A MODEST PROPOSAL FOR A POLITICAL COURT

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I offer a modest proposal. You can decide for yourself whether it is offered in the spirit of Jonathan Swift,[1] or whether I mean it to be taken seriously.

The legitimacy of the Supreme Court is widely assumed to depend on the perception that its decisions are dictated by law. This is the central thesis of the extraordinary joint opinion in *Planned Parenthood v. Casey*,[2] decided by the Supreme Court at the end of the 1991 Term. The joint opinion observes that the Court's power lies in its legitimacy, and that its legitimacy is "a product of the substance and perception" that it is a court of law.[3] Thus, frequent overrulings are to be avoided, because this would "overtax the country's belief" that the Court's rulings are grounded in law.[4] Especially when a controversial ruling like *Roe v. Wade*[5] is involved, a decision to overrule should be avoided at all costs, because this would give rise to the perception that the Court is "surrender[ing] to political pressure" or "over-rul[ing] under fire."[6] Such a perception, in turn, would lead to "loss of confidence in the judiciary."[7] Translated, the thesis of the joint opinion is that the further a decision deviates from the Constitution, the more important it is for the Court to adhere to that decision, or else the public may conclude that the emperor is wearing no clothes.

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1. *See* JONATHAN SWIFT, *A Modest Proposal, in* JONATHAN SWIFT: A CRITICAL EDITION OF THE MAJOR WORKS 492 (Angus Ross & David Woolley eds., 1984) (1729).

2. 112 S. Ct. 2791 (1992).

3. *Id.* at 2814. Justices O'Connor, Kennedy, and Souter explain:

> [O]verruling *Roe*'s central holding would . . . seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. . . . 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.

Id.

4. *Id.* at 2815. For a collection of similar judicial sentiments, see Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 MARQUETTE L. REV. 752, 752-53 & n.131 (1992).

5. 410 U.S. 113 (1973).

6. *Casey*, 112 S. Ct. at 2815.

7. *Id.*

The understanding that the Court's legitimacy is based on the perception that its decisions are dictated by law is not unique to the Justices. It is also implicit in a great deal of modern constitutional scholarship. A central theme of this scholarship is the search for a higher-order justification for the activist decisions of the Warren and Burger Courts, one that would establish that these decisions are in fact required by the Constitution. Thus, whether the Court is being urged to adopt a representation-reinforcing theory,[8] an integrity theory,[9] a natural rights theory,[10] or a version of American civil religion,[11] the underlying objective is to supply a new foundation for the favored decisions of the Court that will provide a more plausible basis for concluding that they are grounded in law, rightly understood. The common assumption of this scholarship is that the Court's decisions will not be regarded as legitimate unless a coherent case can be made that they are dictated by law.

Even the noisy exercises from the Left, which may be subsumed under the banner of deconstructionism,[12] rest ultimately on the perception that the fates of the Court and mainstream legal thought rise and fall on the claim that the Court's decisions are governed by law. Like the Court and more mainstream theorists, the deconstructionists believe that if the Court is unmasked as a political body, its legitimacy will be destroyed. This is precisely what the deconstructionists wish to see happen, because it is their faith that the unmasking will pave the way to a brave new world in which newer and better Justices enforce newer and better political values.

The modest proposal I would like to make is this: The legitimacy of the Court would in fact be enhanced rather than diminished if the Court renounced the idea that its decisions are

8. *See, e.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 77-88 (1980).

9. *See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE 225-28 (1986).

10. *See, e.g.*, DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 92 (1989).

11. *See, e.g.*, MICHAEL J. PERRY, LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 43 (1991).

12. For an analysis of the various schools of the legal deconstructionism of the Left, see DRUCILLA L. CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION AND THE LAW (1991) (discussing Critical Feminist Theory); MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1980) (discussing Critical Legal Studies); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (discussing Critical Race Theory).

compelled by law, and instead openly acknowledged that it exercises political discretion.[13]

If the Court openly acknowledged that it exercises political discretion, it would have to admit that its decisions are not qualitatively different from those of other political actors, such as the President, Congress, and state legislatures. The problem, as would be immediately obvious, is that the Court has no power base from which to assert its political preferences. Unlike other political institutions, the Court does not stand periodically for election, and thus cannot claim any mandate from the people—the ultimate source of authority in a democracy. Moreover, as the joint opinion in *Casey* noted, "the Court cannot buy support for its decisions by spending money and, except to a minor degree, cannot independently coerce obedience to its decrees."[14]

