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Taking the People Seriously

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BOOK REVIEW

TAKING THE PEOPLE SERIOUSLY

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THE INTELLIGIBLE CONSTITUTION. *By Joseph Goldstein.* Oxford University Press. 1992. 22 pp. $22.95.

The subtitle of Professor Goldstein's timely and important book is "The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand." Essentially, Professor Goldstein contends that the Court must explain its constitutional decisions in a manner that is comprehensible to the public because continuing public consent is the true source of the Court's legitimacy and authority.[1] Professor Goldstein analyzes several relatively recent and significant Supreme Court opinions to illustrate how the Court has frequently neglected this responsibility. He concludes by offering a short set of canons of opinion writing which, if heeded, would improve the Court's performance.

Influenced by Professor Robert Nagel's trenchant analysis of the Court's increasing inability to explain its decisions in a comprehensible manner,[2] and my having previously addressed the issue[3] by contrasting the Court's famous flag salute opinion[4] with one of its more recent flag burning cases,[5] I must admit great sympathy toward Professor Goldstein's thesis. Like Professor Goldstein, I believe that the Court is obliged to make a serious effort to ensure popular understanding of, and at least the possibility of consent to, its decisions and decisionmaking process. Further, I agree with Professor Goldstein that improving the clarity of the Court's opinions should generally not

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1 JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 4-7, 19-20 (1992).

2 Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985), substantially republished in ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW (1989).

3 Lackland H. Bloom, Jr., Barnette *and* Johnson: *A Tale of Two Opinions*, 75 IOWA L. REV. 417 (1990). See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 977-85 (1992) for a different analysis of the rhetoric of these cases.

4 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). Justice Jackson's opinion for the Court in *Barnette* is a classic example of judicial rhetoric at its best. It is one of the unusual Supreme Court opinions that can responsibly be considered law as literature. *Barnette* was actually the second flag salute case in that it reversed the Court's prior decision in Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

5 Texas v. Johnson, 491 U.S. 397 (1989).

affect case outcomes.[6] However, in certain instances in which I am skeptical about his application of his canons to specific cases, I wonder whether his criticisms of the opinions are not more related to disagreement with the Court's substantive principles than with its rhetoric.

Professor Goldstein begins by quoting Chief Justice Marshall's famous admonition in *McCulloch v. Maryland*: "[w]e must never forget that it is *a constitution* we are expounding."[7] Professor Goldstein notes that in developing this theme, Marshall emphasized that since a constitution draws its authority from the people and is intended to endure, constitutions are written, and must be interpreted, in a manner designed to retain flexibility.[8] Marshall pointed out that the simplicity of language in the Constitution helps to promote these goals.[9] Just as it was crucial that the Constitution be written in both a language and a style that the public could comprehend, so must Supreme Court opinions "expounding" the Constitution pass a test of public accessibility if they are to ensure an understanding which will facilitate continuing consent.[10] In that regard, Professor Goldstein cautions that the Court must not simply explain its reasoning clearly, but must also "strive to maintain the character of the instrument" by avoiding "convert[ing] it into a detailed body of rules and regulations."[11] He argues that the *McCulloch* opinion itself is a splendid example of how the Constitution should be expounded, because the decision rests on intelligible "constitutional principles of general application" fashioned to maintain the broad constitutional outlines.[12]

It is certainly not necessary to return to the early days of the Court to discover opinions deliberately written in a style comprehensible to the ordinary citizen. Many of the significant decisions of the twentieth century readily qualify, including *Powell v. Alabama*,[13] *West Virginia State Board of Education v. Barnette*,[14] *Brown v. Board of Education*

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6 *See* GOLDSTEIN, *supra* note 1, at 19, 128-30.

7 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). Justice Frankfurter referred to this statement as "the single most important utterance in the literature of constitutional law." Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 219 (1955).

8 GOLDSTEIN, *supra* note 1, at 4.

9 *Id.* at 5 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 404-06).

10 GOLDSTEIN, *supra* note 1, at 7-8.

11 *Id.* at 8.

12 *Id.* at 12.

13 287 U.S. 45 (1932).

14 319 U.S. 624 (1943). *See generally* Bloom, *supra* note 3 (contrasting this opinion with Texas v. Johnson, 491 U.S. 397 (1989)).

(I),[15] *School District of Abington v. Schempp*,[16] *Gideon v. Wainwright*,[17] *Mapp v. Ohio*,[18] *Katz v. United States*,[19] and even *Griswold v. Connecticut*.[20] Until relatively recently, the Court regularly delivered opinions in major cases that were written in ordinary language, relatively uncluttered with citations, quotations and cross-references, that purported to deliver a single opinion of the Court joined without qualification by a clear majority. In other words, a person without legal training could read and understand these opinions.

Unfortunately, that has often not been the case for the last two or three decades. Supreme Court opinions in even the most important and interesting cases have grown technical, tedious, argumentative and fragmented.[21] Regardless of whether this decline in intelligibility is attributable to the increased reliance on law clerks, the rhetorical skills of the justices, changes in the legal and political culture, the complexity of the issues or the increased caseload, it is certainly a matter of great concern.

Professor Goldstein aptly uses the Court's decision in *Webster v. Reproductive Health Services*[22] to illustrate the contemporary Court's explanatory deficiencies.[23] Like so many other recent Supreme Court opinions, *Webster* easily fails the test of intelligibility. It is composed of a jumble of overlapping concurrences and dissents, making it difficult for any but the most careful reader to discern which principles are supported by a majority of the justices.[24] Furthermore, he criticizes

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15 347 U.S. 483 (1954).

16 374 U.S. 203 (1963). *See* Thomas M. Mengler, *Public Relations in the Supreme Court: Justice Tom Clark's Opinion in the School Prayer Case*, 6 CONST. COMMENTARY 331 (1989) (arguing that Justice Clark deliberately wrote an accessible opinion to build public support for the school prayer decisions).

17 372 U.S. 335 (1963).

18 367 U.S. 643 (1961).

19 389 U.S. 347 (1967).

20 381 U.S. 479 (1965).

21 *See generally* NAGEL, *supra* note 2, at 129-31, 139-42, 154-55 (arguing that the Court's overly analytical writing style distances it from its audience); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 92-101, 153-58 (1991) (stating that the Court's rights-based adversarial approach to opinion writing deprives the reading public of a full exposition of the judicial decision-making process); Bloom, *supra* note 3, at 423-29 (arguing that most Supreme Court opinions address an audience of lawyers and scholars); Eisgruber, *supra* note 3, at 1002 (saying that the Court's oratory has become "technical, spare and reductive"); Peter Huber, *Advice to Justice Thomas*, FORBES, Nov. 25, 1991, at 202. *Cf.* Paul M. Barrett, *If there is Blood in an Opinion, We Know Who Wrote It*, WALL ST. J., Oct. 4, 1993, at A1 (discussing the role of law clerks in Supreme Court opinion writing).

22 492 U.S. 490 (1989).

