in them.”²⁶ Bentham’s rigid view of precedent is not surprising given his affinity for securing expectations and maximizing utility. Indeed for Bentham, judicial legislation is to be avoided because expectations will be defeated.²⁷ As Postema points out though, a new statute will also disturb expectations, but Bentham’s arguments are directed only at judicial lawmaking, not the legislature. So the importance of expectations alone is not enough of an explanation. In fact, the real weight of Bentham’s position rests on an institutional argument. For Bentham, Postema reveals,

There is something special about attempting to set aside old rules and establish new ones- that is, something about legislation- when performed by a judge “in his judicial capacity”. There is something peculiar in the role or office of the judge (or at least a judge in a Common Law system) which makes judicial legislation inevitably result in partial good at the price of universal evil.²⁸

The problem was not that the judge was ill-equipped or unprepared, but rather that the functions of lawmaking should be kept distinct. “The problem lies not in judges exercising legislative power, but rather in their doing so in the course of adjudicating particular cases,” Postema says.²⁹ And this argument for separation does not rest on what today is the familiar “anti-majoritarian” objection. Bentham, Postema explains, instead grounded his position in functional terms:

only the legislator (more properly, the code-writer) can take a sufficiently general view of the entire field of action and of law needed for rational and effective legislating.... It is only the codifier- equipped with the conceptual and theoretical tools Bentham himself forged- that

²⁶ Postema, Bentham and the CLT, 194.

²⁷ *Ibid.*, 198.

²⁸ *Ibid.*, 200. It is passages like these which illuminate Postema’s larger claim that early in his career Bentham was working for radical legal reform within the confines of a Common Law system already in place; he did not seek to displace the system as a whole. See generally *ibid.*, 191-217.

²⁹ *Ibid.*, 201. Also see UC, clix, 263, quoted in *ibid.*, 200 [“Tis the provinces/functions that should be distinct and not the persons.]].

can survey the entire field of action and propose sweeping radical reform for the defects of existing law.³⁰

The insistence of Bentham on such a rigid distinction of functions is ultimately grounded in a commitment to judicial sincerity, or- more precisely- a commitment to eliminating strategic judicial behavior. It is clear from the above passage that, for Bentham, only the legislator or code-writer has the opportunity to strategically achieve radical, coherent reform because only the legislator has the “general view” of the whole field of both legal and non-legal action. The adjudicator does not and should not have this view, and thus should not even attempt such a wholesale manoeuvre.

Moreover, the legislator is in an even more advantageous position as to lawmaking “because as a matter of fact the expression of his will is taken as law,” while the judge, “is able to make his choice of a rule law only by showing that it already is law.”³¹ Here Postema uncovers another important assumption of Bentham’s on the subject of lawmaking. “The assumption seems to be that for something to become law it is necessary that it come to be regarded as law,” he writes.³² And unlike statutory law, Bentham maintains that there is no practice of recognizing the product of judicial action as law. Because of this, there are two obstacles which attempts at judicial lawmaking must overcome. Postema: “[J]udicial decisions intended to have ‘legislative’ effect depend for this effect upon concurrence by both the body of active judges and the public.”³³ This need for concurrence produces a consequence that will directly affect judicial behavior. Because a Benthamite judge’s decision must be seen to be right and taken as law, and given that the same judge will come to a determination based upon the expectations of both his fellow judges and the community, for judicial legislation to be successful

30 Ibid., 202; see *ibid.*, at note 17, for citations of primary material.

31 Ibid., 205.

32 Ibid.

33 Ibid., 206; also see Bentham, UC, lxix, 6.

according to Bentham the judge must not only be utilitarianly correct, he must also strategically co-ordinate his behavior. “Thus, effective, law-establishing adjudication under standard conditions in a Common Law system, requires not (only) that the judge get his utilitarian sums right, but (more importantly) that he co-ordinate his decision-activities with the expectations of both the public and his colleagues on the bench,” Postema concludes.³⁴

There is a third aspect of Bentham’s legal theory that is also relevant here. It is in many ways related to the first two but deserves its own separate mention not only because it is a principle which ranks only below utility in importance, but because it focuses squarely on adjudication and judicial behavior as well. Adjudication for Bentham to be legitimate must be a “a process of public deliberation and demonstration. Although the principle of expectations governs every decision, for a decision to be correct, it is not enough to be, in fact, in accord with that principle, but it must be possible to show publicly that it is.”³⁵ This faith of Bentham’s in the principle of publicity was not just a rhetorical flourish; it flowed from his basic conception of legitimate power and provided the basic replies for questions of judicial behavior. For example, even though Bentham believes that judges should base their decisions upon the balance of competing utilities in cases before them, he opposes judges determining these expectations by placing themselves in the same situations. These sorts of intuitions for Bentham were objectionable, Postema tells us, “not because the decision is likely to be wrong or arbitrary, but because the intuitions are by their nature incommunicable, and because it is often difficult for the public to

34 Ibid. 207.

35 Ibid., 214.

distinguish appeals to intuition from prejudice or bias.”³⁶ Public government was accountable government for Bentham, and ultimately the only legitimate exercise of power. Postema elucidates this point:

The exercise of power is legitimate and beneficial, according to Bentham, only if it seeks to direct behaviour through rational persuasion. This legitimate “influence of understanding on the understanding” must be sharply distinguished from the prevalent governing technique of the “influence of the will on the will”. Government by the latter technique is unavoidably government by sinister interest, Bentham held, because it is government that cannot operate in full public view.³⁷

According to Bentham, an example of government which utilized the “will on will” technique was the Church of England. Through what Bentham felt was a blend of coercion over its unwilling subjects and delusion over its willing, the Church preserved its power. In a revealingly worded observation, Postema explains that the result for Bentham of this type of governing technique by the church, “was that the unwilling are sentenced to perpetual insincerity, complying without conviction, and the willing are led into an irrational compliance.”³⁸

For Bentham then, oxygen was the best disinfectant; the principle of publicity was absolutely crucial for his legal theory. Publicity gave shape to law’s primary task of securing expectations. Postema captures the importance of Bentham’s publicity principle when he writes that, “according to Bentham, security is a function of the public conviction of order and justice (the ‘appearance’ of justice) not of its reality, and that conviction is most firmly embedded in the public mind when it is seen that

³⁶ Ibid., 213. For others who include this same type of commitment to publicity in their legal theory, see Ronald Dworkin *Taking Rights Seriously*, seventh impression (London: Duckworth, 1994), 159-168 [Dworkin, arguing for his “constructive” model of coherence: “it assumes that the men and women who reason within the model will each hold sincerely the convictions they bring to it, and that this sincerity will extend to criticizing as unjust political acts or systems that offend the most profound of these.”]; Herbert Wechsler, “Toward Neutral Principles of Constitutional Law.”

³⁷ Ibid., 368.

³⁸ Ibid., 369.

justice is regularly and consistently meted out by the courts.”³⁹ The principle of publicity was essential in Bentham’s view to assure accountability in a judge. And Postema is clear that, on Bentham’s view, the judge must be accountable for not only for the “destination” of a particular exercise of judicial power, but the “journey” as well: “Not only must all actions be open to public view, but also the judge is under strict obligation to fully justify his decision and actions to the people.”⁴⁰ It is because this principle of publicity has the potential to be used in different ways that positivism lends itself to a strategic explanation of official legal behavior.

To this point we have been discussing in some detail three aspects of Benthamite legal theory. The first- Bentham’s insistence on a rigid separation of legal functions or provinces- disclosed an implicit commitment to sincere judicial behavior, or at least to less strategic behavior by judges. The second- Bentham’s assumption that judicial rule-making is in need of two different kinds of concurrence- uncovers a contrasting commitment which suggests that judges must behave strategically in order to legislate effectively from the bench. And the third- that legitimate adjudication is a process of public deliberation and demonstration- seems to provide further support for judges to behave sincerely, though it would seem that this aspect of his theory could be rather easily manipulated to serve the purposes of a strategic judge or judiciary. What conclusions can we draw from these findings? As I said in the introduction to this section, legal positivism more than any other school displays a natural tendency toward strategic behavior of legal officials. This is because the positivist sees law- and Bentham is a classic example- as resting at bottom upon convention. Conventions themselves are invented by people because of the existence of strategic social situations. Now the word “convention” is usually defined as “social

39 Ibid., 365-6.

40 Ibid., 368.

fact” by persons who discuss matters of legal theory. This is a correct but only partial definition. A convention also provides reasons for actors to act in certain specified ways.⁴¹ Because of this view of law as resting on convention, and because law is distinguished by most positivists (as well as most “conventionalists,” as Ronald Dworkin calls them) from other forms of social interaction as an interdependent form of social interaction, the inevitable result is to characterize legal situations and problems strategically. What legal positivists tend to do when providing their account of law- to borrow Postema’s terms- is conflate the different levels of coordination problems faced by the law. There are, Postema writes, “three points of intersection of law and social life at which significant problems of coordination seem to arise.”⁴² Law is utilized to help solve problems which arise independently of law, and these are what Postema calls “Level 1” coordination problems. He continues, explaining that, “Level 2 problems arise between officials and citizens; ‘level 3’ problems arise among law applying officials themselves.”⁴³ The thesis I have been exploring obviously is concerned then with what Postema calls “Level 3” problems, as well as “Level 2” problems. Most positivists (like Postema) for some reason seem to neglect the possibility that conventions which provide for the construction and maintenance of legal institutions may seek to eliminate strategic behavior by certain law applying officials. Postema includes Level 3 problems as having the same “structural property of strategic interaction” that Level 1 and 2 problems have. The functional and institutional concerns of some positivists however, and Jeremy Bentham is an excellent example of this, would seem to be at odds with this kind of conflation. The conflation of what are actually different kinds of coordination problems- and these

⁴¹ See Postema, Gerald J. “Coordination and Convention at the Foundations of Law,” 11 Journal of Legal Studies 165-203 (1982), 166.

⁴² Ibid., 183.

⁴³ Ibid.

problems are different precisely because the conventions which govern some and not others of them have been institutionalized- is too crude and ultimately naive. Though Postema would have law applying officials be cognizant of the lessons of von Neumann, Morgenstern and Nash, his positivism in the end “regards lawmaking and law applying by officials as a matter of eliciting a trained response of habitual obedience in those subject to the law.”⁴⁴

This puts the point in a slightly different way than did the previous section on Common Law theory. There is nothing about legal positivism itself which requires the conventions which are relevant to legal officials (guiding Level 3 problems) to include similar political principles as those conventions which are relevant to Level 1 and Level 2 situations. In fact, given legal positivism’s rather strong emphasis on the institutional character of law,⁴⁵ it seems wholly plausible to envision a legal system which included an institution of law application that was governed by a convention of strategic sincerity.⁴⁶ More affirmatively, a system of interdependent social interaction among Level 1 and Level 2 situations (citizen-citizen and official-citizen interactions) where those participants are strategic actors can be more efficiently maintained and utilized when the participants have at their disposal an institution that does not behave strategically. This “sincere” problem-solver does not rob the law of its

⁴⁴ Ibid., 187. Postema, in committing himself to a vision of “law as strategic social interaction,” actually becomes something like the legal Platonist he abhors. By construing “the beliefs, attitudes, forms of thought, and characteristic patterns of reasoning of participants in the enterprise,” in such an exclusive, narrow way, he begins to construct an “external reality defined independently” of law. This does a disservice to his rather sophisticated treatment of law as objective fact.

⁴⁵ See generally, J. Raz, The Concept of a Legal System, second edition (Oxford: Oxford University Press, 1980).

⁴⁶ In fact, it could be argued that Bentham’s theory of adjudication anticipated this by fashioning a two-step process for the “adjudicating” and “lawmaking” functions. This is a moderating institutional procedure which tempers Postema’s strategic interpretation. The less “fused” (or more separated) the adjudicative result is from the lawmaking rationale, the less strategic a judge can be. The more fused (or less separated; like it is today in the United States), the more strategic a judge can be.

dynamic character; on the contrary, it permits that character to flourish. It is only when the political principle of “institutional coherence” is conceived as a kind of master purpose for law that a wholly strategic institutionalism should be employed.⁴⁷ Otherwise, arguments grounded in a formalist institutionalism stand as a substantial check against the “strategic coordination” variant of legal positivism. This variant of legal positivism, which Postema explicates comprehensively, at bottom is fuelled by a political program of judicial “authoritativeness” (read: supremacy) which prejudices its project of social coordination. Postema combines two judicial obligations. One is a judge’s rather formalist professional obligation which calls for a recognition of the interdependence of law, and the other is an obligation of political responsibility which calls for a judge to fashion a “general public theory.”⁴⁸ Both of Postema’s renderings of these obligations are so politically partial that they trivialize options that would meet these obligations more effectively on his own terms. There is no reason why an appellate judiciary (especially at the apex of a hierarchy) could not induce a range of expectations which stress a greater degree of interpretive symmetry. There is nothing about law according to positivism (or the Constitution for that matter) which demands a priori that citizens are “entitled” to expect Level 2 or Level 3 coordination, or that judges should conform to such a demand. Postema suggests otherwise. The history of Common Law institutions actually suggest that their particular brand of institutionalism was supported by expectations quite different than Postema’s.

They were the kinds of expectations that would permit Bentham

⁴⁷ Postema: “Thus, if the activity of law applying is to achieve the ends of law in a reasonable efficient manner, it must be possible to view the activity of law applying as governed by some reasonably coherent pattern. This requires that judges seek to coordinate their law-applying activities in order to achieve something tolerably close to a norm of what I have called ‘institutional coherence.’” This creates Postema’s Level 3 coordination situation. “Coordination and Convention,” 193, 195-7.

⁴⁸ Postema, “Coordination and Convention,” 196-7.

initially to contemplate his task of radical legal reform within the Common Law system in which he found himself. Much about his legal program can be painted in the uncompromising terms that fit radical agendas and tactics, and Bentham's positivism did not in the end seek to preserve Common Law institutions. Nevertheless, Bentham's institutionalism can not be cast in the same stark terms as can his utilitarianism or his commitment to publicity as a principle. We must be careful not confuse a difference in governmental principles with a difference in governmental forms, and it was on principles of government where Bentham's differences with the Common Lawyers were glaring, not on the forms. His institutional concerns for law compared with the Common Lawyers are strikingly similar to the dichotomy that emerged during the founding period in America and would persist still today. That institutional schism is about whether a "protective" or "developmental" institutionalism would best secure the chosen governmental principles and aims previously agreed upon.⁴⁹ In the main (with certain important political theorists there are important differences), a "protective" institutionalism is one where the constructed governmental structure seeks to, as James Madison put it, "control the effects" of those potential evils which would undermine the social order. The institutionalism is not viewed as a good in and of itself but rather as a necessary and effective check against an unavoidable evil. A "developmental" institutionalism, on the other hand, aspires to "remove the causes" of those same evils, and sees such a construction as a positive good in its own right.

The important point to take away from all this (one which Postema's analysis supports) is that Bentham's legal institutionalism was a "developmental" variant. This foundation would enable Bentham "to reject

⁴⁹ These two terms are taken from P. Dunleavy and B. O'Leary, Theories of the State: The Politics of Liberal Democracy (London: MacMillan, 1987), 16. See also Cooke, ed., Federalist 10, at 56-65.

the ‘incrementalism’ of Blackstone and the Common Lawyers generally,”⁵⁰ who were undoubtedly “protective” in their approach. Postema summarizes Bentham’s theoretical approach to problems of government in a passage which sounds a rather Jeffersonian tone:

The most effective way to secure against corruption and abuse of power in government officials, and especially judges, is not to constrain them by fixed and rigid rules, which deprive them of doing good, as well as evil, but rather to arrange the institutional context within which judicial action and deliberation take place such that only motives of concern for the general or common good have freedom to operate.⁵¹

Specifically on the subject of law, Bentham betrays a markedly “developmental” attitude. Bentham explains that if laws were truly based on reason, “they would infuse themselves, so to speak, into the minds of the people: they would form part of the logic of the people; they would extend their influence over their moral nature... obedience to the laws would come to be hardly distinguishable from the feeling of liberty.”⁵² The way these laws would “infuse themselves” was for officials to engage in an open colloquy with both citizens and themselves on specific legal questions and issues. This is the contribution (which is itself valuable for Bentham), for example, of the publicity principle. The developmental institutionalism Bentham adhered to served the instrumental value of “addressing the understanding of citizens,” rather than intolerably subordinating their will. Postema goes on to suggest that Bentham was fully aware of this attitude, and drew an important implication from it- one that directly concerns the subject of a judge’s behavior. Bentham articulates this implication in his Essay on Promulgation:

I am so convinced of the necessity of this exposition of reasons, that I would not dispense with one of them at any price. To confide in what is

⁵⁰ Postema, Bentham and the CLT, 202.

⁵¹ *Ibid.*, 391-2. This passage which Postema claims encapsulates Bentham’s institutionalism is in marked contrast with the unavoidable and uncompromising “strategic egoism” he presupposes for governmental officials. See text below...

⁵² Bentham, Bowring, i, 161, quoted in *ibid.*, 369.

called a feeling of justice, a feeling of truth, is a source of error. I have seen upon a thousand occasions, that the greatest mistakes are concealed in all those feelings which are not brought to the touchstone of examination. If this feeling, this first guide, the avant courier of the mind, be correct, it will always be possible to translate it into the language of reason. Pains and pleasures, as I have repeatedly shown, are the only sources of ideas in morals. These ideas may be rendered familiar to all the world. The catechism of reasons is worthless, if it cannot be made the catechism of the people.⁵³

It is not enough for judges to give reasons for their actions; they must do by employing a publicly accessible language.

Reinforcing his dedication to a “developmental” institutional arrangement, it should be noted that Bentham’s overriding concern with ensuring decisions in accord with the greatest happiness principle did move him to provide explicit standards of behavior to which government officials should adhere, including judges. Bentham felt a judge should possess three kinds of “official aptitude”: the active, the intellectual and the moral.⁵⁴ Of the three, Postema is clear that the most important for Bentham of the official aptitudes was the moral aptitude. “For in the absence of sufficient moral aptitude,” Postema says, “the others are not simply useless, they are likely to be pernicious.”⁵⁵ Just what is this moral aptitude? In some instances, it would appear that Bentham defines the moral aptitude as a negative virtue, as in being impartial or free from bias. Postema, though, goes on to say that the moral aptitude is more than the absence of prejudices, “rather these factors are causes of moral inaptitude- failure of moral aptitude. Moral aptitude is something more positive.”⁵⁶ Postema presents this positive sense of moral aptitude most succinctly in a passage of Bentham’s: “disposition to contribute, on all occasions and in all ways, to the

⁵³ Bentham, *Bowring*, i, 163, quoted in *ibid.*, 370

⁵⁴ Postema: “The active aptitude is the power or ability to act decisively on one’s judgment. The intellectual aptitude involves both appropriate knowledge and appropriate judgment on the basis of that knowledge.” *Ibid.*, 359-61.

⁵⁵ *Ibid.*, 359.

⁵⁶ *Ibid.*, 360.

greatest happiness of the greatest number.”⁵⁷ Postema explains two implications which follow from this formulation of the moral aptitude, the second of which is quite helpful. To possess the moral aptitude for Bentham means that a person must possess, “the disposition to be moved to do what one judges to be in the universal interest.... Thus, the moral aptitude is directly linked to the motive... of sympathy.”⁵⁸ Now, although it would be stretching it to say that Postema’s positive interpretation of the moral aptitude is another definition of sincerity, it seems reasonable to suggest that someone who had this sort of disposition would not be inclined to act strategically. “Keeping your eye on the prize,” and not allowing alternatives external to the performance of the task of judging to sway a judgment are qualities within the ambit of Postema’s discussion here.

Finally, this brief treatment of some of Bentham’s thoughts on “developmental” institutional constraints should conclude with the reminder that, like Hume before him, Bentham adopted what Postema calls a “strategic egoism” for his general political theory. When considering how political institutions are to be constructed, Hume started from the presumption that men will generally act in their own self-interest. It has been the point of this discussion to suggest that if institutions are constructed with the understanding that certain actors will behave in certain ways to satisfy their self-regarding motives, then the procedures, conventions and constraints- whether “protective” or “developmental” to that institution- which shape and channel that behavior should be essentially maintained. Bentham recognized this.

The arguments and pre-commitments of both Hobbes and Bentham’s legal positivism became popularized by John Austin in the nineteenth

⁵⁷ Bentham, Bowring, ii, 273, as quoted in *ibid.*, 360.

⁵⁸ *Ibid.*, 361.

century. Austin's legal positivism borrowed a great deal from Hobbes and Bentham and during his career Austin articulated what legal positivists still consider to be- notwithstanding Herbert Hart's improvements- the classic definition of a "law properly so called." To this point our unorthodox tour of legal positivism has uncovered a few of the important assumptions and implications of legal positivism which are relevant to our concerns of judicial behavior. Because so much of what Austin did was first formulated by Hobbes and Bentham, our examination of his work will be quite brief.

Our brief interest in Austin is due to some of his specific thoughts on "those essentials of a law proper." In the fifth lecture of his magnum opus, The Province of Jurisprudence Determined, Austin stated three such essentials.⁵⁹ These essentials really flow from a singular central point, that, "Laws properly so called are a species of commands."⁶⁰ Immediately after Austin forwards his idea of law as an essentially imperative notion, he forwards what is an important consideration for inquiries on the subject of judicial behavior, refining that initial claim by saying that, "being a command, every law properly so called flows from a determinate source, or emanates from a determinate author. In other words, the author from whom it proceeds is a determinate rational being, or a determinate body or aggregate of rational beings."⁶¹ The stress Austin places here on the determinate quality of law properly so called is repeated throughout the lecture. Whenever Austin says "imperative" or "command" there is almost always the accompanying phrase, "and therefore proceeding from a

⁵⁹ John Austin, The Province of Jurisprudence Determined, Wilfrid E. Rumble, ed. (Cambridge: Cambridge University Press, 1995), 117-8 [hereinafter cited as "PJD"]. The three essentials are, briefly, as follows: (1) laws properly so called are a species of commands, (2) proper sanctions are annexed to commands, and (3) a duty presupposes a command.

⁶⁰ *Ibid.*, 117. Actually, the full imperative theory which Austin forwarded in PJD stated that these commands were issued by a sovereign lawgiver, but discussions of sovereignty would only be distracting in light of our purposes.

⁶¹ *Ibid.*, 117-8 [original emphasis].

determinate source.” What exactly does it mean for a source to be determinate? Austin supplies a cogent response to this question, specifying that, “If a body of persons be determinate, all the persons who compose it are determined and assignable, or every person who belongs to it is determined and may be indicated.”⁶²

Austin in his lecture adopts much of Hobbes’ thinking (and language) on this subject. A quick digression would be helpful in illustrating this. It was Hobbes who in his discussion “Of Persons, Authors, and things Personated,” in Leviathan spoke of the identifying marks of authority.⁶³ According to Hobbes, of those persons who speak or act in matters of government, some may be “natural persons,” if they act or speak on their own behalf. Others, those who represent the actions or words of another, are “artificial persons.” Of these artificial persons, those who “have their words and actions Owned by those whom they represent,” are termed “Actors” by Hobbes; “he that owneth his words or actions,” are called “Authors” by him. From these distinctions Hobbes concludes that by “Authority” one means “a Right of doing any act.” Hobbes later contends that authority is a rather special reserve. Specifically, Hobbes stipulates that, “things Inanimate, cannot be Authors, nor therefore give Authority to their Actors: Yet the Actors may have Authority to procure their maintenance, given them by those that are Owners, or Governours of those things.”⁶⁴ Hobbes then continues and explains how a “multitude of men are made One Person,” through the act of representation. And the key to a successful representation can be found in “the Unity of the Representer... that maketh the Person One.... And Unity, cannot otherwise be understood in Multitude.”⁶⁵

62 Ibid., 127 [original emphasis].

63 Hobbes, Leviathan, 217-222.

64 Ibid., 219.

65 Ibid., 220.

It is from these assumptions that Hobbes goes on to explain the importance of extracting the singular authoritative unity from a representative multitude by taking “the voyce of the greater number, [which] must be considered as the voyce of them all.” Austin reiterates the thrust of Hobbes’ lesson in his discussion when he writes that a men’s club- which is a determinate body of individuals- “signifies” their preferences by vote. Remembering that such signification of a preference can only be achieved by a determinate individual or body or individuals, is important to point out that the example of voting chosen by both Hobbes and Austin is not an exclusive means of “signifying collective pleasure.”⁶⁶ Appellate judges must signify in a different way; the explanation of the difference between preferences and judgments we considered earlier in chapter three makes this point clearly enough. Austin makes little room for an institution which “signifies” through judgments; in this way he tips his hand and reveals the positivist tendency to view law on a model of legislation.

