

# THINKING ABOUT THE SUPREME COURT AFTER *BUSH V. GORE*

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I stand before you still recovering from that amazing three-week period in late November and early December when the Supreme Court decided the two cases from the 2000 presidential election.<sup>1</sup> Let me give you a bit of the flavor of those thirteen hours on Tuesday, December 12, 2000, when the political future of the country hung in the balance and all we knew that at any moment the Court would issue a decision on *Bush v. Gore*.<sup>2</sup>

People were afraid to leave the room even for a minute. The press room was about the size of a subway car, and as the day went on and reporters kept arriving from all over the world, it became like the most crowded rush hour subway car ever. We received no guidance from the Court staff as to when a decision might come. The breathless waiting, interrupted only by calls from increasingly worried editors as deadlines approached, took on a vaguely hallucinogenic quality. People took to interpreting the arrangement of plants on the desk of a pressroom assistant as some kind of code. I did not think it was, but who was to say? As night fell and starvation loomed, a few erstwhile competitors formed a collective and sent out for pizza. Those who had not gotten in on the deal at the beginning were eventually reduced to begging for pieces of crust.

Unusual times call for unusual responses. I sat down to write my typical speech about the Court for this symposium, but could not go through with it. What is my claim to expertise, after all? The Court completely surprised me by taking up the election case in the first place, by granting the stay that stopped the recount, and by its willingness to put itself in a position of extreme vulnerability. After more than twenty-two years of covering the Court, I felt completely at sea. So I have decided to do something different—to start out by stepping out of my usual role and inviting you to join me in a little role-playing with the following scenario:

I stand before you now, not as the *New York Times* Supreme Court correspondent, but as Chief Justice William Rehnquist—minus the four gold stripes, which I had to leave behind at airport security.

You may have read my year-end report on the federal judiciary that the Court issued this past New Year's Day.<sup>3</sup> In that report, I of course took note of the election cases. "This Presidential election, however, tested our Constitutional system in ways it has never been tested before. The Florida State courts, the lower federal courts and the Supreme Court of the United States became involved in a way that one hopes will

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1. See *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Gore*, 531 U.S. 1046 (2000).

2. 531 U.S. 98.

3. Chief Justice William Rehnquist, U.S. Supreme Court, *2000 Year-End Report on the Federal Judiciary* (2001), at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-end-report.html>.

seldom, if ever, be necessary in the future.”<sup>4</sup>

That was all I said—two sentences out of a nineteen-page report. Is that all there was to say? Of course not. Thank you for inviting me to Indianapolis tonight to share some further thoughts. I’m not going to go over the tangled chronology of that amazing three-week period when the Court accepted and decided the two appeals from the Florida Supreme Court.<sup>5</sup> I’ve always said our decisions speak for themselves. They may not speak very clearly, but as Justice Robert Jackson said, “We are not final because we are infallible, but we are infallible only because we are final.”<sup>6</sup> You know, I clerked for Justice Jackson, and I can tell you he had a real way with words.

For the chronology, you can read an interminable article by Linda Greenhouse that appeared in the February 20, 2001 edition of the *New York Times*.<sup>7</sup> Now, I don’t know her sources. I wouldn’t give her an interview, of course, and I can’t really comment on the article except to say that I do agree with her conclusion—or, I should say, with her statement of the obvious—that the per curiam’s equal protection holding in *Bush v. Gore*<sup>8</sup> was not the opening shot in any Rehnquist Court equal protection revolution. Those civil rights lawyers who think that it was are just trying to make lemonade out of the lemon we handed them when we called the election for George W. Bush. Anyone who tries to cite *Bush v. Gore*<sup>9</sup> will quickly find out that it was a ticket for one train only.

I want to put one thing on the table right now—the charge of hypocrisy that has been leveled against those of us in the majority. It’s true that the five of us—the Federalism Five, some people call us—have been busy rediscovering state sovereignty, rescuing the Tenth and Eleventh Amendments from obscurity. Some people seemed to think that all of that meant we were bound for the sake of consistency to defer to the Florida Supreme Court’s interpretation of Florida law. This is wrong. I understand why that kind of criticism concerning the majority might have a kind of surface appeal, but that’s what it reflects—a superficial understanding of what we are about.

People who think that what has motivated the Rehnquist Court in such cases as *United States v. Lopez*,<sup>10</sup> *City of Boerne v. Flores*,<sup>11</sup> *Florida Prepaid Postsecondary Education Expense Board v. College*

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4. *Id.*

5. See *Bush*, 531 U.S. 98; *Bush*, 531 U.S. 1046.

6. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

7. Linda Greenhouse, *Bush v. Gore: A Special Report; Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

8. 531 U.S. 98, 109-10 (2000).