23 GOLDSTEIN, *supra* note 1, at 13-19.

24 *Id.* at 17. Professor Goldstein quotes from the Court's increasingly familiar introductory paragraph, which purports to explain which justices join in the various portions of the opinion. In the book's Foreword, Professor Burke Marshall presents a similar critique of the analogous introductory paragraph in Arizona v. Fulminante, 499 U.S. 279 (1991). The Court's recent decision in the cigarette advertising federal preemption case, Cipol-

Justice Rehnquist for attacking *Roe*'s overly particularistic trimester framework as if that superstructure was dictated by the underlying constitutional principle of privacy.[25]

Central to Professor Goldstein's thesis is the belief that the true source of the Court's legitimacy is continuing popular consent. As he notes, the significance of popular consent to constitutional government itself, and derivatively to judicial review, played a crucial role in Marshall's opinion in *McCulloch v. Maryland.* Marshall there echoed a theme previously developed in the Federalist Papers[26] which in a more general form can be traced back to Locke.[27] Many scholars have emphasized the significance of popular consent, including Professor Goldstein's colleagues at Yale, the late Alexander Bickel[28] and Charles Black.[29] As Professor Bickel once put it:

> Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives. They are never, at the start, conversations between equals. The Court has an edge, because it initiates things with some immediate action, even if limited. But conversations they are, and to say that the Supreme Court lays down the law of the land is to state the ultimate result, following upon a complex series of events, in some cases, and in others it is a form of speech only. The effectiveness of the judgment universalized depends on consent and administration.[30]

This was ultimately a crucial aspect of Bickel's reconciliation of the tension between the counter-majoritarian force of judicial review and popular democracy. Likewise, the court has just recently emphasized the role of popular consent in *Planned Parenthood v. Casey.*[31] In a

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lone v. Liggett Group, Inc., 499 U.S. 935 (1992) is another stunning example of the fractured and complicated opinion.

25 GOLDSTEIN, *supra* note 1, at 17-18.

26 *See* THE FEDERALIST No. 78, at 467-68 (Alexander Hamilton); No. 49, at 313-14 (James Madison) (Clinton Rossiter ed., 1961).

27 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 366-67 (1690) (Peter Laslett ed., Cambridge Univ. Press 1988).

28 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 27-28 (1962) [hereinafter BICKEL, BRANCH]; ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 90-95 (1970) [hereinafter BICKEL, PROGRESS]; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 15-16, 107-11 (1975) [hereinafter BICKEL, CONSENT].

29 CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT 34-55 (1960). Others connected with Yale and the Yale Law School have also emphasized the role of the Court in legitimating government action. *See, e.g.*, THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 34-35 (1935); JEROME FRANK, LAW AND THE MODERN MIND 37 (1930); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 294 (1957).

30 BICKEL, PROGRESS, *supra* note 28, at 91. *See also* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 599 (1993) (explaining that the Court, while having final authority, must still write its decisions for a public audience).

31 112 S. Ct. 2791 (1992).

key paragraph discussing the need to honor precedent, the Court explained:

> The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands. . . .
>
> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[32]

This may be the most explicit statement the Court has ever offered to explain why it is obligated to write decisions in a comprehensible and principled manner, and it reads as if drawn straight from The Intelligible Constitution. The Court rarely troubles itself to directly address matters of judicial review theory. That it chose these grounds to defend one of its most crucial and controversial contemporary decisions emphasizes the importance of Professor Goldstein's central premise.

The extent of actual public knowledge and approval of the Supreme Court and its decisions is a matter of academic dispute. Some studies have shown that at least at a diffuse level, significant popular approval of and consent to the Court and judicial review is a reality.[33] As the authors of several important studies have concluded, "despite serious misgivings about individual decisions . . . the general public as well as the elites were generally pleased with the way the Court was performing its overall functions."[34] Others argue that the data indicates public disapproval of the Court.[35] Moreover, studies

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32 *Id.* at 2814. *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

33 *See, e.g.*, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); Gregory Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1210, 1224 (1986); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 994-1004 (1990) [hereinafter Murphy & Tanenhaus, *Publicity*]; Walter F. Murphy & Joseph Tanenhaus, *Explaining Diffuse Support for the United States Supreme Court: An Assessment of Four Models*, 49 NOTRE DAME L. REV. 1037 (1974); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 LAW & SOC'Y REV. 357, 370-80 (1968).

34 Murphy & Tanenhaus, *Publicity*, *supra* note 33, at 998.

35 *See, e.g.*, David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y Q. 405, 408 (1983); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 409.

often show that public knowledge of the Supreme Court and its decisions is quite limited.[36] Whatever the reality, considering that in theory legitimation through popular consent is and always has been well accepted as a cornerstone of judicial review and democratic government, the Court should take its obligation to address the public seriously, even if the average citizen fails to take advantage of the opportunity to evaluate the Court and its product. At the very least, the Court should attempt to explain its decisions to the educated, but not necessarily legally trained elite, to whom it must look for the core of its public support.[37]

Although Professor Goldstein makes no such distinction, I would suggest that, as a practical matter, the degree to which the Court should render its opinions intelligible to the lay audience should vary somewhat with the nature of the issues. In cases of obvious interest and significance to the public, such as those involving the constitutionality of abortion regulation, public support or restriction of religious activity, affirmative action plans, and police conduct or restrictions on speech, the Court should make every effort to explain its decisions in a manner that the non-lawyer can understand. While the Court should always attempt to write clearly and concisely, I would afford it somewhat more leeway to be technical and legalistic in opinions adjudicating the latest nuances of constitutional doctrine in areas such as state taxation of interstate commerce, Eleventh Amendment based state immunity or the intricacies of Article III jurisdiction.

The core of The Intelligible Constitution is a four chapter segment critiquing the Court's opinions in *National League of Cities v. Usery*[38] and *Garcia v. San Antonio Metropolitan Transit Authority*,[39] *Cooper v. Aaron*,[40] *Brown v. Board of Education I*[41] and *II*[42] and *Regents of the University of California v. Bakke*.[43] In these four chapters Professor

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36 *See, e.g.*, MARSHALL, *supra* note 33, at 143; David Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 810; Stephen M. Griffin, *What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 522 (1989); Hyde, *supra* note 35, at 407; Murphy & Tanenhaus, *Publicity, supra* note 33, at 996; Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 438-39 (1977).

37 *See* GOLDSTEIN, *supra* note 1, at 114. *See, e.g.*, Adamany & Grossman, *supra* note 35, at 429-30 (Court derives support from liberal political activists); Nelson W. Polsby, *Public Opinion Is Led*, 84 NW. U. L. REV. 1031 (1990) (arguing that the public tends to support the Court because the professional elite does not attack it); Eisgruber, *supra* note 3, at 1009-10 (explaining that the Court's opinions when read by law students can influence public opinion).

38 426 U.S. 833 (1976).

39 469 U.S. 528 (1985).

40 358 U.S. 1 (1958).

41 347 U.S. 483 (1954).

42 349 U.S. 294 (1955).

43 438 U.S. 265 (1978).

Goldstein attempts to show how the contemporary Supreme Court has failed to expound the Constitution in a sufficiently comprehensible way.

In "With Studied Ambiguity," the chapter on *National League of Cities* and *Garcia*, Professor Goldstein argues that the Court failed in its obligation to ensure that the opinion "means what it communicates," because Justice Blackmun's short and essential concurrence endorsing an ad hoc balancing approach seemed inconsistent with Justice Rehnquist's opinion for the Court propounding a much more rigid framework of analysis.[44] Indeed, as Professor Goldstein suggests, perhaps the *National League of Cities* principle never really existed, in that the crucial fifth vote was never truly committed to the core of the Rehnquist opinion.[45]

Professor Goldstein argues that Justices Rehnquist and Blackmun were quite obviously aware of the lack of consistency in their respective approaches and that they should have confronted the issue and hammered out some greater agreement of principle before representing that the Rehnquist opinion actually spoke for a majority of the justices.[46] To the extent that agreement could not be achieved, Professor Goldstein argues that it would have been preferable for Justice Rehnquist to publish his views as a clearly delineated plurality opinion with no pretense of speaking for the Court.[47] That approach would have avoided deceiving the reader into believing that the Court had taken a major step for which it did not quite have the votes.

