

ESSAYS

SCHOLARS AND JUDGES: REASON AND POWER

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The just *qadi* (judge) will be brought on the Judgment Day, and confronted with such a harsh accounting that he will wish that he had never judged between any two, even as to a single date.¹

Judges are three: two in Fire, and one in Paradise. A man who has knowledge, and judges by what he knows—he is in Paradise. A man who is ignorant, and judges according to his ignorance—he is in the Fire. A man who has knowledge, and judges by something other than his knowledge—he is in the Fire.²

Last Fall I heard a news broadcast that the Massachusetts Supreme Judicial Court would that day hear argument in a suit by a man against his ex-wife to prevent her from having implanted in her frozen embryos created by them both while they were still married.³ I remember my first, unreflecting reaction. It was as if scientists were nearing the carbon dating of a strange fossil, and so would settle once and for all the puzzle of dinosaur extinction. Then I realized how strange was

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1. A saying attributed to the Prophet Ibn Hanbal, 6:75 *al-Bayhaqi* 10:96, quoted in Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* 138-39 (May 1993) (unpublished manuscript, on file with Harvard University, Lamont Library).

2. *Id.* at 141.

3. The case, *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), was decided on March 31, 2000. The court concluded that "prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions [There is a public policy] that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired." *Id.* at 1059.

my reflex. Just months before, I had been a member of that court, and if the case had come up earlier I might have been struggling to decide it with no more wisdom or knowledge than I had when I heard that broadcast.

My instinctive reaction finds reflection in the pervasive near reverence with which the public and the profession treats judges and their opinions. Judicial opinions are not quite the exclusive diet of scholars and law teachers that they used to be, but we still teach much of the law out of case books excerpting judicial opinions. Legal scholarship is still largely about judicial opinions. Theories about what the law is—the legal realists notwithstanding—are still mainly about what judicial opinions have said about the law. Nowhere is this truer than in constitutional law. Constitutional theories are constructed based on the most exquisite parsing of judicial opinions, a task made more intricate by the proliferation of cases in which there is no opinion of the court so that scholars offer Venn diagram-like analyses to arrive at the maximum common content of separate opinions.

Constitutional law is a text-based subject only in the sense that antitrust law is text-based. Antitrust law depends basically on three rather terse statutory provisions—sections 1 and 2 of the Sherman Act⁴ and section 12 of the Clayton Act;⁵ yet, Professor Areeda's authoritative treatise has attained eleven volumes and is not yet complete.⁶ Similarly, the text of the Constitution consists of some 68 sections and fills about fifteen pages in a standard constitutional law case book, yet there are now well over 500 volumes of Supreme Court cases, a large part of which deal with constitutional issues and announce constitutional law. Professor Tribe's constitutional law treatise, now in its third edition, runs over 1300 pages of small type in the first volume alone.⁷ Clearly, constitutional

4. 15 U.S.C. §§ 1, 2 (1997). Section 1 of the Sherman Act states in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.* Section 2 states in relevant part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony . . ." *Id.*

5. 15 U.S.C. § 12 (1997).

6. PHILLIP AREEDA, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* (1978).

7. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000).

law is judge-made law. It is not only judge-made law, but its main lines are set out by one court, the Supreme Court. Thus, it is on that Court that I focus in this Essay. In this respect, constitutional law resembles the English common law of contract or tort.⁸ There are, however, these differences: Rules of constitutional law are generally about far more fundamental matters than any particular rule of tort or contract law, and legislatures cannot override these constitutional rules without amending the Constitution.

So it is no surprise that the Supreme Court is held in such awe—power has that effect—but it is also true that the Court from the beginning has conducted itself with a degree of circumspection, dignity, and conscientiousness that has enhanced this natural tendency to venerate power, while giving little ground for the equal and opposite tendency first to gossip about and then to deprecate any institution or person who is the subject of official veneration. Perhaps no institution of our government does its work at once so discretely and so openly. Its authoritative acts are based exclusively on publicly available materials: the briefs and arguments of the parties, the records appended to those briefs, and, to an indeterminate extent, matters of common knowledge that form the common background of those materials. Private communications on pending matters from outside the Court are strictly forbidden—both by tradition and the canons of judicial ethics⁹—and rarely has it been suggested that such communications take place.¹⁰ Whatever else people before the Court may think, they do not worry about that. Additionally, the exercise of the Court's power is remarkably, uniquely open: Its decisions are accompanied by the reasons for those decisions. Indeed, without those reasons the decision in any particular case would be of quite limited significance. To a remarkable degree, to a degree unknown in any other branch

8. See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). Constitutional common law is much less like the general common law of those subjects in the United States, where the courts of any one state will treat the decisions of respected courts across the country as something more than just illustrative or persuasive, though less than authoritative precedent.

9. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT, Canon 3(A)(4) (1986).

10. See 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 294-98 (1926).

of government, the Court's exercise of power *is* its reasons. Yet the internal deliberations by which the Court arrives at a decision once it has publicly been presented with the materials for that decision are shielded almost entirely from view. Alone among governmental institutions, the Court does not leak.¹¹

So—what with the power, the prestige, the aura of the thing—it is not surprising that Justices are treated as oracles, prophets, sages.¹² More to my point, their opinions are treated as oracular, prophetic deliverances. Consider again the way law school classes, casebooks, scholarly books and articles, and learned discussions parse those opinions.¹³

What do scholars and students look for in Supreme Court opinions? Pretty generally, they look for a theory of the subject. The model that comes to mind is Ronald Dworkin's hypothetical Judge Hercules.¹⁴ Faced with a new (constitutional) case, Hercules surveys the whole of the relevant legal universe to determine how it fits with past decisions, the applicable texts, the principles explicit and implicit in those decisions, and a general political and moral

11. This part of the picture is not without its flaws and exceptions. The papers of retired and deceased Justices are sometimes available for public inspection not long after the events they describe, and may contain confidential memoranda circulated between the Justices, preliminary drafts of opinions, and notes of the discussions between them. There have been indiscretions—so far as I know almost always after (often long after) a decision has come down. Justices may commit these indiscretions, and former law clerks to the Justices have regularly, but infrequently, committed such indiscretions. For a recent and particularly nauseating example of such law clerk indiscretion, see EDWARD LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* (1998). For a discussion of this reprehensible pot-boiler, see Alex Kozinski, *Conduct Unbecoming*, 108 *YALE L.J.* 835 (1999). An older example of such indiscretion comes from 1919 when a law clerk to Justice McKenna was fired and indicted for selling advance information about a decision that would have an effect on the stock market. See David Garrow, *The Lowest Form of Animal Life?: Supreme Court Clerks and Supreme History*, *CORNELL L. REV.* 855, 859 (1999).