A Court that acknowledged its political dimension would also be more vulnerable to retaliation from the political branches. There are many potential avenues of political retaliation. The most important is the power of Congress and the President to enact (and enforce) new laws, and occasionally even constitutional amendments, that overturn the Court's decisions. A more remote but potent source of retribution is the power of the President to appoint new Justices who will vote to overrule the Court's previous decisions. If push comes to shove, the President can refuse to enforce the Court's judgments,[15] and the Congress can impeach Justices, force them to ride circuit, pack the Court, cut off its funding, or eliminate parts of its appellate jurisdiction.[16] An openly political Court would have little basis for resisting these forms of political retaliation, and the threat they represent would become more potent.

Given the weakness of the Court's position as a political institution, how would the Court behave if it acknowledged that its decisions were ultimately the product of political discretion?

13. There is a large and gowing literature that seeks to explain the behavior of the Court on the assumption that it operates as a purely political institution. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 9 Game*, 80 GEO. L.J. 523 (1992). The suggestion explored here concerns what would happen if the assumption were adopted by the Court itself as part of its normative conception of its role.

14. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (paraphrasing THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

15. *Compare* Thomas W. Merrill, *Judicial Opinions as Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993) *with* Michael S. Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993).

16. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 71-84 (2d ed. 1991) (describing these congressional powers in greater detail).

Paradoxically, I think that the Court would pay more rather than less attention to legal sources than it does now, would be more rather than less restrained, and would get embroiled in fewer embarrassing conflicts with the political branches. In other words, if the Court openly acknowledged the political nature of its decisions, it would behave more like a court and less like a political institution.

The first paradoxical consequence would come about because the Court always exercises its political discretion within a framework of law—or at least what the legal community conventionally regards as "law." Those who practice before the Court know that legal materials—that is, statutory texts and to some degree the text of the Constitution, evidence of original intent, and, most importantly, the Court's precedents—impose significant limits on what the Court hears, what results it reaches in those cases, and what arguments it makes in support of those results.[17] Ultimately the outcome of many, if not most cases, may turn on a discretionary or political judgment. But the range of options is significantly constrained by these settled understandings.[18]

If the Court is constrained by settled understandings up to a point, but after that point exercises discretion, then in a world where the Court openly acknowledged its political discretion, it would have to make doubly sure that it complies with whatever legal constraints do exist. It is one thing to exercise political discretion when available legal sources have been exhausted. However, given that the Court has no electoral legitimacy and no power to enforce its own judgments, any perception that it is acting *contra legem* would put it in an untenable position. Thus, a Court that openly acknowledged that it exercises political discretion would very likely pay more meticulous attention to conventional legal sources, such as the text of the Constitution, than

17. For empirical support for the proposition that the Court is at least partially constrained by legal authorities, see Tracy E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCIENCE REV. 323 (1992).

18. The idea that judicial decisionmaking consists of both a realm of legal constraint and a realm of discretion provides an important cornerstone in the legal philosophy of H.L.A. Hart. *See* H.L.A. HART, THE CONCEPT OF LAW 141-44 (1961). This view has been challenged by Ronald Dworkin and others, who observe that courts can, in addition to exercising discretion when the rules are silent, also alter or circumvent these rules. *See* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 31-39 (1977). I do not purport to offer a contribution to this debate, but simply submit that practicing lawyers in reflecting on their experience typically recognize that the Supreme Court is at once constrained and yet exercises discretion.

does the current Court, which seeks to foster the impression that its opinions are fully determined by law.[19]

A second paradoxical consequence of acknowledging that the Court is a political institution is that the Court would become a more restrained institution, in the sense that it would be less likely to try to use its power to promote controversial social reform. To see how this might happen, consider various decisional rules the Court might adopt for the exercise of its political function after all legal constraints have been exhausted.