The uninitiated reader would probably have failed to recognize the extent to which Justice Blackmun's concurrence limited the scope and indeed the precedential force of the Rehnquist opinion. To the seasoned reader of the Court's product, Justice Blackmun's understanding that the Court was applying a balancing test seemed puzzlingly inconsistent with the more rigid approach of the Rehnquist opinion. The Court's subsequent cases in the area confirmed that Justice Blackmun was not disposed to interpret the *National League of Cities* principle in the same manner as Chief Justice Rehnquist and its other supporters.[48] However, at the time that *National League of Cities* was decided, quite possibly both Justice Rehnquist and Justice Black-

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44 GOLDSTEIN, *supra* note 1, at 26-30.

45 *Id.* at 30, 32, 35.

46 *Id.* at 29-35.

47 *Id.* at 32.

48 In the three major federalism/state sovereignty cases decided between *National League of Cities* and *Garcia*, E.E.O.C. v. Wyoming, 460 U.S. 226 (1983), Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264 (1981) and F.E.R.C. v. Mississippi, 456 U.S. 742 (1982), Justice Blackmun voted with the majority to uphold the federal regnlation against state challenge in all three cases. The *Hodel* decision was unanimous. There were sharp dissents in the other two cases.

mun believed that they could resolve their differences in subsequent cases and over time produce a workable approach for the Court. If so, they both may have believed that future stability was better served by attempting to start out with a majority holding in need of some reworking, than to invalidate an important piece of federal legislation on the basis of a plurality and a somewhat inconsistent special concurrence. After all, the Court did have a case to decide and there did appear to be five votes in support of some degree of state immunity.

The Court's obligation to develop a body of coherent and justifiable precedent is important but its obligation to decide the actual disputes before it as best it can is arguably even more important and certainly more pressing. Had Justices Rehnquist and Blackmun been unable to agree on the proper analytical approach and had Justice Blackmun persisted in believing that the legislation in question was inconsistent with principles of federalism, the Court would have been justly criticized for deciding a significant issue without a majority opinion to provide gnidance.

The alternative, declining to make significant changes in the law unless a clear majority opinion could be developed, would hopefully render the Court's work product more comprehensible by decreasing the number of plurality opinions. Ideally, such an approach would serve as a disciplining mechanism by forcing concurring justices to work out their differences before publishing their opinions, an option Professor Goldstein obviously prefers. Leaving aside the difficulty of persuading the Court to adopt such a rule in the first instance, it is likely that in many cases the justices would be unable to resolve their analytical disagreements. In those instances, the justices would either revert to filing separate opinions or more disturbingly decide the case against their best judgment as to the appropriate outcome. The latter would be especially unfortunate. It is certainly not obvious that it would be preferable for the Court to decide cases incorrectly rather than unclearly. Furthermore, although it would be desirable if the Court could produce clear, coherent and principled rationales for its decisions in the cases in which an issue is initially presented, that may simply be too much to expect.

In deriving principles from a very general charter through the incremental case method, there will be many instances, as with common law adjudication, in which the appropriate principle can only be developed through trial and error as the line of precedent unfolds.[49] Often, the disjointed approaches of concurring and plurality opinions will ultimately contribute to the development of a stabilizing princi-

49 Professor Goldstein acknowledges this. GOLDSTEIN, *supra* note 1, at 118.

ple. From this perspective, there would be costs as well as benefits from insisting that the Court proceed by clear majority only.

If any of the opinions in *National League of Cities* should be faulted from a rhetorical standpoint, it is surely Justice Brennan's. On a substantive level, he ably presented the case against a judicially enforced state sovereignty principle. Nevertheless, his overheated condemnation of the majority decision and his exaggeration of its significance is all but unprecedented.[50] If ever an opinion violated Professor Goldstein's canon that a justice should "be accurate and scrupulously fair in making attributions to another opinion in the case,"[51] it is the Brennan dissent in *National League of Cities.* The difficulties for the lay reader in separating hyperbole from justifiable disagreement in a dissent on a relatively complex legal issue are obvious. The justices would advance public understanding and diminish the potential for creating disrespect for the Court as an institution by resisting the urge to attack decisions with which they strongly disagree in such shrill and bombastic language.

Turning to the overruling of *National League of Cities* in *Garcia,* Professor Goldstein scolds Justices Rehnquist, Powell and O'Connor for writing dissenting opinions vowing to fight to resurrect state immunity instead of quietly surrendering to the new majority.[52] In perhaps the least persuasive segment of his book, Goldstein argnes that because of the unworkability of *National League of Cities,* respect for stare decisis requires allegiance to *Garcia* rather than to *National League* itself.[53]

To assert that the *Garcia* dissenters failed to properly honor stare decisis when it was the majority who discarded a significant and relatively recent precedent sorely tempts one to cry "Astounding," "Incredulous," echoing Justice Brennan's *National League of Cities*

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50 During the course of his dissent, Justice Brennan characterized the majority opinion or its principles or reasoning as "patent usurpation"; a "manufactured . . . abstraction without substance"; "an abstraction having such profoundly pernicious consequences"; "must astound scholars"; "ill-conceived abstraction can only be regarded as a transparent cover for invalidating a congressional judgment with which they disagree"; "an ipse dixit reflecting nothing but displeasure with a congressional judgment"; "the paucity of legal reasoning"; "by fiat"; "sophistry"; "absurd"; "patently is in derogation of the sovereign power of the Nation"; "no principle given meaningful content"; "devoid of meaningful content"; "could operate as a flat"; "the portent of such a sweeping holding is so ominous for our constitutional jurisprudence as to leave one incredulous"; "more alarming is the startling restructuring of our federal system"; "ominous implications"; "violates the fundamental tenet of our federalism"; "disregard for precedents"; "cavalier treatment"; "no analysis"; "conceptually unworkable"; "a catastrophic judicial body blow"; "an ominous portent of disruption of our constitutional structure implicit in today's mischievous decision." 426 U.S. at 856-80 (Brennan, J., dissenting).

51 GOLDSTEIN, *supra* note 1, at 119.

52 *Id.* at 38-41.

53 *Id.* at 36-41.

rhetoric.[54] Professor Goldstein argues that his call for an intelligible constitution does not assume a particular ideological bias and I accept that as largely true. Nevertheless, I wonder whether in this instance the widely shared academic distaste for *National League of Cities* has influenced Goldstein's application of his analysis.[55] For a precedent that broke new ground, nine years seems like a very short period in which to determine that it could not be applied consistently. The case can certainly be made, as Professor Van Alstyne has argued, that if the *National League of Cities* test didn't work, it was because a hostile federal judiciary, particularly at the Supreme Court level, undermined it from the outset.[56] Thus with the active support of the *National League of Cities* dissenters, Justice Blackmun's critique of that decision's unworkability soon became a self-fulfilling prophecy. As a general rule, precedent, even in constitutional law, should be accorded great weight in order to ensure stability, predictability, neutrality and principled decisionmaking.[57] Consequently, perhaps *Garcia* should be accepted as the final word on this subject although the implications of the recent opinion in *New York v. United States* suggest that this may not be so.[58] Still, stare decisis seems to be a peculiarly inappropriate argument clincher in this particular context given that both the *Garcia* majority and dissents have built their positions on disregard of recent precedent.[59] As a result, perhaps this is an instance in which ulti-

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54 As Professor Goldstein notes, the majority in *National League of Cities* overruled Maryland v. Wirtz, 392 U.S. 183 (1968). GOLDSTEIN, *supra* note 1, at 26 citing 426 U.S. at 845. The successive opinions in *Maryland v. Wirtz*, *National League of Cities* and *Garcia* indicate the general instability in the law that existed when the Fair Labor Standards Act was extended to the states. It would not seem appropriate to attach too much weight to stare decisis in this area at least until the Court had an adequate opportunity to work through the issues in a series of cases. Whether the Court had done that by the time of *Garcia* is a debatable question.