12. I was a Justice for a time on a state supreme court, and I am glad to report that along with many of my colleagues on that and other benches, I found the fawning deference showed judges quite tiresome. As one wise judge responded to an acquaintance who always called him judge: "My name is Bill. Judge is my job."

13. One striking exception is the annual *Supreme Court Note* produced every November by the student editors of the *Harvard Law Review*, commenting on the work of the just completed term. The dominant tone is that of a churlish and highly opinionated elder correcting and grading the incompetent fumbblings of a novice junior. It is interesting to speculate why this regular display of sophomore arrogance strikes one as so hilariously inappropriate.

14. See Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1083 (1975); see also Ronald Dworkin, *In Praise of Theory*, 29 *ARIZ. ST. L.J.* 353 (1997).

theory of constitutional law in which those decisions and principles are embedded. I agree with Dworkin's description of this ideal type of judicial activity.¹⁵ This may mean that legal scholarship and judging—each at their best—converge, but they do not become the same thing.

Scholarship and judging diverge most obviously when the scholar criticizes the Herculean construct at which the judge has arrived, either in part or root and branch. The judge is also free to criticize the law as she finds it—and there are some notable examples of judges doing just that while accepting and carrying on in a course of decision they regret or even deplore.¹⁶ Judges act in this manner because, though the Herculean labor may seem quite unconfined, the law confines judges. What does it mean to be confined by the law? It means that however much freedom the interpretative task may seem to leave judges, still, they do interpret the *law*. They interpret the legal materials out of which they construct a legal theory that carries them forward to the new decision they must make, and there is a limit beyond which it is simply no longer plausible to claim that a decision is interpreting those materials rather than twisting or ignoring them.¹⁷ I will not offer here a complete account of when that limit is reached; it is in any event ultimately a matter of judgment and good faith.¹⁸

A scholar, by contrast, is entirely free to offer whatever construct he chooses, constrained only by the requirements of candor and whatever ambition he may entertain that his analysis be relevant. As to candor, little need be said: This is the scholar's equivalent of the good faith enjoined upon judges. The issue of relevance is another matter. A scholar pays a price if he offers a whole new way of approaching a subject, prescinding from the legal materials whenever they do not accord with (whenever they constrain) his construction: The further he moves away from the constraining materials the less

15. See Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994).

16. See, e.g., Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 171-72 (1970).

17. See *United Steelworkers v. Weber*, 443 U.S. 193, 222 (1979) ("Thus, by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history and uniform precedent . . .") (Rehnquist, J., dissenting).

18. See Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155-94.

useful will his alternative account be to judges who live under those constraints. The scholar may be willing to pay that price. His ambition may extend no further than to lay out what a better treatment of the subject would look like, or he may hope that some of the constraints imposed by the materials might be loosened. In that case, his enterprise may differ from that of the judge absolutely or only as a matter of degree. The difference is absolute when the scholar proposes amending the legislative texts—in the case of constitutional law, amending the Constitution. Of course, a judge also may propose amending the constraining texts, but only either as an aside, or as an argumentative trope to show why she is not free to act against them and so to emphasize their constraining power. The scholar may strain against a line of precedent, proposing overruling large or small parts of it. To be sure, as a matter of power, judges are free to overrule precedent whenever they wish, but a proper view of their role limits the occasions when they do, or should, feel free to do that.¹⁹ In a sense, respect for precedent, *stare decisis*, counts as an item in the materials which constrain the judge. To the extent that the scholar's proposal accepts that particular constraint but merely interprets it differently, then his plea for an overruling remains congruous with the judge's work. The scholar, however, need not accept that constraint any more than he need accept the constraint of a particular authoritative text. The only constraint a scholar need accept is candor.²⁰

This shows that over a very large range—perhaps the whole of the domain of traditional legal scholarship—a scholar works as a kind of shadow judge, doing just what the judge would do and implicitly proposing that he in fact does it better. He may do it better by reaching conclusions that accord more closely with the legal materials, or he may do it better in the more modest sense that, though he reaches the same conclusions as the judge, his is the superior account: better reasoned, or taking in a wider range of relevant materials.

19. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and affirming *Hans v. Louisiana*, 134 U.S. 1 (1890)); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (affirming the basic holding of *Roe v. Wade*, 410 U.S. 959 (1973)).

20. See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

Judges are often impatient with scholarly writing, complaining that it is padded out with overly elaborate discussions of relatively straightforward points and references to materials of only marginal relevance.²¹ Scholars, conversely, find judicial opinions too summary, skating over difficulties and jumping to conclusions where the scholar would spell out the steps in painstaking detail. This mutual disparagement assumes that scholars and judges are doing the same thing, and that therefore the documents embodying their activity should be judged by the same standard. The common understanding of the judge's and scholar's work conduces to this assumption, but I think it misses something. It misses the fact that judges exercise power while scholars analyze. However much their two activities may converge, however much they may work in similar ways from the same materials, scholars and judges do different things.

This divide is illustrated nicely by a case recently decided by the Supreme Court, *United States v. Morrison*,²² which held unconstitutional a provision of the Violence Against Women Act.²³ The Fourth Circuit and the defendants had insisted that it is beyond the power of Congress to create a federal cause of action for an act of violence without any necessary showing in the particular case that the conduct occurred in connection with an interstate economic transaction or an economic transaction at all. Indeed, given the definition of the conduct condemned—an act of violence motivated by gender—it is likely that most instances of such conduct will involve persons acting in circumstances quite remote from any economic activity. Congress justified its intervention in what traditionally had been a subject for the state criminal and tort law of rape, assault, and battery with findings that the victims of gender-motivated violence sometimes were inhibited from interstate travel and sometimes were affected in their ability to work and consequently to spend because of such acts. This, Congress concluded, constituted a substantial effect on

21. See generally Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (discussing the growing disconnect between the legal profession and legal academia).