9. *Id.*

10. 514 U.S. 549 (1995).

11. 521 U.S. 507 (1997).

*Savings Bank*,<sup>12</sup> *Alden v. Maine*,<sup>13</sup> *Kimel v. Florida Board of Regents*,<sup>14</sup> and just last month, *Board of Trustees of the University of Alabama v. Garrett*<sup>15</sup> is states' rights are looking through the wrong end of the constitutional telescope. The game that is really afoot is judicial supremacy, and for that, states' rights are just the most convenient playing field. After all, if we are really so interested in states' rights, why do we continually strike down the North Carolina legislature's judgment on how to draw the state's congressional districts? What could be closer to the core of a state's sovereignty interests than the choices its legislature makes about how to allocate power within its borders? What this is really about is protecting the Supreme Court's authority to have the last word.

John Marshall said it best. In *United States v. Morrison*, my opinion for the Court which struck down the civil damages provision of the Violence Against Women Act, I quoted from *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>16</sup>

Just last June, in an opinion that surprised many supposedly well-informed court-watchers, I wrote for the Court in *Dickerson v. United States*<sup>17</sup> that Congress's clumsy effort to legislatively overrule *Miranda v. Arizona*<sup>18</sup> was unconstitutional.<sup>19</sup> As everyone knows, I have never liked *Miranda*, and I don't like it to this day. But if there is one thing I like even less than undue solicitude for the rights of criminal defendants, it's Congress telling us how to interpret the Constitution. In my *Dickerson* opinion, I quoted Justice Kennedy's opinion for the majority in *City of Boerne v. Flores*,<sup>20</sup> the 1997 case that overturned the contumaciously-named Religious Freedom Restoration Act,<sup>21</sup> which itself purported to overrule our 1990 interpretation of the Free Exercise Clause in *Employment Division v. Smith*.<sup>22</sup> Coincidentally Justice Kennedy quoted John Marshall in *Marbury v. Madison*<sup>23</sup> in his *City of Boerne* opinion.<sup>24</sup>

I have made it perfectly clear, both in my recently reissued book on

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12. 527 U.S. 627 (1999).

13. 527 U.S. 706 (1999).

14. 528 U.S. 62 (2000).

15. 531 U.S. 356 (2001).

16. 529 U.S. 598, 616 n.7 (2000) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

17. 530 U.S. 428 (2000).

18. 384 U.S. 436 (1966).

19. *Dickerson*, 530 U.S. at 444.

20. 521 U.S. 507 (1997).

21. 42 U.S.C. § 2000bb (1994).

22. 494 U.S. 872 (1990).

23. 5 U.S. 137 (1803).

24. 521 U.S. 507, 516, 529 (1997).

Supreme Court history<sup>25</sup> and in remarks from the bench last month, that John Marshall is my judicial hero. Last month, I opened the Court's daily session by departing from my normal routine and commemorating the 200th anniversary of Chief Justice Marshall's swearing in. I proposed that John Marshall be elevated to the status of founding father, along with Washington, Hamilton and Jefferson: "I do not think I am overstating the case to say that it is in large part because of Chief Justice Marshall's tenure on the Supreme Court that the Third Branch of our government occupies the co-equal position it does today." That may have been undershooting the mark a little bit, but you never know who might show up at the Court's public sessions. So, just between us, I have no intention of settling for co-equal. In my view, the Supreme Court is not co-anything. If the election case proved anything, I trust it proved that.

I probably should also mention that Chief Justice Marshall served on the Supreme Court for thirty-four years. I am now closing in on my thirtieth anniversary. Doesn't time fly? I know there's a lot of speculation out there that I might be handing President Bush my retirement sometime soon. But what's the hurry when I have a record to break and so much work still to do?

I hope I have not stretched your indulgence beyond the breaking point. To err on the side of caution, I will reassume my normal role and spend our remaining minutes together by sharing a few thoughts about where the Court is right now and how to think about it as we move on from the election case in what I think of as a multi-step recovery process.