55 The overwhelming amount of academic commentary on *National League of Cities* was highly critical. *See, e.g.*, Dean Alfange, Jr., *Congressional Regulation of the "States Qua States": From* National League of Cities *to* EEOC v. Wyoming, 1983 SUP. CT. REV. 215; Sotirios A. Barber, National League of Cities v. Usery: *New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161; Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority, *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

56 William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1717 (1985).

57 *See* Planned Parenthood v. Casey, 120 L. Ed. 2d 674, 709 (1992); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

58 112 S. Ct. 2408 (1992). There, in the course of invalidating an attempt by Congress to "commandeer" state government for the purpose of carrying out federal regulation, the Court purported to distinguish *Garcia* on the ground that the legislation at issue was applicable to private parties and the states alike. *Id.* at 2420. Justice White argued persuasively in dissent that this distinction was of little siguificance. *Id.* at 2441-44 (White, J., dissenting). If Justice White's argument is taken seriously in the future, it could provide a basis for reconsidering *Garcia*.

59 *See supra* note 54 and accompanying text.

mately getting it right, if that is possible, should prevail over the normally sound considerations of stare decisis.

In the chapter entitled "Had Understanding Been the Goal," Professor Goldstein addresses the Court's unanimous opinion in *Cooper v. Aaron*.[60] Here, Professor Goldstein focuses on Justice Brennan's apparently deliberate substitution throughout the opinion of the word "desegregation" for the term "integration," which had been used by the lower court in its decree.[61] In an interview, Justice Brennan had stated that he had made that substitution after having been informed that the term desegregation would be considered less inflammatory in the South since it apparently suggested a mere cessation of legally mandated segregation rather than an affirmative mixing of the races.[62] Professor Goldstein criticizes the Court (or at least Justice Brennan) for deliberately attempting to obscure the meaning of the decision and indeed the lower court's mandate.[63] In this instance, Professor Goldstein's commitment to intelligibility arguably leads to a "damn the torpedoes full speed ahead" approach to constitutional decisionmaking. Apparently, he believes that the Court is obliged to announce its principles clearly and firmly with no concern for whether they can be enforced. He decries the *Cooper* Court for attempting "to play prophet and politician."[64] In an ideal world, this might be a desirable model for the Court. In the real and very complicated world in which the Court operates, however, such an approach seems romantic, naive and, most significantly, a threat to the ultimate realization of constitutional rnle.

Presumably, Professor Goldstein believes that the Court acts legitimately only when it acts in a principled manner; that once it begins to temper principle with considerations of expedience, even in an effort to achieve principled results in the long term, it undermines its own credibility and authority. Again, from an idealistic standpoint, there is much to admire in such an uncompromising stance. Theoretically, under such an approach, the Court would draw strength from its unwillingness to flinch. Indeed that seems to be the thesis of the joint opinion in *Planned Parenthood v. Casey* quoted earlier.[65] Hopefully, the public and the executive branch would rally to the aid of an institution that carried out its obligation of constitutional exposition so heroically.

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60 GOLDSTEIN, *supra* note 1, at 43-55 (discussing Cooper v. Aaron, 358 U.S. 1 (1958)).

61 *Id.* at 47-55.

62 *Id.* at 48-50.

63 *Id.* at 52-55.

64 *Id.* at 53.

65 *See supra* note 32 and accompanying text.

And yet *Cooper v. Aaron*, as much as any decision the Court has ever rendered, was written in a context in which the Court must have entertained doubts as to whether either significant segments of the public or the other branches of the government were prepared to stand behind its mandate. I find it hard to fault the Court for being somewhat manipulative at a time when guile may have appeared to be one of the few weapons in its arsenal that it could call on to advance the constitutional principles set forth in *Brown*.

There are, however, at least two possible responses to my apology for Justice Brennan's deviousness. As suggested above, one might conclude that if the Court simply states its principles clearly without pulling its punches, resistance will be less significant than if it proceeds in a more Machiavellian manner. In the long run, the Court's mandates probably will be accepted even when presented bluntly. In the short run however, which may entail many years, I believe it is unduly optimistic to assume that resistance will simply dissipate when confronted with clearly stated principle, especially when those who disagree strongly believe that their own understanding of the Constitution is correct.

Alternatively, one could maintain that it is the constitutional role of the executive to see that the Court's mandate is enforced and as such, the Court should not undermine its own function in an effort to perform another institution's job. This is a principled position, admirable for its rigor. Executive failure to enforce the Court's mandates, however, could undermine the Court's power and authority by making it appear impotent. As a matter of institutional self-protection, the justices have almost certainly considered the prospect of inadequate executive support since at least *Marbury*.[66] It would be hard to imagine justices as politically sensitive as John Marshall, Felix Frankfurter, Earl Warren, William Brennan and William Rehnquist doing otherwise. I do not fault the Court for behaving in such a politically conscious manner, at least in the extreme case. Clarity, candor, and even principle, in the short run, can be carried to counterproductive extremes.

In the following chapter, "Decisions Unexplained," Professor Goldstein examines the opinions in *Brown v. Board of Education*, with primary emphasis on the Court's consideration of the appropriate approach to the remedial issue in *Brown II*. Professor Goldstein argues

66 *See, e.g.*, ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 39-44 (1960). In a television interview with Bill Moyers, Justice Powell confided that when *United States v. Nixon* was before the Supreme Court, the justices worried about the possibility of Presidential defiance. Justice Powell quipped that they considered what would happen if the Court were to send its fifty security guards up against the best infantry in the world in an effort to enforce its mandate. *Moyers in Search of the Constitution, Conversation with Associate Justice Lewis Powell* (PBS television broadcast, June 1987 (tape on file with author)).

that in *Brown II*, the Court concluded that some amount of delay in desegregation would have to be tolerated. It neglected, however, its obligation to explain why any public interest in accommodating the problems faced by the southern school districts could override the private and public interests in ensuring that the victorious plaintiffs in the cases received immediate vindication of their rights to attend integrated public schools.[67] Goldstein seems to be more troubled by the substance than the style of *Brown II*, although one could certainly maintain that if there is no underlying principle to the decision, it can hardly be stated intelligibly.

Of course the probable explanation for the Court's decision was its belief that gradualism was necessary to both obtain compliance and avoid violence and to accommodate legitimate administrative burdens.[68] Professor Goldstein acknowledges that these were unavoidable considerations, but argues that the Court was under an obligation to explain clearly in its opinion its concern about violence and enforceability rather than leave it as a shadowy sub-text.[69] He notes however that he would not actually expect the Court to openly acknowledge these matters since it would be embarrassing to rely on such unprincipled considerations.[70] Hence his position seems to be "if you can't say it, then don't do it."