22. 120 S. Ct. 1740 (May 15, 2000), *aff'g* *Brzonkala v. Virginia Polytechnic*, 169 F.3d 820 (4th Cir. 1999).

23. 42 U.S.C. § 13981 (1994).

interstate commerce, which made it a fit subject for national legislation under Congress's Article I power to "regulate . . . Commerce among the several States."²⁴

With its 1995 decision in *United States v. Lopez*,²⁵ the Court halted a long march towards the expansion of the commerce power into a general power of government. As currently interpreted, the Spending Clause already gives Congress the power to tax and spend "for the general Welfare."²⁶ The trend halted by the Court would have given Congress the power to *regulate* for the general welfare—a power that many in Congress probably believe they already have, if they choose to exercise it. In *Lopez*, the Court explained that the commerce power limited Congress to regulating and protecting the channels and instrumentalities of commerce as well as such activities as have "a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce."²⁷ As scholars by the bushel pointed out, this last category was the soft spot in any tightening up of general commerce power. Congress—ever eager to cast a vote for motherhood and apple pie—made straight for it. Congress made findings about the billion dollar effect of violence on women's participation in the work force and the economy, an effect which they claimed satisfied the Court's substantiality requirement.²⁸ It is readily apparent that if this argument had prevailed in *Morrison*—it is essentially the argument of Justice Breyer dissenting in *Lopez*—then the substantiality requirement would have become merely a formal hurdle, readily satisfied by Congressional findings, which Congressional staffs and advocacy groups can produce at the drop of a ten-dollar contribution.

There have been several suggestions about how to prevent the *Lopez* test from becoming merely a formal hurdle. The foremost suggestions came from references in Justice Kennedy's *Lopez* concurrence to preventing intrusions on an "area of traditional state concern,"²⁹ and the restriction of the

24. U.S. CONST. art. I, § 8, cl. 3.

25. 514 U.S. 549 (1995).

26. U.S. CONST. art. I, § 8, cl. 1.

27. *Lopez*, 514 U.S. at 559.

28. See H.R. CONF. REP. No. 103-711, at 385 (1994).

29. 514 U.S. at 580 (Kennedy, J., concurring) (joined by O'Connor, J.).

third leg of the *Lopez* test to the regulation of economic activities or to regulations that are part of a larger scheme of economic regulation.³⁰ Chief Justice Rehnquist alluded to the latter restriction several times in his opinion for the Court in *Lopez*,³¹ and this was the basis of the Fourth Circuit's decision in *Brzonkala* holding this aspect of the Violence Against Women Act beyond Congress's commerce power.³² There are difficulties with both proposals. In *Morrison*, the Court chose a version of the later, but with which ever approach the Justices could have chosen, they would not feel pressed, as a scholar would, to point out all the landmarks, features, or even the final destination of the new path on which they were striking out.³³ This they would leave to commentators, future developments, and future judges to do. In *Morrison* this is just what happened. The Chief Justice wrote: "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history, our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."³⁴ In this way they put themselves at the beginning of a line of doctrinal development in an intellectual operation that complements the task of building on the work of prior judges in the manner I have already discussed.

A recent sharp exchange between Justices Breyer and Scalia in *Printz v. United States*³⁵ also illustrates how a judicial opinion might begin a possible line of doctrinal development. In that case, the Court struck down a provision in a federal firearms control statute, the "Brady Bill,"³⁶ which required local law enforcement officials to help in its administration. Building on an earlier case, *New York v. United States*,³⁷ the Court held that if Congress wants to regulate a subject within its powers it must work directly on the people and may not recruit ("commandeer" is the Court's word) state officials to do some

30. *See id.* at 583.

31. *See id.* at 560.

32. *See Brzonkala v. Virginia Polytechnic*, 169 F.3d 820, 832 (4th Cir. 1999).

33. *See, e.g.,* CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

34. *United States v. Morrison*, 120 S. Ct. 1740, 1751 (May 15, 2000).

35. 521 U.S. 898 (1997).

36. 18 U.S.C. § 922 (1990).

37. 505 U.S. 144 (1992).

of its work for it, if the states do not consent to such recruitment.³⁸ In his dissenting opinion, Justice Breyer added a new thought to the other dissents to that proposition:

[T]he United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control. At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. . . . Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. Cf. *The Federalist* No. 20, pp. 134-138 (C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (rejecting certain aspects of European federalism). But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity. Cf. *id.*, No. 42, p. 268 (J. Madison) (looking to experiences of European countries); *id.*, No. 43, at 275, 276 (J. Madison) (same). And that experience here offers empirical confirmation of the implied answer to a question Justice STEVENS asks: Why, or how, would what the majority sees as a constitutional alternative—the creation of a new federal gun-law bureaucracy, or the expansion of an existing federal bureaucracy—better promote either state sovereignty or individual liberty?³⁹

Justice Scalia, writing for the Court, responds:

Justice BREYER's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis

38. See *Printz*, 521 U.S. at 929.

39. *Id.* at 976-77 (Breyer, J., dissenting) (internal citations omitted).

inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. The Framers were familiar with many federal systems, from classical antiquity down to their own time; they are discussed in Nos. 18-20 of *The Federalist*. Some were (for the purpose here under discussion) quite similar to the modern "federal" systems that Justice BREYER favors. Madison's and Hamilton's opinion of such systems could not be clearer. *The Federalist* No. 20, after an extended critique of the system of government established by the Union of Utrecht for the United Netherlands, concludes:

I make no apology for having dwelt so long on the contemplation of these federal precedents. Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity *Id.* at 138.