There is a Rehnquist Court revolution in progress, and it is definitely not an equal protection revolution. Nor is it a states' rights revolution, as I had often thought and written in the six years since the Court in *United States v. Lopez*<sup>26</sup> struck down an exercise of Congress' commerce power for the first time in sixty years. Rather, it is a separation of powers revolution that has to do with the primacy of the judicial branch and of the Court itself. The Court's 5-4 ruling in *Garrett*,<sup>27</sup> holding that the Americans with Disabilities Act (ADA)<sup>28</sup> was not an appropriate exercise of Congress' authority to enforce the Fourteenth Amendment, and that the law, at least in its employment title, failed to abrogate the states' Eleventh amendment immunity from suit. This was a breathtaking judicial trumping of Congress' policy judgment. To understand how radical a shift there has been, take yourself back to 1990, when the ADA, sponsored by Senator Bob Dole, signed by President George Bush, and containing an explicit abrogation of Eleventh Amendment immunity, became law. It was inconceivable

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25. WILLIAM H. REHNQUIST, *THE SUPREME COURT* (Alfred A. Knopf 2001).

26. 514 U.S. 549 (1995).

27. 531 U.S. 356 (2001).

28. Americans with Disabilities Act of 1990, Pub. L. No. 107-56, 104 Stat. 327 (codified and amended in scattered sections of 42 U.S.C.).

that the abrogation would be held invalid by the Supreme Court. Yet by the time the ruling in *Garrett* came down, such an outcome appeared plausible if not completely predictable.

Where do we go from here? That depends on many variables, including the timing of any retirements and the politics of filling the vacancies. That is beyond our collective power to predict. One thing of which I am certain is that we need to maintain an active and informed civic dialogue about the Court. Everyone has done their screaming and venting or possibly, cheering, about *Bush v. Gore*,<sup>29</sup> but there are seventy-five other cases for decision this Term, many of them quite important, and it is important that they receive full attention.

I thought I might spend a few minutes putting the election case aside, if that is possible. I obviously cannot analyze the entire docket. What might be more helpful is for me to offer a generic road map, a template for observing the Court and assessing its work regardless of the particular doctrinal area involved and one's view of the merits of a particular decision. I think, that as citizens, we are entitled to hold the Court to a set of performance standards, and I will sketch these out briefly and offer some examples from the past few Terms of what I am talking about.

At the most basic level, the Court owes the public an obligation to speak clearly. Obviously, there will be specialized language in any legal opinion, but an educated person ought to be able to pick up a Supreme Court opinion, make sense of the reasoning, find a clear bottom line, and count the vote, without making a two-color chart. I had to do that a few years back when confronted with the following headnote in *Denver Area Educational Telecommunications Consortium v. FCC*,<sup>30</sup> which had to do with the regulation of indecent programming on cable television.

[Justice] Breyer announced the judgment of the Court and delivered the opinion of the Court with respect to Part III, in which [Justices] Stevens, O'Connor, Kennedy, Souter, and Ginsburg joined; an opinion with respect to Parts I, II, and V, in which [Justices] Stevens, O'Connor and Souter joined, and an opinion with respect to Parts IV and VI, in which [Justices] Stevens and Souter joined. [Justices] Stevens and Souter filed concurring opinions. [Justice] O'Connor filed an opinion concurring in part and dissenting in part, [Justice] Kennedy filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which [Justice] Ginsburg joined, [Justice] Thomas filed an opinion concurring in the judgment in part and dissenting in part, in which [Chief Justice] Rehnquist and [Justice] Scalia joined.<sup>31</sup>

As consumers of the Court's work, it seems to me we have a right to expect opinions that we can understand, at least structurally. After all, the power of judicial review is an extraordinary power—one of America's major gifts to

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29. 531 U.S. 98 (2000).

30. 518 U.S. 727 (1996).

31. *Id.* at 731 (internal citations omitted).

democracy and political theory. That great power gives the Court what Professor Burke Marshall of Yale Law School has called the “preeminent duty of principled explanation of what is actually going on in constitutional decision-making,”<sup>32</sup> or what Professor Joseph Goldstein described as “the Supreme Court’s obligation to maintain the Constitution as something we the people can understand.”<sup>33</sup>

That raises another question: Who is the Court’s audience, after all? Yes, it is, in Professor Goldstein’s words, “we the people,” but I think that is a bit romantic and not too realistic. Judges of other courts in the federal and state systems are an important audience, of course, and I know, from my conversations with judges over the years, that they are as frustrated as anyone else when the Supreme Court fails to attain a basic level of coherence.

However, I want to focus on the wider audience for the Court’s work. The public learns about Supreme Court opinions only derivatively, through the media, or as mediated by politicians or leaders of other sectors of society. How many people believe that the Court’s school prayer decisions of the 1960s expelled God from the classroom, because that is what sloppy journalism and political demagoguery told them the Court did? Does the distinction matter? It absolutely does.