As with his objections to *Cooper v. Aaron*, this approach seems dangerously naive. Clearly Professor Goldstein is correct that the Court would be unlikely to explicitly note that its gradualist approach to remediation was in part attributable to its fear of resistance. Its reticence, however, would be driven as much by concern that such an admission would further embolden the opponents of *Brown* as by embarrassment. It is easy enough in retrospect to argue that the Court could and should have taken a more principled approach in *Brown II*[71] by ordering immediate desegregation of the schools before the Court.[72] But it is not at all apparent that the mandate would have been heeded. The Court decided *Brown* during a decade in which integration was opposed with police dogs, fire hoses, billy clubs, mass arrests, fire bombings and murders. While one school of thought maintains that the resistance and violence would not have been so

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67 GOLDSTEIN, *supra* note 1, at 76-80.

68 RICHARD KLUGER, SIMPLE JUSTICE 742-46 (1977); BERNARD SCHWARTZ, SUPER CHIEF 118-25 (1983); Philip Elman (interviewed by Norman Silber), *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 827-30 (1987).

69 GOLDSTEIN, *supra* note 1, at 78.

70 *Id.* at 79.

71 349 U.S. 294 (1955).

72 Chief Justice Warren apparently came to believe that "all deliberate speed" was a serious error. SCHWARTZ, *supra* note 68, at 123-24.

great had the Court simply issued a "principled" decision requiring immediate compliance,[73] it is certainly possible that the resistance and violence would have been even greater had the Court taken that approach.[74] While we can never know with certainty, I would maintain that the Court would have been irresponsible not to consider such consequences in the course of making its decision.

The ambiguity of *Brown II* may very well reflect the Court's understandable inability to forecast the nature and the scope of potential resistance, administrative burden and judicial competence. *Brown II* after all is the source of modern structural reform litigation. Over the past forty years the potential and the limitations of this approach have been made apparent.[75] For these reasons, the approach remains a matter of great controversy. While clarity, certainty, coherence and unwavering principle are obviously desirable, it may be unrealistic to expect that the Court can attain these ideals as it sails in turbulent and uncharted waters.

Moreover, the historical evidence suggests that, for at least some of the justices, the remedial gradualism of *Brown II* was an absolute prerequisite to their decision to join *Brown I*'s invalidation of segregated schooling.[76] Had the Court felt obligated to order immediate desegregation as the only principled remedy, it may have forfeited the unanimity which it deemed so crucial to enforcement. It is not obvious that strict adherence to principle would have been worth the risks posed by a divided Court. Faced with these considerations, the gradualist approach of *Brown II* may have been the best that could be expected under the circumstances. While the Court may be faulted for failing to develop the meaning of *Brown* adequately over the next fifteen years, the *Brown* decisions themselves remain heroic efforts in the context of their day.

Before turning away from the *Brown* decisions, I should note that in many respects, they are among the stronger contemporary examples of Supreme Court decisions written in a style that is relatively

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73 Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 22 (1970); Robert L. Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 244 (1968). Professor Goldstein cites a recent speech in which Justice Stevens made the same point. GOLDSTEIN, *supra* note 1, at 80.

74 J. HARVIE WILKINSON III, FROM BROWN TO BAKKE 68 (1979).

75 *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE (1991); Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978).

76 *See* Elman, *supra* note 68, at 828; Mark Tushnet, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1928-30 (1991) (describing how Frankfurter required gradualism to convince himself that *Brown I* was correct); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1, 39 (1979).

accessible to the layperson. Granted, they are not perfect examples of legal craftsmanship. *Brown I* obviously overemphasizes the significance of education to the underlying principle of the case. Nor does it clearly explain why the Court takes racial discrimination so seriously. And perhaps it relies too heavily on social science data.[77] As Professor Goldstein argnes, *Brown II* does not adequately explain why the constitutional rights of the school children should be sacrificed in the (very long) interim.

The weakness of the decisions as a matter of legal reasoning may be somewhat attributable to one of their greatest strengths—their peculiarly public oriented nature. Both of the *Brown* opinions were short, largely devoid of legal jargon and fairly straightforward in their explanation. Apparently, the Court concluded that it was more important to appeal to (and hopefully convince) the lay person, especially the open-minded southerner, than the law professor.[78] Perhaps the Court would have produced a less equivocal opinion had it focused primarily on its traditional professional audience rather than the general public. *Brown* was a case, however, in which the Court understood that its legitimacy as an institution would be challenged and tested. As Professor Goldstein recognizes, the public is the ultimate arbiter of whether the Court has passed the test. Obviously, cases such as *Brown* are the exception rather than the rule. Rarely is so much at stake. Still, I would argue that the style of opinions that the Court produced in the *Brown* decisions is an admirable one. They provide a far better model than the typical legalistic, quarrelsome, fractionalized, citation-laden product that has become all too common recently.

In the final case study, Professor Goldstein chastises the Court, and especially Justices Brennan and Powell, for "Failing to Take Their Own and Each Other's Opinions Seriously" in the *Bakke* opinion.[79] He focuses on the paragraph in Justice Brennan's opinion in which he purports to state, but in fact significantly overstates, "the central meaning" of the Court's opinion, which in itself required a combination of the Powell opinion with the divergent plurality opinions of Justices Brennan and Stevens.[80] Professor Goldstein notes that although there was indeed internal discussion between the justices regarding the ac-

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77 *See, e.g.*, Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150 (1955).

78 Professor Goldstein notes that Chief Justice Warren had explained to the members of the Court that " 'opinions should be short, readable by the lay public, non-rhetorical, unemotional and, above all non-accusatory.' " GOLDSTEIN, *supra* note 1, at 58 (quoting DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 281 (1986)). Professor Eisgruber argues that the Court in *Brown* ignored educative concerns in its opinion in order to avoid fueling the fires of resistance. Eisgruber, *supra* note 3, at 1020-28.

79 GOLDSTEIN, *supra* note 1, at 81.

80 *Id.* at 89-90.

curacy of Brennan's summary, it did not lead to meaningful alteration of the paragraph.[81] He argues that the opinion as published was misleading in that the Brennan summary misrepresented the holding of the Court and that the justices should have continued to confer until they agreed either to drop the summary entirely or to rewrite it to accurately reflect the Court's holding.[82] This point is well taken, at least as long as the focus is on intelligibility to the lay reader. Certainly, those of us who read Supreme Court opinions for a living immediately recognized that Justice Brennan was engaging in the sort of overreaching rhetoric that has become quite common on the Court. As such, the statement was easily discounted. Likewise, virtually every time the Court decides an abortion case, the justices quarrel vigorously about whether it preserves *Roe* or effectively overrules it.[83] The academic community does not take these broadsides seriously and I am not certain that the public does either, given that the press generally provides an adequate summary of the conflicting positions. Nevertheless, the justices should attempt to decrease the amount of manipulative and disingenuous rhetoric that they presently employ. Some readers may be confused by the misleading claims that the justices frequently make, and even if they are not, these misstatements certainly do not enhance the prestige of the Court.

The book's final chapter outlines Professor Goldstein's prescription for change. In order to render constitutional opinions more intelligible, he urges the Court to adopt and apply five canons of comprehensibility. He suggests that the justices hold a conference after the drafting but prior to the release of opinions, to ensure that these canons have been observed.[84] He concludes the book by suggesting how these canons might have been applied in a final review of each of his five case studies.[85] Canon One calls for the Court to "[u]se

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81 *Id.* at 92-97. Professor Goldstein quotes from memoranda published by Bernard Schwartz in his book BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT 138-40 (1988).