From this rather brisk discussion, an argument in positivist terms for what I have been calling sincere judicial behavior becomes a bit clearer. The language of Hobbes and Austin on the subject of authoritative legal sources that we have been reviewing here can not fit the role of the common law appellate judge on a multi-member court. Judges are individual authors which make up a determinate (not representative) source of law. In Hobbesian terms it could even be said that the effect of the transformation of the judiciary that took place during the revolutionary and founding periods of American history was to alter the perceived role of the judge from that of an actor to an author.⁶⁷ Later, Chief Justice John Marshall’s transformation of the national judiciary was that of an author to an actor. Moreover, it is understandable why legal positivists tend to paint judges as strategic actors.

⁶⁶ See Austin, PJD, 118, 122-5.

⁶⁷ See Wood, Creation of the American Republic, 453-63.

It is because they mistake the appellate judge as one actor of a multitude that should be aspiring toward an ideal unity rather than as an individual author of the law who already possesses such unity. Those who hold the strategic view actually attempt to perform what for Hobbes was the impossible task of instilling authority in an inanimate institution.⁶⁸ This may add a sense of authority to an institution which is unrivalled; it ultimately does nothing for the authority of the law and even serves to undermine its primacy of place in the constitutional order.

Today many lawyers, and most legal positivists, who work in Anglo-American legal systems would say that Herbert Hart's description of law as recorded in his seminal treatise, The Concept of Law, comes closest to "fitting the facts" of their day-to-day practice.⁶⁹ Hart's achievement was to restate Austin's imperative theory of law in such a way as to improve upon and further emphasize the conventional basis of law. Austin's theory, according to Hart, suffered from four important defects which brought into question its completeness and suitability to provide an answer to the question of law's essence.⁷⁰ Hart describes law as the union of two different kinds of rules.

⁶⁸ As I said in chapter one, I do not mean to suggest for one moment that the Supreme Court has been acting without authority during its history or that the means of expression employed by the Court ultimately renders suspect its legitimacy. The message here is a more moderate one; the authority of political and legal institutions is not a stark choice of "either/or." Again, the point is that authority for the law of any community can be achieved through more or less effective means. We should choose the more effective.

⁶⁹ H.L.A. Hart, The Concept of Law, second edition (Oxford: Clarendon Press, 1994).

⁷⁰ *Ibid.*, 1-78. Hart summarizes his four points of attack on Austin's theory of law on page 79, which can be further condensed as follows: (1) a criminal statute best conforms to Austin's imperative theory but still deviates from it in that "it commonly applies to those who enact it and not merely to others," (2) other varieties of law confer public legal powers or create private legal relations and cannot semantically fit Austin's theory of law as orders backed by threats, (3) some legal rules "are not brought into being by anything analogous to explicit prescription," and thus cannot semantically fit Austin's theory, and (4) Austin's use of the term "sovereign" was unsuitable because (a) it could not "account for the continuity of legislative authority characteristic of a modern legal system," and (b) "could not be identified with either the electorate or the legislature of a modern state."

The first kind, what Hart calls duty-imposing rules, “concern actions involving physical movement or changes,” while the second type, what Hart calls power-conferring rules, “provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.”⁷¹ The most important of these latter power-conferring rules is the rule of recognition which provides for the criteria of validity for other secondary rules (which Hart terms “rules of change” and “rules of adjudication”) and “conclusive identification” of primary, duty-imposing rules. Hart’s legal theory, with the rule of recognition at the core, subtly alters Austin’s imperative theory of law by founding law- at bottom- upon the deep and wide social consensus which accepts those conventions of behavior that, when complied with, place their distinctive imprimatur upon legally authoritative actions. Hart’s theory, as one of his theoretical antagonists, Ronald Dworkin, puts it, identifies legal propositions, “in virtue of social conventions that represent the community’s acceptance of a scheme of rules empowering such people or groups to create valid law.”⁷²

This conventional bedrock is precisely why legal positivism has been so relevant to our questions of proper judicial behavior. Positivism- of which Hart’s theory expounds so elegantly- sees those unwritten, unchallenged (and seemingly unchallengeable) directions of legal activity as ultimately emanating from the consensus of the community. It would seem to follow that conventions that regulate the tenor and direction of the behavior of legal officials and institutions can only change when the popular consensus which animates that convention changes on those sorts

⁷¹ Ibid., 81.

⁷² Ronald Dworkin, Law’s Empire (London: Fontana Press, 1991), 34. Hart, when discussing the “minimum conditions necessary and sufficient for the existence of a legal system,” echoes this idea of the conventional bedrock which undergirds those rules of recognition and suggests the consequences of this for legal officials. The secondary rules of recognition, change and adjudication, he says, “must be effectively accepted as public standards of official behavior by its officials.... They must regard these [secondary rules] as common standards of official behavior and appraise critically their own and each other’s deviations as lapses.” Concept of Law, 116-7.

of questions. This view tends to look at law as only a receptor of the norms and ideas of the community. The refined “interdependent positivist” (such as Bentham or Hart) position on the other hand sees a sort of two-way exchange between community norms and power-conferring rules; this is the essence of what Hart himself calls the “internal point of view” and what separates him from positivists like Austin.⁷³ Social rules, for Hart, essentially include the existence of both feelings and observable physical behavior by community members to hold that rule as a “general standard” towards which to strive. Hart is what legal theorists call a “soft-positivist” because he permits (through his discussion of the rule of recognition and the internal point of view) moral and other value-laden attitudes and judgments to be within the ambit of law identification, but it is the interactive quality of his vision which is most relevant here.⁷⁴ This interdependent quality of Hart’s positivism places an emphasis (more explicitly so than Bentham before him) upon the dialogue between the social rule as an ideal and those who strive to conform to it. Participants in a system of Hart’s social rules have a “reflective critical attitude” they bring to bear on their behavior and rules they follow.⁷⁵

One area where Hart’s theory of law intersects closely with concerns over judicial behavior is in his discussion of judicial discretion.⁷⁶ The legal landscape for Hart is wholly distinct from issues of morality since laws can be identified by their institutional imprimatur. Again, under Hart’s model the content of rules has nothing to do with recognizing them as legal propositions; only comporting with criteria of legal validity as set out by

⁷³ For a succinct summary and comparison of Hart’s and Austin’s positivism, see R. Dworkin, Taking Rights Seriously, 17-22.

⁷⁴ In this way a student of legal theory sees most clearly that Jeremy Bentham provides a sort of intellectual bridge between Hart and Austin. See generally Hart’s “Postscript,” Concept of Law, 238-76.

⁷⁵ Hart, Concept of Law, 55-58.

⁷⁶ *Ibid.*, 141-7.

secondary rules or being accepted as primary rules determines that existence. Because legal systems order human societies, there may come a time when certain disputes give rise to legal questions which have not been contemplated by the system. In these instances, according to Hart, there are “gaps” in the law and in systems where these gaps are to be resolved by adjudication the only option is for the judge to exercise a careful discretion. There are two points worth making here. Firstly, Hart’s thesis that at certain points there will be gaps in the law to be filled by a judge’s discretion would seem- in conjunction with any political theory that placed value on a principle of accountability- to call for a principle of judicial sincerity to be included (tacitly or otherwise) in a secondary rule of adjudication. Honesty, candor, and generally not using strategically the unavoidable gaps in the law to forward personal preferences seems a reasonable requirement to ask of a judge. Strategy would make a charade out of the “critical reflective attitude” that is so important to Hart. Secondly, the secondary rules of recognition, change and adjudication would appear in our example of the Supreme Court of the United States to be so uncertain on this question of how the law is to be expressed that it brings into doubt the very basis of acceptance on which this secondary rule must rest. Marshall’s move in 1801, and the subsequent “acceptance” of that move, would appear to grant such a high level of original initiating force to both judges and secondary rules that this should be incorporated in the very notion of secondary rules. Either the seriatim procedure or Marshall’s “opinion of the Court,” was a deviant practice according to any plausible official self-critiques of the applicable secondary rule in 1801. The only available (and unsatisfactory) positivist conclusion appears to be that of power acquiring authority ex post facto. To hold that a rule of recognition rests only upon community acceptance of that rule either misrepresents the degree of autonomy that rule possesses or defines the “open-textured” quality of such a rule so

obtusely as to be of no use.⁷⁷

⁷⁷ *Ibid.*, 127-36, 145-7.

Chapter Six: "Post-Positivist" Legal Theory

This final section of Part Two concerns itself with views of law that were fashioned after Hart's version of positivism. Each of the theoretical explanations of law which follow are reactions to seeing law as a collection of determinate, clear rules; each questions the foundationalism so central to positivism. The immediate problem faced by any student who wishes to study such a pack of writers under a single heading is to adequately label the pack. Others who have studied these internalists identify them by using terms such as "anti-foundationalists," "pragmatists," or "postmodernists." Unfortunately, each of these stamps of identification only muddies the water either because they fail to recognize where these visions deviate from past groups who were called the same (as in the case of the first and second example) or are so superficially unintelligible that they defeat the very purpose of labelling at all (as in the case of the third). Moreover, the views of the authors below are by no means united in their effort; there are substantial differences between authors that the above labels would disguise. These authors, then, are best linked by their synchronous emergence and the initial target they each trained their sights upon; they are each "post-positivists."¹ Each forwards a conception of law as an enterprise in contradistinction to the positivist conception of law as a collection of determinate rules. For the post-positivist, the predominant conventions of current legal practice generate obligations for judges and ensure the central influence of law in judicial decision-making. It should be stated up front

¹ I first came across this term in a paper by Howard Gillman delivered at the 1995 annual convention of the American Political Science Association. Gillman in employing this term has in mind any legal theory which stresses a non-ontological conception of law. See Gillman, "Judicial Behavioralism's Problematic Jurisprudence: On the Relationship Between Legal Philosophy and Social Science Methodology" (Paper delivered at the 1995 Annual Meeting of the American Political Science Association, Chicago, Illinois, August 31-September 3, 1995).

that this section does not include one group of scholars that some may consider a natural member of post-positivist jurisprudence: the more vocal members of the critical legal studies movement such as Roberto Unger and Duncan Kennedy.² Critical legal thinkers do not maintain a distinction between law and politics, legal judgment and political preference. Each of the post-positivists in this section, at the end of the day, does maintain these kinds of distinctions and separations within their theories of law. Post-positivists, in fact, are remarkable additions to the field of jurisprudence precisely because of this ability; they can fit and operate these kinds of distinctions within a phenomenological legal framework.

Returning to the subject at hand, what is also remarkable about these post-positivist legal theorists is that, upon close examination, each of them forwards a conception of law which logically includes a commitment to sincere judicial behavior. Interestingly, this commitment is largely overlooked and often holds the key to understanding portions of their legal vision.

The bulk of this chapter will be focused on one “post-positivist” in particular. Ronald Dworkin’s assault upon the tenets of legal positivism and his own interpretive account of law are seminal readings for the student of jurisprudence. Dworkin’s early essays, written as early as 1966 and published under one cover in 1977, maintained the position that law was something other than political preference while at the same time illuminating significant problems of the positivist concept of law.³ It was the dominance of positivism (which Dworkin dubbed “the ruling theory of

² See, for example Roberto M. Unger, Law in Modern Society: Toward a Critique of Social Theory (New York: Free Press, 1976); Unger, “The Critical Legal Studies Movement,” 96 Harvard Law Review 561 (1983); Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 89 Harvard Law Review 1685 (1976); Kennedy, “The Political Significance of the Structure of the Law School Curriculum,” 14 Seton Hall Law Review 1 (1983).

³ Ronald Dworkin, Taking Rights Seriously, seventh impression (London: Duckworth, 1994).

law”) which Dworkin complained had fostered a sort of Hobson’s choice regarding theoretical questions of law. Either accept the positivist rendering of a mechanical jurisprudence or be left with the “nominalist” (read: neo-realist) assertion that law was merely charade, a disguise for the implementation of a judge’s preferences. Dworkin believed that neither of these options accurately reflected legal practice and sought to illustrate a third choice. In “The Model of Rules I,” Dworkin examined the positivist belief that law is a set of rules and found it to be deficient. Specifically, Dworkin sought to correct the positivist’s assertion that, “if someone’s case is not clearly covered by such a [legal] rule... then that case cannot be decided by ‘applying the law.’ It must be decided by some official, like a judge, ‘exercising his discretion,’ which means reaching beyond the law for some other sort of standard to guide him.”⁴ Dworkin exploded this assertion by showing that, in actual practice, legal principles exist in the law which do not take the form of rules but still provide a sense of obligation for legal officials. Legal principles have a “dimension of weight or importance,” while legal rules have an “all or nothing character.” In a case where a legal principle is at work, “it states a reason that argues in one direction, but does not necessitate a particular decision,” Dworkin explains. A legal rule on the other hand is either valid in a particular case or not; “If two rules conflict, one of them cannot be a valid rule,” Dworkin writes.⁵

Dworkin’s introduction of legal principles puts him immediately at odds with both legal nominalists and positivists. Dworkin marks out his differences with these two camps even further in his discussion of discretion.⁶ Dworkin distinguishes between two types of discretion, what he calls “weak discretion” and “strong discretion.” When a legal official

4 Ibid., 17.

5 Ibid., 26-7.

6 Ibid., 31-9.

exercises weak discretion for Dworkin that just means that, “for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment,” or that an official has final decision-making authority.⁷ As was pointed out earlier in chapter three, Dworkin’s legal theory assumes that there is an important distinction to be made between judgments and preferences. These two senses of weak discretion should be separated from another context, where an official may said to have strong discretion. “We use ‘discretion,’” Dworkin says, “sometimes not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question.” Dworkin’s point is to show that the two senses of weak discretion may indeed be recognizable in law, that they are different in character from strong discretion, and that strong discretion is not a legal option that fits our practice.⁸

Dworkin separates himself from the positivists still further. In his article titled, “Hard Cases,” Dworkin explains another important distinction to be made between arguments of policy and arguments of principle. Dworkin writes of arguments of policy that they, “justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole.” Arguments of principle, for Dworkin, on the other hand, “justify a political decision by showing that the decision respects or secures some individual or group right.” These two are not the only grounds of political justification for Dworkin (he suggests arguments of generosity or virtue as other examples) but they are the dominant ones.⁹ Unlike the positivist insistence that judges actually legislate when gaps are found in the

7 Ibid., 31, 32.

8 Ibid., 38.

9 Ibid., 82-3.

landscape of legal rules, Dworkin argues that judges deciding hard cases base (and, further, should base) their decisions on arguments of principle and avoid arguments of policy.¹⁰ This policy/principle dichotomy enables Dworkin to construct the institutional office of the “judge” that does not legislate in instances where “the rules run out.”¹¹ And this (controversial) distinction between arguments of principle and arguments of policy forms the bedrock of Dworkin’s “rights thesis,” his affirmative response to positivist legal theory. Finally, for the purposes of this brief sketch of Dworkinite legal theory, the rules and principles which are the judge’s tools won’t “run out” because Dworkin’s view of the legal landscape is that of a “seamless web” where a judge (like Dworkin’s ideal judge Hercules) will construct “a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, so far as these are to be justified on principle, constitutional and statutory provisions as well.”¹²

What is important to notice about Dworkin’s view of law for our purposes is that, from the outset, it is committed to what I have been calling sincere judicial behavior. That is, Dworkin’s legal theory does not allow for compromised or strategic behavior among judges of an appellate tribunal. When Hercules, for example, constructs his seamless web of what legislation or judicial precedent requires, Dworkin is transparent that, “he will, of course, reflect his own intellectual and philosophical convictions in making that judgment.”¹³ Furthermore, Hercules does not become a tyrant in doing

¹⁰ Ibid., 82-105.

¹¹ T.R.S. Allan writes (quoting Lord Scarman in A.-G. v. BBC, [1980] 3 All ER 161, 182) that the policy/principle distinction, “is fundamental to the separation of powers. It underlines the conviction, basic to the rule of law, that ‘the judicial power of the state exercised through judges appointed by the state remains an independent, and recognisable separate, function of government’.” See Allan, Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism (Oxford: Clarendon Press, 1993), 58. Institutional separation is thus ensured through the exercise of official power by individuals.

¹² Taking Rights Seriously, 116-7.

¹³ Ibid., 118.

this, or a kind of deputy legislator as the positivist would contend, because those convictions are not independent of the law, but simply manifest in him. The seamless web of principle, furthermore, cannot be revealed by an institution, given its complexity; only Hercules- an individual judge- can hope to perform such a feat. Only an individual human mind can hope to achieve the “articulate consistency” Dworkin suggests constrains all legal officials. Dworkin reveals just such a commitment in the following anecdote:¹⁴

Suppose a Congressman votes to prohibit abortion, on the ground that human life in any form is sacred, but then votes to permit the parents of babies born deformed to withhold medical treatment that will keep such babies alive. He might say that there is some difference, but the principle of responsibility, strictly applied, will not allow him these two votes unless he can incorporate the difference within some general political theory he sincerely holds.

Dworkin does say that the demand for “articulate consistency” is weak when “policies are in play,” and the example of the Congressman may actually diminish the force of Dworkin’s claim here. In cases of principle- the proper province of the judge- however, this demand hardens. Dworkin firmly insists that in such cases the doctrine of “political responsibility,” which articulate consistency serves, “does not allow for the idea of a strategy that may be better served by unequal distribution of the benefit in question.”¹⁵ Dworkin is emblematic of what I described earlier as a legal internalist; the consequence of portraying judicial obligation as a function of the internal constraints of an unperforated enterprise is that the individual mind of a “principled” actor- a judge- is the only means of reflecting and constructing accepted legal conventions.

To supplement these claims, consider for a moment one of our previous discussions about appellate adjudication in chapter three. If

¹⁴ Ibid., 87 [emphasis added].

¹⁵ Ibid., 88. Dworkin: “Consistency here, of course, means consistency in the application of the principle relied upon, not merely in the application of the particular legal rule announced in the name of that principle.” Ibid.

Arrow's Impossibility Theorem is applied (roughly) to Dworkin's theory of adjudication, it would appear that Dworkin is in somewhat of a bind. Given the value he places on the Transitivity condition, which of the other four conditions drops, as Arrow requires so that Dworkin's theory remains viable? As Easterbrook suggested in his article,¹⁶ and as I have been trying to say here, Dworkin's theory only works under the assumption that only an individual human mind can make the attempt to comport with demands such as articulate consistency and political responsibility. This causes the Nondictatorship condition to drop out, preserving the other four. This is one of the key lessons of Arrow's work; if you believe that the Impossibility Theorem can be applied to matters of "judgment" (that is, if judgments are really only preferences), and that the three conditions of unanimity, range and the independence of irrelevant alternatives are desirable, then only "Dictatorship" or an individual personified actor will be able to preserve any semblance of consistency (Transitivity).¹⁷

Dworkin further underscores his pre-commitment to the essentially individual nature of judging when he asserts his "right answer" thesis- that hard cases where complex questions of political morality surface can be resolved by a judge's single right answer.¹⁸ Some students of legal theory, because of the right answer thesis, have accused Dworkin of succumbing to a kind of formalism and have rebutted that there is no "right answer" in hard cases, only "answers." These sorts of objections are mistaken. Dworkin is not a formalist and his right answer thesis does not assume a positivist

¹⁶ See text *supra*.

¹⁷ I am convinced that Arrow's Theorem is not an appropriate model in which to analyze judicial decision-making, for the reasons set out by Kornhauser and Sager, "Unpacking the Court," 109-110, note 37.

¹⁸ See Dworkin, "Hard Cases," and "Can Rights be Controversial?," in TRS, 81-130, 279-90; "Is There Really No Right Answer in Hard Cases?," in A Matter of Principle (Oxford: Clarendon Press, 1986), 119-45; "Pragmatism, Right Answers, and True Banality," in Michael Brint and William Weaver, eds., Pragmatism in Law & Society (Boulder, San Francisco and Oxford: Westview Press, 1991), 365-66.

ontology of transcultural, transhistorical truth. Dworkin is perfectly transparent about this, saying of his right answer thesis that, "It is a claim made within legal practice rather than at some supposedly removed, external, philosophical level."¹⁹ This is a crucial move of Dworkin's as it underlines his commitment to foundations of law and that these foundations are best understood as conventional or institutional, not as metaphysical. The importance of this claim for Dworkin's view of legal practice is well captured by Howard Gillman, when he writes that, "a judge's willingness to approach a case as if there is a right legal answer is designed to replace positivism's emphasis on determinate rules as the measure of whether a judge is acting in accordance with the law."²⁰

Dworkin's legal theory should not only be viewed as a confrontation with positivism; in a book first published in 1986 he clearly articulated his model of law and defended it against other popular models as most deserving of our allegiance.²¹ Dworkin's concept of "law as integrity" is testimony to a working assumption of this paper that legal meaning is inextricably tied to its manner of expression. Dworkin first suggests that law is best understood as "an interpretive concept," to be distinguished from "semantic" concepts of law like (once again) positivism. Dworkin labels positivism a semantic concept of law because positivists claim that apparent disagreements about

¹⁹ See "Pragmatism, Right Answers, and True Banality," 365. Howard Gillman writes of Dworkin that he, "has indicated repeatedly that his argument about right answers is meant to be conventional rather than metaphysical." Gillman, "Judicial Behavioralism's Problematic Jurisprudence," 12.

The embedding of arguments (whether moral, political or interpretive) within a practice is perhaps the most telling characteristic of Dworkin's writing on subjects of law. The examples we have been dealing with so far have shown how Dworkin does distance himself from positivists and formalists. Dworkin also makes the same move to deal with the challenges of skeptics and localists as diverse as Mark Tushnet and Stanley Fish. See Dworkin, "On Interpretation and Objectivity," in A Matter of Principle, 171-7. A similar version was also published in the 1982 issues of Critical Inquiry and the Texas Law Review. 9 Critical Inquiry 179 (1982); 60 Texas Law Review 527-50 (1982).

²⁰ Gillman, "Judicial Behavioralism's Problematic Jurisprudence," 13.

²¹ Law's Empire (London: Fontana Press, 1991).

law are ultimately “borderline drawing” exercises about the penumbral and core meaning of the word “law.” This positivist portrayal of legal argument for Dworkin is a betrayal to the actual rich fertility of our legal practice. Unlike the positivist who sees legal argument as exclusively empirical, Dworkin maintains that “much disagreement in law is theoretical rather than empirical.” In addition to the borderline cases, Dworkin adds that there are “pivotal or testing cases” where disagreement about law is a disagreement about “the grounds of law,” the very criteria for deciding when a legal claim is valid.²² That is to say, disagreement about law can be deeply (foundationally) theoretical, not only a semantic exercise. Dworkin contends that the semantic legal concept of positivism is impoverished because it clings to,

a certain picture of what disagreement is like and when it is possible. They [the positivists] think we can argue sensibly with one another if, but only if, we all accept and follow the same criteria for deciding when our claims are sound... You and I can sensibly discuss how many books I have on my shelf, for example, only if we both agree, at least roughly, about what a book is.... Either, in spite of first appearances, lawyers actually all do accept roughly the same criteria for deciding when a claim about law is true or there can be no genuine agreement or disagreement about law at all, but only the idiocy of people thinking they disagree because they attach different meanings to the same sound.²³

This “crude” picture of what disagreement is like “fits badly” with our actual practice, according to Dworkin, where in many cases lawyers do argue about the criteria for deciding when our claims are sound- the grounds of law.