In evaluating whether the Court is doing a good job of communicating, we must look at how the Court communicates to the specialized audience that in turn is going to carry the message to the wider audience of people who will never in their entire lives hold a Supreme Court opinion in their hands.

The Court’s relationship with the press is problematic at best. The Court is not so much hostile to the press as it is, often, oblivious to what the press needs in order to do an adequate job of describing the Court’s work. I do not mean this comment as special pleading. To the extent the Court is oblivious to the needs of the press, it is oblivious to its need to communicate to the public.

I do not mean background briefings on the real meaning of opinions; I’m a realist. I understand the culture of an institution that has not changed much since the late Justice William Brennan spoke to a group of law students in 1959:

A great Chief Justice of my home State [Arthur Vanderbilt of New Jersey] was asked by a reporter to tell him what was meant by a passage in an opinion which had excited much lay comment. Replied the Chief Justice, “Sir, we write opinions, we don’t explain them.” This wasn’t arrogance—it was his picturesque, if blunt, way of reminding the reporter that the reasons behind the social policy fostering an independent judiciary also require that the opinions by which judges support decisions must stand on their own merits without embellishment

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32. Burke Marshall, *Foreword* to JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT’S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND*, at xx (1992).

33. GOLDSTEIN, *supra* note 32, at 19.

or comment from the judges who write or join them.<sup>34</sup>

Now I do not mean sitting at the Justices' elbows or interviewing them behind the scenes on the deeper meanings of their opinions. Rather, I would have a more modest wish-list. The spacing of opinions, for example, sounds almost foolishly trivial as an issue. However, considering the number of finite commodities involved in digesting and reporting news about the Supreme Court (or about anything else for that matter), a finite amount of time to make the evening news or next day's newspaper, the finite amount of broadcast time or space in the paper, the finite number of human beings to handle the material, timing emerges as an important issue.

The Court always finishes its Term with a bang, with most of the major decisions coming in the last few weeks of June. That is only human. Like any other institution, the Justices save the hardest work for the end. In the Term that ended last June, for example, the Court on its final day issued 391 pages of opinions deciding four major cases: the Boy Scouts' right to exclude gay members,<sup>35</sup> the Nebraska partial birth abortion case,<sup>36</sup> a case on the permissible limits of federal aid to parochial schools,<sup>37</sup> and a First Amendment case on restrictions on demonstrations outside abortion clinics.<sup>38</sup> Earlier in the same week, the Court issued its decisions reaffirming *Miranda v. Arizona*,<sup>39</sup> striking down California's blanket primary system,<sup>40</sup> and issuing highly significant new rules requiring jury participation in criminal sentencing.<sup>41</sup> Now, this was nothing compared to the last day of the 1987 Term when the Court handed down an entire

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34. Remarks to the Student Legal Forum, University of Virginia Law School, Charlottesville, Virginia (Feb. 17, 1959) (unpublished).

35. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (applying New Jersey's public accommodations law, requiring Boy Scouts to admit plaintiff, violated the Boy Scouts' First Amendment right of expressive association).

36. *Stenberg v. Carhart*, 530 U.S. 914 (2000) (holding that Nebraska statute banning "partial birth abortion" was unconstitutional).

37. *Mitchell v. Helms*, 530 U.S. 793 (2000) (holding that Chapter 2 of Title I of Elementary and Secondary Education Act of 1965, under which federal government distributes funds to state and local governmental agencies, does not violate the Establishment Clause of the First Amendment).

38. *Hill v. Colorado*, 530 U.S. 703 (2000) (holding that Colorado statute, prohibiting any person from knowingly approaching within eight feet of another person near a health care facility without that person's consent, did not violate the First Amendment).

39. *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that *Miranda's* warning-based approach to determining admissibility of statement made by accused during custodial interrogation was constitutionally based, and could not be overruled by legislative act).

40. *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California's blanket primary violated political parties' First Amendment right of association).

41. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (determining that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

volume of U.S. Reports.

Ideally, newspapers and television networks would expand to fit the news from the Court, and people would be able to cover it all. I have written three, and on rare occasions, four Court stories in a day—not particularly well, by the third or fourth story, but if I can write them, my newspaper will probably print them. However, most of the media do not have my employer's priorities, and when opinions come in a huge rush like this, the triage is brutal.

I once mentioned this problem to Chief Justice Rehnquist, who listened sympathetically and then said, quite cordially, "Well, just because we put them out on one day doesn't mean you have to write them all on one day—save some for the next day." At that point, I lost all hope that we could ever have a meeting of the minds on the subject of the desirability of the Court—in its own interest and in the public interest—to accommodate the needs of the press.