82 GOLDSTEIN, *supra* note 1, at 97.

83 *See, e.g.*, Casey v. Planned Parenthood, 112 S. Ct. 2791, 2819-21 (1992) (opinion of O'Connor, J., Kennedy, J., & Souter, J.) (replacing the trimester framework with undue burden analysis but purporting to preserve the core of *Roe*); *Id.* at 2843, 2853. (Blackmun, J., concurring and dissenting) (Court's approach does not protect the woman and protect the competing interests as well as the strict scrutiny trimester approach of *Roe*); Webster v. Reproductive Health Serv., 492 U.S. 490, 518-21 (1989) (Rehnquist, C.J.) (replacing trimester framework with undue burden analysis but purporting not to reconsider the validity of *Roe*); *Id.* at 532. (Scalia, J.) (joining the Rehnquist opinion on the belief that it does effectively overrule *Roe* despite its disclaimer to the contrary); *Id.* at 537, 538. (Blackmun, J., dissenting) (*Roe* could not survive the plurality's analysis).

84 GOLDSTEIN, *supra* note 1, at 125.

85 *Id.* at 126-28.

simple and precise language 'level to the understanding of all.' "[86] This is without doubt the most important step that the Court must take to ensure that its opinions are accessible to the public. It is hard to overstate how incomprehensible the Court's work product has become in recent years. The average Supreme Court opinion, especially in cases of significant public interest, is written in a technical langnage of legal tests and standards which can mean little, if anything, to the uninitiated. The opinions tend to be littered with string citations, needless quotations from earlier cases and lengthy and quarrelsome footnotes.[87] They often read as though they were specifically designed to intimidate all but the most determined readers.

An obvious response to the call for clearer langnage is that constitutional law is simply too complicated to explain in terms that the non-lawyer can understand. But, as noted earlier, in the not too distant past the Court managed to write many significant opinions in a very comprehensible style.[88] Unintelligible constitutional law is a relatively recent development. It is all the more unfortunate that for the most part, the worst offenses occur in the Court's opinions in areas of general public interest such as abortion regulation, affirmative action, regulation of speech on public property and restriction of religious symbols on public property.

Perhaps there nonetheless remains some reason for hope. The portion of the significant joint opinion in *Planned Parenthood v. Casey* that explained why the Court would not overrule *Roe v. Wade* was written in a very clear and non-technical style.[89] It seems obvious that Justices Kennedy, O'Connor and Souter made a deliberate effort in that closely watched case to speak to the American people directly. To a large extent, Justice Kennedy followed the same straightforward approach in his opinion for the Court in *Lee v. Weisman*,[90] the school graduation prayer case. Hopefully, this trend will continue in other important cases in the future.

Sometimes, the legal and factual issues in a case will be quite complicated and a proper decision will require a relatively complex discussion. Professor Goldstein identifies a way in which the Court could decide and explain such a case properly and still render its opinion intelligible to the public at large. In his discussion of *Bakke*, he notes that Justice Powell read a statement from the bench, not incorporated in his opinion, which explained the complexities of the

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86 *Id.* at 112 (quoting JAMES WILSON, A LETTER OF AUGUST 24, 1791 FROM A DELEGATE TO THE CONSTITUTIONAL CONVENTION TO THE SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES, *reprinted in* THE WORKS OF JAMES WILSON 62 (R. McCloskey ed. 1967).

87 *See generally* NAGEL, *supra* note 2; Bloom, *supra* note 3.

88 *See supra* notes 13-20.

89 112 S. Ct. 2791, 2808-16 (1992).

90 112 S. Ct. 2649, 2652-61 (1992).

decision more clearly than anything in the opinion itself.[91] In a case like *Bakke* involving lengthy discussions of the appropriate legal standards and state justifications along with several overlapping concurring and dissenting opinions, the Court could include a summary of its decision and reasoning for the lay reader devoid of the lengthy consideration of authority that would follow.

The same technique would be especially appropriate in factually complex abortion regulation cases such as *Webster* or *Casey*. As Professor Goldstein recoguizes, since the Court's authority is grounded in public consent, the summary fulfilling its obligation to explain its decisions should be a part of the authoritative opinion written by the Court and not a mere non-binding syllabus prepared by the reporter of decisions.[92] It is possible that confiicts and inconsistencies would arise between the summary and the more analytical sections, but this possibility alone should not deter such a practice. Such conflicts already occasionally arise when the Court restates its holding somewhat differently in the course of a lengthy opinion.[93] The courts manage to interpret these holdings in later opinions. If the task of explaining Supreme Court decisions in understandable language seems too imposing to handle, this alone suggests that there is something seriously wrong with the Court's decisiomaking process.

Professor Goldstein's second canon requires the Court to "[w]rite with candor and clarity."[94] As developed in his discussion of *Brown II*, this is a call for the explanation of "the 'real' and significant reasons underlying the decision."[95] Within limits, this is certainly a desirable goal. The canon of candor compliments the canon of simplicity since nothing is gained from a comprehensible explanation if it is dishonest. Throughout the Court's history, dissenting justices as well as academic critics have charged that opinions with which they disagree are less than candid, if not intellectually dishonest.[96] Many of them cer-

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91 GOLDSTEIN, *supra* note 1, at 98-102.

92 *Id.* at 98, 104.

93 *See, e.g.*, United States v. Fordice, 112 S. Ct. 2727, 2747 (1992) (Scalia J., concurring in part and dissenting in part) (pointing out that the Court used two different and arguably inconsistent tests to analyze the issue).

94 GOLDSTEIN, *supra* note 1, at 114. *See generally* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

95 GOLDSTEIN, *supra* note 1, at 115.

96 *See, e.g.*, Webster v. Reproductive Health Serv., 492 U.S. 490, 410, 537-60 (1989) (Blackmun, J., dissenting) (charging that the plurality is effectively overruling *Roe* though purporting not to do so); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 455-60 (1985) (Marshall, J., concurring in part and dissenting in part) (arguing that the Court applies a higher standard of review than it is willing to acknowledge); United States v. Leon, 468 U.S. 897, 928-60 (1984) (Brennan, J., dissenting) (charging that the Court deliberately misstates the costs and benefits of a limited good faith exception to the exclusionary rule); Plyler v. Doe, 457 U.S. 202, 242, 253 (1982) (Burger, J., dissenting) (arguing that the Court used precedent disingenuously to render a very result oriented decision);

tainly are, yet candor with regard to the legal rationale of an opinion is not objectively verifiable. It is almost axiomatic that any reasonably challenging legal decision can be explained by a variety of rationales.[97] In *Planned Parenthood v. Casey*,[98] the joint opinion argued that its undue burden standard remained true to the core holding of *Roe v. Wade*. The concurring and dissenting opinions maintained that the joint opinion's rejection of the three trimester framework narrowed Roe significantly.[99] Neither position is necessarily disingenuous for a credible argument could be made in support of either. And yet if the critic is convinced that one position is clearly correct and the other is clearly erroneous, he could easily conclude that proponents of the alternative must recognize its logical flaws, especially after they have been revealed by the dissenting opinion or the critic. From that conclusion, the charge of intellectual dishonesty flows readily even though there may be nothing more than a vigorously contested good faith disagreement on a difficult issue.

Counseling justices to be candid will not resolve this type of conflict. Hopefully, this is not what Professor Goldstein has in mind. Rather, he is apparently focusing on the case, such as he perceives *Brown II* to be, in which the Court deliberately conceals something of significance in its explanation. Ideally, candor in judicial reasoning would seem to be very desirable policy. But as in the case of *Brown II*, there will be instances in which it will be difficult, if not impossible, for the Court to candidly explain all of the underlying aspects of its decision without undermining it at the same time.

