Florida Law Review

Volume 72 | Issue 2 Article 5

Aesthetic Judging and the Constitution (or, Why Supreme Court Justices are Less Like Umpires and More Like Figure-Skating Judges)

Chad M. Oldfather

AESTHETIC JUDGING AND THE CONSTITUTION (OR, WHY SUPREME COURT JUSTICES ARE LESS LIKE UMPIRES AND MORE LIKE FIGURE-SKATING JUDGES)

Chad M. Oldfather[*]

INTRODUCTION

This is an Article about a pair of metaphors and the light that metaphors can shed on the process of judging in constitutional cases and the nature of constitutional change. The more familiar of these metaphors suggests that judges, including those in constitutional cases, act analogously to umpires.[1] I have suggested in prior work that this is misguided and that a second metaphor is more apt. Judging in the American legal system often requires judges to engage in a mode of reasoning akin to that of their counterparts in "aesthetic" sports such as figure skating and gymnastics.[2] The process involves not merely the simple application of rules (as the judge-as-umpire metaphor suggests), but rather often entails adherence to norms and the application of standards and principles that are often beyond the capacity of language to fully capture. Sometimes these norms, standards, and principles help the judge decide which of a host of applicable legal reasons to privilege.

---

* Professor of Law, Marquette University Law School. Thanks to participants at "Amending America's Unwritten Constitution," sponsored by the Boston College Institute for Liberal Arts and the University of Texas School of Law, to participants in a faculty workshop at Marquette University Law School, and to Bruce Boyden, Emily Cauble, Atiba Ellis, Alex Lemann, Kali Murray, Ryan Scoville, and Mark Sides for their helpful feedback.

1. The most famous of these invocations was by Chief Justice Roberts at his confirmation hearing. *See Transcript: Day One of the Roberts Hearings*, WASH. POST (Sept. 13, 2005, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html [https://perma.cc/C8YC-VU2T].

2. *See* Chad M. Oldfather, *Aesthetic Judging*, 52 U.C. DAVIS L. REV. 981, 981 (2018).

Other times they serve to provide more particularized content to those reasons.

The notion of such intangible knowledge is not new, nor is the idea that judges must sometimes draw on it. The underlying concept has been reflected in philosopher Immanuel Kant's aesthetic theory,[3] scientist and philosopher Michael Polanyi's "tacit knowledge,"[4] United States Supreme Court Justice Oliver Wendell Holmes's declaration that "[g]eneral propositions do not decide concrete cases,"[5] and scholar Karl Llewellyn's "situation sense"—the latter characterizing it as a combination of "ways and attitudes which are much more and better felt and done than they are said."[6] Just as figure-skating judges must apply indeterminate criteria such as "flow and effortless glide,"[7] and must otherwise judge in a context in which the written rules of the sport do not (because they cannot) fully specify what judges are to privilege and how they are to go about assessing it, so must legal judges apply underspecified concepts such as "due process" and "equal protection" and unspecified concepts such as "separation of powers" and "federalism" while making choices about the applicability and weight of various interpretive modalities. This is not to suggest a pervasive lack of readily applicable criteria. There are easy questions in both contexts. But both types of judges also routinely draw on internalized senses of what sorts of criteria are appropriate to a situation and use those criteria to assess the relative appropriateness and strength of the various arguments and potential conclusions available.[8] Justice Stewart's (in)famous "I

3. *See* DOUGLAS E. EDLIN, COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW 52–54 (2016).

4. The core idea in the concept of tacit knowledge is "we . . . know more than we can tell." MICHAEL POLANYI, THE TACIT DIMENSION 4 (1966) [hereinafter POLANYI, TACIT DIMENSION] (emphasis omitted). Polanyi contends "that strictly speaking nothing that we know can be said precisely," and that some types of knowledge are so thoroughly beyond our capacity to describe that they may properly be labeled "ineffable." MICHAEL POLANYI, PERSONAL KNOWLEDGE: TOWARDS A POST-CRITICAL PHILOSOPHY 87–88 (1962) [hereinafter POLANYI, PERSONAL KNOWLEDGE]. "[T]o the extent to which our intelligence falls short of the ideal of precise formulation, we act and see by the light of unspecifiable knowledge," which sometimes, including in the case of the common law, can be embodied in tradition, in recognition of the principle "that practical wisdom is more truly embodied in action than expressed in rules of action." *Id.* at 53–54.

5. Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

6. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 214 (1960).

7. U.S. FIGURE SKATING JUDGES EDUC. & TRAINING SUBCOMM., U.S. FIGURE SKATING SINGLE/PAIRS JUDGING MANUAL FOR TEST JUDGES' TRANINING 25 (1979), https://www.usfsa.org/content/00S-PSchool%20Manual2-02.pdf [https://perma.cc/7B9W-5HX3].

8. *See, e.g.*, Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27 ("Judges and lawyers subscribe to an elaborate network of craft norms. Acquired through professional training and experience, these norms generate a high degree of convergence . . . on what counts as appropriate decisionmaking.").

know it when I see it"[9] formulation may be unfashionable, and indeed it may not satisfy all the norms associated with the judicial role, but it captures a core truth about judging.