Let us move on: assuming some minimal level of coherence and some minimal accommodation to the realities of press coverage—I would like to focus on candor. Is the Court being honest with its audience? Is the Court dealing squarely with precedent, or is it playing games with precedent? These are not just questions of style. They go to the reliable and orderly development of the law.

There are numerous recent examples of the Court not dealing squarely with precedent. One of my favorite examples is *United States v. Ursery*,<sup>42</sup> a recent decision about the relationship between civil forfeiture and double jeopardy. *Ursery* grew out of the federal government's aggressive use of civil forfeiture as part of a multi-pronged strategy in the war on drugs. Property acquired as the result of drug dealing, or that served as the location of drug dealing, was targeted for forfeiture, either preceding or following the criminal conviction.

The obvious fly in this ointment was the fact that the Double Jeopardy Clause of the Fifth Amendment bars multiple punishments for the same offense. Whether civil forfeiture presented a double jeopardy problem, when added to a criminal conviction and sentence, depends on whether forfeiture is "punishment." If it is not punishment, then there is no problem.

In *Ursery*,<sup>43</sup> two federal appeals courts had found civil forfeiture to be a punishment sufficient to trigger the Fifth Amendment protection against double jeopardy.<sup>44</sup> Under those rulings, the government had to choose between two opinions. If it had already seized a drug dealers assets through civil forfeiture, it could not then go on and conduct a criminal prosecution. If it had already gotten a conviction, it had to forget about the forfeiture.

The Ninth Circuit and the Sixth Circuit did not pull that conclusion out of a hat. The appellate courts were informed by a series of very recent Supreme Court decisions that had in fact treated civil forfeiture as punishment. In *Austin*

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42. 518 U.S. 267 (1996).

43. *Id.*

44. *United States v. \$405,089.23 U.S. Currency*, 56 F.3d 41 (9th Cir. 1995), *cert. granted sub nom*; *United States v. Ursery*, 59 F.3d 568 (6th Cir. 1995), *revd.* 518 U.S. 267 (1996).



*v. United States*,<sup>45</sup> the Court ruled that forfeiture could be so disproportionate to the offense as to amount to an excessive fine under the Eighth Amendment,<sup>46</sup> which is more generally known for its prohibition against cruel and unusual punishment.

This was obviously inconvenient for Chief Justice Rehnquist, the author of *United States v. Ursery*, who concluded that civil forfeiture was not punishment after all; therefore, double jeopardy did not occur.<sup>47</sup> This overruled two previous appellate court rulings. How did he reconcile the precedents and reach that conclusion? True, he wrote, forfeiture was punishment for Eighth Amendment purposes, but that interpretation of the Eighth Amendment should not be seen “as parallel to, or even related to, the Double Jeopardy Clause of the Fifth Amendment.”<sup>48</sup> Q.E.D., no problem.

Justice Stevens, in his dissenting opinion, noted that both the Fifth and Eighth amendments were drafted by the same people at the same time, and said it was “difficult to imagine why the Framers of the two Amendments would have required a particular sanction not to be excessive, but would have allowed it to be imposed multiple times for the same offense.”<sup>49</sup> So I leave it to you—was the majority being candid?

Another case in which precedent got rather short shrift was *Romer v. Evans*,<sup>50</sup> the decision that struck down, on equal protection grounds, Colorado’s constitutional amendment that barred any public entity in the state from adopting gay rights legislation. Justice Kennedy’s majority opinion did not even cite *Bowers v. Hardwick*,<sup>51</sup> the Court’s 1986 decision holding that homosexual relations between consenting adults are not protected by the constitutional right to privacy. There were no doubt strong strategic reasons for Justice Kennedy to avoid any mention of *Bowers*, which is still on the books. He was not on the Court when it decided *Bowers*, but Justice Sandra Day O’Connor was a member of the *Bowers* majority, and avoiding mention of *Bowers* may have freed her to join the *Romer* majority without the explicit need to reconcile the two votes. Nonetheless, and despite the considerable merit of the *Romer* opinion, this was scarcely the most intellectually honest way of dealing with the state of the law. In fact, if a purpose of a Supreme Court decision is to guide the lower courts in the consistent development of the law, the success of the *Romer* decision is quite problematic.

As another example in this general discussion of candor, let me mention the decision in the physician-assisted suicide case, *Washington v. Glucksberg*.<sup>52</sup> I cite this case for a slightly different purpose than our previous examples—to

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45. 509 U.S. 602 (1993).