The Court's opinion in *United States v. Nixon*[100] was widely criticized for lack of candor. Critics maintained that the Court was less deferential to the assertion of Presidential privilege than it should or ordinarily would have been because it suspected that the President could not be expected to impartially evaluate the competing interests given his own involvement and interest.[101] But the Court could not express such a sentiment, either out of respect for the Presidency or

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Warth v. Seldin, 422 U.S. 490, 520 (1975) (Brennan, J., dissenting) (alleging that the Court construed the elements of standing narrowly due to an unstated hostility to the merits of the case).

97 *See, e.g.*, EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-149 (1978); RONALD DWORKIN, LAW'S EMPIRE 379-92 (1986); MARK V. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 47-57 (1988).

98 112 S. Ct. 2791, 2820-2821 (1992).

99 *Id.* at 2847-50 (Blackmun, J., concurring in part and dissenting in part); *id.* at 2839-41 (Stevens, J., concurring in part and dissenting in part).

100 418 U.S. 683 (1974).

101 *See* Louis Henkin, *Executive Privilege: Mr. Nixon Loses But the Presidency Largely Prevails*, 22 UCLA L. REV. 40, 45-46 (1974); Philip B. Kurland, United States v. Nixon: *Who Killed Cock Robin*, 22 UCLA L. REV. 68, 74-75 (1974); Paul J. Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 UCLA L. REV. 76, 76-78 (1974).

for fear of prejudicing a potential impeachment proceeding. Thus, the consensus maintains, the opinion did not truly explain the basis of the Court's decision.

If candor is the goal, then what should the Court do in a case such as *Nixon*? Professor Kurland argued one alternative at the time. He would have had the Court dismiss the case as nonjusticiable to avoid the embarrassment of an inadequately reasoned opinion.[102] Another alternative would favor candor at all costs, and explain that the Court would of necessity be less deferential to the President when he or his close associates were implicated. While this approach might be more honest, it would not necessarily be prudent. Finally, in the hard case like *Nixon*, the Court could simply pull its punches as it apparently did and attempt to be candid when it could afford to do so. As much as I admire judicial candor and clarity, I would not demand that the Court strive to achieve these values without regard for the consequences.

There is another facet of candor in Supreme Court opinions that I do find quite disturbing: candor with respect to the record. A regular reader of Supreme Court opinions can't help but notice fairly persistent disagreements among the justices regarding the facts of a case. Allegations that opinion writers have omitted key facts, relied on facts that are not in the record or lifted important facts out of context have become commonplace.[103] Indeed, it often seems that the primary differences between the majority and the dissent in many significant constitutional cases has less to do with the law than with the facts. As with disputes about the legal rationale or the implications of the decision, some of this is doubtlessly good faith disagreement. Judicial records are not free of ambiguity. Moreover, to some extent it is simply a permissible element of the judge's craft to emphasize certain facts and

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102 Kurland, *supra* note 101, at 74.

103 *See, e.g.*, Lee v. Weisman, 112 S. Ct. 2649, 2682-83 (1992) (Scalia, J., dissenting) (charging that the Court based its decision on a distortion of the record); New York v. United States, 112 S. Ct. 2408, 2435-38 (1992) (White, J., concurring in part and dissenting in part) (alleging that the Court omitted key facts with respect to the enactment of the legislation at issue); Colorado v. Bertine, 479 U.S. 367, 378-81 (1987) (Marshall, J., dissenting) (alleging that the record does not support the majority's assertion that the police relied on specified criteria in conducting an inventory search); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 278 n.5, 297-99 (1986) (Powell, J., plurality and Marshall, J., dissenting) (disagreeing as to whether material "lodged" with the Court should be considered to provide a showing of past discrimination); Allen v. Wright, 468 U.S. 737, 758 at n.73, 774-75 at n.5 (1984) (disagreement between O'Connor and Brennan as to whether the petitioner's complaint alleged that desegregation order could be undermined if enough discriminatory private schools were receiving tax credits); New York v. Quarles, 467 U.S. 649, 674-77 (1984) (Marshall, J., dissenting) (arguing that the Court's entire decision is based on a false factual assumption); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 664, 679, 685, 687, 694-96 (1981) (disagreement between Justices Powell, Rehnquist and Brennan as to the state of the district court's findings and the relevance of various facts).

ignore others. At some point, however, skillful lawyering begins to shade into disingenuousness.

Deliberate misuse of the record is particularly troublesome since it will generally be more difficult and time consuming for the reader to detect and evaluate. At least the professionally trained reader with access to a law library can review relevant precedents and statutes and draw an independent conclusion. As a practical matter, all but the most dedicated scholar must rely on the Court's statement of the facts. Moreover, allegations of factual manipulation by the Court should certainly be a cause for concern considering that the Court itself, as well as the legal profession, places a very heavy premium on candor with respect to the record.[104] If the reader concludes that the Court cannot be trusted to set forth the facts in a relatively objective manner, the integrity of judicial review itself is seriously undermined. Ultimately, as Professor Goldstein recognizes, a Court which makes a good faith attempt to explain its reasoning and decisions openly and honestly will earn far greater respect from the legal profession and the public than one that is perceived to be manipulative and devious.

Professor Goldstein's third canon requires that the Court "[a]cknowledge and explain deliberate ambiguity."[105] He recognizes that due to the collaborative process of building a majority and the evolutionary aspect of judicial reasoning, ambiguity will often be unavoidable.[106] But "[c]andor requires that ambiguity be unambiguously acknowledged" so that the public is able to understand the basis on which the judguent rests.[107] As a general rule, this makes sense in that almost any attempt to build greater clarity and comprehensibility into Supreme Court opinions should be welcome. As Professor Goldstein recognizes, a justice may occasionally use deliberate ambiguity in an opinion to build or maintain a majority. Ideally, the justices joining in the opinion should attempt to clarify their differences and emphasize the common ground, but sometimes this may be unattainable. In that event, Professor Goldstein seems to prefer that the justices go their separate ways and produce a plurality opinion with a concurrence rather than a potentially misleading majority opinion.[108] This is

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104 The Model Rules provide that:

> (a) A lawyer shall not knowingly:
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> (1) make a false statement of material fact or law to a tribunal;
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> . . .
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983).

105 GOLDSTEIN, *supra* note 1, at 116.

106 *Id.* at 116-17.

107 *Id.* at 117-19.

108 *Id.* at 32.

certainly a defensible position and if the justices took it seriously perhaps they would succeed in ironing out their differences and produce even clearer and more principled majority opinions. On the other hand, it might result in an increase in plurality opinions in significant cases. As noted previously, the recent Supreme Court can be justly criticized for its inability to produce majority opinions. At least in areas where gnidance is important, the public might well be better off with more deliberately ambiguous majority opinions and less plurality opinions in the hope that the ambiguity can be subsequently clarified. Neither alternative, however, is ideal and each contributes to the present unintelligibility of constitutional law.

Deliberate ambiguity may also be used in an attempt to preserve flexibility with respect to unforeseen future applications. Professor Goldstein would not object to this as long as the Court explained what it was doing. This seems reasonable, however it is likely that justices will rarely be inclined to emphasize ambiguity in their opinions since clarity is a well accepted ideal in most expository writing and hence a deliberately ambiguous judicial opinion will be subject to obvious criticism. Alert critics like Professor Goldstein, however, will make it difficult for the Court to successfully pursue such a strategy of concealed ambiguity.