Dworkin, in making these sorts of observations, brings an “interpretive attitude” to law, emphasizing two elements.²⁴ The first interpretive element is that the practice of law, “does not simply exist but has value, that it serves some interest or purpose or enforces some principle- in short, that it has some point- that can be stated independently of just

²² See generally *ibid.*, 31-46.

²³ *Ibid.*, 45.

²⁴ See generally *ibid.*, 46-86.

describing the rules that make up the practice.”²⁵ The second element that is characteristic of the interpretive attitude one takes toward a practice is that the behavior of the person within that practice “must be sensitive to its point [as conceived in the first element], so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point.”²⁶ Dworkin uses the example of a community’s practice of courtesy to illustrate the point. Though at first such a practice, “has the character of taboo,” and the rules are “just there,” after a while an interpretive attitude will be taken by members of the community towards the practice and they will have in mind both of the elements that are characteristic of the interpretive attitude. I think it is fair to say, as I intimated in the introduction and chapter three, that for most members of the interpretive community of law the manner by which the judicial power is expressed or exercised remains unquestioned and generally characterized by, in Dworkin’s terms, the “preinterpretive attitude.” One of the main purposes of this thesis, in Dworkin’s terms then, is to bring the interpretive attitude to this aspect of the law- to make members aware of and sensitive to “the point” of the mode of judicial expression.

With the understanding that law is essentially an interpretive concept, Dworkin sets to construct and defend his theory about “the proper grounds of law.” Dworkin’s theory of law is carefully crafted because he realizes that he is carving a path between formalism and skepticism. Dworkin refines his observation that law is an interpretive enterprise and makes the comparison of the legal enterprise to one of literary interpretation. He does this because he feels that law is most like literary interpretation in its reply to two important questions for any interpretive endeavor, which follow: (1) Is the kind of collaboration that is involved

25 Ibid., 47.

26 Ibid.

between a “creator” and an “interpreter” of the enterprise cooperative or non-cooperative, and (2) do members of the enterprise regard the “point” (which is of course the hallmark of its being an interpretive enterprise at all) of the enterprise as controversial or uncontroversial? It of course follows that, using these two questions of interpretive disciplines, there are four possible results. Dworkin’s observation can be seen more easily if the questions are arranged graphically, with sample disciplines filling each of the four possible combinations:²⁷

	<u>Cooperative</u>	<u>Non-Cooperative</u>
<u>Uncontroversial:</u>	Conversation	Scientific Interp.
<u>Controversial:</u>	Literary Interp.	History

Law then is like literary interpretation because Dworkin sees them both as enterprises which are “cooperatively-collaborative” and “purposefully-controversial.” Is law always that kind of enterprise? Is law no longer an interpretive enterprise on occasions (which make up much of the life of the law) where it is actually “purposefully-uncontroversial?” On many occasions doesn’t the law look a lot like conversation, and yet still have an important interpretive job to do? Dworkin prefers to view the creatively interpretational enterprise of law as “not conversational but constructive... essentially concerned with purpose not cause,” but in fact this rather rigid classification does a disservice to law.²⁸

In any event, Dworkin’s comparison between legal and literary

²⁷ See “How Law is Like Literature,” in A Matter of Principle, 146-66; Law’s Empire, 49-76, 225-8. However, I am indebted to professor Dworkin for spelling out this particular formulation (both the examples and the graphic presentation) in a jurisprudence seminar given at Oxford University during Hilary Term, 1996.

²⁸ Law’s Empire, 52. In fact this classification does a disservice to Dworkin’s own theory of “law as integrity,” which is a view of law that “insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice as an unfolding political narrative.” *Ibid.*, 225 [emphasis added]. Dworkin puts forth “law as integrity” so as to escape “the ancient question whether judges find or invent law; we understand legal reasoning, it suggests, only by seeing the sense in which they do both and neither.” *Ibid.* [emphasis added].

interpretation leads to his “banal suggestion” about what it is members of this kind of interpretive enterprise are doing when they interpret a text. Dworkin calls this suggestion the “aesthetic hypothesis,” and it follows, verbatim: “an interpretation of a piece of literature attempts to show which way of reading (or speaking or directing or acting) the text reveals it as the best work of art.”²⁹ It follows for Dworkin that for a judge to decide a hard case at law he must interpret the relevant, antecedent materials (which include the principles of political morality which animate them) in such a way as to make them the best coherent explanation of the enterprise. Or, to use Dworkin’s terms, a judge must first comport with “the dimension of fit,” which will admit of possibly several different interpretations. Then the judge must choose which of these readings, “makes the work in progress best, all things considered.”³⁰ Given that a community’s legal enterprise is to continue beyond the lives of a single generation of both officials and citizens, the judge will most likely find himself engaged in a kind of “chain novel” project (which, in fact, Dworkin interestingly characterizes in Law’s Empire as a “seriatim” exercise³¹). Unlike other critics of Dworkin, who dismiss the aesthetic hypothesis as either trivial (“people’s views about what makes art good art are inherently subjective”) or that it confuses the important difference between “interpretation” and “criticism,” I would suggest instead that on its own terms the aesthetic hypothesis can only be satisfied by an individual judge acting sincerely. Dworkin’s discussion of the judge’s strange project reveals such a commitment:

Any judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial political philosophies, in periods of different orthodoxies of procedure and judicial convention. Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain

²⁹ A Matter of Principle, 149. Also see Law’s Empire, 45-86, 225-32.

³⁰ Law’s Empire, 230-1.

³¹ *Ibid.*, 229.

enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He *must* interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.³²

It would appear from comments like these that Dworkin has in mind a certain behavioral context when he employs the term “best” in his aesthetic hypothesis. A fair interpretation of the hypothesis (especially considering Dworkin’s earlier distinction between arguments of principle and policy) I think eliminates the opportunity for a judge to compromise her “best” rendering of the relevant materials. This means that either the “internal” compromises that would aid in majority- or unanimity-gathering or the textual compromises that would soften the force of that “best” rendering are not relevant considerations. If these sorts of considerations were relevant, they would rob the aesthetic hypothesis of any explanatory or interpretive power. Early in Law’s Empire, Dworkin writes that he purposefully omits,

the practical politics of adjudication, the compromises judges must sometimes accept, stating the law in a somewhat different way than they think most accurate in order to attract the votes of other judges, for instance. I am concerned with the issue of law, not with the reasons judges may have for tempering their statements of what it is.³³

This broad denial will not do, and Dworkin’s explication of what it is judges do with the law will not admit of such strategic compromises for they would immediately doom the sophisticated internal theory of adjudication that Dworkin provides as an alternative to rival theories of law. For a theorist who takes on diverse competitors from fields of law, philosophy and literary theory, this initial omission is an important admission. No matter what period (each characterized by “different orthodoxies of procedure and judicial convention”) in which a judge may find himself one aspect of orthodox procedure and judicial convention must remain constant.

³² A Matter of Principle, 159 [emphasis added].

³³ Law’s Empire, 12.

Specifically, that aspect where an individual judge must sincerely determine what the enterprise demands of him regarding the case at hand. Whatever else may change over time in the interpretive enterprise of law, this characteristic must remain or the aesthetic hypothesis says too much and, therefore, says little. That is why it is most disturbing when, towards the end of Law's Empire, Dworkin seems willing to destroy all that he has created.

"An actual justice," Dworkin says, in contrast to Hercules,

must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level.³⁴

The importance of the very real constraints of judging- time, docket and language, to name just three- should not be underemphasized. Neither though should they assume such a position of paramountcy that matters of principle are in the end either strategically avoided or compromised away in due deference to the constraints. What is Dworkin trying to tell us by inserting such a caveat? Can a community of principle at the highest level only be preserved by willful insincerity? Dworkin himself seems to reject this conclusion only ten pages later when he discusses the Supreme Court's remedy of "all deliberate speed" in the desegregation cases.³⁵ American legal history as well as current English legal practice demonstrates that the ideal Dworkin is suggesting does not have to be abandoned so soon.

When Dworkin further elaborates his theory of law, this pre-commitment to individual, sincere behavior is again evident. He introduces, for example, the "catch phrase" of treating like cases alike, to be considered

34 Ibid., 380-1.

35 Ibid., 390-391 [Explaining that a judicial remedy which aimed for the ideal of law as integrity, "is not simply or directly consequentialist the way a flat decision of policy would be," Dworkin writes that a Herculean effort must, "search out the most effective and immediate enforcement of substantive constitutional rights consistent with the interests of those who claim them but must not otherwise defer to or try to accommodate the interests of people who want to subvert those rights."].

along with other political ideals of justice and fairness. This ideal, Dworkin explains, “requires government to speak with one voice, to act in a principled and coherent manner toward all of its citizens, to extend to everyone the substantive standards of fairness and justice it uses for some.”³⁶ This slogan of treating like cases alike does not capture fully the virtue Dworkin wishes to convey- the virtue of “political integrity”- which he characterizes as the (interpretive) attitude that exists when persons act, “according to convictions that inform and shape their lives as a whole rather than capriciously or whimsically.”³⁷ The virtue of political integrity is divided by Dworkin into two principles, legislative integrity and adjudicative integrity. Legislative integrity, Dworkin asserts, “asks those who create law by legislation to keep that law coherent in principle,” while adjudicative integrity, which is the impetus for Dworkin’s own conception of law,

asks those responsible for deciding what the law is to see and enforce it as coherent in that way.... It explains why judges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one, with nothing but a strategic interest in the rest.³⁸

What is suggested throughout Dworkin’s discussion of integrity is that integrity presupposes sincerity as I have been speaking about that virtue. Perhaps the best illustration of this is in Dworkin’s discussion of “internal compromises.”³⁹ Why, Dworkin asks, can we not adopt a “Solomonic model” to deal with problems of justice and fairness? Why, when a community is divided on the question of abortion is it not acceptable to adopt a kind of “checkerboard statute,” which would make abortion criminal for pregnant

³⁶ Ibid., 165.

³⁷ Ibid., 166.

³⁸ Ibid., 167 [emphasis added]. It is worth noting that Dworkin rejects a rival conception of law (“conventionalism”) because he believes that “consistency in principle, and not merely in strategy, must be at the heart of adjudication.” Ibid., 135.

³⁹ Ibid., 178-86.

women who were born in even years but not for ones born in odd years?

This sort of solution is often employed for issues like zoning; why not abortion? When matters of principle are stake, Dworkin rightly observes that,

We follow a different model: that each point of view must be allowed a voice in the process of deliberation but that the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority. If there must be compromise because people are divided about justice, then the compromise must be external, not internal; it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice.⁴⁰

This picture of how to (and how not to) resolve problems of justice is precisely the picture of sincerity of which I have been speaking- precisely that is, except for one point in need of emphasis. Any “external compromise” that Dworkin’s ideal of integrity permits must be a bona fide attempt to arrive at a coherent scheme of justice and can not purposefully utilize the inherent elasticity of language to present the facade of coherence. This minor amendment is really only needed to emphasize a point that is latent in Dworkin’s legal theory, as preceding considerations make plain. Dworkin rightly points out that this ideal has even been somewhat constitutionalized, by interpretation of the equal protection clause of the Fourteenth Amendment, for example.⁴¹

Finally, consider Dworkin’s particular view of state and community “personification” that political integrity assumes, one where “we need to treat group responsibility as logically prior to the responsibilities of officials one by one.”⁴² Now all this talk about integrity brings us to an observation I believe to be essential. Whether in the form of “catch phrase” or political virtue, the legal coherence that the integrity principle should express is an ultimate political ideal. Coherence may be an ultimate hermeneutic virtue, a

40 Ibid., 179 [emphasis added].

41 Ibid., 184-6. See also Allan, Law, Liberty, and Justice, 44-7.

42 Ibid., 175.

way for citizens and officials to make sense of their rights, their duties, their community. This is all fair enough; in the final analysis human civilizations need to act with purpose in order to survive and flourish. What needs to be remembered is that this ultimate end can be (and, given a fair reading of American constitutional theory and history, should be) attained through governmental machinery which includes a judiciary which is not institutionally coherent but individually so. Dworkin's treatment of integrity is couched in the terms of a monological mode of legal development. In this way, Dworkin's conception of "law as integrity" leaves no room for the conversation of law. Even worse, it ignores what Dworkin himself considers "the most important lesson" the chain-novel view of law teaches: each interpretive claim of the enterprise must be earned and defended through open argument and justification.⁴³ Dworkin, at times, seems content to rest upon a monological mode of legal discourse for the enterprise of law. This result is not defended by Dworkin as the best possible reading of the enterprise, and makes no room for the competing, alternative mode of dialogue.⁴⁴

It should be reiterated that it is a matter of degree as to whether the characteristic of sincerity is present; it is surely still present in American law today, even in many instances when hard cases reach the highest court in the land. Again, I have not for a moment wished to indicate that the Supreme Court- because of certain conventions which act against the ideal of sincere, individual behavior by judges- is somehow acting extra-legally or that it no longer deserves respect as an authoritative legal interpreter. All I have been trying to do here is expose what is an embedded "preinterpretive

⁴³ Ibid., 237-8.

⁴⁴ Frank Michaelman, in a well-known article, expresses similar thoughts about Dworkin and what I have been calling judicial sincerity. Michaelman's article is a valuable addition in that his arguments are expressed on behalf of a desire to achieve a "dialogue" of republicanism between rulers and ruled. See Michaelman, "The Supreme Court, 1985 Term - Foreword: Traces of Self-Government," 100 Harvard Law Review 66-73, 76-77 (1986).

attitude” regarding matters of judicial (and thus constitutional) expression. Any government which holds dear the principle of the separation-of-powers must sooner or later confront such issues of communication.

Like Dworkin’s legal theory, the essays of Stanley Fish offer a conception of law as an enterprise; a conception that contrasts with the ontological, determinate conception of the positivist. Since he first wrote Is There a Text in This Class?, Fish has advanced the proposition that the historically- and culturally-contingent assumptions of any “interpretive community” will constrain the behavior of embedded participants.⁴⁵ Fish is also well known for his antagonism to Dworkinite legal theory as well as for a special brand of antifoundationalism or “localism” that puts him at loggerheads with many apparently similar skeptical theorists. Perhaps the hallmark of Fish’s theory is that by his own admission the acceptance of an antifoundationalist critique of interpretation “has no consequences” for the practice of the “interpretive community” being critiqued.⁴⁶ Many authors have commented upon traits of Fish’s work such as these, and Dworkin and Fish have been writing against each other for over a decade.⁴⁷ Fish’s ideas about law are useful for a more tailored purpose; Fish is a great believer in the constraining effect of sincere judicial behavior.

Fish is a consistent proponent of what I have called the internal view of law. He denies that any text or rule can have any constraining force upon

⁴⁵ See Stanley Fish, Is There A Text in This Class?: The Authority of Interpretive Communities (Cambridge, Mass.: Harvard University Press, 1980).

⁴⁶ See, for examples of this, *ibid.*, 370; “Interpretation and the Pluralist Vision,” 60 Texas Law Review 495-505 (1982).

⁴⁷ Fish’s direct responses to Dworkin’s writing on the subjects of interpretation, the “chain-novel” enterprise, and law as integrity can be found in, “Working on the Chain Gang: Interpretation in Law and Literature,” “Wrong Again,” and “Still Wrong After All These Years,” in Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Durham, N.C.: Duke University Press, 1989), 87-102, 103-119, 356-371. Also see “Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin,” in Michael Brint and William Weaver, eds., Pragmatism in Law & Society, 47-81.

a practicing participant before the act of interpretation, or that the meaning of a text is somehow timeless or “external” to the interpreter. It is only the interpretive assumptions and beliefs of the reader approaching a text that can produce meaning. Without these previously acquired tools, texts would be incapable of delivering any meaning at all because they would be only be arbitrarily produced marks on paper.⁴⁸ Remarks such as these would seem to indicate that Fish adopts a realist view of law that claims that judges simply forward their own personal preferences when deciding cases. Fish is no realist however; he is more properly viewed as a “localist,” and his point that the culturally-contingent assumptions and purposes of a practicing participant within an “interpretive community” are very real constraints upon interpretation is crucial to understand.⁴⁹ Even though texts can not possess a universally shared meaning in and of themselves, Fish’s point is that the behavior of readers is still very much constrained because interpreters only encounter texts in highly specific contexts. No phrase gets to the root of Fish’s localism quicker than his admission that, “life is lived not at the general level but in local contexts that are stabilized (if only temporarily) by assumptions already and invisibly in place.”⁵⁰ In this way Fish is very much like Dworkin (though by their colloquies you wouldn’t know it) in that he seems to have a distaste for theorists who adjust their thoughts for metacritical concerns. “Readers and texts,” Fish writes,

⁴⁸ See Fish, “Play of Surfaces: Theory and the Law.” In Leyh, Gregory, ed. Legal Hermeneutics: History, Theory, and Practice (Berkeley: University of California Press, 1992), 299-300; idem, Is There A Text in This Class?, 322-37.

⁴⁹ For an excellent brief review of Fish’s post-positivism, see Gillman, “Judicial Behavioralism’s Problematic Jurisprudence,” 13-17.

⁵⁰ Fish, “Play of Surfaces,” 307. Fish has reiterated this basic point throughout his career. I can not resist reprinting another of his attempts to emphasize the essentially local character of language: “Words are intelligible only within the assumption of some context of intentional production, some already-in-place predecision as to what kind of person, with what kind of purposes, in relation to what specific goals in a particular situation, is speaking or writing.” “Don’t Know Much About the Middle Ages: Posner on Law and Literature,” in Doing What Comes Naturally, 295.

are never in a state of independence such that they would need to be “disciplined” by some external rule. Since readers are already and always thinking within the norms, standards, criteria of evidence, purposes, and goals of a shared enterprise, the meanings available to them have been preselected by their professional training; they are thus never in a position of confronting a text that has not already been “given” a meaning by the interested perceptions they have become.⁵¹

Notice Fish’s local characterization of the text as an unavoidably “interested” perception. It is my contention that, as far as the interpretive community of Common Law judging is concerned, Fish’s inherently local characterization of texts can only be accepted upon the assumption that a practicing participant within the community can not strategically manipulate the locally-generated “interested perceptions.” If such a strategic avenue is available, then the participant is no longer “disciplined” by the standards of the “shared enterprise.” In fact, the enterprise would no longer be “shared” by the participant; local meaning would not be meaning at all without a sincere participatory approach to the texts of the community.

A reply to this assertion might be that I am including as “locally generated” an assumption of legal practice that is simply not there, an assumption that I am simply inserting for my own purposes of reform. On Fish’s terms, the answer undoubtedly must be yes and no. Though I do not deny that, for example, the current practices of the Supreme Court do not reflect the highest ideals of sincerity and at times sacrifice the prestige and importance of law for the prestige and importance of the judiciary, the fact remains that such norms are present to some degree and that without them Fish’s characterization of law makes no sense. Fish’s reliance on “an enriched notion of practice,” which is a fancy way of saying that practice is not influenced by theory, is ultimately as unimportant for practice as he claims theory to be if such a notion is not constrained by a sincere approach to participating within the practice. Fish intimates such a commitment

⁵¹ “Fish v. Fiss.” In Doing What Comes Naturally, 133.

when he notes that a local characterization of an enterprise means that an embedded participant will think within a practice, in contrast to thinking with a practice (which he accuses Dworkin's chain-novel characterization of doing). Fish elucidates the difference between the two types of thinking, saying that,

To think within a practice is to have one's very perception and sense of possible and appropriate action issue "naturally"- without further reflection- from one's position as a deeply situated agent. Someone who looks with practice-informed eyes sees a field already organized in terms of perspicuous obligations, self-evidently authorized procedures, and obviously relevant pieces of evidence. To think with a practice- by self-consciously wielding some extrapolated model of its working- is to be ever calculating just what one's obligations are, what procedures are "really" legitimate, what evidence is in fact evidence, and so on. It is to be a theoretician.⁵²

What can it mean for a "deeply situated agent" to bring a "natural" disposition to problems of the enterprise if the prior assumption that such a disposition should be sincerely held is not already in place? The agent does not deeply situate himself to sabotage the enterprise. Fish may be right that Dennis Martinez (a professional baseball pitcher) may not be conscious of all that informs his deliberations on pitching, but there can be no doubt that Martinez when engaging in his practice sincerely believes there is a single way he should conduct himself in the performance of his task. Any "natural" disposition must incorporate internal feelings of fidelity to such a disposition. Moreover, if such allegiance is present, it must be allegiance to something, some single view (however unreflective) of what the enterprise demands of its participants. This is why Fish has such disdain for Dworkin's aesthetic hypothesis and chain-novel metaphor for participants of an enterprise; there is no such thing as a judge acting "according to the best interpretation," but only for a judge to act like a judge.⁵³ Fish might insist

⁵² "Dennis Martinez and the Uses of Theory." In Doing What Comes Naturally, 386-7.

⁵³ See *ibid.*, 391-2. Also see "Almost Pragmatism: The Jurisprudence of Richard Posner, Richard Rorty, and Ronald Dworkin," in Michael Brint and William Weaver, eds., Pragmatism in Law & Society, 73-80. Howard Gillman summarizes the Fishian view of a judge when he says that, "Part of what it means to be a judge is to act in

that Supreme Court Justices today simply do not reflect upon the current mode of expressing themselves; which includes strategically compromising their language and forming coalitions. These sorts of unreflective actions and dispositions, to continue this line of thinking, make up what it means to be Supreme Court Justice in 1996. To be judge means to engage in such compromises; this is what the enterprise demands. If, on the other hand, this view is not simply to slide into a behavioralist-realist view of law (and this is not what Fish argues for at all) then Fish's "enriched notion of practice" must cling to a kind of perceptual formalism that allows a judge to present his decision according to a sincere view of what the practice requires.⁵⁴ Notice how Fish says that to think with a practice is "to be ever calculating" what one's obligations are as a participant. In the case of a judge, such calculations (or strategies) could not only alter the content of those obligations but affect the product- law- as well. At the heart of this perceptual formalism is the sincere execution of a task the interpretive community asks the participant to perform. Fish's admonishment that all interpretation is local, however, leaves the outside theoretician only able to argue substantive political agendas of reform or entrenchment.

Fish is clear in his belief that law is at bottom an extraordinary kind of rhetorical activity, "creating and recreating itself out of the very materials

a way that is consistent with the prevailing understanding of a judge's duties and obligations...what makes a decision 'legal' rather than narrowly partisan or idiosyncratically personal is not the discipline of a determinate rule but the discipline of a practice- the discipline of a discipline- if you will." Gillman, "Judicial Behavioralism's Problematic Jurisprudence," 14-15.