Antifederalists, on the other hand, pointed specifically to Switzerland—and its then-400 years of success as a "confederate republic"—as proof that the proposed Constitution and its federal structure was unnecessary. See Patrick Henry, *Speeches given before the Virginia Ratifying Convention*, 4 and 5 June, 1788, reprinted in *The Essential Antifederalist* 123, 135-136 (W. Allen & G. Lloyd ed.1985). The fact is that our federalism is not Europe's. It is "the unique contribution of the Framers to political science and political theory." *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring) (citing Friendly, *Federalism: A Forward*, 86 *Yale L.J.* 1019 (1977)).⁴⁰

This exchange, while perhaps more interesting than the jousting on matters of history between majority and dissent that has become perhaps too frequent in Supreme Court opinions,⁴¹ is in fact neither a display merely of irrelevant erudition on Justice Breyer's part nor of philistinism and parochialism on Justice Scalia's part. A reproof such as the one that begins the quotation here from Justice Scalia's opinion if

40. *Id.* at 921 n.11.

41. See, e.g., *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

contained in a scholar's article would seem philistine indeed, but it is not here, and the reason why it is not points to the difference between scholarship and judging. It also illuminates my strange but not idiosyncratic reflex reported at the outset of this essay. Judicial opinions may look—and with more and smarter law clerks, may increasingly look—like law review articles, but they do a different job, just as judges do a different job. If one looks at the difference between the two jobs—judge and scholar—one will understand both why we treat judicial opinions differently from law review articles, holding the former in a certain awe (and, as is often the case with awe, awe tinged by scorn) and why they should be judged by different standards.

Justice Breyer's remarks on comparative constitutional law, if they had appeared in a law review article, would have been quite unremarkable, since the modalities of federalism and their manifestation in the European Union have become commonplace in legal scholarship.⁴² As part of a judicial opinion, they were altogether remarkable. Why should that be? The reason is that if Justice Breyer's insertion into the case of comparative constitutional law materials had gone unchallenged, it would have been a step towards legitimizing their use as points of departure in constitutional argumentation—and much more so if they had appeared in a majority or even a plurality opinion.⁴³ Earlier, I spoke of the

42. Justice Breyer's opinion cites DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 66, 84 (1994); Lord Mackenzie-Stuart, *Foreword to COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* ix (Mark Tushnet ed. 1990); Clíona J.M. Kimber, *Comparison of Environmental Federalism in the United States and the European Union*, 54 MD. L. REV. 1658, 1675-77 (1995); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205, 237 (1990), which are the standard works on this subject.

43. Justice Breyer made the same move in a dissent from the denial of certiorari in *Knight v. Florida* and *Moore v. Nebraska*, 120 S. Ct. 459 (1999). The petitioners had sought review of decisions denying their claims that the lapse of twenty-five and nineteen years, respectively, since the time they had been sentenced to death constituted cruel and unusual punishment. Justice Breyer noted "that a growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that a lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel." *Id.* at 462 (emphasis added). Justice Breyer adduced decisions of the Privy Council reviewing a decision of the Jamaica courts, the Supreme Courts of India and Zimbabwe, and the European Court of Human Rights. He also noted that a decision of the Supreme Court of Canada points, though rather ambivalently, in the opposite direction. *Id.* at 462-63. Justice Thomas, who concurred in the denial of the writ, took issue with Justice Breyer:

ideal judge surveying the whole of the relevant legal universe to determine how it fits with applicable texts, past decisions, the principles explicit and implicit in those decisions, and a general political and moral theory of constitutional law in which those decisions and principles are embedded. Justice Breyer's foray was an attempt (probably not successful—at least not this time) to expand the universe of relevant legal materials to include the structures and judgments of other constitutional systems. The dispute is particularly striking because it would be one of the few instances of a deliberate attempt by a Justice to expand the canon of authoritative materials from which constitutional common law reasoning might go forward. In the last generation we have had a significant debate about that canon, into which scholars and Justices have entered with gusto. Justice Brennan may be taken to have been the champion of the proposition that the canon capaciously includes materials reflecting the moral sensibilities of the time,⁴⁴ while Judge Bork and Justices Scalia⁴⁵ and Rehnquist (as he then was)⁴⁶ would restrict those extra-judicial materials far more closely.⁴⁷

I am unaware of any support in the American constitutional tradition or this Court's precedents for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.

Id. at 459 (footnote omitted). A denial of certiorari is supposed to have no precedential effect, is rarely accompanied by opinion, and therefore such an opinion serves at most to signal a Justice's disposition in future cases, perhaps to encourage further petitions, and perhaps to protest against the action of the six or more Justices voting to deny the petition and thus perhaps to embarrass them. See *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("The 'variety of considerations [that] underlie denials of the writ' counsels against according denials of writ any precedential value.") (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)).

44. See, e.g., William J. Brennan, Jr., *The 1986 Oliver Wendell Holmes, Jr. Lecture: Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313 (1986).

45. See, e.g., ROBERT H. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

46. See, e.g., William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751 (1986).

47. The debate is well-known and need not be rehearsed here. Justice Scalia has been most insistent in focusing attention on the materials illuminating the meaning of terms as they were understood by those who placed them into the constitutional text. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). But he does not limit himself to the text and the materials bearing on

Justice Breyer's *démarche* might have had a palpable effect. Consider the work of the very excellent new Constitutional Court of the Republic of South Africa. That court regularly canvasses the decisions of the world's leading constitutional tribunals—especially those of Canada, Germany and the United States. Its surveys and analyses of these sister courts have a substantial effect on the South African court's judgments. Nor can that effect be set down as merely persuasive, as might be the effect of a particularly respected treatise. The decisions have a compulsory force akin to but less than the decisions of the South African court's own prior decisions and even the text of the South African Constitution. Section 36(1) of the South African Constitution states:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom⁴⁸