One possibility, vigorously promoted by Justice Scalia,[20] is that the Court would look to tradition for guidance in the exercise of its political discretion. A standard of tradition might or might not produce a more restrained Court, depending on how narrowly the relevant tradition is identified.[21] However, rigidly following the narrow pathways of the past would make little sense in a world in which the Court was understood to exercise political discretion and thus was more dependent on public support to avoid retaliation for its decisions. What garnered political support in the past might not be politically acceptable today or tomorrow.[22] For example, if the Court consistently followed a

19. Anyone who doubts that the Court frequently ignores the relevant text of the Constitution and its own precedents should read David Currie's valuable two-volume study on the history of the Court. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 (1985); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 (1990). Time and again, Currie shows that the Court has decided constitutional controversies without discussing or citing the relevant constitutional text or its own prior decisions on point.

20. According to Justice Scalia, the Due Process Clause "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). Therefore, for an asserted liberty interest to have due process protection, the Court must find that the interest is rooted in the nation's traditions. *See id.* at 123; *see also* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting) (recognizing that the traditions of American society allowed abortion to be legally proscribed prior to *Roe*).

21. For example, in *Michael H.*, 491 U.S. 110, at 124-30, Justice Scalia sought evidence of a traditional understanding at a very narrow level, asking whether adulterous fathers of children born to another married couple have ever been entitled to parental visitation rights. Not surprisingly, he uncovered no such evidence. Justice Brennan, however, asked whether there was any tradition protecting the parental rights of unwed fathers generally. *See id.* at 139-43 (Brennan, J., dissenting). By framing the inquiry in this broader fashion, he was able to conclude that there was a protected right at issue. *See id.* at 142-43. For a similar contrast, compare the majority and dissenting opinions in Bowers v. Hardwick, 478 U.S. 186 (1986), where the majority asked whether homosexual sodomy was a fundamental right rooted in American history and tradition, while the dissent framed the inquiry more broadly in terms of a right to engage in private, consensual sexual activity.

22. Another, less familiar, illustration concerns the right of prison inmates to marry. *See* Turner v. Safley, 482 U.S. 78 (1987) (finding a constitutionally-protected right of prisoners to marry despite the substantial restrictions imposed by incarceration). This right is

norm of narrowly-defined tradition, many landmark decisions, including *Brown v. Board of Education*,[23] the reapportionment cases,[24] and the gender discrimination cases,[25] would have come out differently. These decisions are widely applauded, and there is reason to believe that Court's standing with the public would have suffered if it had decided those disputes according to the dictates of narrowly-defined tradition.

Another decisional rule the Court might adopt is to conform its exercise of discretion to existing majoritarian preferences, as reflected, for example, in opinion polls. This, in fact, may be the implicit decisional rule of *Casey*, which, after all its posturing about not overruling under fire, proceeded to adopt a series of outcomes that mirror almost exactly the preferences of a majority of the American public as reflected in opinion polling about abortion.[26]

From the perspective of a political Court, the purely majoritarian approach is an improvement on the narrow-tradition approach. Moreover, there is reason to believe that much of the Court's behavior can be explained on this basis.[27] There are several problems, however, with such a decisional rule. First, discerning majority opinion is often difficult because there are no polls bearing directly on most issues that come before the Court. The abortion controversy is somewhat exceptional in this regard. Second, majority opinion may be unstable or in the process of evolution, in which case embracing current opinion would leave the Court "high and dry." Third, and perhaps most importantly, the opinion of the majority reflected in polls may not translate into political power, as when a majority is diffuse and poorly or-

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not deeply rooted in narrowly-defined tradition. If, however, the Court declared no marriage right in this context at all, it would almost surely expose itself to the claim that it questions whether there is a constituitonal right to many, which would in turn undermine the Court's standing as a political institution.

23. 347 U.S. 483 (1954).

24. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

25. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

26. *See* ELIZABETH A. COOK ET. AL., BETWEEN TWO ABSOLUTES: PUBLIC OPINION AND THE POLITICS OF ABORTION 140-46 (1992) (summarizing public opinion polling data and showing that most Americans oppose an absolute ban on abortions but also favor parental notification and consent, viability testing, and other restrictions on abortion).

27. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 78-80 (1989) (summarizing data showing that the Court follows public opinion most of the time); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POLITICS 652 (1985) (describing general consistency of Supreme Court decisions on controversial issues with polling data).

ganized, in contrast to certain minorities which are concentrated and well organized.[28] In these circumstances, the political system may retaliate against the Court, even if the Court is faithfully reflecting majority views.[29]

Perhaps the best decisional rule for a political Court to adopt is to exercise its discretion in accordance with the emerging consensus among the dominant political elites of society.[30] If the Court correctly anticipates the emerging consensus among those with influence, then there is little danger that its decisions will be overruled. Moreover, if powerful elites are happy with the Court, then the Court can rest assured that the Executive will enthusiastically enforce its judgments, Congress will not cut its funding, and no attempt will be made to circumscribe its jurisdiction. Indeed, if the Court correctly anticipates the emerging elite consensus, it will be hailed in the halls of Congress and elsewhere as an enlightened and progressive tribunal of justice.

How does the Court discern emerging elite views? Various techniques are available. One is to note the reaction of the political branches to other decisions of the Court that are closely on point.[31] Another is to pay close attention to the briefs filed by politically accountable parties such as the Solicitor General, Con-

28. *See, e.g.*, MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS (1981) (examining the circumstances in which special interest groups control political outcomes by creating a "demand for public policy"); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (arguing that some large groups lack the incentive to organize into effective political lobbies to advance the common interests of their members).

29. The 1991 Civil Rights Act, Pub. L. No. 102-166, 105 Stat. 1071 (*codified as amended* in scattered sections of 29 and 42 U.S.C.), which overruled six 1989 Supreme Court decisions, provides a possible illustration of this phenomenon. The Court's rulings had the effect of moving employment discrimination law away from numerical standards toward a more color-blind approach. There is reason to believe that a majority of the American public supported such an understanding. *See* Seymour M. Lipset & William Schneider, *The Bakke Case: How Would it be Decided at the Bar of Public Opinion?*, 1978 PUB. OPINION 38; Andrew Hacker, *The Blacks and Clinton*, N.Y. REV. OF BOOKS, Jan. 28, 1993, at 14-15. Yet the civil rights lobby intensely opposed any weakening of disparate impact theory or affirmative action, and its political clout was sufficient, both with Congress and President Bush, to secure an embarrassing repudiation of the Court. For a further discussion of the Act and the six decisions it overruled, see George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463 (1992) (book review).

30. The data on the Supreme Court and public opinion collected by David Barnum, *supra* note 27, are more consistent with this decisional rule than with a purely majoritarian rule.

31. For example, it is probably no accident that shortly after Congress first moved in 1990 to overrule the Court's civil rights decisions of 1989, the Court did an about-face on government-mandated affirmative action in Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990) (upholding the constitutionality of the FCC's affirmative action program for the award of broadcast licenses).

gress, and state governments. The positions taken by the Solicitor General's Office, for example, are the product of an exhaustive internal review, in which the Solicitor General considers the views of various affected governmental agencies, and even private parties, before deciding what legal position to take. The result, generally, is a position that is "within the law," but also satisfactory to a wide range of organized interests canvassed by the Solicitor General.[32]

A third method of discerning emerging elite consensus is to scrutinize the covers of amicus briefs filed by interest groups, to see who has filed on which side and why. Often these briefs have little to add by way of legal analysis, but they perform an important signalling function by identifying for the Court which cases have strong political overtones, which interests groups are sufficiently concerned about the outcome to expend resources on filing a brief, and how the different interest groups line up on the issue presented.

The final method for discerning emerging elite consensus is for the Justices to read the editorial pages of the *Washington Post*, the *New York Times*, and the *Wall Street Journal* (or whatever newspapers reflect elite opinion), to see what the opinionmakers have to say about issues that come before the Court. Of course, the views of the editorial writers do not always prevail in Congress. Yet these journalists have the power to make an issue salient that might otherwise be ignored, and their views often provide important clues about the positions of powerful interest groups, which have considerable influence in Congress.

To be sure, when all these sources are exhausted, considerable difficulty will remain in predicting what the emerging consensus of powerful political elites might be on any particular issue. Herein lies the explanation for the second paradox: that a political court will be a more restrained Court. A Court that admitted to its exercise of political discretion, and then tried to exercise that discretion by anticipating the emerging consensus among

32. It is interesting to note in this regard that many of the Court's 1989 civil rights decisions overruled by Congress took positions more extreme than those urged in the briefs filed by the Solicitor General on behalf of the Reagan Administration. This was true in Public Employees Retirement System v. Betts, 492 U.S. 158 (1989), *overruled by* The Older Workers Benefit Protection Act of 1990, Pub. L. 101-433; Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); and Patterson v. McLean Credit Union, 491 U.S. 164 (1988). The fact that the Solicitor General was unwilling to press as far as the Court was inclined to go should have served as a warning about the political limits confronting the Court on these issues.

political elites, would probably be much more cautious about engaging in social engineering than a Court that is convinced that it is the oracle of the law. When unable to predict with confidence the emerging political consensus, an openly political Court would invariably defer to the status quo, as embodied in existing legislation. Only when the political Court could be reasonably confident about the future direction of dominant opnion would it have the temerity to intervene to mandate a change in the status quo.