⁵⁴ Fish: "A preference is something one cannot have independently of some institution or enterprise within which the preference could emerge as an option, and an institution or enterprise is itself inconceivable independent of some general purpose or value... I may be a judge deciding a case involving voter fraud who 'personally' prefers one political party to another (it would be hard to imagine a judge of whom this would not be true), but if I am thinking of myself as a judge, I automatically conceive of my task as a judicial one and comport myself accordingly." "Still Wrong After All These Years." In Doing What Comes Naturally, 366-7 [emphasis added]. Also see "Force," in *ibid.*, 520.

and forces it is obliged, by the very desire to be law, to push away.”⁵⁵ In one of his articles, however, Fish displays what can only be called a remarkable bias about the rhetoric of law, which causes him to incorrectly claim that any such theoretical view “has no consequences” for the practice of law. In his critique of the legal theory of James Boyd White, Fish agrees with much of White’s observation about law (specifically, that law is essentially rhetorical), but decries his “antifoundationalist theory hope,” which is the suggestion that “by becoming aware of the rhetoricity of our foundations we gain a [nonrhetorical] perspective on them that we didn’t have before.”⁵⁶ That is to say that Fish agrees with White’s portrayal of the subject but denies that such a picture could generate any practical change in the law. It is Fish’s understanding of both rhetoricity and the enterprise of law, however, which is skewed. Chiding White for claiming that the awareness of certain rhetorical features (such as the commitment to “many-voicedness”) of the law can improve our practice, Fish writes that, “it is hard to see what place [such features] could have in a process that demands single-voiced judgments, even if that voice can be shown to be plurally constituted.”⁵⁷ At the very least Fish here misunderstands both the function and possibility of the rhetoricity of law; he appears here (as earlier discussions reveal) to have an almost oxymoronic idea of rhetoric as well as a rigid “result-oriented” view of legal practice. Both characterizations are surprisingly partial given Fish’s general attitude toward institutional structures.⁵⁸ More importantly, White’s thesis of law’s rhetoricity, despite what Fish thinks, potentially does

55 See “The Law Wishes to Have a Formal Existence,” in There’s No Such Thing as Free Speech, and It’s a Good Thing, Too (New York: Oxford University Press, 1994), 156.

56 *Ibid.*, 172. For more on the legal theory of James Boyd White, see text *infra*.

57 *Ibid.*, 174.

58 For just such a general statement by Fish, see, “Appendix. Fish Tales: A Conversation with ‘The Contemporary Sophist,’” in, There’s No Such Thing as Free Speech, 297.

have consequences for legal practice. It is precisely because White- like Fish and unlike many others who Fish correctly castigates- sees law as essentially rhetorical that our current practice can be affected. By Fish's own admission, the goals of the law are achieved through "winning an argument or crafting an opinion." These, "result-oriented activities," as Fish calls them, would no longer be only result-oriented if White's observations became accepted as "natural." Theory which is sensitive to the rhetorical nature of law- perhaps only such theory- can generate consequences for a rhetorical legal practice.

Finally, this review of post-positivist legal theory will briefly touch on some of the writing on the subject of law forwarded by the "Law and Literature" school of legal theory. Two prominent authors will be discussed: James Boyd White and Joseph Vining. The Law and Literature school prefers to characterize law as a language, a constitutive discourse, a "set of resources for thought and argument."⁵⁹ In his best known book, When Words Lose Their Meaning, professor White sets out a particular "way of reading" legal texts so that a person can be sensitive to the rhetoricity that is law. This "way" focuses on "four fundamental questions" that a reader should have in mind when trying to best understand and analyze a text.⁶⁰

Those who view law as White does make a great deal of room for the centrality of the human mind- the individual human mind- in the legal

⁵⁹ Heracles' Bow: Essays on Rhetoric and the Poetics of the Law (Madison, WI: The University of Wisconsin Press, 1985), 33.

⁶⁰ James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community (Chicago: University of Chicago Press, 1984), 3-23. White's "way of reading" is too subtle and (not surprisingly) rhetorical to be capable of an effective summary. In White's sequel to When Words Lose Their Meaning, he offers "three interrelated points of attention" which characterize his approach: "[T]he language and culture within which the writer works; the art by which he reconstitutes his use of it; and... the kind of community he establishes with his readers in the experience he offers them." White, Justice as Translation: An Essay in Cultural and Legal Criticism (Chicago and London: University of Chicago Press, 1990), 99.

endeavor.⁶¹ This is because White sees language as having, “an ineradicably individual character.... I do not mean that meaning is completely private, which would obviously make social and linguistic life impossible, but that for each of us there is always an element or dimension of meaning... that is irremediably personal.”⁶² White’s view of language, not surprisingly, directly influences his characterization of the judicial opinion. One of the most important features of this particular form of law, White explains, is that “In every judicial opinion the judge gives himself a character or personality, demonstrating by performance certain intellectual and ethical qualities which he of necessity asserts to be appropriate to his role.”⁶³ These sorts of characterizations of language point toward another commitment of White and his Law and Literature colleagues- a normative commitment to the conversation of law. We should strive for this conversing ideal in law, White says, because it is the only way forward for any legal practice whose currency is human language; what is needed to improve any legal practice is not, “more theory, but more practical criticism.”⁶⁴ Unlike Fish’s radical localism, White takes a moderated position as he believes that texts can deliver shared meaning among readers because he sees language and texts not only as created by communities but also as constitutive of those communities.

White’s specific discussion of the difference between “British” and “French” methods of constitutional expression stands out for our purposes.⁶⁵ The distinctively British contribution is that discourse on constitutional values must be discussed all at once in combination, as opposed to a chain of

61 See, for example, White, Justice as Translation, 3-21.

62 *Ibid.*, 35.

63 *Ibid.*, 111.

64 *Ibid.*, 99.

65 See White, When Words Lose Their Meaning, 192-230.

singular values in line. Using the writings of Edmund Burke as his exemplar, White explains that British constitutionalism's true aim,

is not the isolated definition of values but their combination, their composition into a whole. . . .The central characteristic of this language. . . is its integrative force: it is a language that unites fact, value, and reason; thought and emotion; the family and the crown; the social and the natural worlds; ethical motives and material results.⁶⁶

"French" methods are notable for "a theoretical, single-value discourse," which leads to such undesirables as detachment, chaos, disintegration, and dissolution.⁶⁷ It is both clear and correct that White links American constitutionalism to her British roots regarding such methods.⁶⁸ White's illuminating, while somewhat artistic, point is that a constitutive language that values integration and combination can not be read by utilizing a serial mode of scientific inquiry and judgment. In a language that employs "many-voicedness," and "comprehending contraries," . . . the interesting question is not what the main idea is but how it is given meaning by the text, and given meaning in particular by the oppositions that are its life," White says.⁶⁹ In hoping to demonstrate how certain latent institutional practices may comport with constitutional principles and forms, White's discussion is valuable. In his own words, White explains how such a constitutive language, incorporated in law, "is profoundly against monotonal thought and speech, against the single voice, the single aspect of the self or culture dominating the rest."⁷⁰

We conclude this tour of "post-positivist" legal theory with a very brief mention of the work of one of White's colleagues. Joseph Vining, in The Authoritative and the Authoritarian, echoes many of the same themes as

66 Ibid., 201, 208.

67 Ibid., 201-2.

68 See White, "The Judicial Opinion and the Poem," in Heracles' Bow, 107-38.

69 Ibid., 116-17.

70 Ibid., 124.

does White about the law. Like his colleague, Vining emphasizes the legal enterprise as centrally dependent upon the human mind. “[T]he method lawyers use,” Vining is plain, “involves a presupposition of mind.”⁷¹ Some may notice that, like Vining, I too have been inserting terms like “mind” in this discussion of legal theory and terms like these need proper definition. Vining is right to reply to such persons that want prior definitions that, “To try to specify what we mean by mind would be to fall into the very way of thinking and talking that it should be our purpose above all to bypass.... What good would it do to try to define what we mean by ‘tragic’? Our meaning will come clear only in discussion.”⁷² Perhaps when I have been suggesting in these pages- that latent in much of legal theory is a commitment to judicial sincerity- would also be conveyed by saying that at the core of legal theory there is mind. Without mind, there is no law.

The main reason I have taken this brief moment to discuss Vining is because he is preoccupied with the same question that has gripped these pages. Listen to the question that Vining says will guide his inquiries throughout his monograph:

Sometimes lawyers, judges, officials, and citizens say they speak “in the name of the law.” When they say this they invoke the authority of the law. It is not too literal to ask what the law’s name is and whether it can have a name.... Our inquiry is guided, as will be seen, by a question that can be raised today about the American Supreme Court: whether it will become a bureaucratic institution, and if so what that will mean.⁷³

For Vining, law will become authoritarian if its practitioners insist on making law into some kind of machine, erasing its presupposition of mind. The peculiar institutionalism that has surrounded our legal practice, Vining claims, will ultimately rob law of its authoritative purchase upon us. Vining is a kindred spirit in this suggestion; he is concerned with the eroding

⁷¹ Vining, J. The Authoritative and the Authoritarian (Chicago: University of Chicago Press, 1986), 156.

⁷² *Ibid.*, 205.

⁷³ *Ibid.*, 6.

quality of the Court's work which he attributes to such internal features as the proliferation of the influence of law clerks. It is also Vining's purpose to suggest that our legal practice would do better to search for (and create and maintain) an authoritative center of legal meaning rather than for a hierarchical apex which ultimately will be transformed into an authoritarian phenomenon of impersonal process. This is the great confusion of many scholars who suppose that "judiciary" and "law" are convertible terms; there can be a Supreme Court at the apex of an institutional hierarchy and yet still retain an authoritative center for law. In one sense, it is the aim of this paper to affirm Vining's protests. American law has been marching down the hierarchical, bureaucratic path for a very long time, and there was a particular moment when the pace of that march was greatly accelerated.

PART III

Chapter Seven: Judicial Sincerity and Its Absence

In addition to any historical or jurisprudential arguments which might bolster claims of relevance for an argument on behalf of judicial sincerity, there needs to be an exploration of whether authoritative constitutional theory adds any support to such a thesis, and what some of the important practical consequences might be if the judiciary reflected such a behavioral standard. This is the primary task of the third and final part of the paper. Each of the chapters which follow are concerned with either the important practical consequences of conceiving of “the judicial Power of the United States” as entailing a prior commitment to sincere behavior, or whether American constitutional theory speaks to such a commitment.

The thesis which has been presented to this point would be well served by a brief chapter which spells out in a more concise, systematic way what I have been arguing for and how I understand- practically speaking- the idea of judicial sincerity and its application to the United States Supreme Court. The ideal of judicial sincerity would manifest itself in the everyday operations of an appellate court like the Supreme Court in two basic ways. Specifically, two main elements would exist which reflect the importance of the value of individual sincere judgment: (1) a set of institutional conventions, and (2) an set of discourse ethics. The following summary of these two elements is conducted with the U.S. Supreme Court in mind.

Institutional conventions which reflect the value of judicial sincerity would, in the first place, have to not only permit but harbor no animosity whatsoever against a dissenting opinion of a fellow judge. The role of dissent of any kind has really been at the heart of the discussion; judicial sincerity values dissenting opinion of any kind. As I have been trying to show, the theories which underpin Anglo-American common law traditions actually

treat dissent much differently than it usually is treated by legal theorists.¹ Any rule, convention or attitude which displays any degree of preference for plurality, majority or unanimous opinion has no place in a forum of principled legal judgment in the Anglo-American tradition. Conventions of opinion assignment and construction which are operative within the present Court would be abolished. It is not enough for option of dissent to be present. Individual and plurality opinions should be accorded equal institutional respect even if a plurality opinion may become the law of the land. One (political) value reflected by a common law tradition which prizes judicial sincerity is that dissent- and the ability to accommodate it- reflects strength in both the law and the polity which is governed by it.

Ethics of discourse among the judges of a sincere court would also develop. In one sense they can be understood to be derivative of the institutional conventions of the court, but in another sense they can be seen as reinforcing and altogether separate from a court's institutional conventions. These discourse ethics would be important reminders to a judge that there is a line between persuasion and strategy which should not be traversed. There would be appropriate ways to persuade colleagues, and there would be inappropriate ways. Of course there would be disputed limits of these discourse ethics, but over time the day to day operations of a sincere appellate court would be characterized by an understanding that certain kinds of persuasion were simply unacceptable.

It is important to point out that to a degree these two elements are discernible within the present Supreme Court. Though I have been arguing in these pages that strategic behavior plays a large role in the exercise of

¹ Kent Greenawalt, for example, argues that it is important for the Justices to avoid separate opinions in important cases because separate opinions with different rationales make both the Court and law appear less principled than a singular majority statement. This is the essence of the consensus view about dissent generally: dissent reflects weakness. Greenawalt, "The Enduring Significance of Neutral Principles" 78 Columbia Law Review 982 (1978), 1007.

judicial power today, strategy has not yet annihilated sincerity as a judicial value. The opportunity to dissent and the nonexistence of certain kinds of strategic dialogue certainly speaks to the notion that the terms strategic and judicial are not entirely synonymous, at least in the American context.

Nevertheless, some of the Court's current conventions themselves create a general dynamic of text negotiation and compromise from the time the opinion is first assigned, throughout the many phases of drafting until it is finally handed down. Majorities are often strategically "purchased" through a compromise of language; sometimes even unanimity is a consideration for compromising the opinion of the Court. The remedy of "all deliberate speed" in the school segregation cases forever symbolized by Brown v. Board of Education is perhaps the most famous example of the price of unanimity.² Crucial passages of opinions are made ambiguous intentionally so as to secure a majority foothold. It seemed hardly problematic, for example, that much of Chief Justice Rehnquist's rationale in his opinion in National League of Cities v. Usery was simply not compatible with Justice Blackmun's concurring rationale.³ Rehnquist's opinion would not have been the "opinion of the Court" without Blackmun's vote, so articulate, comprehensible principles of federalism need not get in the way. Another patently strategic result was produced in the creation of the Court's opinion for the 1941 migration case, Edwards v. California.⁴ Justice James Byrnes effectively acquired the right to write the Court's unanimous opinion

² See Brown v. Board of Education, 347 U.S. 483 (1954) [Brown I]; 349 U.S. 294 (1955) [Brown II]. The remedy of "all deliberate speed" is from Brown II, 349 U.S. at 301.

³ See 426 U.S. 833 (1976). The ambiguity of the Rehnquist opinion and its superficial compatibility with the Blackmun opinion did not stand the test of time. National League of Cities was overruled in the 1985 case, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, when Justice Blackmun switched his vote.

⁴ 314 U.S. 160.

by threatening dissent. The important doctrinal effect of Byrnes' procurement was that the Court's opinion in the case would be based upon the Interstate Commerce Clause of Article I, instead of the Privileges and Immunities Clause of the Fourteenth Amendment.⁵ Let me be clear: a legal community which valued judicial sincerity as I have been arguing for it would have to conclude that, at the very least, both Justice Byrnes and Chief Justice Harlan Stone engaged in improper judicial behavior.⁶ Stone, who because of convention had the prerogative to assign the opinion, allowed a consideration of institutional prestige to grossly manipulate legal doctrine. The strategy of Byrnes and Stone effectively prevented what could have been an important colloquy about the nature and parameters of the Privileges and Immunities Clause. Some may claim that such a conversation occurred anyway, but there can be no doubt that the salience and intensity of the disagreement was considerably muted by the appearance of unanimity.

In other instances, the Court deliberately clouds its language so as to avoid possible ill reactions from the citizenry. The Court's notorious substitution of the term "desegregation" for "integration" in Cooper v. Aaron is perhaps the most famous example of this tactic.⁷ Finally, even on occasions when the Justices try to render individual judgment, the institutionalism of today's Court effects the final product negatively and all that results is confusion in a blur of multiple, overlapping opinions. The landmark affirmative action case, Regents of the University of California v.

⁵ See Abraham, The Judiciary, 40-41.

⁶ In the wake of this shell game, Justice Robert Jackson added a concurring opinion based upon the Privileges and Immunities Clause, which was joined by three others.

⁷ See 358 U.S. 1 (1958). Justice Brennan is regarded as primarily responsible for the change of terms.

Bakke is most often cited by students of the Court as producing precisely this effect.⁸

It is this general atmosphere, this culture of decisionmaking, that is most at odds with a distinctive judicial function.⁹ Since the days of the Marshall Court, the push for single-voiced pronouncements has led to an institutionalism that increasingly negotiates, compromises, and dehumanizes its product. Early in this century, the fact of the matter was that the Supreme Court when deciding cases was very often unanimous. In 1900, over 76 percent of the cases heard by the Court were unanimously decided; in 1910, almost 90 percent of decisions were unanimous; in 1920, 82 percent were unanimous.¹⁰ In 1942, there was a large decrease in unanimity, and for the next fifty years the proportion hovers between a low of 16 percent and a high of 49 percent.¹¹ Another plain fact, somewhat linked to the first, is that for most of the Court's history, the appearance of even one dissenting opinion in Supreme Court decisions is a rather rare phenomenon. From the year 1801 until 1937, the highest proportion of cases in a single term with at least one dissenting opinion was only 26 percent (in 1845).¹² Even this rather low figure doesn't convey the rarity of dissent within the Court; the

⁸ See 438 U.S. 265 (1978). Also see Arizona v. Fulminante, 499 U.S. 279 (1991).

⁹ Rodney Blackman humorously explains certain stratagems such as "Spinning," "Shelling," and "You Scratch My Back and I'll Scratch Yours," as commonplace Supreme Court practices. See Rodney J. Blackman, "Spinning, Squirrelling, Shelling, Stiletting and Other Stratagems of the Supremes," 35 Arizona Law Review 503-33 (1993).

¹⁰ Epstein et. al., Supreme Court Compendium, 147.

¹¹ *Ibid.*, 147-48.

¹² *Ibid.*, 149-53.

mean proportion for all 134 terms is just over 10 percent.¹³ The regularity of concurring opinions is even lower than that of dissents. Over the same 134 terms, the mean proportion of cases with at least one concurring opinion is 8.5 percent; no one term had more than 9 cases with concurring opinions.¹⁴ Statistics such as these are important indicators of Supreme Court practice. Most of the time, the majority rulings of the Court have been expressed through a singular voice. Since 1937, dissenting and concurring opinions have been far more frequent. In the 1980's for example, 61 percent of cases had at least one dissenting opinion and 42 percent had at least one concurring opinion.¹⁵ Increases like these have led many commentators to draw a parallel between current trends and past seriatim practice. But this comparison is too superficial; the internal practices of the today's Court effect even seemingly individualistic Justices. When Justice John Blair gave his opinion in Chisholm v. Georgia, adhering to the seriatim practice, he did not negotiate or compromise the language of his opinion for the sake of the result. The text of his own opinion even suggests that, at the moment of his delivery, he was unaware of what the result of the case would be!¹⁶ Of course, such disregard for the work and product of others has its own set of effects and disadvantages, so the point is not to praise the seriatim form of judicial pronouncement as the one true example of proper judicial behavior. The seriatim form has been introduced and referred to in these pages because it is an emblem of a set of standards that guides essentially judicial

¹³ The Court did not meet in 1802 or 1811. This figure has increased slowly but steadily throughout this time span. From 1801 through 1844, the mean proportion of cases per term with at least one dissenting opinion was just under 7 percent; from 1801-1889, just over 8 percent.

¹⁴ *Ibid.*, 154-58.

¹⁵ *Ibid.*, 153, 158.

¹⁶ See Chisholm v. Georgia, 2 Dallas 419, at 452 (1793).

behavior and distinguishes it from other exercises of power.

Perhaps most obviously, conventions regarding institutional pronouncement and opinion-assignment provide incentive for the Chief Justice or most senior Associate Justice to vote with the majority. The great John Marshall himself went against his own jurisprudential convictions on occasion so that he could deliver the opinion of the Court. Marshall was an anomaly to be sure; his behavior as Chief Justice was almost obsessive with regards to institutional stature and prestige. Statistics for modern-day Courts are less startling. During his sixteen years as Chief Justice, Earl Warren assigned 80 percent of all the Court's opinions and self-assigned 10 percent. Chief Justice Warren Burger assigned almost 85 percent of all cases and self-assigned about 10 percent during his fifteen year tenure (1969-84). These sorts of figures can be deceiving, however. Just because the case is not self-assigned does not mean that the assignor did not apply judicial strategy. Assigning a majority opinion to a certain junior Justice may have precisely the effect upon the law that the assignor had hoped for. General jurisprudential positions of the Justices are well-known, and certainly the conference discussion of a case would reveal significant differences even among those Justices who agree upon the result. These sorts of considerations seem to be wholly out of place in an arena that has devoted so much of its energies to how the Constitution should be interpreted or what it is judges actually do in the name of the law.¹⁷

Surprisingly though, the bulk of the academy as well as much of the bench and bar does not countenance this discrepancy. One noted professor

¹⁷ Deborah Hellman has argued that the Court should consciously consider "the appearance of principle" as a relevant legal factor when deciding cases. Hellman's argument is advanced on several fronts and I believe it to be severely flawed. I will not make a rebuttal plain in these pages, but for the moment I would point out that arguments such as Hellman's are a direct result of the peculiar culture which permeates the exercise of judicial power. If judges would only be more principled in their behavior, they would have no need to take pains in order to appear so. "The Importance of Appearing Principled," 37 Arizona Law Review 1107-51 (1995).

of law, Eugene Rostow, is unabashedly transparent about the role of the Supreme Court. “Exercising high political powers,” Rostow explains, “the Court must have a high sense of strategy and tactics.”¹⁸ On this reasoning, it is no wonder that many lawyers agree that tactics such as assembling unanimity in Brown is not only unproblematic, but essential.¹⁹ Justice Ruth Bader Ginsburg, concerned with the proliferation of separate opinions with no single opinion commanding a clear majority, echoes many others of the bench when she wrote in 1990 that judges should strive more toward collegiality.²⁰ Ginsburg even goes so far as to say that American judicial power could benefit from some of the lessons of French practice, where the value of collegiality is so influential that judicial products are expressed in a unanimous judgment and the author is not identified. Justice Potter Stewart was also straightforward in a 1985 interview: “The business of the Court is to give institutional opinions for its decisions.”²¹ What is described as an increase in “individualism” on the part of the Justices is almost unanimously decried by lawyers and judges alike. Or consider some of Philip Bobbitt’s remarks on the “expressive function” performed by the Supreme Court, within the pages of his highly praised typology of constitutional argument, Constitutional Fate. Bobbitt’s remarks are worth repeating because they

¹⁸ E.V. Rostow, “American Legal Realism and the Sense of the Profession,” 34 Rocky Mountain Law Review 123 (1962), 142.

¹⁹ See, for example, C. B. Motley, “From Brown to Bakke: The Long Road to Equality,” 14 Harvard Civil Rights-Civil Liberties Law Review 315-27 (1979) [unanimity essential to efficacy of Brown decision]; R. Kluger, Simple Justice: The History of *Brown v. Board of Education* and Black America’s Struggle for Equality (New York: Alfred A. Knopf, 1976), 678-99. But cf. John Paul Stevens, “The Concept of Liberty,” 41 Bulletin: American Academy of Arts & Sciences 11, 30 (1988) [Court’s use of ‘all deliberate speed’ prevented what would have been total compliance in the South and elsewhere.].

²⁰ Ruth Bader Ginsburg, “Remarks on writing separately,” 65 Washington Law Review 133 (1990).

²¹ David M. O’Brien, Storm Center: The Supreme Court in American Politics, 3rd edition (New York: W.W. Norton & Co., 1993), 276.

betray the familiar academic bent which is present when any discussion of the Court as communicator is attempted. The relevant portions of Bobbitt's text follow:

First it should be observed how well suited our Supreme Court is to fulfill an expressive role. For most of the life of the Court, there has been a tradition of unanimity. This is crucial if the Court is to be perceived with clarity and with an undivided force. The strenuous efforts of the Court to achieve unanimity in the Brown desegregation opinion are evidence that the Court itself is not unmindful of this fact, although the recent proliferation of opinions suggests that such virtues are not always decisive. For a very long period of our history the Court spoke either through one opinion for the entire Court or through a single opinion not joined in by dissenters. The splintering of the Court and particularly the fractionization of a majority renders an expressive role more difficult...

The most interesting features, and the most illuminating, are those in which we differ from the English practice because these have been deliberately chosen. It is largely to John Marshall that, as with so much else, we owe a debt for halting the English practice of seriatim opinions delivered orally and summarily reported and for replacing them with a single written opinion. Only once in Jay's tenure was this done, and this, in the important jurisdictional case arising from the Neutrality Proclamation, seems to have been done in part to evade giving reasons for the decision rather than to account for it. Jay's successor, Ellsworth, tried to eliminate the seriatim practice, but his absence on a mission to France in 1800 provided an opportunity for backsliding, so that when Marshall was sworn in the following year the practice of delivering seriatim opinions was still in some use.