The fourth canon of comprehensibility is "[b]e accurate and scrupulously fair in making attributions to another opinion in the case."[109] During the past few decades, characterizations of other opinions by the justices have grown more caustic, exaggerated and personal.[110] Professor Glendon has observed that "the justificatory reasoning of American Supreme Court judges" results in a style in which "[t]he'

109 *Id.* at 119.

110 *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2853-54 (1992) (Blackmun, J., concurring in part and dissenting in part) (overwrought criticism of Chief Justice Rehnquist's opinion); *Id.* at 2873-85 (Scalia, J., concurring in part and dissenting in part) (scathing and sarcastic attack on the reasoning of the joint opinions); Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting) (charging that majority is exercising "[p]ower, not reason" and "inviting . . . [an] open defiance of our precedents"); Webster v. Reproductive Serv., 492 U.S. 490, 532-37 (1989) (Scalia, J., concurring) (attacking Justice O'Connor's unwillingness to overrule Roe v. Wade); *Id.* at 537-38 (Blackmun, J., concurring in part and dissenting in part) (accusing the plurality of bad faith and intellectual dishonesty); DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 212 (1989) (Blackmun, J., dissenting) (emotional critique comparing the Court to "antebellum judges who denied relief to fugitive slaves"); City of Richmond v. J.A. Croson, 488 U.S. 469, 528 (1989) (Marshall, J., dissenting) (accusing the majority of being disingenuous and manipulative); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 679 n.27, 682 n.3, 697 n.8, 700 n.10, 703 n.13 (1981) (quarrelsome footnotes between Justices Brennan & Rehnquist); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 601 (1980) (Blackmun, J., concurring) (referring to portions of one of the Court's earlier opinions as "graffiti"); National Leagne of Cities v. Usery, 426 U.S. 833, 856-80 (1976) (Brennan, J., dissenting) (submitting an extraordinarily shrill and bombastic dissent).

Court's ruling is made to appear almost inevitable: the winner's position entirely vindicated, the loser's thoroughly discredited."[111]

This uncompromising, confrontational approach which characterizes social interaction well beyond Supreme Court opinions encourages the type of overstatement and misrepresentation to which Professor Goldstein and others quite rightly object.[112] As noted earlier, partisan exaggeration of this nature does not tend to fool the professional reader but may very well confuse the lay audience for whom the Court should be writing. Obviously, no bright line separates legitimate criticism from unfair exaggeration. One effective method of critiquing an opinion is to speculate about its potential implications. Whether such speculation constitutes either fair logical progression or rhetorical hyperbole will often depend on whether the reader agrees with the result. Carried to an extreme, this constant bickering and misstatement may detract from the reputation of the Court.

Professor Goldstein's final canon of comprehensibility is "[i]ncorporate in the text, rather than relegate to footnotes, material that is directly related to the reasons for the decision or to the meaning or breadth of the holding."[113] This is yet another common sense way by which the Court can ensure that it is including the non-legally trained in its audience. As a corollary, I would suggest that the Court should relegate a far higher percentage of the legal citations, quotations and cross references which presently clutter the text of its opinions to the footnotes. This material, which is often important, would remain in the opinion for the professional reader and anyone else who might be interested but would not pose such an obstacle for the ordinary citizen.

In order to implement these canons, Professor Goldstein recommends that the justices hold a final-review conference to ensure the candor and accuracy of their opinions. Of course, all of the suggestions for improving the intelligibility of the Court's opinions are entirely academic unless the Court as a whole desires to move in that direction. Perhaps the most obvious objection to requiring such a conference for each case would be the crush of time. Given that a large percentage of the Court's most significant decisions are not completed and released until the last week or two of the term, it

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111 GLENDON, *supra* note 21, at 154. For further criticism of this type of squabbling see Arnold C. Johnson, *Supreme Court Sound and Fury*, LEGAL TIMES, Dec. 14, 1992, at 30; Brenda Jones Quick, *Whatever Happened to Respectful Dissent?*, A.B.A. J., June 1991, at 62; *The Court at the Millennium—A Conversation*, A.B.A. J., Jan. 1990, at 62-66 (comments of Professors Stephen Carter and Mark Tushnet).

112 *See* GLENDON, *supra* note 21; Robert Nagel, *The Supreme Court's Bad Language*, WALL ST. J., Feb. 17, 1993, at A15.

113 GOLDSTEIN, *supra* note 1, at 121.

would probably be impossible for the justices to sit down and carefully scrutinize and discuss as many as a dozen lengthy and difficult cases at the very point at which they are attempting to bring the term to a close. The Court would probably need to alter its present publication schedule, and there is obviously some question as to whether it could. Moreover, it would be naive to believe that such conferences could resolve all of the problems that Professor Goldstein identifies. In many instances, it is likely that the justices would be unable even to agree on whether there were problems in need of resolution. The inability to achieve perfection, however, should hardly deter attempts at improvement.

As my responses to these case studies indicate, the type of intelligibility that I would demand of the Court is arguably more modest than that sought by Professor Goldstein. I believe that in order to provide the public with the opportunity to evaluate its decisions and hopefully continue to consent to its constitutional stewardship, the Court should write in a style that is accessible to the intelligent but non-legally trained reader.[114] This would continually remind the Court of the true source of its authority and would give the citizen a realistic opportunity to listen to the Court, learn from it and evaluate its work product. Professor Goldstein would demand at least that much of the Court, but in addition, like Professor Bickel, he would insist that the Court's exposition of the Constitution must always be strictly principled as well. That is certainly a worthy ideal for the Court to pursue and I generally endorse it. I question, however, whether it is always attainable in the type of landmark cases that Professor Goldstein discusses.[115] The Court may not be able to justify its decisions in a coherent and professionally satisfying manner in its first pass at difficult issues. Or, it may encounter the type of obstacles to candor and principle that were presented in *Brown v. Board of Education*, *Cooper v. Aaron* and *United States v. Nixon*. Usually, the case must still be decided. Even in these hard and controversial cases however, the Court can attempt to explain the basis of its decisions in a manner

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114 *But see* Eisgruber, *supra* note 3, at 1030 for the conclusion that the Court's educative function often conflicts with its decisional role. As he puts it:

> If the people's understanding of the Constitution is defective by comparison to the Court's—as the education metaphor might presuppose—then one migbt say that the Court must bring its message down to the level of the people. This might, in the end, elevate the people. It also risks, however, corrupting the Court (or, at least, the Court's message).

I am not certain that I would agree with Professor Eisgruber as to the frequency and inevitability of this conflict, but I do agree that it occurs, as my prior discussion of *Brown II* and *Cooper v. Aaron* should indicate. Like Professor Eisgruber and unlike Professor Goldstein, I am comfortable with some degree of deliberate judicial ambiguity and reticence in such instances.

115 *See generally* TUSHNET, *supra* note 97, at 46-60; Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

that is comprehensible to both the lay and the professional reader. I doubt that we can expect much more of the Court. Professor Goldstein clearly does.

Professor Goldstein has written a timely, useful and eminently intelligible book. While I disagree with the analysis of several of his specific case studies, I still believe that I can accept the general principles he propounds. I consider the book, as a whole, to be a particularly valuable contribution to Supreme Court scholarship. I believe that the Court would be both a more effective and a more respected institution if the justices read this book and took many of its teachings to heart.