46. *Id.* at 620-21.

47. 518 U.S. at 297.

48. *Id.* at 286.

49. *Id.* at 308 n.5 (Stevens, J. dissenting).

50. 517 U.S. 620 (1996).

51. 478 U.S. 186 (1986).

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

examine the candor issue not in the context of how the Court treats precedent—but of how the Court defines the question to be decided. In law, as in many other enterprises, where you begin has a lot to do with where you end up. What exactly was the Court being asked to decide in its review of the Washington criminal prohibition against physician—assisted suicide?

According to Chief Justice Rehnquist, the author of the Court's majority opinion, "The question presented in this case is whether Washington's prohibition against 'caus[ing]' or 'aid[ing]' a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not."<sup>53</sup>

With the question framed in that way, in fact, every member of the Court agreed that the answer was "no," and the holding of the opinion, rejecting the constitutional claim, was unanimous. But that was not the only, or indeed the most accurate, way to describe the question that a group of doctors, on behalf of their dying patients, had brought to the Court. In concurring opinions, several Justices offered a different formulation of the question and suggested, that in subsequent cases, questions phrased that a much lower level of generality might produce a different answer.

Justice Souter said: "[H]ere we are faced with an individual claim not to a right on the part of just anyone to help anyone else commit suicide under any circumstances, but to the right of a narrow class to help others also in a narrow class under a set of limited circumstances."<sup>54</sup> Justice Breyer said flatly that he did not agree with the Chief Justice's formulation. He said:

I would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support. That formulation would use words roughly like a 'right to die with dignity.' But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.<sup>55</sup>

The lens through which the Court looks at a particular case—the paradigm it chooses—can be so important, but difficult to evaluate unless the Court really grapples honestly and openly with its choice.

A subset of the candor issue is the question of consistency. Two recent decisions provided a striking example of the absence of consistency—might I suggest, of the result-orientation—in the Court's treatment of what it likes to call "bright line rules."

Both decisions were in criminal cases, both were Fourth Amendment cases, and both had to do with the encounter between police officers and people in cars. The first was *Ohio v. Robinette*.<sup>56</sup> The Ohio Supreme Court had ruled that once a police officer makes an otherwise valid traffic stop, that officer may not, in the

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53. *Id.* at 705-06.

54. *Id.* at 773 (Souter, J. concurring).

55. *Id.* at 790 (Breyer, J., concurring).

56. 519 U.S. 33 (1996).

absence of any suspicion of further, hidden wrongdoing, begin interrogating the driver about whether he has drugs or other contraband in the car unless the officer first advises the driver that he does not have to answer these questions and is legally free to go.<sup>57</sup> Only that explicit advice can make a subsequent search, even one the driver has agreed to, truly consensual.

Not surprisingly, the Court, in *Robinette* overturned this decision, by an 8-1 vote, in an opinion by Chief Justice Rehnquist.<sup>58</sup> The Chief Justice said, in a rather weary tone, that the Court had said over and over again that the test under the Fourth Amendment was “reasonableness” and that the Ohio court had gone astray in trying to construct a bright line rule. “[W]e have consistently eschewed bright line rules,” he said, “instead emphasizing the fact-specific nature of the reasonableness inquiry.”<sup>59</sup>

Then came *Maryland v. Wilson*,<sup>60</sup> another state appeal from a ruling by a state court. In this case, the Maryland Court of Special Appeals ruled that a police officer may not, as a matter of course and in the absence of any suspicion, order a passenger out of a car that was stopped because the driver was speeding or for some other routine reason.<sup>61</sup> The Maryland court refused to extend to passengers the rule of *Pennsylvania v. Mimms*,<sup>62</sup> a 1977 Supreme Court case holding that the police, for their own safety, may routinely order the driver out of the car during a routine traffic stop.<sup>63</sup>

Not surprisingly, the Supreme Court overturned this decision as well, in another opinion by Chief Justice Rehnquist. The Court said the Maryland court was wrong in not adopting a bright line rule. “While there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out, the additional intrusion on the passenger is minimal,”<sup>64</sup> the Chief Justice said. “We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”<sup>65</sup> Well, so much for case by case assessment of Fourth Amendment reasonableness.

As a final subset of the candor issue, let me mention something that is perhaps a bit more elusive but equally important. How honestly does the Court confront the scope of what it’s accomplishing and the order of magnitude of the change it is bringing about?