Marshall at once began urging their abandonment and replacement by a single written opinion. This for two reasons, was a crucial step in permitting the Court to exercise an expressive function. First, it allowed the Court to speak with a single voice, so that its message was both unqualified and the prestige of that message thereby enhanced. Second, the effort to achieve agreement on a single opinion increased the importance of bargaining and persuasion among the Justices. This meant that the statement finally agreed to would reflect more than the attitudes of a single person, and it increased considerably the proximity an opinion was likely to have to the views shared by the larger polity (by a sort of regression to the mean, I would surmise).²²

If remarks such as Bobbitt's are reflective of the legal academy's view of the Court as communicator (and I am afraid they are), then it is no wonder that American judicial power is viewed through a prism of strategy. Consider some of the important assumptions within the above passages. Firstly, according to Bobbitt, the expressive function of the Court is well served by singular pronouncements, made more difficult by multiple

²² Bobbitt, Constitutional Fate, 186-87.

pronouncements. Next, a more critical reader of this passage might take issue with Bobbitt's claim that the Court's expressive function was "deliberately chosen" and the evidence of this is John Marshall's halting of seriatim opinions. How is this singular act by Justice Marshall evidence of deliberate constitutional choice? It would fit the facts just as well to say that the Court under Marshall's initiative and subsequent "ratification" by other Chief and Associate Justices simply amplified and concentrated their expression illegitimately according to any fair appraisal of the history and understanding of judicial practice at that time. Bobbitt's tone regarding the peculiar development of the Court is all the more surprising given his characterization of the Jay Court when it tried to fulfill the Court's expressive role once on his own (strategic) terms. The singular expression by the Jay Court in the case of Glass v. The Sloop Betsey,²³ is correctly summarized by Bobbitt as an attempt "to evade giving reasons" for the decision- surely not a behavioral principle towards which a common law judiciary should strive. The last paragraph reflects a view of expression which is certainly controversial and is not at all clear that it best fulfills Bobbitt's expressed goal- the fulfillment of an expressive function by the Court. At the very least, Bobbitt's rather conventional narrative lacks sensitivity to the argument that, on his own terms, the Court should only be acting strategically when such action produces an "expressive" communicative result. The fact remains that today's culture of American judicial power does not in fact produce this desirable yield; singular statements are too often highly "qualified" constructions which do not aid the expressive function at all. Finally, Bobbitt's last claim that a compromised singular opinion would be reflective of "more than the attitudes of a single person" is only an unexplored assertion that neglects an at least equally satisfactory interpretation. The opinion of the Court may,

²³ 3 U.S. (3 Dall.) 6 (1794).

and does, in many cases reflect less than the attitudes of a single person because of its additional baggage. A singular opinion does not in every case lead to an “unqualified” one. It is unclear what the value is (even if it is true, which it may not be) of a singular Court opinion being in closer “proximity” to the views of the public or whether a “regression to the mean” is at all appropriate in a forum of principle.

It is important to note that there are important structural differences between the federal courts of appeals and the Supreme Court which may make a judge more individualistic or more institutionally-minded depending on the court under discussion. Chief judges of federal courts of appeals, for example, are not chosen or appointed to their post; unlike the Chief Justice of the United States, they reach that position by virtue of seniority.²⁴ This fact may explain the presence of consistent deliberate leadership exerted by a Chief Justice but not by a chief judge. Also, because Congress generally legislates uniformly with respect to the courts of appeals,²⁵ and because the Supreme Court is more powerful and closely observed, certain “feedback” effects and “free-rider” problems may be more serious at one level than another.²⁶

These important considerations notwithstanding, there can be little doubt that the structure and culture of the federal appellate judiciary today primarily supports attitudes of an overtly institutionalist perspective. The conventions surrounding the formulation of the judicial opinion which may be invoked by key judicial actors still point to an undeniable dominance of

²⁴ 28 U.S.C. § 45(a). When the position becomes vacant, the most senior judge on the circuit who is under the age of sixty-five becomes chief judge. There is a term limit of seven years.

²⁵ The large exception to this is the number of judges provided for by Congress to each circuit.

²⁶ See Richard Posner, The Federal Courts: Challenge and Reform (Cambridge, Mass.: Harvard University Press, 1996), 347-50.

the institutionalist perspective. These sorts of claims lie in stark contrast to the conventional narrative of the bench and academy. “Unfortunately,” Richard Posner, Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, summarizes, “the structure of the federal appellate system, together with the broader American culture... fosters individual self-assertion rather than institutional loyalty and cohesion.”²⁷ Posner points to many aspects of the federal judiciary to make his point, but in the end his argument is simply too one-sided; he fails to account for the all-too-frequent occurrences of compromise and strategy which are emblematic of an institutionally-minded appellate membership. Posner may be right that things have changed recently; increasing dissents and concurrences surely point to a relative trend of individuality. But even this observation lacks the context and perspective that would allow any judicial system under review to be evaluated according to the possible range of individual and institutional behavior available. It is indicative that Posner discusses the “costs and benefits” of the individual practice of the signed judicial opinion but does not give similarly candid treatment to more institutionally-minded conventions.²⁸ The Chief Judge’s reaction to present-day concurring behavior by Supreme Court Justices is perhaps even more revealing: “Ordinarily, the inability of a judge on a multimember court... to persuade even a single colleague to his view should be a compelling reason for him to swallow his doubts and join an opinion that commends more support.”²⁹ Posner’s book on judicial administration is undoubtedly written for a

²⁷ *Ibid.*, 347. See generally *ibid.*, 347-68.

²⁸ *Ibid.*, 349.

²⁹ *Ibid.*, 361. This suggestion is later combined with a Burkean sensibility which rounds out Posner’s feelings towards concurring opinions. See *ibid.*, 362 [“A majority opinion is generally stronger when it has been recast to incorporate the suggestions of concurring judges.”].

professional audience, but his rather myopic treatment of the responsibilities of federal appellate judges speaks to the rather weak position that individualism holds in the minds of American judges and lawyers.

Chapter Eight: Constitutional Theory and Context

An argument in favor of judicial sincerity is really only another contribution in what has been a string of critiques from a sizable group of scholars I refer to as constitutional contextualists. It would be prudent to explain just what it is I mean by “context” here and the assembly of minds that expounds upon its virtues. By using the root word context I do not mean to contend that all forms of social pressure and influence are considered worthy of examination. Instead, I utilize the term with a view towards institutions; quite specifically, the full set of constitutionally constructed institutions. “Contextualism” resembles that particular bent of constitutional argument known commonly as constitutional structuralism, or the structural modality of constitutional argument, though there are key differences.¹ The structuralist seems more concerned, and most effective, with overarching arrangements and intergovernmental designs.² The contextualist would charge the structuralist as being less attentive to those behaviors, conventions, rules and understandings which govern the internal mechanics of the institution under analysis.

It would appear that the raison d’être for this particular academic ensemble is to shift the focus away from the judiciary when inquiring about the Constitution. Cass Sunstein explains that the result of such a shift, “would amount to a recovery of the original constitutional goal of creating a

¹ On constitutional structuralism as a general approach, mode, or technique of analysis, see Walter F. Murphy, J.E. Fleming, and W.F. Harris, II, American Constitutional Interpretation (Mineola, New York: Foundation Press, 1986), 292-94, 319-27. On the structural modality of constitutional argument, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution (New York: Oxford University Press, 1982), 74-92.

² Philip Bobbitt supports this view of the structural modality as most persuasive when discussing those cases where intergovernmental designs are implicated. Bobbitt, Constitutional Fate, 74-92.

deliberative democracy.”³ Ideas rooted in republican thought are very important for any constitutional contextualist, and a recent exploration of the components and implications of “deliberative democracy” offers strong support on behalf of institutionally-reflective norms like those I have been arguing for in these pages.⁴ Rather than shift the focus away from the judiciary, it would seem prudent to try explain what a revival of the republican tradition might mean specifically for the judiciary. The aim of this chapter is to present in a “realistic republican” way (a phrase that will receive fuller meaning shortly) what some of the shared commitments or understandings that animated the original foray into American constitutionalism might mean for the exercise of judicial power. There are four such “shared commitments” I wish to highlight.

Constitutional Context

First of all, perhaps the common ground for all those who would discuss the legitimacy, scope, and implications of the Constitution in 1787 was that the instrument itself was essential for peoples who wished security and prosperity. The first shared understanding to underscore was the respect accorded for constitution as political device to regulate and improve the

³ Sunstein, Partial Constitution, 10. It is worth mention that, although Sunstein here does in fact examine judicial interpretation, he feels that many of the resulting proposals to be deduced from his work, “are not intended for judges at all, but for others thinking about constitutional liberties in the modern state.” Ibid.

⁴ Amy Gutmann and Dennis Thompson suggest in their analysis of the components and implications of “deliberative democracy” that the nature of the reasoning which the concept “deliberative democracy” itself requires is fundamentally individualist. Gutmann and Thompson: “The reasons that deliberative accountability requires are given to and by individuals. The individual is the only kind of agent who can judge whether a reason should be accepted as a basis for fair comparison, in accordance with reciprocity.” The authors later conclude the “inescapably individualist” nature of the principle of accountability as a component of deliberative democracy. Democracy and Disagreement (Cambridge, MA: Harvard University Press, 1996), 151. Inexplicably, Gutmann and Thompson dismiss the judiciary early on in their analysis of deliberative democracy, and they in large part avoid discussion of formal constitutional expressions of deliberation. Their discussion of the component principles of deliberative democracy- “reciprocity”, “publicity”, and “accountability”- are very much compatible with the judicial function.

general affairs of mankind. American democracy then would benefit by and depend upon the character of our constitutionalism. The emphasis of this claim, necessarily, opposes the operating assumptions of the noted political scientist of the pluralist school, Robert Dahl.⁵ For Americans, the paramountcy accorded to constitution as political device stretches back to the Mayflower Compact of November, 1620. For the human race, constitutionalism has its known origins with the ancient Greeks and Romans.⁶ Rather than appeal to reason through tradition and longevity, however, the point is to briefly recall what exactly it means to constitute a people. Professor Charles McIlwain explained that this meaning has not been static. For the Greeks a constitution was the clearest description- and only a description- of the polity.⁷ The Greek vocabulary did not apply meanings of “bindingness” to their notion of constitution. The writings of St. Thomas Aquinas served as a marker of a new acquisition for constitution: the addition of a normative check. The constitutionalism of Rome offered the contribution that only the populus, in its wholeness, is the ultimate source of

⁵ In his review of relevant democratic theories for the American experience, Dahl concludes that, “To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic.” Robert A. Dahl, A Preface to Democratic Theory, ninth impression (Chicago: University of Chicago Press, 1967), 143. Also see Dahl, “On Removing Certain Impediments to Democracy in the United States,” Political Science Quarterly 92 (Spring, 1977): 1-20. But cf. James W. Caesar, “In Defense of Republican Constitutionalism: A Reply to Dahl,” in Robert H. Horwitz, ed., The Moral Foundations of the American Republic, 3rd edition (Charlottesville, Va.: University Press of Virginia, 1986), 253-81.

My work, in rejecting claims such as this, can be seen as a “constitutionalist” reply to the arguments and underpinnings of an author who falls close to the opposing pole of this continuum- the pure “representative democrat”. This continuum is a plausible one, and one that explains well the disputes between interpreters in our political hybrid of constitutional democracy. For a clear picture of the tension and implications of this continuum between the pure constitutionalist and the pure representative democrat, see Murphy, Fleming, and Harris, “The Theoretical Context of Constitutional Interpretation,” in American Constitutional Interpretation, 23-47.

⁶ Charles Howard McIlwain’s lectures on the history of constitutionalism remain seminal. For the evidence suggesting the origins of the very notion of constitutionalism, see Charles H. McIlwain, Constitutionalism: Ancient and Modern (Ithaca, Cornell University Press, 1947), 23-29.

⁷ *Ibid.*, 34-36.

legal authority and legitimate political authority in a state.⁸ The law books of Justinian are a template for McIlwain here. In mid-thirteenth century England Lord Bracton best summarized the legacy of Medieval constitutionalism with the distinction and dilemma presented by jurisdictio and gubernaculum.⁹ Influenced by Rome, the lesson to be derived from this is that to speak of constitutionalism, or to declare that a people are governed constitutionally, is to speak- essentially- of certain prescribed limits or declare that such a people are safeguarded by a limited government.¹⁰

McIlwain himself states this ultimate lesson of constitutionalism's history:

It is a very curious and interesting fact that in ordinary language we usually speak of a constitutional monarchy as a "limited" monarchy. The characteristic that distinguishes this kind of monarchy from others for us is a negative, not a positive characteristic. We think first of all what the monarch may not do, not of what he may do. The whole history of modern constitutionalism proves the soundness of this instinct. A constituted authority is one that is defined, and there can be no definition which does not of necessity imply a limitation. Constitutional government is and must be "limited government" if it is constitutional at all.¹¹

Constitutional government means limited government; that is the first commitment. Of course, constitutions historically have varied in their meaning, just as the forms and principles that permeate them have. In the

⁸ Ibid., 56-63.

⁹ Ibid., 67-79.

¹⁰ This core theme of constitutionalism- as it was understood and relevant for the newly emerging American experience- is discussed in the works of John Locke, John Trenchard, and Charles Louis de Secondat, commonly known as the Baron Montesquieu. See Locke, *Second Treatise*, §§ 89-94, 134-42, 212 (1689), in P.B. Kurland and R. Lerner, eds., The Founders' Constitution, vol. 1 (Chicago: University of Chicago Press, 1987), 614-618; Trenchard, *Cato's Letters*, nos. 60, 61, 62 (January, 1721), *ibid.*, 618-23; Montesquieu, The Spirit of the Laws, trans. and ed. A. M. Cohler, B. C. Miller, and H. S. Stone (Cambridge: Cambridge University Press, 1989), bks. 5, 6, 8, 11,12, pp. 42-95, 112-30, 154-212.

Noted colonial and revolutionary figures also emphasized this core theme, such as William Penn, Richard Henry Lee, John Adams, "Publius", and influential antifederalists. See Kurland and Lerner, The Founders' Constitution, vol. 1, 607.

¹¹ C. H. McIlwain, Constitutionalism and the Changing World (Cambridge: Cambridge University Press, 1939), 244 [original emphasis].

McIlwain elucidates this theme at the start of his eleventh chapter, titled, "The Fundamental Law behind the Constitution of the United States". McIlwain's formulation of the relationship between fundamental law and the Constitution offers affirmation, consciously or not, to the claim that the very genre of the Constitution has suffered alteration.

American case, respecting the value of constitution as a desirable political device for limited government for the people of post-revolutionary America means that certain forms and principles should be noted and reviewed for importance. For our purposes there are two adjuncts of American constitutionalism worth mention. The first, a principle of American constitutionalism alluded to in the introduction to this chapter, is “classical republican” ideology. Since the publication of Thomas Paine’s Common Sense in January 1776, republican beliefs of civic virtue were widely shared as being a necessary ingredient for the future of the American polity.¹² These feelings were not the brainchild of a small group of enlightened gentlemen, however. The framers convened due to widely shared sentiment that the Articles of Confederation were seriously flawed.¹³ The Articles, to these men, were too susceptible to influence from faction. This trait severely hindered any form of deliberation without being overwhelmed by faction’s sway. Sunstein, among others, supports this reading, claiming that, “Above all, the American Constitution was designed to create a deliberative democracy.”¹⁴ In this construction, “deliberative,” profoundly affects-

¹² “This pamphlet [Common Sense], comes as close to being a justification of American republicanism as any document we have.” Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era, trans. Rita Kimber and Robert Kimber (Chapel Hill, N.C.: The University of North Carolina Press, 1980), 104.

It is important to emphasize here that I speak of republicanism in the same manner as those who invoked these ideas during, to borrow Clinton Rossiter’s phrase, the seedtime of our republic. I am aware that much of classical republican ideology held certain meanings and normative emphases that did not affect the minds of the American founders at all. In the case of civic virtue, however, classical republican thought was indeed influential. For a review of republican ideology generally, see Z.S. Fink, The Classical Republicans: An Essay in the Recovery of a Pattern of Thought in Seventeenth-Century England, 2nd edition (Evanston, Ill.: Northwestern University Press, 1962).

¹³ I am aware that the extent to which these sentiments existed is in some dispute. Indeed, many of the (misnamed) Anti-federalist opposition were of the mind that the very purpose of the convention at Philadelphia was only to amend the existing articles, implying a frame of mind that the system needed only minor repair. Many antifederalists did not wish to even engage in much of the debate over the proposed constitution, claiming that such a radical break exceeded the authority and purpose for which they convened. See Herbert J. Storing, “What the Anti-Federalists Were For,” in The Complete Anti-Federalist, vol. 1 (Chicago: University of Chicago Press, 1981).

¹⁴ Sunstein, The Partial Constitution, 19-20.

generically affects- the nature and character of its object, “democracy.”

It is widely agreed that the points of contention between the parties who first discussed the Constitution clashed not on the principles that all wished to see included in the fabric of the new nation, but on the forms selected to achieve those principles.¹⁵ At the heart of genuine republics civic virtue, or a commitment to the public good, must be found. The heart of the debate between Federalists and Anti-Federalists consisted of what forms would allow civic virtue to become established and thrive. The position, and ensuing victory, of the Federalists was rooted in an introduction of mechanisms to preserve civic virtue that repudiated much of classical republican beliefs and replacing them with their own.¹⁶ The framers wanted to see the classical republican belief of virtue implemented and applied, “in a way that responded realistically, not romantically, to likely difficulties in the real world of political life.”¹⁷ The point here is that one- if not the central- principle that would be incorporated into the Constitution was a subject of little friction. On the other hand, the forms by which this principle would be established and maintained- or the way in which this principle of American constitutionalism would come to be recognized and admired (or criticized, depending upon your point of view) as just that, American- were a matter of deep division that would continue to persist throughout American constitutional history. One of these forms is the second of our constitutional adjuncts, the doctrine of the separation of powers.

¹⁵ See generally Storing, The Complete Anti-Federalist, vol. 1; Adams, The First American Constitutions; Gordon S. Wood, The Creation of the American Republic, 1776-1787 (Chapel Hill, N.C.: The University of North Carolina Press, 1969); Bernard Bailyn, The Ideological Origins of the American Revolution (Cambridge, Mass.: Harvard University Press, 1967).

¹⁶ The classic American exposition of the modernization of the classical republican belief in civic virtue is James Madison’s in his famous Federalist 10. See Alexander Hamilton, James Madison, and John Jay, The Federalist, Jacob E. Cooke, ed. (Middletown, Conn.: Wesleyan University Press, 1961), 56-65.

¹⁷ Sunstein, Partial Constitution, 21.

Like constitutions and republican ideas, separation of powers doctrine has held varied meanings for different peoples in history. The doctrine itself is difficult to trace; even operating within the American example, authors disagree as to who should be given credit for certain breaks and emphases.¹⁸ It doesn't help that there are some deep misconceptions surrounding the subject- the clear distinction between "separation of powers," and "checks and balances," being emblematic to many students of politics. There are some common threads, however, that are reassuring to the student. Studying the doctrine of the separation of powers, one finds a bond to an earlier dichotomy that applied to our brief look at constitutionalism generally. The separate domains of law and government- or jurisdictio and gubernaculum- contributed directly to the development of the doctrine. W.B. Gwyn reiterates the point: "The distinction [between domains] was not merely taxonomic but provided the basis for normative constitutional doctrine."¹⁹

For those interested in court-centered constitutional theory, the separation of powers doctrine is especially relevant. For, as Gwyn puts it, there were two distinctly American variants that contributed to the new version of the "American doctrine" of the separation of powers.²⁰ Firstly, the executive was to receive an equivalent amount of respect and prestige relative to the legislature. The second trait that distinguished the American doctrine was that the judiciary was introduced formally into the equation as an institution in its own right, as opposed to its latter-day perception as just a segment of the executive. John Adams is given substantial credit for introducing the judiciary, though Alexander Hamilton and James Wilson are

¹⁸ Cf. W.B. Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution (The Hague: Martinus Nijhoff, 1965); M.J.C. Vile, Constitutionalism and the Separation of Powers (Oxford: Oxford University Press, 1967), 119-75.

¹⁹ Gwyn, Separation of Powers, 28.

²⁰ *Ibid.*, 124, 125.

also considered influential.²¹ They of course were borrowing heavily from Baron Montesquieu and William Blackstone, as well as John Locke and others concerning the separation of powers doctrine and the role of the judiciary.²² The doctrine itself was modified further with the additional mechanism of checks and balances- a testament to the willingness of the framers to address republican aspirations realistically. Indeed, the doctrine itself was urged by the Constitution's drafters on the grounds of efficiency in addition to its accountability and balancing properties.²³

This brief review may seem a digression to some. Hopefully a larger purpose is served in demonstrating what may be the common trait shared by all who attempted to influence and reconcile the principles and forms that would guide the American experiment. Nearly all who engaged in this critical period of constitutional debate were devoted believers to a science of politics. "The significance of the science of government," Willi Paul Adams explains,

was obvious in an age that concerned itself with discovering laws not only in physics, biology, and other natural sciences but also in all areas of human activity. The great reputation won by Montesquieu reflected a widespread desire to understand the function and organization of social processes.²⁴

²¹ Ibid. For support of the influence of those mentioned, see Malcolm P. Sharp, "The Classical American Doctrine of 'The Separation of Powers'," University of Chicago Law Review 2 (1934): 414, 415.

²² Sharp, "Classical American Doctrine," 389, 393. But cf. Vile, Constitutionalism, 121-22. Generally, for original contributions deemed influential for the American doctrine see Kurland and Lerner, The Founders' Constitution, vol. 1, 311-35.

²³ Gwyn, Separation of Powers, 34. For a summary of the historically demonstrated arguments in favor of the doctrine, see *ibid.*, 127-28.

²⁴ Adams, First American Constitutions, 120-21. Also see Henry Steele Commager, The Empire of Reason: How Europe Imagined and America Realized the Enlightenment (London: Weidenfeld & Nicolson, 1978).

A condemnation of the constitution of Pennsylvania in 1777 by the noted physician and politician Benjamin Rush illustrates the belief in scientific application for political settings, as well as being indicative of the distinction accorded for political principles and forms: "It is one thing to understand the principles, and another to understand the forms of government. The former are simple; the latter are difficult and complicated. There is the same difference between principles and forms in all other sciences. Who understood the principles of mechanics and optics better than Sir Isaac Newton? and yet Sir Isaac could not for his life have made a watch or a microscope. Mr.

The belief that science could and should be applied to political dilemmas is, perhaps, the most telling characteristic, and most important contribution, of American constitutionalism.²⁵ The Constitution being written down is often cited as the most revolutionary feature of American constitutionalism; this feature of “writtenness” is best seen as an example of the belief that enlightenment thinking could play a major role in political situations. In addition to the positing of the Constitution for all to see, the constitutional structure was devised to preserve liberty and economize upon the rare but essential quality of civic virtue.

From these four shared commitments of American constitutionalism, a fundamental inference emerges. Charles Black, with his well-known examples of “inferring from the overall structure” of the union, was perhaps the first to explicitly recognize this aspect of our constitutionalism. What Black inferred from the structure of the federal union was that communicative transactions play a special role.²⁶ Out of Black’s review of the famous Dennis²⁷ and Gitlow²⁸ cases, as well as Barron v. Baltimore,²⁹ there surfaced a comprehensive theory of free speech that sought its legitimacy from the overall structure of the polity. For our purposes, what is noteworthy is the extent to which an otherwise obvious characteristic of our system received treatment. The flow of communication, for Black, is the

Locke is an oracle as to the principles, Harrington and Montesquieu are oracles as to the forms of government.” Benjamin Rush, Observations Upon the Present Government of Pennsylvania (Philadelphia, 1777), quoted in Adams, First American Constitutions, 120.