The Constitutional Court has consistently taken these words to require it to canvas the work of constitutional courts in other countries which meet the criteria of "open and democratic societ[ies]."⁴⁹ The South African Court treats these foreign materials as something more than just proposals or good ideas. Similarly, Justice Breyer's move, if it had been taken up by others, would itself have been—at a higher level of abstraction—something more than just a proposal or a good idea. It would have introduced a whole new range of materials

original understanding. He is willing to look to subsequent custom and understanding, but only if they are so nearly universal that a departure from them could truly be characterized as aberrational—and therefore unlikely to occur. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986). (The Connecticut birth control statute at issue in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Poe v. Ullman*, 367 U.S. 497 (1961), may have been such a rare instance.) It is intriguing to speculate whether the rare invocations of the Declaration of Independence and the Preamble to the Constitution are intended more than just as bearing in a vague way on an understanding of the intentions of the Framers or whether they are attempts to give these texts some authoritative status. An analogous question might be raised about the invocation of the actions of the first Congress, which, as it has been said, included several of the Framers of the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). As a recent amusing exchange between Justices Stevens and Scalia brings out, it was that Congress which enacted the Judiciary Act of 1789 held unconstitutional in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

48. S. AFR. CONST. ch. 2 § 36(1) (1996).

49. *See, e.g., Du Plessis v. De Klerk*, 1996 (5) BCLR 658 (CC); *Ferreira v. Levin*, 1995 (4) BCLR 437 (W).

to the texts, precedents and doctrines from which the Herculean task of constructing judgments in particular cases proceeds.⁵⁰

Here, then, is one crucial distinction between two bodies of thought and writing that look so much alike that they are almost homonyms. They are not synonyms because in the end a judicial opinion announces—or pronounces—a judgment. The judge's opinion embodies an exercise of power as well as a display of intellect. The scholar's analysis, by contrast, is just that; it merely proposes a judgment. But given the Dworkinian account of legal reasoning and of the proper labors of Judge Hercules, are the two not likely to come so close together that the contents of the opinion and that of the scholar's essay will be practically indistinguishable—except for the last line of each? Apart from the constraint I have already mentioned—that the judge is bound by her canonical materials while the scholar may propose amending or even abandoning them—I now want to say that even when working with the same materials the fact that her opinion not only explains but pronounces judgment colors the whole of the judge's work.

The crux is here: Does the intellectual operation of constructing the best answer to a particular problem out of a constraining set of canonical materials (a set which, for the sake of simplicity, I assume identical for judge and scholar) if competently carried out reach one and only one "right answer?"⁵¹ The common impulse is to deny this, to insist that

50. Whether such an expansion of the universe of materials surveyed in the Herculean enterprise should include foreign materials may be taken as a test of the nature of constitutional discourse altogether. Restricting that discourse to domestic materials—including domestic traditions and history—implies a kind of expanded positivism: Traditions are incorporated are part of the corpus of domestic law which it is the duty of local courts to survey. If a more rationalistic approach is adopted, in which legal materials are not just data but arguments or evidence of an underlying objective moral sense, then it is parochial in the pejorative sense of that term to consult only the moral sensibilities displayed within particular national borders. To be sure, national borders may correspond to common moral and political sensibilities, which is how the reference in Section 36(1) of the South African Constitution to "an open and democratic society based on human dignity, equality and freedom" might be taken, but it is the moral and political judgment about what societies meet those criteria and not the national borders that do the work. See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819 (1999).

51. See Ronald Dworkin, *Pragmatism, Right Answers, and True Banality*, in *PRAGMATISM IN LAW AND SOCIETY* 359, 371 (Michael Brindt & William Weaver eds., 1991).

the "no right answer" thesis is to some degree correct, that the canonical materials are too open-ended to foreclose all choice, too indeterminate to make the operation one entirely of intellect, foreclosing all action of the will. If that explains the difference between the work of the scholar and that of the judge, then the awe in which we hold the judge is the awe that is felt for one who wields power, for it is an act of power to make the choice that the indeterminacy of the materials allows. And the suspense with which we await the decision of Supreme Court on a controversial issue is not the suspense we might feel as we await a mathematician's or a scientist's promised solution to a difficult problem: It is more like the suspense we feel as we wait the outcome of an election or the verdict of a jury.

Although the power wielded by judges no doubt provides part of the explanation, it provides a disappointing explanation. It is disappointing because it denies the essential rationality of the judicial decision. More than just myth is at stake. The more the judicial decision is an act of power, the more acute is the question of democratic legitimacy. This is especially so in the case of the Supreme Court, whose judges are not elected, serve for life, decide issues of surpassing importance, and place decisions in the name of the Constitution beyond the reach of elected representatives.

It is disappointing also because it makes of the opinion something of a sham. The opinion purports to be more than just the announcement of a vote or pronouncement of a verdict; it purports to be an explanation, and the more the explanation comes down to "Well, this is how I (we) chose" the less of an explanation it is. This brings us around again to the scholar's essay, which is worth attending to *only* in so far as it is an explanation. After all, who cares about the exercise of power by one who wields none? In short, how can the judicial opinion be both an exercise of power and a satisfactory explanation?

Here is another possibility: We await the judge's opinion in order to see if she has got it right. This is the judge as student and the opinion as exam question which the scholar grades. And because the judge's decision is in any event *also* an exercise of power, we await the decision to see if it is an exercise of power justified by reason. This may explain the

suspense but not the reverence that accompanies the wait for a Supreme Court decision in an important case. There is a sense that the decision will embody a wisdom that the scholars' analyses may miss. Sheer superstition? After all, judges are neither smarter nor more learned than the commentators on their work.

I suggest that one substantial advantage the judge enjoys over the scholar comes from the fact that just because the judge exercises power, because her decision directly effects lives, she will have thought differently and perhaps more deeply, more responsibly. This notion is captured in the old saw that a judge must have an answer for every question, while the scholar has a question for every answer. Responsibility—like the prospect of hanging—concentrates the mind. The prospect of the real life effect of her decision gives off the vapors which the judge inhales to nourish her prophetic utterances.

I take the Court's recent decision in *Washington v. Glucksberg*⁵² as evidence of this effect. In that case six of the Academy's most brilliant and respected moral philosophers submitted an *amicus* brief arguing that the Constitution allows terminally ill patients in great pain to obtain the assistance of a physician in ending their lives.⁵³ The Court did not agree. Although several of the Justices indicated sympathy with the notion that substantive due process might perhaps offer some basis for claiming that the state may not shut off access to such help in extreme circumstances, not one was willing to proclaim such a right in that case. For even those most sympathetic to the philosophers' position, the claim was just too novel, the practical circumstances too various and ill-defined, and there was too scant evidence that such a permission would not lead to abuses far worse than the sufferings of the dying patient, which might in any event be alleviated without running afoul of such a state prohibition.