To what extent does the Court owe the public a full accounting of exactly what is in play when obscure amendments which the average citizen has barely heard of, like the Tenth and Eleventh Amendments, are invoked to frustrate the

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57. *State v. Robinette*, 653 N.E.2d 695, 699 (Ohio 1995), *rev'd sub nom.*, *Ohio v Robinette*, 519 U.S. 33 (1996).

58. *Robinette*, 519 U.S. at 35.

59. *Id.* at 39.

60. 519 U.S. 408 (1997).

61. *State v. Wilson*, 664 A.2d 1, 13 (Md. Ct. Spec. App. 1995).

62. 434 U.S. 106 (1977).

63. *Id.* at 112.

64. *Wilson*, 519 U.S. at 415.

65. *Id.*

will of Congress? In subjecting Congress' use of the commerce power to a new kind of strict scrutiny, is the Court setting itself up as some kind of unaccountable, unelected, super legislature that some have discerned? Does the Court not owe us some hint as to how far it plans to go? Of course I understand that in our common law system, the law develops case by case and not necessarily according to a grand design, but there is a certain coyness to some of these opinions that one could argue serves to hide rather than illuminate what the Court is really up to.

Let me turn now to a different subject, the question of the Court's voice, or specifically, the voice of dissent. We certainly have to expect differences of opinion on the Court, especially on questions that divide the society of which, after all, the Court is only a mirror. But I think we can also expect these differences to be expressed without personal invective. In his dissenting opinion in *Romer*,<sup>66</sup> Justice Scalia's invocation of a "Kulturkampf,"<sup>67</sup> his excoriation of "the elite class from which the Members of this institution are selected,"<sup>68</sup> did not leave readers with confidence that the constitutionality of Colorado's Amendment 2 was being debated on the basis of legal principles rather than emotional invective.

Before we leave the question of the Court's voice, I want to touch on an elusive subject that for lack of a better word we might call institutional compassion. I do not mean compassion in the touchy-feely sense. Rather, what I want to convey is my sense that good judging requires some institutional ability to look at the world, or at the complaint, or at the appeal, from a point of view other than what might come naturally to the judge. I am not advocating knocking down precedents that stand inconveniently in the way of a sympathetic outcome. Nonetheless, I was rather amused recently by a pair of criminal cases, decided within a week of one another, that seemed to call for some comment along this line.

In one case, *Minnesota v. Carter*,<sup>69</sup> the question was whether the police violated the Fourth Amendment rights of the occupants of a ground floor apartment whom a police officer observed, while standing on the grass and looking through the crooked and not quite closed venetian blinds, engaged in the task of preparing cocaine for distribution. In upholding the criminal convictions, Chief Justice Rehnquist's majority opinion did not reach the underlying issue of the validity of the search, but rather held that the defendants did not even have standing to challenge the search because they were not the owners or renters of the apartment, but were just passing through, as temporary guests engaging in a business transaction.<sup>70</sup>

The next week, in *Knowles v. Iowa*,<sup>71</sup> the Court decided a criminal case with

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66. 517 U.S. 620 (1996).

67. *Id.* at 636 (Scalia, J., dissenting).

68. *Id.*

69. 525 U.S. 83 (1998).

70. *Id.* at 91.

71. 525 U.S. 113 (1998).

a different outcome and quite a different flavor. The question was whether a simple speeding ticket could justify a police officer in conducting a search of the entire car. In this case, the Court quickly and unanimously, in another opinion by Chief Justice Rehnquist, said no, overturning a conviction for the marijuana the police had found in the speeding motorist's car.<sup>72</sup> There was no justification for the further search, the Chief Justice said.

I do not want to be unfair, but looking at these two cases, it was hard to escape the sense that the Justices may have identified a bit more with someone stopped for speeding—as several of them have been—than with temporary denizens of a ground floor apartment in a housing project. The Justices were downright solicitous of the interests of the driver and quite dismissive of the privacy interests of the apartment's occupants, even though both had drug offenses in common. Is it possible the Justices could see themselves standing in the shoes of the one and not the other?

Let me move from voice to, what for lack of a better word, I will call reach. What should be the Court's stance toward its work? How directly should the Court confront the myth of judicial infallibility—what Professor Paul Gewirtz calls “the ideology of perfectionism”?<sup>73</sup> And should we give the Court points or demerits for admitting that some cases and some questions are just too hard for the Court to speak definitively about? After all, it was Justice Robert Jackson who said, in his great opinion in the flag salute case, “we act in these matters not by authority of our competence but by force of our commissions.”<sup>74</sup> We need a Supreme Court that at the end of the day is going to tell us what the law is.