²⁵ See generally I. B. Cohen, Science and the Founding Fathers: Science in the Political Thought of Jefferson, Franklin, Adams and Madison (New York and London: W.W. Norton & Co., 1995).

²⁶ See generally, Black, Structure and Relationship in Constitutional Law (Baton Rouge: Louisiana State University Press, 1969).

²⁷ Dennis v. United States, 341 U.S. 494 (1951).

²⁸ Gitlow v. New York, 268 U.S. 652 (1925).

²⁹ 32 U.S. (7 Pet.) 243 (1833).

“lifeblood,” of our government. Though Black at first is interested in such claims in order to legitimate a comprehensive theory of free speech, he does not stop there. Black’s contention is that serious discussion of political issues that, “connect with the federal government process- petition, election, judicial proceedings, Presidential action, and so on- would result in a merging of boundaries,” and must remain unfettered in our system on structural grounds.³⁰ What Black understood is that the particular patterns and rhythms of legal communication, in and of themselves, were central to constitutional maintenance. The wholesale manipulation or modification of these communication flows would be the end of the Constitution.

The Constitution, a short and openly-textured document, was envisioned by its creators and ratified by its People as a plan of government that was overwhelmingly committed to organizing and regulating powers among the institutions it created. This is in stark contrast to the way it is currently discussed today by the lawyer/philosopher. The first ten amendments, the Bill of Rights, is often given a somewhat inverted degree of importance relative to the seven articles that comprise the Constitution’s body. At the root of my foray into the world of constitutional theory then, is the hope that what follows will go some way to reversing the trends of the lawyer/philosopher and begin again to view the document in more seriously structural ways.³¹ This modality not only seems true to the original

³⁰ Black, Structure and Relationship, 44-45. The crux of Black’s discussion on the importance of communication can be found *ibid.*, 39-46. Finally, it should be pointed out that one of the classic cases for Black in demonstrating the legitimacy and efficacy of structural inferences is Crandall v. Nevada, 73 U.S. (6 Wallace) 35 (1868). Black placed similar reliance on the importance of communication in Crandall.

³¹ The reader can by now come to see that I bestow great importance to the conception of constitutional “structuralism”. I employ the root of the word- structure- in two ways.

The first is the way in which it is employed in the works of Charles Black, Jr. Structural argument for Black is best defined as, “the method of inference from the structures and relationships created by the constitution in all its parts or in some principal part.” See Black, Structure and Relationship, 7.

For the second way, somewhat grander in scope but I believe still complementary to Black’s usage, I employ the term structuralism as, “emphasizing coherent designs and wholes, which are seen as compositions or constructive forms,” as defined by William F.

enterprise of our constitutionalism, but also seems to pose the greatest flexibility for problems of continuity faced by it. Philip Bobbitt once commented on why Black's suggestions for utilizing structural arguments were so often cited but so little applied. "This is perhaps," Bobbitt said,

partly a reflection of a narrow-minded formalism that persists in law schools and can be observed whenever one hears the clipped citation of a case which is, by its very mention, supposed to resolve a serious question. . . . The future, however. . . will see more of structural approaches. As governments qua producers gain more importance in our lives, and hence as intergovernmental questions are brought to prominence, structural arguments will become more useful.³²

To this point it has been argued that a plausible reading of Anglo-American legal history, jurisprudence, and the shared commitments of American constitutionalism suggest that judicial power is best understood as power to be exercised by authorized individuals acting sincerely. The remainder of this chapter will bolster that claim with support from authority. The most authoritative explanation of the Constitution- The Federalist Papers of Hamilton, Madison and Jay- offers great support to an argument for judicial sincerity, though these insights are nowhere to be found in the mainstream constitutional narrative.

Publius

It is truly fitting that the most important product of American political science and the only American effort considered worthy to reside in the pantheon of the classics of political theory is a series of newspaper articles. The eighty-five essays that were addressed to the people of the state of New York from October 27, 1787 through May 28, 1788 were produced for purposes of persuasion. The newly conceived offspring of the Philadelphia

Harris, II, in his book, The Interpretable Constitution. This wide view of structuralism is, for Harris, in contrast to "positivism", defined by him as focusing, "on words and clauses, which are viewed as commands or free-standing imperative values." See W.F. Harris, II, "Explaining the Constitutional Polity: The Methodology of Interpretive Meaning," in The Interpretable Constitution (Baltimore, Md.: Johns Hopkins University Press, 1993), 114-63.

³² Bobbitt, Constitutional Fate, 91-92.

convention was in need of defense. A student of American history learns early on that the eighty-five essays of "Publius" provide evidence of constitutional intention that remains unsurpassed. For a long time in fact, The Federalist Papers have been treated by many as a unified constitutional philosophy;³³ others have suggested that Publius should be seen for who he really was- principally two authors (Madison and Hamilton) who betrayed important differences on matters of constitutional government.³⁴ In keeping with the themes of this study, the latter view of this historical controversy will guide the present analysis. Madison's essays and Hamilton's essays may have been united in a single mission, but they are each the products of different minds. The rhetorical strategy of The Federalist is in fact further testimony of a major theme of this study. Ironically, just as a seemingly unified presentation would aid in securing the immediate ("result-centered") objective of the Constitution's defenders, it is because the distinctive rationales which animated the arguments of Madison and Hamilton continue to be recognized as distinctive that their essays are still accorded such authority. The Constitution can comprehend both Hamiltonian and Madisonian (and Jeffersonian and Lincolnian and other) bases as authoritative foundations for its operation notwithstanding their opposition to each other at certain junctures. It is because of this capability

³³ Professor Sotirios Barber is one such student of American constitutional theory who is transparent about doing this. His discussion of The Federalist is predominantly Hamiltonian, but often mixes in Madison's views at important junctures. "In analyzing The Federalist I refer to its authors jointly as Publius, thus adopting their pen name for my purposes.... So Publius is not Madison and Hamilton viewed separately or as historically bounded persons. Publius is who The Federalist implicitly indicates Publius is: Madison and Hamilton (in the main) standing together and addressing a coherent message to a community comprising both their generation and what the Constitution calls their 'Posterity.'" Sotirios A. Barber, The Constitution of Judicial Power (Baltimore: Johns Hopkins University Press, 1993), 27. Also see Bruce Ackerman, We The People: 1. Foundations, 165-99.

³⁴ For scholarship that insists upon a division of Publius to illuminate points where rationales conflict, see Burt, Robert. The Constitution in Conflict (Cambridge, Mass.: Harvard University Press, 1992), 47-76. On this controversy generally, see Alpheus T. Mason, "The Federalist- A Split Personality," 57 American Historical Review 625 (1952); George Carey, "Publius- A Split Personality?" 46 Review of Politics 3 (1984).

that both the Constitution and the essays of Publius remain authoritative today.

Alexander Hamilton authored fifty-one essays of The Federalist.³⁵ Like many of the leaders who reacted to the excesses of liberty the revolution had elicited, Hamilton's political philosophy is characterized by the search and placement of sovereignty to provide authoritative resolutions to both fundamental and ordinary political problems. And like many others, for the fundamental problems of government Hamilton was happy to place ultimate sovereign decision-making in the people. But recourse to the ultimate decision-maker was supposed to occur very infrequently; it is in his thoughts about the locus of authoritative decision-making for "ordinary" governmental affairs where Hamilton shows his distinctiveness. Hamilton believed that an absolute sovereign was needed for the ordinary problems of government as well as the fundamental. Political scientist Robert Burt underlines this central feature of Hamilton's political theory, saying that Hamilton was, "convinced that an actively available locus of indivisible sovereign authority was necessary in any government worthy of the name."³⁶ Hamilton saw the situation faced by the newly independent states and constructed his political theory with a what can only be described as a Hobbesian sensibility. What appears to have disturbed Hamilton most at the

³⁵ See the introduction of the editor in Hamilton, Alexander, James Madison, and John Jay, The Federalist, Jacob E. Cooke, ed. (Middletown, Conn.: Wesleyan University Press, 1961), xix-xxx. The Cooke edition is widely regarded as the definitive edition of The Federalist; all subsequent citations refer to this edition.

Furthermore, I follow Cooke's tentative conclusions regarding authorship of the essays. Cooke explains that it is basically undisputed that Hamilton was the author of essays 1, 6-9, 11-13, 15-17, 21-36, 59-61, and 65-85 (a total of fifty-one); Madison wrote 10, 14, 37-48 (fourteen); Jay contributed 2-5 and 64 (five). The authorship, then, of 18-20, 49-58, and 62-63 (fifteen) is not conclusive. Later in the introduction, Cooke—relying on internal and external evidence—gives Madison at least principal (and in most instances, sole) credit for the disputed fifteen essays, bringing his total contribution to twenty-nine.

³⁶ Burt, Constitution in Conflict, 52. Bruce Ackerman gives prominence to the notion that the Constitution is best understood as constructing a "dualist democracy," where the distinction between "ordinary" and "fundamental" politics is underscored. See Ackerman, We The People: 1. Foundations.

close of the 1780's was the apparent squeamishness of his adversaries.

"While they admit that the Government of the United States is destitute of energy," Hamilton wrote in Federalist 15, "they contend against conferring upon it those powers which are requisite to supply that energy... They still in fine seem to cherish with blind devotion the political monster of an imperium in imperio."³⁷ Hamilton was arguing that tough choices had to be made to counter the excesses of liberty, and that opponents of the Constitution were masquerading the alternative of multiple sovereigns as a viable option. Government qua government, for Hamilton, required unity. And according to Hamilton's reading of the Constitution, the essential authoritative sovereign for ordinary affairs of government was created by that document.

The second clause of Article Six was evidence of the first necessary step needed to construct a "government worthy of the name," for Hamilton. In matters of national-state conflict, the national government was to be superior because the Constitution stated that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made... shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."³⁸ In Federalist 33, Hamilton speaks of the supremacy clause as being, "only declaratory of a truth," and such "truths" simply flow from Hamilton's understanding of power.³⁹ The Constitution, Hamilton explained, did not create a mere "treaty," which was dependent upon the good faith of the parties; it, rather, created a government, "which is only another word for POLITICAL POWER AND

37 Federalist 15 at 93.

38 U.S. Const., Article VI, §2.

39 Federalist 33 at 204.

SUPREMACY.”⁴⁰

The supremacy clause was a necessary measure for the creation of a Hamiltonian government, but in and of itself was not sufficient. “[P]lacing the locus of authority in the national government was not sufficient,” for Hamilton, Burt explains, “because the national government itself was divided.”⁴¹ For the national government then, where was “the single locus of supreme national authority,” to be found? Hamilton’s answer to this is found in Federalist 78. Through the exercise of what Hamilton called the “duty... to declare all acts contrary to the manifest tenor of the constitution void,” the national judiciary with the Supreme Court at its head was to be Hamilton’s essential unitary sovereign.⁴² It is well known that in response to charges of unfettered judicial authority Hamilton emphasized the inherent weaknesses of the judicial power, claiming of the judiciary that, “It may truly be said to have neither FORCE nor WILL, but merely judgment.”⁴³ But in the same essay Hamilton’s vision of the relationship between judicial and legislative power led him to say that, “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.”⁴⁴ Burt’s characterization of Hamilton’s structural view deserves reiteration: “His hierarchical pyramid is thus clear: the people are at the pinnacle; but in their (ordinarily anticipated) silence, the Court speaks as their intermediary, as the delegated repository of ultimate sovereignty from the People.”⁴⁵ The judiciary for Hamilton was purposefully placed in a

⁴⁰ *Ibid.*, at 207.

⁴¹ Burt, Constitution in Conflict, 52.

⁴² Federalist 78, at 524.

⁴³ *Ibid.*, at 523.

⁴⁴ *Ibid.*, at 525.

⁴⁵ Burt, Constitution in Conflict, 53.

position to check the other branches, and it was the natural institutional weakness of judicial power itself that would serve as a check the judiciary. Judicial power, on Hamilton's view, contained self-checking properties.

This review of Hamilton's constitutional theory is important in and of itself, but still does convey the sheer inventiveness of his view of the judicial power. Most commentators choose to exclusively focus upon Federalist 78 to demonstrate Hamilton's contribution, but I think it better to include the lesser known Federalist 22 as well. In this paper, Hamilton remarks upon the defects of the Articles of Confederation and explains that "the want of a judiciary power," is a major flaw. But it is his characterization of the voice of the judicial power which is so striking. "Laws are a dead letter," Hamilton writes, "without courts to expound their true meaning and operation."⁴⁶ Courts, not judges, are needed. Like Hamilton's discussion of authority, there is a dominant emphasis upon the values of uniformity, stability and singular meaning. Later in the same paper, Hamilton explains that the one supreme tribunal created by the Constitution will serve the purpose of uniformity. Hamilton's further criticism of the state judiciaries reveals his implicit commitment to uniformity as well as his crucial recharacterization of the nature of judicial power. The passage in full reads as follows:⁴⁷

There are endless diversities in the opinions of men. We often see not only different courts, but the Judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest- possessing a general superintendence, and authorised to settle and declare in the last resort, an uniform rule of civil justice.

Hamilton's flourish is political action by rhetorical omission and deflection. There is an important difference between the "diversities" which result from unsure and untidy jurisdictions of a haphazard legal system and those which occur on the same bench in a given case. Hamilton obscured this in

⁴⁶ Federalist 22, at 143 [emphasis added].

⁴⁷ Ibid., at 143-44.

his search for a unitary sovereign authority. He carries this distortion of the judicial power into his later (and better known) papers on the subject, Federalist 78 through 83. The judiciary was the object for Hamilton which possessed “neither FORCE nor WILL, but merely judgment.” More precisely, that would be singular, collective, unified judgment.

This collective depiction of judicial power may not appear so radical a departure as I am making it out to be, but it lies in stark contrast to most other conceptions of judicial power and process recorded at the time of the founding and the formative years of the Constitution. Consider the comments of Nathaniel Gorham, delegate to the Philadelphia Convention, as one such insight: “As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures.”⁴⁸ Or, for another, consider those of delegate Luther Martin: “A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislative.”⁴⁹ Hamilton himself reveals his perceptiveness about matters of institutional “voice” in Federalist 81, when he offers a definition of the word jurisdiction. “This word is a compound of JUS and DICTIO, juris, dictio, or a speaking or pronouncing of the law,” Hamilton says.⁵⁰ Most commentators refer to the concept of jurisdiction in its traditional sense- a technical concept concerning a court’s authority to pronounce judgment in a particular case. Hamilton’s jurisprudence is distinctive because he envisioned a distinctive “jurisdiction” for the Supreme Court; not only a special category of cases, but a special way to pronounce the law when operating within those categories.

To repeat what has already been said or implied to this point, perhaps

48 Max Farrand, ed. The Records of the Federal Convention 1787, 4 vols. (New Haven, Yale University Press, 1911), vol. 1, p. 73.

49 *Ibid.*, p. 76

50 Federalist 81, at 551. Also see William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth (Columbia, S.C.: University of South Carolina Press, 1995), 5-6.

the single most important effect of Hamiltonian theory in discussions of judicial power was the substitution of “court” and “judiciary” for “judge.”

James Madison, the sole or principal author of twenty-nine essays of The Federalist, presents a view of constitutional government which differs markedly from Hamilton’s. In particular, Madison’s writings on the principle of the separation of powers and the means of enforcing that principle reveal crucial differences. The heart of Madison’s argument resides in his famous Federalist 51. Madison- in contradistinction to Hamilton’s vision of a hierarchical, unitary sovereign authority- believed that authority should be permanently fragmented both among and within rival departments. The Constitution in Madison’s view insured the maintenance of Montesquieu’s sacred maxim of structural integrity, “by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”⁵¹ Madison comes to this view of coordinated balance after rejecting the notion that a “parchment barrier” alone would be sufficient to maintain structural integrity in Federalist 48, as well as opposing two other possible means of enforcing the separation of powers in Federalist 49 and 50. Responding to Jefferson’s remarks in “Notes on the state of Virginia,” Madison rejects the option of an special elected convention (for “occasional appeals to the people,”) for such boundary policing in Federalist 49. In Federalist 50, Madison opposes a method of “periodical appeals,” to be performed by a regularly constituted organ of government, precisely the sort of method Hamilton envisioned and vested in the Supreme Court in Federalist 78.⁵²

But Madison’s reasons for rejecting these options deserve further discussion. Madison’s rejection of a permanent institution to supervise

⁵¹ Federalist 51, at 347-8.

⁵² Federalist 50, at 343-4. Also see Burt, Constitution in Conflict, 58-59.

constitutional boundaries in Federalist 50 is illustrated by his example of the Pennsylvania council of censors of 1783 and 1784. He concluded that such a tribunal would be ineffective and undesirable for five distinct reasons; a couple of these are of particular interest as they indicate with some precision Madison's vision of how such determinations should be conducted. One of the duties of the council of censors was to determine "whether the Constitution had been violated, and whether the legislative and executive departments had encroached upon each other."⁵³ Madison found both the composition and the manner of proceeding of the council seriously flawed in light of its purpose. There was an inappropriate membership of recent, influential legislative and executive officials on the council, "even patrons or opponents of the very measures to be thus brought to the test of the Constitution."⁵⁴ More importantly, the proceedings of the council were inappropriately reflective of this impartiality and generally unsuited to its function. Read Madison's observations of the workings of the council carefully:

Throughout the continuance of the council, it was split into two fixed and violent parties.... In all questions, however unimportant in themselves, or unconnected with each other, the same names, stand invariably contrasted on the opposite columns. Every unbiased observer, may infer without danger of mistake, and at the same time, without meaning to reflect on either party, or any individuals of either party, that unfortunately passion, not reason, must have presided over their decisions. When men exercise their reason coolly and freely, on a variety of distinct questions, they inevitably fall into different opinions, on some of them. When they are governed by a common passion, their opinions if they are so to be called, will be the same.⁵⁵

Pennsylvania's duly constituted tribunal for maintaining the structural integrity of her constitution, in short, was unsuccessful in performing its task because it did not properly behave like the tribunal it was envisioned to

53 Ibid., at 345.

54 Ibid.

55 Ibid., at 345-6.

be.⁵⁶ The particular development of the council toward what can only be described as a “legislative” style of institutional pronouncement led to the dominance of “passion” in its decision-making, to the exclusion of “reason.” Madison’s lesson is inescapable in this paragraph; individually-exercised “cool and free” reason is the only appropriate method for performing functions of such a distinct and constitutional nature. Collectively-exercised “passions,” on the other hand, are unsuited to the task of true opinion-making at this level; indeed, Madison asks whether such a method can produce an authentic “opinion” at all. The lesson for the Supreme Court here is patent, and Madison’s description of the council looks all too familiar to students of the Court.

So Madison in Federalist 51 sets out his famous explanation of how political power in America will be channelled and controlled. Tyranny- or the concentration and aggrandizement of power by a single department- will be prevented in the national government by,

giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.... This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.⁵⁷

In addition to these national arrangements, the federal principle will ensure security, with the governments of the several states checking the national government, and vice versa. Also, repeating the innovative performance of his Federalist 10, Madison explains that the size and diversity of America will prevent easy “interested combinations of the majority,” further securing

⁵⁶ Professor Ackerman gives this paper a quite different reading than this, one which highlights Madison’s understanding of the “limitations of legal form,” in periods of “constitutional creativity.” Though I find Ackerman’s reading both interesting and plausible, here I am employing an interpretation like Robert Burt’s- one which applies the lessons of the paper to the more proximate orbit of constitutional maintenance. See Ackerman, We The People, 176-7; Burt, Constitution in Conflict, 58-59.

⁵⁷ Federalist 51, at 349.

individual and minority rights.⁵⁸ Madison's argument stands in sharp contrast to Hamilton's; Madison is untroubled by the "monster" of divided sovereign authority.

But if authority is to be wielded by several coordinate departments, how is an uncontradicted, comprehensible rule for action to be produced? Burt explains that Madison's vision of constitutional interpretation contains two principles that reconcile this problem his theory confronts; Burt:

His first principle was that constitutional interpretation takes place over time, not in a single instant at a fixed and privileged institutional locus of interpretive authority. His second principle was that institutional competitors for interpretive authority must be linked together in an inextricably nested relationship, so that each would clearly see its interdependence with the others and all would accordingly work toward mutual accommodation.⁵⁹

It was the conversation among and between governmental branches that was key for Madison, one that would lead to an ultimate authoritative position.⁶⁰ But what is lacking in this otherwise excellent analysis of Burt's is that Madison fully recognized the essentially different requirements of the inhabitants of each department and the different means by which their product of power was executed. It is this recognition which in fact caused Madison to deviate from the otherwise unassailable principle that appointments for the three departments, "should be drawn from the same fountain of authority, the people, through channels, having no communication whatever with one another."⁶¹ Of the judiciary in particular, Madison explains that, "it might be inexpedient to insist rigorously on principle," because that department essentially requires "peculiar qualifications," for its members and because of the permanent

⁵⁸ *Ibid.*, at 350-1; also see Federalist 10, at 56-65.

⁵⁹ Burt, Constitution in Conflict, 68-9.

⁶⁰ Burt echoes this theme of conversation as emblematic of the outlooks of both Madison and Lincoln. *Ibid.*, 98.

⁶¹ Federalist 51, at 348.

tenure of the positions.⁶² It was these unique departmental characteristics that, in turn, would fundamentally affect the nature of the “conversation.”

It is a common anachronistic tendency of constitutional scholarship to graft the (largely Hamiltonian) institutional characteristics of today on to any analysis of texts such as The Federalist. But both Hamilton’s and Madison’s theories of constitutional interpretation require the student to provide specific institutional context in order to understand them accurately. Hamilton’s view demands it; without incorporating the understanding that judicial power itself produces a unique institutional product, Hamiltonian judicial supremacy can be manipulated into a more powerful sovereign authority than even he intended. Madison’s theory of a coordinated colloquy among the branches is also lacking without such attention to institutional context. The Madisonian view is not best represented by a conversation among three equal voices; the voices were coordinate for Madison but purposefully unequal in their manner because of their unique departmental characteristics.⁶³ This is why founders like Madison spent so much time dealing with the composition and particular institutionalism of each department. In wording similar to Federalist 50 above, Sotirios Barber points out that Madison in the preceding paper mentions the electorate, the three national departments and the Constitution itself; only the judiciary and the Constitution is associated with “the reason of the public.”⁶⁴ Madison’s

62 Ibid.

63 Burt’s analysis of Madison’s theory on this point is revealing: “The touchstone for Madison’s governance technique,” Burt writes, “was the pursuit of unanimity among governmental actors (but not directly among the populace at large) in institutions whose interlocking authority and overlapping constituencies would tend to promote accommodation rather than fixed confrontation.” Burt, Constitution in Conflict, 74. To the extent that Burt is suggesting that unanimity is an institutional end for the judiciary so that it may better participate in a Madisonian “conversation,” I must disagree.

64 Federalist 49, 342-43; also see generally Barber, Constitution of Judicial Power, 27-43. Hamilton is as precise as Madison in this regard. In Federalist 71, the four year term for the president is supposed to foster “personal firmness.” Federalist 71, at 481.

inventive institutionalism, as Burt correctly points out, was to facilitate ultimate resolution for political disputes, transforming them into a “unifying vision of public virtue,” characterized by “mutually respectful accommodation.”⁶⁵ Madison’s project would be undermined irreparably if one of the institutions would acquire vocal dominance.

If Madison and Hamilton held different views about the locus of authority for the proper resolution and maintenance of constitutional parameters, on one large and important aspect of their theory they were of similar mind. Though the rhetoric of pamphlets and debates tend to mute its treatment somewhat, proponents of the Constitution included republican virtue- the creation and nurturing of civic devotion- as an essential ingredient for their constitutional experiment to succeed. As Cass Sunstein’s idiom conveys of this commitment to republicanism, present at the founding was an original constitutional goal of creating a “deliberative democracy.”⁶⁶ There can be no doubt that both Madison and Hamilton constructed their governmental apparatus with a Humean egoism in mind. Still, neither of them eliminated the “better motives” of citizens entirely. “The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated power implies that there is a portion of virtue and honor among mankind, which may be a reasonable foundation of confidence,” Hamilton writes in Federalist 76.⁶⁷ Madison was equally transparent on the subject in Federalist 55:

As there is a degree of depravity in mankind which requires a certain

⁶⁵ Burt, Constitution in Conflict, 96-7.