A constitutional pronouncement in favor of permitting physician assisted suicide could only have been reversed in the light of further experience, and only if the Court would later

52. 521 U.S. 702 (1997).

53. See Brief for Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, and Judith Jarvis Thompson as Amici Curiae in Support of Respondents, *Washington v. Glucksberg*, 521 U.S. 702 (1997), available in 1996 WL 708956.

acknowledge that experience had proven it wrong. But the Court does not issue constitutional rulings on an experimental basis. It is in the nature of a constitutional judgment that it asserts its timeless and permanent validity. I make the point with deliberately provocative emphasis. The Justices of the Supreme Court know that "nothing lasts forever" and that very few judgments in the realm of politics and morals—and they are in the business of issuing several dozen a year—survive the passage of time and gathering of experience without significant, perhaps radical, alteration. Yet a pronouncement of constitutional law, like a moral pronouncement, claims permanence and universality. This shows in the fact that a constitutional pronouncement—again like a moral pronouncement—which abandons a previous one carries the implication that the previous pronouncement was wrong when made. What is unacceptable is the posture which shrugs that "O, well, we were right then, but we have changed our minds, and we are also right now." That is a posture appropriate to legislation or to the decisions of a political leader. It is appropriate to an act of will, not to a determination of reason. Consider an analogy: A mathematician does not say that a prior theorem was correct in its time but now another has taken its place. The earlier theorem might have seemed correct, or been close enough for the uses to which it was put, but the assertion of the new, contradictory theorem necessarily revises or displaces the earlier one. In the same vein a moral proposition is not right at one time and wrong in another. At most, changed circumstances may reveal and undermine a tacit premise of the earlier judgment. In that event, the later condemns the earlier as a partial analysis, and therefore to that extent as not having been entitled *from the outset* to the status which at the outset the earlier proposition claimed for itself.

Constitutional judgments are like that, or at least they have the same grammar. They speak in that way so as not to forfeit the claim that they depend not on will but on reason. The Court does overrule itself and shift grounds without quite admitting it, but each such move costs it something. The price paid is not just lost prestige, as when a champion athlete loses a match; rather, on each such occasion the Court contradicts the very premise of its authority. No single such occasion changes the essential nature of the Court, just as a single broken

promise does not make a person untrustworthy, but each one is a temptation to give up one's self-conception of an honest man. So each time the Court overrules itself it puts in jeopardy its own confidence in its own distinctive role.⁵⁴

This is the menace that makes the Justices particularly stingy about constitutional pronouncements: Each such pronouncement puts out a hostage against their deepest honor as judges. Scholars do not work under quite such a lash. Yes, if they change their minds too readily they risk not being taken seriously, but their words do not become, instead of pronouncements of reason, an exercise of power because they have no power to begin with. So the Court's words are weightier because there is more at stake both for those subject to the judgment and for the Court itself. This explains why the most scrupulous of the Justices are also scrupulous about deciding no more than the occasion requires: not so little that the pronouncement is a singularity and so not a pronouncement of reason at all, but with exquisite awareness that with the concentric circles of generality comes increased risk to the whole enterprise.

This phenomenon is particularly striking because Justices are rarely experts in a particular subject matter—or if they are, it will be only one of the vast number of subjects that come before them.⁵⁵ Scholars usually write in their field of expertise. This difference too explains the tendency to greater caution in judicial opinions, rarely does a Justice feel competent or inclined to write an opinion that sets straight a whole field of law.⁵⁶ Rather she is acutely aware that to pronounce on issues

54. This is my understanding of the agonized ruminations about *stare decisis* in the *Casey* case. See *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

55. Justices Scalia and Breyer were professors of administrative law and Justice Breyer was also a teacher of antitrust law. Justice Stevens practiced antitrust law. Justice Thomas was for many years Chairman of the Equal Employment Opportunity Commission and thus expert in anti-discrimination law. Justice Ginsburg also wrote, taught and litigated in that area as well as in civil procedure.

56. As a state supreme court justice, I once or twice tried to do that in a field of my expertise. Thus, for instance, in *Commonwealth v. Amirault*, 677 N.E.2d 652 (Mass. 1997), I tried to rationalize the practice of Massachusetts courts in respect to post-conviction remedies, a subject I knew well from teaching Federal Courts. Although my opinion drew only one dissent, it did not last, was partially repudiated two years later in *Commonwealth v. Alphas*, 712 N.E.2d 575, 580 (Mass. 1999), and partially disparaged in *Commonwealth v. LeFave*, 714 N.E.2d 805, 810 (Mass. 1999) ("The forceful, one might say enthusiastic, endorsement of an interest in finality and the application of waiver in [*Amirault*] apparently struck some as a radical and unwelcome departure from precedent.").

not briefed and argued because not closely implicated in the actual controversy at hand is to risk error and later repudiation. To pronounce in this manner is also unfair to the extent that it decides issues without giving interested parties an opportunity for dispute before the Court. This brings out a further difference between judges and scholars: Adjudication is theater in a way that scholarship is not. It is, to be sure, a particular kind of theater, but a judgment is the final act of a defined process which goes forward by fixed and formal rules.⁵⁷ For instance, a decision should not rest on facts or communications not openly and formally brought before the Court. That once again is because the opinion first of all pronounces judgment and that is an exercise of power, power above all over the parties before the Court, of whose interests the judgment will definitively dispose of. But judges must decide as scholars need not,⁵⁸ and this gives the opinion a special quality; it is a statement and explanation, to be sure, but it is an explanation of what is just, *given the need to decide*. The scholar does not stand under such a necessity. Accordingly his explanation lacks both the constraint and the urgency of the judge's explanation, and with that urgency and constraint come a form of wisdom.⁵⁹

Finally, this brings out another distinction between a scholar's analysis and an opinion of the Court. The latter is necessarily a collegial product. The judge must convince not only herself but enough of her colleagues to make up a majority. No matter how expert a judge may be in a subject—or, because of unusual brilliance, become in the course of

57. I have called this "legal reason as theater." Fried, *Constitutional Doctrine*, *supra* note 15, at 1148; *see also* Charles Fried, *Oral Argument*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 612 (1992).