But there is a new academic interest in what Professor Cass Sunstein of the University of Chicago calls “decisional minimalism” or “the constructive uses of silence.”<sup>75</sup> Minimalism is to be favored, according to this school of thought, when the Court is dealing with issues that are in flux, and on which democratic debate has not yet run its course. Professor Sunstein has high praise for the *Romer* opinion, which he calls “puzzling and opaque” and unsatisfying from a theoretical point of view, but from a broader institutional and political point of view, “a masterful stroke—an extraordinary and salutary moment in American law”<sup>76</sup> precisely because it said no more than it had to say to decide the case at hand while not foreclosing further development.

By the same token, Justice Breyer's unusual opinion in the Denver cable indecency case,<sup>77</sup> with which I began this address by citing the headnote, has won wide praise from academics although not, I hasten to add, from either practicing

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72. *Id.* at 119.

73. Linda Greenhouse, *When a Justice Suffers from Indecision*, N.Y. TIMES, July 14, 1996, § 4, at 5.

74. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

75. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 7 (1996). See also CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

76. *Id.* at 9.

77. *Denver Area Educ. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996).

lawyers or lower court judges, who have criticized the opinion for not giving adequate guidance on cable television's place in the First Amendment pantheon. Perhaps this disparity between academia and practitioners just goes to show how out of touch the law professors are, but I will use it to make a different point—it illustrates the different premises that go into evaluating the Court's work.

What Justice Breyer basically said in *Denver* was that the technology was moving so fast that the Court should not lock itself into a hard and fast set of First Amendment rules for evaluating indecency on cable television or more generally, for how traditional First Amendment doctrine applies to nontraditional media. Specifically, Justice Breyer said, "aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, . . . we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now."<sup>78</sup>

Indeterminacy of this sort can undoubtedly sometimes be the better part of wisdom. Just as clearly, it has its dangers in the hands of a Court that does not quite know how to get where it wants to go. The Court's recent decisions involving affirmative action and, particularly, race-based redistricting, strike me as examples of inconclusiveness being more troublesome than helpful. Justice O'Connor's 1993 opinion in *Shaw v. Reno*,<sup>79</sup> which launched the Court on its ongoing examination of majority-black congressional districts, was extremely unsettling to the law and was highly charged rhetorically, using words such as "bizarre"<sup>80</sup> and "apartheid."<sup>81</sup> But it never really explained whether the Equal Protection problem with these districts was their shape, the race consciousness with which they were created, or some inchoate and unpredictable combination of the two. Proof of how much difficulty the Court created for itself is that it had to review the constitutionality of the twelfth congressional district of North Carolina four times in seven years, because the rules were so unclear that the case kept coming back. The fourth argument for this case was held earlier this Term and a decision is due any day. I will be interested to see what lesson the Court derives from its recent experience.<sup>82</sup>

On the other hand, I think the Court deserves substantial credit for the clarity with which it addressed the question of free speech on the Internet when it finally did reach that issue a couple of years ago, in a case that is not necessarily the Court's last word on the subject but was a very important first word.<sup>83</sup> In striking down the Communications Decency Act,<sup>84</sup> in its essentially unanimous opinion in *Reno v. American Civil Liberties Union*, the Court announced with great clarity that First Amendment principles apply fully to speech on the Internet and that the government can regulate speech in that forum only with the most

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78. *Id.* at 742 (citations omitted).

79. 509 U.S. 630 (1993).

80. *Id.* at 631.

81. *Id.* at 647.

82. *See Hung v. Cromartie*, 532 U.S. 234 (2001).

83. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997).

84. 47 U.S.C. § 223 (1994 & Supp. V 1999).

compelling of justifications.<sup>85</sup> Not only the result of that case, but the Court's clarity of expression, will have a major impact on the further development of this new medium.

The Court also deserves credit for setting out clear rules for both employers and employees on the question of sexual harassment in the workplace, and I give Justice Scalia credit for the clarity of his opinion for a unanimous Court recently, upholding the authority of the Environmental Protection Agency to issue regulations under the Clean Air Act<sup>86</sup> and re-burying the non-delegation doctrine that the D.C. Circuit had so provocatively revived two years before.<sup>87</sup>

As I said earlier, my goal was to offer a kind of road map out of the election case that might help guide you in thinking about the Court in the months and years ahead. Much as we need and deserve a competent, candid, and comprehensive Supreme Court, the Court needs an attentive, informed citizenry to monitor, critique, and build upon its efforts.

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85. 521 U.S. at 885.

86. 42 U.S.C. § 7401 (1994 & Supp. V 1999).

87. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