⁶⁶ Sunstein, Cass. The Partial Constitution (Cambridge, Mass.: Harvard University Press, 1993), 9.

⁶⁷ Federalist 76, at 513-14. Hamilton goes on in the same paper to praise the British House of Commons, in spite of well founded accusations of its “venality,” claiming that, “there is always a large proportion of the body, which consists of independent and public spirited men.” *Ibid.*, 514. Also see Ackerman, We the People, 197-99.

degree of circumspection and distrust: So there are other qualities in human nature, which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form. Were the pictures which have been drawn by the political jealousy of some among us, faithful likenesses of the human character, the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.⁶⁸

This is the same Madison who wrote Federalist 10 and 51. Careful manufacture of checks and counterchecks notwithstanding, a sufficient amount of republican virtue among officials was required for any attempt of self-government to succeed.

Ralph Lerner, in "The Supreme Court as Republican Schoolmaster," cites two of Hamilton's and one of Madison's papers to support the proposition that woven into their constitutional visions, "there is presupposed a sense of duty- rare, needful of institutional support, but in the last (and desperate) instant, indispensable."⁶⁹ Lerner's reading of Publius contains all the hallmarks of a Hamiltonian bent, but is no less useful for understanding the republican assumptions of both Hamilton and Madison. His interpretation of "Publius" makes it clear that the judiciary is the department where a republican sense was most likely to receive care and exposition.⁷⁰ The key to a republican understanding of the judiciary is to realize that the judges which constituted it were supposed to be different than most people and, indeed, most other government officials. Lerner remarks that only the judges for Publius would be "too far removed from the people to share much in their prepossessions," and that this distinctive

⁶⁸ Federalist 55, at 378.

⁶⁹ Ralph Lerner, "The Supreme Court as Republican Schoolmaster," 1967 Supreme Court Review 127-180, 162. Lerner quotes Hamilton's Federalist 71 and 73, at 482-83 and 493, 497, respectively; and Madison's Federalist 37, at 239. Also see Paul D. Ellenbogen, "Judges as Republican Educators: The American Judicial Aristocracy," (Paper delivered at the 1994 Annual Meeting of the American Political Science Association, September 1-4, 1994).

⁷⁰ *Ibid.*, 163. Also see *ibid.*, 180 ["Whether the Justice should teach the public is not and cannot be in question since teaching is inseparable from judging in a democratic regime."].

dissimilarity was the special qualification for the judiciary to be the “intermediate body” that Hamilton envisioned.⁷¹ The judiciary in this way depends upon a perception of the legal distinctiveness of both its members and its mode of proceeding by the other branches and the people. The Hamiltonian location of the Court between the people and the legislature is dependent upon the preservation of those special qualities of judges and judging.

An important point of clarification should be included about what I mean by, “a perception of the legal distinctiveness both of its members and its mode of proceeding.” First of all, the word “perceived” is all-important; what counts here is that non-judicial officers and the populace treat the judicial function as a distinctive function. By “legal distinctiveness,” I mean a characterization of judging or adjudicating as a task which is essentially different than legislating. I of course realize that “legal formalism” entails more than this, but this view is far too broad a construction; Publius may have been a legal formalist in the fullest sense and viewed judges as “mere machines,” but the integrity of his constitutional theory does not rely upon such a view.⁷² There is no problem for Publius’ constitutional theory if a judge is either perceived to be or is in fact a “lawmaker.” There is no problem for Publius if the product of the judge is not distinguishable from other legal products, perceived or otherwise. The key for the Court (so far as Publius is concerned) is that its members and method must be regarded as legally distinctive; it makes no difference whether the end product is so regarded.

Now Lerner’s discussion is couched within Hamiltonian terms. He

⁷¹ Ibid., 165; Federalist 49, at 341; Federalist 78, at 525.

⁷² See Lerner’s reading of Publius’ (really Hamilton’s) characterization of the judicial function as, “occup[ying] some sort of middle ground between a technician’s deductions from general rules and a legislator’s pure reason prescribing such general rules.” Ibid. I take this as a “legally distinctive” view, for the judge- while not a purely formal technician- is certainly doing something different than the legislator.

even says that the Court as Hamiltonian sovereign implies a further Publian commitment, namely, “that the courts would stand in a closer relation to the deliberate will of the people as expressed in the Constitution than would the representatives of the people.”⁷³ The republican arguments forwarded by Lerner, however, work equally well for a Madisonian structuralism. It is a great mistake to suppose that the “conversation” Madison envisioned between departments could only be effective or worthwhile if each department offered a similar contribution of communication- namely, through a singular departmental expression. Lerner is right to insist that a fair interpretation of Hamilton’s thoughts on the judiciary produces a view of judges, “who would view themselves as teachers of republicanism using the text of the Constitution and the national laws, interpreted in a judicial spirit of moderation and fairness.”⁷⁴ Unfortunately, Lerner’s blanket Publian statement overlooks the crucial differences between Hamilton’s and Madison’s views of the “judicial spirit.” Madison’s thoughts on “the faculties of the mind” in Federalist 37 illuminate these differences most clearly:⁷⁵

The faculties of the mind itself have never yet been distinguished and defined, with satisfactory precision, by all the efforts of the most acute and metaphysical Philosophers. Sense, perception, judgment, desire, volition, memory, imagination, are found to be separated by such delicate shades, and minute gradations, that their boundaries have eluded the most subtle investigations, and remain a pregnant source of ingenious disquisition and controversy.

This passage is generated by a very different mind than that of the author of Federalist 78. If it were included as within the ambit of Hamiltonian constitutionalism, it would cause the arguments of that famous paper to self-destruct. It would be pointless to assert as Hamilton does that the judiciary is

⁷³ Ibid. Lerner actually claims that Publius “rejected” a coordinate theory of constitutional maintenance; he strictly relies on Hamilton’s arguments in Federalist 71 and 78 in doing this. In this latter paper, Hamilton foresees situations when proper constitutional maintenance will require “an uncommon portion of fortitude in the judges,” so as to rebuke “legislative invasions.” Federalist 78, at 528.

⁷⁴ Ibid., 166.

⁷⁵ Federalist 37, at 235 [emphasis added].

a safe repository for the tasks of a sovereign interpreter because it possesses, “neither FORCE nor WILL, but merely judgment,” if the shades which separate judgment and volition (will) are so “delicate” and controversial that they are impossible to distinguish.⁷⁶ If Hamilton adhered to this position, his central argument in favor of the judiciary branch would be harmed beyond repair.

As the whole of Federalist 37 makes clear, discriminating among the faculties of the mind for Madison was analogous to “marking the proper line of partition,” for the provinces of inter- and intra-governmental functions. These remarks bring out the full sense of Madison’s nuanced argument of Federalist 51. The assertion that “each department should have a will of its own,” is not only an argument for judicial independence; that proposition was not all that inventive or controversial when the Constitution stood for ratification.⁷⁷ Rather, Madison’s practical insights on how to make operative Montesquieu’s maxim suggest that in addition to independence the judiciary will offer a distinctive voice to the conversation of constitutional maintenance. It is reasonable, of course, to graft strong institutional conventions of a Court like John Marshall’s onto Madison’s vision. But what I have been trying to show is that this is only one alternative- one that

⁷⁶ Lerner mistakenly combines Madison and Hamilton here into a single Publian mindset on this point. See Lerner, “Republican Schoolmaster,” 168, at note 122 [“Publius was not of two minds on this matter.”]. Lerner cites Hamilton, Federalist 79, at 533, as evidence of this similarity, saying, “The mensuration of the faculties of the mind has, I believe, no place in the catalogue of known arts.” What Lerner neglects to say is that Madison’s passage is found within a general discussion of the practical operation of the principle of the separation of powers. Hamilton makes his remark while rebutting a proposal that there should be a broad impeachment provision that would enable the removal of judges, “on account of ability.” This passage of Hamilton’s is simply not adequate to support such an important claim of similarity.

⁷⁷ Lerner himself points this out and correctly adds that at the time, (as we have already discussed in chapter one) most states provided for judicial tenure during good behavior and that appointment was the method by which the highest state courts were filled. *Ibid.*, 166-67, at note 119. These sorts of comments are incomplete without the further recognition that judges at this time also observed the seriatim form when exercising their function. This point is essential for understanding the expectations and mechanisms of judicial power; without it those latter-day doctrines of political accountability are incomplete.

clings to a Hamiltonian pedigree. Madison's republican constitutionalism more readily allows for an altogether different sort of judicial institutionalism than this dominant Hamiltonian view. Lerner forecloses this alternative in what is a Hamiltonian interpretation of Federalist 51; he assumes a Hamiltonian institutionalism for the judiciary in order for that branch to be an equal and independent participant in constitutional maintenance.⁷⁸ "By being in a position and of a mind to resist the encroachments of the others," Lerner writes, disclosing his enthusiastic Hamiltonianism, "each branch will be able to perform its distinctive function and also serve as an effective element in the system of checks and balances."⁷⁹

This disservice to Madisonian theory is in need of correction, or at least counterbalance. The distinctive quality of the judiciary which leads to Madison's "deviation" of choosing judges from the people also has consequences for the contribution of the judiciary to the constitutional conversation. The judges of the federal judiciary especially must maintain their individuality during the exercise of their function because it is their distinctive individual qualities which force effective government to deviate from strict principle. This is what balances the equation and enables Madison to faithfully forward a constitutional vision which satisfies his call for civic virtue and his wariness of power due to its potential for tyranny. This rendering of Madison's theory better serves Lerner's argument of the Supreme Court as republican inculcator as well. It complies with what Hamilton says the republican principle demands, "that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs."⁸⁰ Most importantly for this discussion,

⁷⁸ See *ibid.*, 169-70.

⁷⁹ *Ibid.*, 170.

⁸⁰ Federalist 71, at 482. See Lerner, "Republican Schoolmaster," 171-72.

Lerner himself notes that the deliberate sense “is found in a blend of voices.”⁸¹ The mistake of scholars like Lerner is to assume that the special quality of the judiciary lies exclusively in its ability to “remove itself from its popular source of power.” This is nothing more than a partial view of the judiciary as Publius envisioned it; even from a purely Hamiltonian point of view it accounts for the special qualities of judges but neglects those special qualities of judging. The judicial power- just as could be said of the other two departments- is also special because of its distinctive vocal contribution as shaped by its unique institutionalism. The conventions of what it is that makes certain behaviors “judicial” is an indispensable aspect of the constitutionalism of The Federalist. Lerner, towards the end of his article, proclaims that John Marshall’s “greatness” lies in his explicit ploy of altering the Court’s voice because this enhanced the guardianship role the Court was designed to undertake.⁸² Lerner’s one-sided praise for such tactics ignores those aspects of republicanism that have been sacrificed by their implementation. What is most surprising is that Lerner seems oblivious of this duality; he fails to see that, contrary to his own statements, in important ways the Supreme Court is less “before the public eye” than its proponents had envisioned and that its function of teaching civic virtue is in many ways

⁸¹ Lerner, “Republican Schoolmaster,” 172 [emphasis added]. Lerner admittedly makes this statement in a different context, referring to a conversation between “the people and their representatives, direct and remote, present and past.” *Ibid.* Lerner cites three separate papers to support these points, Hamilton’s Federalist 22 and 71, at 139 and 482, respectively, and Madison’s Federalist 58, at 397. Once again, Lerner’s combination of the two authors into “Publius” really only confuses the issue. The point, however, retains its value for our purposes, as Lerner (taking Hamilton’s cue in Federalist 71) goes on to say that the deliberate sense can be found at times through the courageous declarations of the judges.

⁸² *Ibid.*, 178-79. Matthew Franck, in his new book, takes up the questions of whether the national judiciary was intended to be a “guardian” at all, or whether justices of the Supreme Court were intended to engage in “statesmanship.” To this latter question Franck responds with a resounding “no”, and his sub-section titled, “Publius on the Meaning and Locus of Statesmanship,” comes very close to an argument for sincerity as a constitutionally intended postulate of judicial behavior. See Franck, Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People (Lawrence, KS: University Press of Kansas, 1996), 21-39.

thwarted by an asymmetric institutionalism.⁸³

There is one final point worth emphasis when considering the views of constitutional theorists like Publius. It is an observation that is perhaps so obvious that it escapes most discussions about Publian views of the judiciary and the Constitution more generally. Both Hamilton and Madison in their arguments about the Supreme Court and the national judiciary never conceive of these institutions as themselves representing a group interest of any kind. The judges of the national judiciary were not envisioned to be, sitting on their benches as a composite whole, a kind of Senate with additional powers of legal interpretation. This observation is crucial to understand; if the opposite were true, then the argument that the Constitution could be designed or modified to facilitate the expression of a group interest and could perhaps override normal judicial ethics of behavior. The explanations of certain judicial commentators, such as that geographical balance or other discernible criteria has always been sought by Presidents for their nominees, may foster the crude notion that the Court is somehow a “representative” institution.⁸⁴ Any student of the Constitution should be alert to such metaphor.

The preceding review of The Federalist was conducted so as to underscore the importance of “voice” in the theories of Hamilton and Madison. It is this aspect of our constitutional development- the manipulation and transformation of voice- which comes to the fore in many well-known historical instances. It is perhaps the most important element of the 1803 case, Marbury v. Madison. So much has been said about this great case that there is little need for a great deal of elaboration here. For many students of constitutional law, John Marshall’s opinion of the Court in

⁸³ Ibid., 179-80. Lerner recognizes that how a judge “conducts himself and how he fashions his speech with an eye to [a large nonprofessional] public are very much within his control.” Given this recognition, his omissions are all the more striking.

⁸⁴ See, for example, Abraham, The Judiciary, 63-9.

Marbury stands as a monument to judicial supremacy in matters of constitutional interpretation.⁸⁵ For others, including scholars like Burt, Bruce Ackerman and Robert Lowry Clinton,⁸⁶ the Madisonian aspects of Marbury are more persuasive, emphasizing those aspects of institutional equality or coordination for the Court but not supremacy. Whichever of these versions is chosen, the truly unmistakable component of Marshall's opinion is his transformation of the Court's voice. "It is emphatically the province and duty of the judicial department to say what the law is," Marshall's opinion says; declaring of the supremacy clause that it, "confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."⁸⁷ The words of Marshall's predecessor, Oliver Ellsworth, are worthy of juxtaposition. "Suggestions of policy and expediency," Ellsworth said, "cannot be considered in the judicial determination of a question of right."⁸⁸ In one of the most unremarked shifts of American constitutional development, Marshall, extending Hamilton's theory of judicial process, exempted concerns of institutional prestige, uniformity and appearance from Ellsworth's catalog of "suggestions of policy and expediency."

⁸⁵ Barber lays out concisely the basic arguments for this position, though he himself adopts a moderate view. Barber, Constitution of Judicial Power, 40-43.

⁸⁶ Robert Lowry Clinton, Marbury v. Madison and Judicial Review (Lawrence, KS: University Press of Kansas, 1989).

⁸⁷ 1 Cranch 137 (1803), 177, 180 [original emphasis].

⁸⁸ Moodie v. The Ship Phoebe Anne, 3 U.S. (3 Dallas) 319 (1796).

Chapter Nine:

“A Will of Its Own”- Changing the Judicial Voice

The attempt has now been made to demonstrate that judicial power must be sincerely expressed if it is to be significantly distinguished from other governmental functions. The ancient question of the difference between a judge and a legislator is best answered with a reply that, at bottom, rests upon an ideal attitude. Current institutional conventions within the Supreme Court fight against this important ideal. This section will briefly explore some practical considerations if the reader is persuaded at all by what has been argued to this point. How, practically speaking, could judicial expression be changed today so as to embrace the value of sincerity?

Perhaps the most popular response to this question would be that Congress has the authority to alter the Court’s mode of expression. There can be little doubt that a legislator who is cautious of judicial power could accomplish more by a single action than by passing legislation requiring the Court’s internal rules to reflect and encourage sincere behavior. That is, if the legislation itself was considered constitutional. There are good reasons in support of such a hypothetical congressional action. First there is the Constitution’s Necessary and Proper Clause, which gives to Congress the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹ Better support can be found in the Constitution’s third article, which includes the provision that “the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make.”² Ever since the days of

¹ U.S. Const., Article I, §8 [emphasis added].

² U.S. Const., Article III, §2.

Chisholm v. Georgia,³ the Supreme Court has explicitly recognized Congress' authority to regulate jurisdiction of the federal courts. There is no doubt that Congress has the authority to regulate the jurisdiction of the federal courts, though controversy does certainly thrive as to the limits of that authority.⁴ This is an area of American constitutional law where, as professor Lawrence Sager puts it, "the rich vein of scholarly commentary on these matters does not yield more than a glimmer of consensus."⁵ According to Sager's analysis, the records of the Philadelphia Convention concerning the "exceptions and regulations" clause "favor a limited view of its scope."⁶ Some scholars have even argued that the debate over constitutional limitation of Congressional authority to regulate court jurisdiction is itself a function of the indecisive texture of the problem. The waxing and waning of federal court jurisdiction in its broadest sense is seen by some as part of a Madisonian dialogue and without fixed parameters.⁷

Particles of constitutional text have been invoked in support of Congress' regulatory authority on issues of institutional hierarchy, appellate process, membership, and subject-matter jurisdiction. On each of these fronts, the judiciary has faced and accepted Congressional assault. For example, the original membership of the Court was specified in the Judiciary Act of 1789 at six. This number was changed to five in 1801, restored to six in 1802, increased to seven in 1807, nine in 1837, ten in 1863, decreased to seven

³ 2 U.S. (2 Dallas) 419 (1793). Justice Iredell in this case provides a noteworthy passage about Congressional power over Supreme Court jurisdiction. "I conceive," Iredell wrote, "that all the Courts of the United States must receive, not merely their organization... but all their authority, as to the manner of their proceeding, from the Legislation." *Ibid.*, at 432.

⁴ See generally Lawrence G. Sager, "The Supreme Court 1980 Term: Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," 95 Harvard Law Review 17-89 (1981).

⁵ *Ibid.*, 19-20.

⁶ *Ibid.*, 50; see generally *ibid.*, 50-53.

⁷ See generally H. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," 66 Harvard Law Review 1362 (1953).

in 1866, and expanded to nine in 1869, which has been unchanged through today. All of these changes were achieved through legislative action.⁸ Various judiciary acts also constructed different judicial hierarchies and appellate processes. Subject-matter jurisdiction is a perpetual Congressional endeavor, though the judiciary has never ruled decisively on these encroachments.⁹ In the early 1980's, for example, bills were introduced which would eradicate the jurisdiction of all federal courts in cases concerning "voluntary prayer" or in cases involving state laws dealing with race-based school assignments.¹⁰ Throughout American history, these types of legislative regulation of the federal judiciary have been thought unproblematic as long as the "essential function" of the Supreme Court was not legislated away.¹¹

These types of regulation, however, do not really shed much light upon the particular type of regulation which concerns us here. With the large exception of membership regulation, most Congressional regulation of the judiciary does not address issues of internal decisionmaking or the mode of judicial expression for cases admittedly and properly within the Supreme Court's jurisdiction. It is fair to say that problems of regulation concerning the Court's internal decisionmaking (as well as regulation of judicial power generally)¹² are so uncertain because for the most part Congress and the Supreme Court have behaved respectfully toward one another. As we have discussed, attitudes of strict judicial independence have never been codified as part of fundamental law; the prevalence of these kinds of feelings owe as

⁸ There are six relevant judiciary acts regarding the issue of the Court's membership: The Judiciary Act of 1789, 1801, 1802, 1837, 1866, 1869.

⁹ See Sager, "Supreme Court Foreword," 19-20.

¹⁰ See *Ibid.*, 17-18, at note 3 [citing, among others, S. 481, 97th Cong., 1st Sess., 127 Cong. Rec. S1284; H.R. 869, 97th Cong., 1st Sess. (1981)].

¹¹ For an explanation of the "essential function" view of the Supreme Court's appellate jurisdiction, see *ibid.*, 42-45; Hart, "Power of Congress," 1364-65.

¹² See, for example, Sager, "Supreme Court Foreword," 20.

much to convention as to Constitution. Some examples of historical practice, however, do provide further support to proponents of Congress on precisely these sorts of issues. As we have already seen in chapter two, Edmund Randolph drafted a bill in 1790 that would have required the Court to proceed according to the seriatim form. The bill did not become law, but nowhere can a student find any commentary saying that such provisions were unconstitutional or improperly invasive.¹³ Another example of regulation that would have directly impacted the Court's decisionmaking occurred in 1868, when the House of Representatives passed a measure requiring a two-thirds vote of the Court to invalidate an Act of Congress.¹⁴ It would appear from these sorts of historical examples that Congress may include the manner of judicial expression as within the ambit of its authority to prescribe exceptions and regulations to the Court's appellate jurisdiction.

Perhaps not; though attitudes of judicial independence may not be codified, they may be thought to act as operative considerations that compose a legislator's oath of office and in that way may be constitutionalized. It is not completely clear that legislative incursions which deal with matters of the "judicial voice" would be accepted by Supreme Court Justices. The surest way of altering such conventions would be for changes to originate in the Supreme Court itself. "Five votes can do anything around here," Justice William Brennan once remarked. One student of the Court agrees with Brennan's assessment, saying that, "Five votes could change even long established procedures at the Court," including for example the Rule of Four, the rules that privilege the Chief Justice in leading conference and assigning opinions, or even the rule that only Justices be present during conference.¹⁵ The problem, of course, is that any change would have to be

¹³ See text *supra*.

¹⁴ Cong. Globe, 40th Cong., 2d. Sess. 489 (1868).

¹⁵ See Schwartz, Decision, 6.

done in concert. An individual Justice acting alone would most likely only diminish her own importance within the institution. The only possible exception to this would be if the Chief Justice sought to abolish the current rules. This would not ensure that the current rules would be changed, but it would require (at the very least) consideration by the other eight members as to what new rules should govern the process.

In 1983, Justice John Paul Stevens wrote an article which assessed the Rule of Four and its susceptibility to change.¹⁶ Stevens first analyzed the doctrine of stare decisis in light of the life-span of the rule announced by the Court in Southern Pacific Co. v. Jensen.¹⁷ The "Jensen rule," as it came to be called, held that the constitutional grant of admiralty and maritime jurisdiction (as per Article III, section 2) to the federal courts prevented a state from applying its own worker's compensation statutes to longshoremen. A five-to-four majority announced the Jensen rule, and consistently applied it in subsequent cases.¹⁸ The minority coalition, led by Justice Oliver Wendell Holmes, did not waver in dissent. Justice Holmes' dissent in the Jensen case, Stevens says, "is famous both for its candid acknowledgement of judicial lawmaking power and for its biting condemnation of the abuse of that power."¹⁹ "I recognize without hesitation," Holmes wrote, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."²⁰

¹⁶ John Paul Stevens, "The Life Span of a Judge-Made Rule," 58 New York University Law Review 1-21 (1983).

¹⁷ Ibid., 6-9; also see Southern Pacific Co. v. Jensen, 244 U.S. 204 (1917).

The doctrine of stare decisis et non quieta movere, "to stand by the decisions and not to disturb settled points," is at least as ancient as Lord Bracton, though his understanding of the rule was quite different than the modern-day application of it would suggest. See Ibid., at note 1.

¹⁸ See Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

¹⁹ Stevens, "Rule of Four," 6.

²⁰ Southern Pacific Co. v. Jensen, at 218 (Holmes, J., dissenting).