58. *See* Daubert v. Merrill Dow Pharm., Inc., 509 US 579, 596-97 (1993):

It is true that open debate is an essential part of both legal and scientific analyses. Yet there are important differences between the quest for truth in the courtroom and the quest for truth in the laboratory. Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly.

Id.

59. Joseph Weiler has made this point in explicating one of the senses in which a judge must be courageous: "Unlike lawyers who advocate for one party, unlike professors who . . . 'kibitz' on the sideline, the judge has to take a decision, look in the face of those against whom his decision goes and live with the (internal) consequences of his decision." J.H.H. Weiler, *On Being a Judge—Jethro's Lesson*, 2 GREEN BAG 291, 297 (2d ed. 1999).

studying a case⁶⁰—her colleagues who must join her are unlikely to share such a wide-ranging confidence and will hazard only a decision on the case before them.

Usually, there is an opinion of the Court which states the opinion of the controlling majority. Even in those cases with no majority opinion, there is collegiality in the more limited sense that, if common ground may be discerned in the opinions supporting the Court's judgment, that ground expresses the holding of the Court.⁶¹ Consider how differently this constrains scholars who may collaborate in writing a law review article—like Brandeis and Warren's famous article on the right to privacy.⁶² They work together because they have discussed the subject and agree on a common approach and conclusions. If in the course of their collaboration they find that their thinking has taken divergent paths, one or both of them may just let the project drop or they may pursue it separately. A Justice writes an opinion *for* the Court because that is her job. It is the job of the whole Court to decide the case, and it is the Justice's assignment to explain that decision. The pressure to arrive at a common statement is greater and quite different than in joint scholarship; her opinion will only be authoritative—it will only be an exercise of power—if it gathers a majority. It is the concurrence or dissent whose status and function more nearly resembles a work of scholarship (or journalism). Its significance lies in the power of its argument—with a threat that with the needed number of recruits it might one day become fully authoritative.⁶³ It was Chief Justice Marshall who moved the Court away from the practice of each Justice delivering a separate opinion.⁶⁴ Under that practice the common explanation of the judgment had necessarily to be gathered by finding the sufficient area of

60. I think of Judge Posner here.

61. *See, e.g., City of Richmond v. Croson*, 488 U.S. 469 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). There is something odd about treating as controlling an explanation with no part of which any other Justice agreed.

62. Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) ("I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.") (Rehnquist, J., dissenting).

64. *See* LISA PADDOCK, *FACTS ABOUT THE SUPREME COURT OF THE UNITED STATES* 72 (1996).

overlap in the individual statements, but that common ground was then just the collegial product. Indeed the old practice might be seen as making particularly palpable why collegiality makes a judicial opinion (and appellate judging) different from a scholar's article. The justification of the judgment has its distinctive normative force only in so far as it has behind it the force of the Court's authority, which by law belongs neither to a unanimity of the Court (so that the dissent of a single Justice cannot deprive a majority explanation of that force) nor to the single most, say, eloquent, persuasive, or prestigious Justice. (The Chief Justice has only one vote.) So an opinion is—in the world of political discourse—a unique item: It is an authoritative explanation. That is the opinion's distinction: It is both authoritative and an explanation. The convergence of the colleagues is a condition of its authority in a way that has no analogue in the world of scholarship. But there is the further point that the need to attain that convergence is another important and distinctive discipline on the opinion. Before a Justice's explanation can attain authority it must have been able to gather the assent the Justice's colleagues. So the judicial opinion is not just power disciplined by reason; it is also reason disciplined by power and that aspect of power that requires assent before its assertion.

The judge's subjective experience in writing an opinion bears this out. Having been assigned the opinion in conference by the Chief Justice (or senior Justice in the putative majority),⁶⁵ the writing Justice generally tries to hold her "Court" by writing an opinion that will attract and hold a majority. This means that from the start the opinion is not a personal product—as a scholar's article is and should be—but an institutional explanation.⁶⁶ In an earlier essay, I described how a judge may not start from scratch in thinking through and deciding a case.⁶⁷ She must accept prior decisions as more than

65. See Justice William H. Rehnquist, *Sunshine in the Third Branch*, 16 WASHBURN L.J. 559, 559-60 n.1 (1977).

66. I recall an instance when serving on the Massachusetts Supreme Judicial Court when I was assigned to write an unsigned opinion of the court. When my draft was discussed in the consultation of the Justices, there was no disagreement with its substance, but my Chief asked only that "I lower the level of performance." What he meant was the draft had a kind of eloquence that was appropriate to a personal, not a collegial product. I obliged him—to an extent.

67. See Fried, *Constitutional Doctrine*, *supra* note 15.

suggestions for what she writes, and must write as part of a continuum into which her opinion must fit for it to have the steadiness and character we ascribe to law:

She will be drawn to maintain continuity, keep faith, with her own past decision, at least in order to conceive of herself as a person with projects and steadiness of reason. Then, because her reasoning will be part of her Court's reasoning, what she says must relate not only to what she has said and will say, but also to what the other judges can subscribe to, so that she can speak for them. In the same way, she must incorporate into her present thinking what other judges have previously said in her name. So her reasoning is public inside and out: its steadiness and coherence must not only be palpable to those who will be ruled by it; it must be steady and coherent to her. It must exhibit both forms of steadiness and coherence if it is to be part of a joint line of reasoning of a collegiate body of which she is just one member. ("The Chief Justice, with whom Justices O'Connor, Scalia, Kennedy, Souter, and Thomas join . . .") And it is hardly a further step at all to see how she must be ready to incorporate lines of reasoning from which she dissented, or (more compellingly) which were started before she joined the Court.⁶⁸

In that essay I elaborated on the continuity through time of doctrine—its diachronic coherence. The point I make here (and adumbrated then as well) is that collegiality gives an opinion a horizontal, synchronic continuity. Both continuities exercise a kind of constraint that reasoning from scratch need not display, and both are distinctive of the reasoning of judges.