A final paradox is that an openly political Court would very likely be less prone to periodic crises than has been the case in the past. To be sure, political scientists have persuasively argued that the Court inevitably conforms its views about the Constitution to the demands of the dominant political coalition. For example, Robert Dahl once calculated that the longest period during which the Court was able successfully to maintain its constitutional views in opposition to Congress was twenty-two years.[33] Thus if the Court expressly acknowledged that it exercises political discretion, there is little reason to think that the ultimate shape of our legal order would look fundamentally different from the one produced on the assumption that the Court's decisions are dictated by law.

However, a Court that expressly acknowledged its political role would be less likely to forget the limitations on its power, and thus less prone to engage in destabilizing conflict with the political branches.[34] Prominent examples of such conflicts include *Dred Scott v. Sandford*,[35] *Lochner v. New York*,[36] and *Roe v. Wade*.[37] Each of these cases can be seen as attempts by the Court to declare the law so as to resolve societal conflicts in circumstances where public opinion was, at best, divided. A Court more conscious of its own limitations as a political institution might have avoided these debacles.

In sum, there are three main differences that would follow from the Court's express acknowledgment that it exercises political discretion. First, the Court would become more meticulous

33. Robert A. Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUBLIC LAW 279, 290 (1957). The twenty-two year standoff concerned the conflict over whether Congress could enact child labor legislation.

34. *See generally* ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992).

35. 60 U.S. (19 How.) 393 (1857).

36. 198 U.S. 45 (1905).

37. 410 U.S. 113 (1973).

about observing legal constraints on its behavior than it does currently. Second, the Court would be less aggressive about seeking to engage in projects for the reform of society. Third, the Court would likely avoid major embarrassments that come about when it seeks to resolve highly divisive social issues by declaring one side or the other the victor as a matter of law.

How probable is it that the Court will embrace the understanding that its decisions contain elements of political discretion? Not very. As long as the Court can peddle the idea that its decisions are fully determined by law, as it did in *Casey*, the Court will have every incentive to continue doing so, because its power as a political institution is greater when it claims that its decisions are fully determined by law. Moreover, it is unlikely that any single Justice or group of Justices will ever have sufficient incentive to denounce the public posture that the Court's judgments are dictated by law. In effect, there is a kind of Gresham's law, or to use the fancy modern terminology, a prisoner's dilemma, at work here.[38] Any Justice who openly acknowledged that the Court's decisions are the product of political discretion would necessarily become more law-bound and restrained than Justices who continue to insist that the Court's opinions are compelled by law. The overtly political Justice would therefore consistently lose influence on the Court relative to Justices who maintain that their decisions are dictated by law. Thus, no individual Justice or bloc of Justices has an incentive unilaterally to embrace the idea that judicial decisions are political.

If no hope can be expected from the Court on its own initiative, then what should persons who believe in judicial restraint and the rule of law do? One positive step would be to have the Federalist Society, which contains many individuals of this description, cease promoting the ideas of people like my friend Gary Lawson,[39] who believe that legal questions have right answers. Instead, the Federalist Society should dedicate itself to promoting deconstructionism, Critical Legal Studies, feminism, Critical Race Theory, and the widest possible cacophony of liberal constitutional theories. The message conveyed by these enterprises is that the Supreme Court is a political institution. The

38. A prisioner's dilemma arises when the pursuit of individually rational ends leaves individuals worse off than they would be if they could act cooperatively. *See generally* ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISIONER'S DILEMMA: A STUDY IN CONFLICT AND COOPERATION (1965).

39. *See, e.g.*, Gary Lawson, *Legal Theory: Proving the Law*, 86 NW. U. L. REV. 859 (1992).

more widespread this perception becomes, the closer will come the day when the Court behaves like a court of law.