Even in subsequent cases, the minority in Jensen would not yield and reiterated its position- seemingly undaunted by the doctrine of stare decisis. Seven years after the Jensen rule was first announced, Justice Louis Brandeis authored a dissent which further illuminated the doctrine of stare decisis. Explaining that stare decisis is “ordinarily a wise rule of decision,” but not a “universal, inexorable command,” Brandeis judged that the doctrine should not deter the Court from overruling Jensen.²¹ Eighteen years later, Justice Felix Frankfurter- notwithstanding his own judgment of the Jensen rule as erroneous- concluded that the circumstances which had transpired in the twenty-five years since Jensen was decided precluded judicial repudiation of the Jensen doctrine.²²

There is an important lesson to be gleaned from the opinions of Holmes, Brandeis and Frankfurter concerning a judge-made rule like the one in Jensen. Stevens, in a concise set of guidelines, explains:

Thus, the question whether a case should be overruled is not simply answered by demonstrating that the case was erroneously decided and that the Court has the power to correct its past mistakes. The doctrine of stare decisis requires a separate examination. Among the questions to be considered are the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law. Such a separate inquiry is appropriate not only when an old rule is of doubtful legitimacy- as was true of the Jensen rule- but also when an old rule that was admittedly valid when conceived is questioned because of a change in the circumstances that originally justified it.²³

From this appraisal of what stare decisis demands, Stevens suggests that the Court’s Rule of Four is an example of this latter example- a rule that should be questioned because the circumstances which originally justified its existence have changed. Stevens then provides an excellent summary of

²¹ See Washington v. W.C. Dawson & Co., at 238 (Brandeis, J., dissenting).

²² See Davis v. Department of Labor and Industry, 317 U.S. 249 (1942), at 258-59 (Frankfurter, J., concurring).

Justice Stevens sums up Frankfurter’s rationale succinctly: “An admittedly erroneous judge-made rule had taken on a life of its own and even today continues to survive despite its questionable origins.” Stevens, “Rule of Four,” 9.

²³ Stevens, “Rule of Four,” 9.

how and why the Rule of Four came to be.²⁴ Though the precise origins are unknown, it is widely agreed that the Rule of Four was created by the Court about the same time as the Judiciary Act of 1925 was passed.²⁵ The Judiciary Act of 1925 alleviated the Court's increasingly crowded docket by reallocating many classes of cases from mandatory review to discretionary review. Until that time under the Judiciary Act of 1891, the Court's discretionary docket was much smaller; nevertheless the Court had developed procedures for processing such cases. Under the newly proposed legislation, the Court intended to follow those same procedures. The Rule of Four, Stevens explains, was one of many features of Court practice which were stressed to Congress "in order to demonstrate that the discretionary docket was being processed in a responsible, nonarbitrary way."²⁶ Stevens explains that other features of Court practice were also emphasized; (1) copies of the printed record and briefs were distributed to each Justice; (2) each justice personally examined the papers and prepared a memorandum indicating his view; (3) each petition was discussed by each justice at conference.²⁷ The Rule of Four was only one component of a complete practice regarding discretionary cases, perhaps not even of equal importance compared with other such components. Stevens' own impression of the legislative history of the Judges Bill was that "the principal emphasis in the presentation made by the justices concentrated on the individual attention given to every petition by every justice and the full discussion of every petition at conference, and that significantly less emphasis was placed on the Rule of

24 Ibid., 10-12.

25 Ibid., 10. Stevens on the Rule of Four: "It was first publicly described by the justices who testified in support of the Judges Bill that became the Judiciary Act of 1925." Ibid (footnote omitted).

26 Ibid., 11.

27 Ibid., 12.

Four.”²⁸ The point Stevens is making is that a judicial process is tailored to its times. When the Rule of Four was created, it addressed circumstances that no longer hold today.²⁹ Many of the features of Court practice which accompanied the Rule of Four no longer occur. Stevens’ suggestion is that, in light of these facts and circumstances, it is perfectly acceptable to question whether the Rule of Four should be abandoned.³⁰

The relevance of Stevens’ discussion of stare decisis and the Rule of Four is manifest. The reasoning which he applies to the Rule of Four should be applied to the rule regarding opinion-assignment as well as any other rules or practices which promote a strategic judicial attitude. Attitudes of judicial strategy no longer fit the constitutional circumstances. Stevens wrote his article (though cautiously) to suggest that the Rule of Four should be reexamined because the Court today faces circumstances which did not exist when the rule was instituted. First on this list of circumstances is docket overcrowding. For Stevens, being of the opinion that the Court takes “far too many cases” for review today, an abandonment of the Rule of Four (in favor of, perhaps, a Rule of Five) would suit his purpose of decreasing the number of cases taken by the Court. Stevens’ general assessment- that the Court should be less concerned with the quantity and more concerned about the quality of its work- of Supreme Court practice appears sound and has firm support from the legal academy.³¹ Surprisingly however, commentators and students of the Court almost invariably insist that the “modern” proliferation of concurring and dissenting opinions is a bad

28 Ibid., at note 59.

29 The explosion of writs of certiorari is well known. See chapter one, ??

30 Stevens, “Rule of Four,” 14.

31 Perhaps the most lucid explanation of this general assessment was made by professor Henry Hart in 1959. Hart also felt that the number of concurring and dissenting opinions had become “excessive,” but this charge (which most of the legal academy seconds) actually blunts the force of his primary argument. See Henry M. Hart, Jr., “The Supreme Court, 1958 Term- Foreword: The Time Chart of the Justices,” 73 Harvard Law Review 84-125 (1959), 94-101.

thing. This stance is undeniably a function of the dominant but erroneous perception of what the Supreme Court should be. The musings of Henry Hart are indicative of this dominance; “the Court is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice reason,” he writes.³² Professor Hart’s lessons should not be challenged casually, but his appraisal of the judiciary is undone by an over-reliance upon a particular variant of American institutional development. The proper destiny for the Supreme Court- which is sustained by common law traditions- is to be the voices of reason. Of course, any program of sincere institutionalism must be part of an overall scheme of judicial maintenance. The constraints of time and docket are very real; any alteration of the Court’s internal procedure would have to occur simultaneously with other changes in judicial practice so that the judiciary would maintain a position of prestige and balance commensurate to its purpose. For example, different canons of opinion-writing would need to be in place as a counterweight to the increased demands that individual opinion-writing would certainly bring.³³ Specifically, opinions would no doubt need to be shorter and contain far fewer research appendages such as footnotes.³⁴ The proliferation and

32 Ibid., 99.

33 The work of Karl Llewellyn and Richard Posner are two well-known efforts which deal with the problem of opinion writing and suggest general guidelines for reform. See Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (Boston: Little, Brown and Co., 1960); Richard A. Posner, Law and Literature: A Misunderstood Relation (Cambridge, Mass.: Harvard University Press, 1988), 269-316; Posner, The Federal Courts: Crisis and Reform (Cambridge, Mass.: Harvard University Press, 1985), 223-58. Posner is a rare scholar in that he notes the difference between individual and institutional perspectives. However, he summarily dismisses the individualist perspective for appellate judges as “not a realistic model for American appellate courts.” Posner, The Federal Courts, 227, at note 7. Also see generally Ruggero J. Aldisert, Opinion-Writing (St. Paul, Minn.: West Publishing Co., 1990).

34 One member of the legal academy has even suggested that the Supreme Court would be well-served by an opinion-style exemplified by the famous Pentagon Papers Case, where a short per curiam statement was followed by nine individual opinions. See New York Times Co. v. United States, 403 U.S. 713 (1971). The result of such a style, the author explains, would be “similar to the legislative model of law-making because the single consensus expression of the law in a statute is accompanied by a published

augmented influence of the law clerk upon judicial opinions (a modern-day phenomenon) would no doubt be affected by a shift toward sincerity as well.

There are two final points worth considering before concluding. In fact, these two points are really concentrated reiterations of problems considered earlier. The first of these is a set of practical concerns: How, if appellate institutions like the Supreme Court were constructed so as to reflect the importance of judicial sincerity, would national rules of law be fashioned from increasingly plural voices? If individual opinions were to dominate the Court, wouldn't every case result in an unintelligible babble? The simple reply to concerns such as these is that lawyers and judges, both in Great Britain and the United States at every level of their respective judicial systems, have performed such feats for a very long time. Professional rules of judicial rule construction have been applied to diverse opinions so that over time- authoritative ratios emerge. There can be no doubt that a return to sincerity as a judicial virtue will elevate once again lessons of judicial reasoning to higher rank within the law school curriculum. The well-known teachings of Arthur Goodhart, Jerry Stone and Edward Levi will need more study in a world where judicial sincerity is valued highly.³⁵ The more important reply, I believe, to this first set of concerns though is to reiterate that this sort of alarm reflects a misunderstanding about the effects of today's collegial, strategic institutionalism. It is simply not the case that a sacrifice of individualism leads to more legal certainty and precision. In

legislative history of debates and committee proceedings that reveal individual viewpoints of interested legislators." See Ray Forrester, "Supreme Court Opinions-Style and Substance: An Appeal for Reform," 47 Hastings Law Journal 180 (1995).

³⁵ See generally, A.L. Goodhart, "The Ratio Decidendi of a Case," in Essays in Jurisprudence and The Common Law (Cambridge: Cambridge University Press, 1931), reprinted from 40 Yale Law Journal 161 (1930); J. Stone, Legal System and Lawyers' Reasonings (1964); E.H. Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949). Goodhart is plain that determining principles from several opinions is simple and uncontroversial. "Ratio Decidendi," 178-9. Stone, even as he stands in general critique of Goodhart, is equally transparent that "competing versions of a legal category" are unproblematic and part of the essential nature of the Common Law.

many instances, the opinion crafted out of strategy and compromise is a vague or internally contradictory standard. To those who would decry the “lack of guidance” or “delegation of authority” given to lower court judges that would occur in a system where judicial sincerity was valued, there is again a similar reply. Over time, through more refined litigation, the judicial system would produce clear legal rules. Meanwhile, just because (in a hypothetical case) a particular result is buttressed by different analyses does not in any way provide less guidance to individuals. More precisely, the multifaceted rationale which supports the Court’s decision provides a clearer reflection of the range of relevant principles which animate the holding. It would be silly to deny that the current brand of institutionalism which characterizes Supreme Court practice does indeed aid in producing an immediate authoritative precedent of “singular meaning,” though the utility of that singular meaning is often very much in dispute. There is nothing about a sincere Supreme Court that would preclude similar outcomes, either immediately or over time. All that is possibly given away is the immediate presentation of an artificial legal unity in the service of prestige.

Secondly, the following proposition needs to be firmly resisted: Judicial sincerity as a primary organizing feature of appellate courts is not needed because a moderate alteration of current Supreme Court practice where dissenting and concurring behavior increases is the same as a system which embraces the ideal of sincerity. There is nothing preventing a Justice from concurring or dissenting from an institutional opinion today, so this line of thinking goes, so any Justice who prizes “sincerity” may do so. The flaw of this suggestion is that it fails to recognize that there is a price to be paid by the “sincere rogue” who dares to act sincerely if one or a few of his number wish to engage in collective rationale formulation, aided by the existence of conventions of strategy. John Frank actually provides a possible example of this in his study of Justice Felix Frankfurter, whom Frank dubs

the “concurringest” member of the Court during his era. Frankfurter’s concurrences were almost never cited by anyone, which led Frank to conclude that Frankfurter’s opinions “for all practical purposes, might as well have been written on paper airplanes and thrown out a Supreme Court window.”³⁶ Those who would equate this alternative with sincerity forget a distinctive premise of American constitutionalism: institutional arrangements directly bear upon substantive action.

When Madison in Federalist 51 remarked that “each department should have a will of its own,” he was attending to the need for a proper foundation to be laid for a constitutional system whose hallmark was the “separate and distinct exercise” of governmental power. The will of the American judiciary was largely fashioned during threatening moments of institutional marginalization. In the absence of such threats its continued existence unbalances and disserves the system as a whole. The will of the judicial department today actually blurs away its distinctive function and in that way undermines the revolutionary principles of American government.

I suggested at the beginning of this paper that events which have developed the peculiar institutionalism of the Supreme Court are just one example of the dynamism of American constitutionalism. This illustration of “amendment by other means” is a prominent feature of professor Ackerman’s widely-acclaimed project, and is a theme to which many scholars have devoted attention.³⁷ The importance of recognizing the centrality of “voice” can be (and has been, though often unconsciously)

³⁶ Frank, Marble Palace: The Supreme Court in American Life (1958), 126.

³⁷ See Ackerman, We The People; A.R. Amar, “Philadelphia Revisited: Amending the Constitution Outside Article V,” 55 University of Chicago Law Review 1043-1104 (1988); Walter Dellinger, “The Legitimacy of Constitutional Change: Rethinking the Amendment Process,” 97 Harvard Law Review 386-432 (1986); Sanford Levinson, “A Multiple Choice Test: How Many Times Has the United States Constitution Been Amended? (a) 14; (b) 26; (c) 420 +/- 100; (d) all of the above,” (Paper delivered at the 1990 Annual Meeting of the American Political Science Association).

applied to the other two departments of the national government as well. Perhaps the best example of this predisposition can be found in the work of Jeffrey Tulis on the executive power.³⁸ For the legislative branch, studies like Barbara Sinclair's also testify to the importance of the unique, often silent institutional changes which occur within flexible constitutional parameters.³⁹ Studies of the evolution of the "advice and consent" doctrine, for example, are in the same vein as the change of judicial voice. The founding generation, with much deliberation and purpose, endowed the legislative power and executive power with different voices. Different periods of history have seen voice-changes in each of these departments. The possible voice of judicial power, though, seems to have been largely forgotten.

This discussion commenced in the spirit of towering constitutional lawyers and political scientists like Charles Black and Walter Murphy. Certain political values that were once fiercely contested have now achieved the status of being "the way things have always been." In a constitutional democracy this is perhaps the highest status of all. Nowhere is this more evident than the specific commitment to a plausible but contestable value of judicial power. I do not pretend that there is nothing to be said for the status quo or that the alternative I have been suggesting is somehow "neutral". The status quo, in the case of the judicial power of the United States, is not power illegitimate, but power ill-conceived. At bottom, this discussion, like others before it, is animated by the desire to allow constitutional citizens "to

³⁸ See J.K. Tulis, The Rhetorical Presidency (Princeton, N.J.: Princeton University Press, 1987). Also see, J. M. Bessette and J. K. Tulis, "The Constitution, Politics, and the Presidency" in J. M. Bessette and J. K. Tulis, eds., The Presidency in the Constitutional Order (Baton Rouge: LSU Press, 1981), 3-30; R.W. Grant and S. Grant, "The Madisonian Presidency," in *ibid.*, 31-64; H. Flaumenhaft, "Hamilton's Administrative Republic and the American Presidency," in *ibid.*, 65-114.

³⁹ See Barbara Sinclair, The Transformation of the U.S. Senate (Baltimore and London: Johns Hopkins University Press, 1989). The constitutional issues of executive impoundment is another example.

choose self-consciously rather than blindly among our possible futures.”⁴⁰ Thomas Reed Powell in 1917 in a classic essay argued for the importance of the individual voice of the judge within the institution of the judiciary. Lack of judicial unanimity should not breed insecurity about judicial power, Powell contended; he insisted that “the fact that judges disagree, and freely express the reasons for their disagreement, should add to our confidence in their labors rather than detract from it.”⁴¹ The peculiar institutionalism of the Supreme Court is not foreordained or somehow inexorable. In the early 1830’s, Alexis DeToqueville observed and analyzed the United States of America and saw that an unfolding “tyranny of opinion” was a potentially dangerous characteristic of American constitutional democracy. Louis Hartz gave voice to this Tocquevillian concern when he detected within the dominant liberal consensus of the United States “a hidden conformitarian germ.” Reflection and deliberation upon the problem of “The judicial Power of the United States,” has been infected by such a pathogen for far too long.

⁴⁰ R. Dahl, “On Removing Certain Impediments to Democracy,” in R. H. Horwitz, ed., The Moral Foundations of the American Republic, 3rd edition (Charlottesville, Va.: University Press of Virginia, 1986), 230.

⁴¹ Thomas Reed Powell, “The Logic and Rhetoric of Constitutional Law,” 15 Journal of Philosophy, Psychology & Scientific Method 645-58 (1918), 651.

APPENDIX
&
SELECTED BIBLIOGRAPHY

APPENDIX 1:

Majority, Dissenting, and Concurring Opinions,
U.S. Supreme Court, Selected Terms 1895-1996

Term	Number of Opinions			Majority Opinions as Percentage of Total
	Majority	Dissenting	Concurring	
1895	188	18	0	91.3
1915	272	14	2	94.4
1935	156	14	4	89.7
1955	82	47	15	56.9
1975	137	101	51	47.4
1976	156	117	86	43.5
1977	142	140	91	38.1
1978	135	143	81	37.6
1979	138	122	78	40.8
1980	149	156	79	38.8
1981	138	119	91	39.7
1982	167	135	95	42.1
1983	162	140	70	43.5
1984	163	127	68	45.5
1985	151	117	62	45.8
1986	159	161	89	38.9
1987	152	154	76	49.8
1988	142	97	64	46.9
1989	143	116	88	41.2
1990	139	118	85	40.6
1991	120	95	47	45.8
1992	116	89	75	41.4
1993	114	81	63	44.2
1994	87	65	82	37.2
1995	86	64	50	43.0
1996	79	67	46	41.1

Sources: With two exceptions, data for number of opinions taken from November issue of Harvard Law Review. For 1895 and 1915 terms, see Richard A. Posner, The Federal Courts: Challenge and Reform (Cambridge, Mass.: Harvard University Press, 1996), 358 (Table 11.1).

APPENDIX 2:
Review of Reports by Alexander J. Dallas

Total Reported Cases: 67
Cases Discarded:¹ 24
Cases Classified: 43
Total Behavior Types (cases are listed in their proper category below figure):² 48

<u>"Homogeneous"</u>	<u>"Dissentient"</u>	<u>"Conversing"</u>
30	6	12
<u>Glass v. The Sloop Betsey</u>	<u>Georgia v. Brailsford III</u>	<u>Georgia v. Brailsford I</u>
<u>U.S. v. Hamilton</u>	<u>Chisholm v. Georgia</u>	<u>Georgia v. Brailsford III</u>
<u>U.S. v. Judge Lawrence</u>	<u>Penhallow v. Doane's Admin.</u>	<u>Chisholm v. Georgia</u>
<u>U.S. v. Peters</u>	<u>Hylton v. U.S.</u>	<u>Penhallow v. Doane's Admin.</u>
<u>Hills v. Ross I</u>	<u>Ware v. Hylton</u>	<u>Talbot v. Janson</u>
<u>M'Donough v. Dannery</u>	<u>Wiscart v. D'Auchy</u>	<u>Hylton v. U.S.</u>
<u>Geyer v. Michel</u>		<u>Ware v. Hylton</u>
<u>U.S. v. La Vengeance</u>		<u>Brown v. Van Braam</u>
<u>Cotton v. Wallace</u>		<u>Calder v. Bull</u>
<u>Aracambel v. Wiseman</u>		<u>Wilson v. Daniel</u>
<u>Olney v. Arnold</u>		<u>Sims v. Irvine</u>
<u>Moodie v. Phoebe Anne</u>		<u>Cooper v. Telfair</u>
<u>Grayson v. Virginia</u>		
<u>Jennings v. Perseverance</u>		
<u>Clerke v. Harwood</u>		
<u>Fenemore v. U.S.</u>		
<u>Brown v. Barry</u>		
<u>Hollingsworth v. Virginia</u>		

¹ Cases may be discarded for a number of reasons, as follows: report is unclear, suit is discontinued, merits not discussed, opinion(s) not offered, writ is non-prossed, cause is double-counted, disposed of after 1800. I have followed many of the guidelines for inclusion in Goebel, Jr., A History of the Supreme Court of the United States Vol. 1, 795-801.

Cases which were discarded, reason given in parentheses:

(1) West v. Barnes (report unclear); (2) Vanstophorst v. Maryland (report unclear); (3) Oswald v. New York I (suit discontinued); (4) Oswald v. New York II (report unclear); (5) Hayburn's Case (not an "opinion"); (6) Oswald v. New York III (no merits; counsel failed to appear); (7) Georgia v. Brailsford II (not an "opinion"); (8) Bingham v. Cabot I (record unclear); (9) Hunter v. Fairfax (record unclear); (10) Moodie v. Alfred (no merits); (11) Hills v. Ross II (see Hills v. Ross I); (12) Del Col v. Arnold (record unclear); (13) Huger v. South Carolina (record unclear); (14) Emory v. Greenough (no merits); (15) Hamilton v. Moore (writ non-prossed; merits not discussed); (16) Dewhurst v. Coulthard (no merits); (17) Ex Parte Hallowell (opinion(s) not offered); (18) The Same Cause (see New York v. Connecticut; double counting); (19) The Same Cause (see New York v. Connecticut; no merits); (20) Hazelhurst v. United States (writ non-prossed); (21) Rutherford v. Fisher (record unclear); (22) Blaine v. Charles Carter (no merits); (23) Priestman v. United States (record unclear); (24) Talbot v. Amelia (disposed after 1800).

² Behavior types total 47, 5 more than the number of classified cases. This is due to the classification of Georgia v. Brailsford III, Chisholm v. Georgia, Penhallow v. Doane's Administrators, Hylton v. U.S. and Ware v. Hylton as containing both "Dissentient" and "Conversing" behavior.

(Appendix 2 continued from previous page)

“Homogeneous”

“Dissentient”

“Conversing”

Bingham v. Cabot II

Jones v. Le Tombe

Fowler v. Lindsey

Clerk v. Russel

New York v. Connecticut

Turner v. Enrille

Turner v. Bank of No. America

Mossman v. Higginson

Williamson v. Kincaid

Blair v. Miller

Course v. Stead

Bas v. Tingy

APPENDIX 3:

Behavior Types by Chief Justice (same format as Appendix 2)

I. John Jay (February 1790 - July 1795): 7 cases; 10 behavior types

<u>"Homogeneous"</u>	<u>"Dissentient"</u>	<u>"Conversing"</u>
3	3	4

Glass v. The Sloop Betsey
U.S. v. Hamilton
U.S. v. Judge Lawrence

Georgia v. Brailsford III
Chisholm v. Georgia
Penhallow v. Doane's Admin.

Georgia v. Brailsford I
Georgia v. Brailsford III
Chisholm v. Georgia
Penhallow v. Doane's

Admin.

II. John Rutledge (July 1795 - February 1796): 2 cases; 2 behavior types

<u>"Homogeneous"</u>	<u>"Dissentient"</u>	<u>"Conversing"</u>
1	0	1

U.S. v. Peters

Talbot v. Janson

III. Oliver Ellsworth (February 1796 - February 1801): 34 cases; 36 behavior types

<u>"Homogeneous"</u>	<u>"Dissentient"</u>	<u>"Conversing"</u>
26	3	7

Hills v. Ross
M'Donough v. Dannery
Geyer v. Michel
U.S. v. La Vengeance
Cotton v. Wallace
Aracambel v. Wiseman
Olney v. Arnold
Moodie v. Phoebe Anne
Grayson v. Virginia
Jennings v. Perseverance
Clerke v. Harwood
Fenemore v. U.S.
Brown v. Barry
Hollingsworth v. Virginia
Bingham v. Cabot
Jones v. Le Tombe
Fowler v. Lindsey
Clerk v. Russel
New York v. Connecticut
Turner v. Enrille
Turner v. Bank of No. America
Mossman v. Higginson
Williamson v. Kincaid
Blair v. Miller
Course v. Stead
Bas v. Tingy

Hylton v. U.S.
Ware v. Hylton
Wiscart v. D'Auchy

Hylton v. U.S.
Ware v. Hylton
Brown v. Van Braam
Calder v. Bull
Wilson v. Daniel
Sims v. Irvine
Cooper v. Telfair

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