I would put these lines together. The awe and suspense with which we cloak judicial opinions on important questions is intellectual, but not only intellectual; it is a response to power, but not only to power. It is a response to the exercise of power disciplined by reason—the reason made manifest in the *reasons* of the opinion—and to reason disciplined by the risks in the exercise of power.

Now let us play this out in a minor key. Have I not just spun out a fantasy? Judges are busy, middle-level officials, cranking out opinions at break-neck speed. As Judge (and earlier professor) Posner has pointed out, often they are not even their opinion's authors but at best their editors—the actual

68. *Id.* at 1157 (footnotes omitted).

authorship being that of law clerks.⁶⁹ Judge Posner has acutely observed how galling it must be for scholars in a field to spend their time parsing the writings of recent law school graduates.⁷⁰ And if that is so, the attitude of reverence with which I began is better described as fear, fear that overburdened and incompetent officials will make a hash of whatever subject they may get their hands on. I think this is a distortion of the actual phenomenon. I have concentrated my observations on constitutional law, and I have argued that constitutional law is the work almost exclusively of one Court. As to that Court the attitude of reverence does in fact obtain, and it is justified. Careful study of its opinions shows that first of all (to speak only of today's Court) several Justices—I think particularly of the Chief Justice and Justices Scalia, Thomas and Breyer—write in such a distinctive style that their work could immediately be identified by an adept at a blind tasting. But more importantly, even Justices who had no distinctive style—Justice Brennan comes directly to mind—and whose opinions may have started life as law clerks' drafts, maintain such a steadiness and continuity in their work over the years, that the substance of the opinions must be their own, and the law clerks only the draftsmen working under orders.⁷¹ I do not, therefore, retreat from my judgment in reflecting on a Court that issues fewer than one hundred decisions a year. How my observations apply to other appellate courts whose opinions number many times that, and particularly to courts which have no discretionary jurisdiction, is work for another day.

What I must attend to, however, is the discipline of the scholar. Corresponding to Judge Posner's acidulous view of the judge as a kind of bureaucrat of modest abilities, hurrying to get through the day's work, is a view of the scholar as a *prima donna* motivated to astonish at whatever cost to

69. See Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641, 651 (1991).

70. See *id.* ("Nowadays most judicial decisions, even those in the Supreme Court, are written by law clerks a year or two away from graduation. What professors of constitutional law teach and study is, to an extent I should think they would find embarrassing, the work of their recently graduated students."); see also LAZARUS, *CLOSED CHAMBERS*, *supra* note 11; Henry J. Friendly, *Reactions of a Lawyer-Newly Become Judge*, 71 YALE L.J. 218 (1961).

71. See Charles Fried, *Remarks at the Proceedings of the Bar and Officers of the Supreme Court of the United States in Memory of Justice Brennan XI* (May 22, 1998) (transcript on file with author).

common sense: the judge as tired old man and the scholar as *enfant terrible*. There is something to this view as well. These days the feats of scholarship of a Williston,⁷² Corbin,⁷³ Wigmore,⁷⁴ Scott⁷⁵ or Areeda⁷⁶ are rarely attempted, and one suspects if they were, they would not be much prized. What is prized are surprising ideas and juxtapositions, or if not originality of this sort then the more or less rigorous and expert deployment of techniques, theories and insights of other academic disciplines. In the field of constitutional scholarship one need only compare to the masters of my teachers' generation—Herbert Wechsler⁷⁷ and Paul Freund⁷⁸—the astonishing work of this generation's most original scholar, Akhil Amar.⁷⁹ Their work was prized because it synthesized and made perspicuous what was accepted as the best elements in the common, if inarticulate, understanding of constitutional practice. Many reasons exist for this shift. There is the corrosive cynicism of the critical legal studies movement, that made such an approach seem intolerably blimpish. There is the sheer massiveness of the constitutional materials—two hundred more volumes of United States Reports—and the rapid evolution of constitutional law since the late 1950s, the era of what might rightly be called the Brennan Court. There is also the great increase in the number of law professors and the corresponding increase in the number of law reviews. This is in every sense a crowded field and a young scholar must stand out to be noticed. Once having stood out, he experiences pressure to remain faithful to his brand. The very originality, which these pressures reward, makes the scholars' work less likely to influence judicial opinions—as the more modest work of scholars in other fields (one thinks of Areeda on antitrust

72. See, e.g., SAMUEL WILLISTON, *THE LAW OF CONTRACTS* (1931) (Five volumes).

73. See, e.g., ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* (1952).

74. See, e.g., JOHN HENRY WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* (3d ed. 1940) (Ten volumes).

75. See, e.g., AUSTIN W. SCOTT, *TRUSTS* (3d ed. 1967).

76. See, e.g., AREEDA, *supra* note 6.

77. See, e.g., HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953).

78. See, e.g., PAUL A. FREUND ET AL., *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* (4th ed. 1977).

79. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985).

law) aspired to do in earlier times—and emphasizes the divergence between the work of scholars and judges I have signaled.⁸⁰

But these are caricatures. The best scholars—including the astonishing Professor Amar—are and always have been disciplined and moved by ideals higher than the intoxication of originality, just as the judges I write about are moved by an ambition higher than that of getting through the day. They both seek to tell the truth. The differences may be put down as only a psychological difference: a degree of caution that comes from the awareness that what you say will have an effect on people's lives not only because of its persuasive force but by the very saying of it. Thus, the way we look at judges may be put down as only the natural disposition of some to stand in a certain awe of those who can make things happen just by ordering that they be done. I, however, think there is more to it than that. We stand in awe of high officials who also can make things happen by issuing orders, but it is a different sort of awe. The judge is the only government official whose authority is supposed to be explained by his reasons; he is the only authority to claim that his reasons are part of his authority.

80. Acknowledging the anomalous case of Professor Tribe's treatise, see *TRIBE*, *supra* note 7.