This Article extends the project of exploring the metaphor to the specific context of constitutional adjudication and change. It works from the understanding that both sports and constitutional law can be understood as "practices" in the philosophical sense, as "activities that are constituted by the convergent or overlapping understandings, expectations, and intentions of multiple participants."[10] The analysis is thus fundamentally comparative in nature. Conceiving of the operation of constitutional law in these terms, like any comparative analysis, helps to uncover and highlight certain of its features, including the ways in which its content is susceptible to change, only some of which occur in the formalistic ways easily accounted for by the umpire model. The approach is useful not only in providing a counter to the notion of the judge-as-umpire, but also in that it helps flesh out, supplement, and make more concrete a model of constitutional law that includes judicially implemented change.

The metaphor also operates as a caution. Figure-skating judges, after all, do not enjoy a sterling reputation for impartiality or incorruptibility.[11] Recognition that judges in the legal system perform an analogous role—and one that is likewise heavily dependent on the good-faith application of an internalized cluster of norms and values—thus serves to highlight the need for attention to institutional legitimacy and invites consideration of ways in which that legitimacy might be preserved (or eroded). If the

---

9. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

10. RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 88 (2018). Fallon elaborates as follows:

> American constitutional law is a practice in this sense, constituted by the shared understandings, expectations, and intentions of those who accept the constitutional order and participate in constitutional argument and adjudicative practices. It is crucial to recognize, moreover, that the relevant understandings and expectations go far beyond knowledge of the linguistic meanings of the Constitution's words and the history of its drafting and ratification.

Id.; *see also* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1957 (2008) ("[T]he recognition and non-recognition of law and legal sources is better understood as a *practice* in the Wittgensteinian sense: a practice in which lawyers, judges, commentators, and other legal actors gradually and in diffuse fashion determine what will count as a legitimate source—and thus what will count as law.").

11. The highest profile scandal took place at the 2002 Winter Olympics and resulted in a substantial reworking of the judging system, which has continued to undergo adjustments in the wake of subsequent controversies. Gabrielle Tetrault-Farber, *Despite Reforms, Figure Skating Battles Scoring Flaws*, REUTERS (Jan. 12, 2018, 8:26 AM), https://www.reuters.com/article/us-olympics-2018-figs-scoring/despite-reforms-figure-skating-battles-scoring-flaws-idUSKBN1F11L2 [https://perma.cc/298H-MJGP].

comparison reveals that some of the two worlds' shared features play a significant part in the story of why figure-skating judging is regarded with suspicion, then we ought to carefully examine those features' role in the legal system as well. This lesson is especially pertinent in the current environment of deep partisan division.

I. AESTHETIC JUDGING IN SPORT AND LAW

A. *A Brief Overview of Judging in Aesthetic Sports*

Philosophers of sport have distinguished between sports in which the role of officials is primarily to ensure compliance with the rules, with scoring determined in a manner that is otherwise independent of the officials' judgment, and those in which a primary responsibility of the officials is to assess the competitors' performances and thereby to serve as the source of the scores based on which winners and losers are determined.[12] The former, known under one formulation as "purposive" sports,[13] includes football, basketball, hockey, and baseball. In such sports scoring depends on the achievement of specified goals—getting the ball across the goal line or through the hoop, for example—with no consideration for how the goal is achieved so long as it is not done in a prohibited manner.[14] The latter, sometimes called "aesthetic" sports,[15] most prominently includes figure skating and gymnastics, but also includes some equestrian sports as well as more recent additions to the sports landscape such as snowboarding. These sports place considerably less emphasis on the achievement of a specified goal and more on the manner in which the goal is achieved.[16] It is impossible to "win ugly" in an aesthetic sport, for the simple reason that skilled, and often beautiful, performance is the central criterion in determining who wins. And while teams and athletes in purposive sports routinely overcome officials' blown calls, the nature of aesthetic sports and the role of judges within them make it nearly impossible to win in the face of error by an official for the simple reason that it is, fundamentally, the officials who determine who wins and who loses.

These differences have implications for the nature of officials' roles. An official in a purposive sport determines whether some antecedent state of affairs complied with what is often (though not always[17]) a bright-line

12. *See, e.g.*, DAVID BEST, PHILOSOPHY AND HUMAN MOVEMENT 103–05 (1978).

13. *Id.* at 103–04.

14. *Id.* at 104.

15. *Id.*

16. *Id.*

17. As Mark Graber has pointed out, the role of an official in such sports often involves considerably less mechanistic application of rules than meets the eye and considerably more

rule, sometimes literally, in the sense that the job often entails assessing where a ball or a player was relative to some painted line. These sorts of assessments can be, and increasingly are, reviewed for correctness by instant replay. In contrast, the judge assessing a performance in an aesthetic sport draws upon his or her expertise to give significance to an antecedent state of affairs in a much more holistic sense. Such assessments involve the balancing of sometimes incommensurable considerations and are too observer-dependent for replay review to serve as anything more than a replacement for, rather than correction of, the initial determinations. As author Nicholas Dixon puts it, "Even if we can agree on common criteria for aesthetic judgments, two different works of art— or athletic performances—can qualify as aesthetically pleasing by virtue of different subsets of these criteria, making it difficult to make comparative judgments."[18]

Perhaps unsurprisingly, the rules in aesthetic sports typically provide little in the way of specific criteria for judges to draw upon in assessing performances.[19] The factors that make up excellence in a given sport are too diverse and too disjunctive—and the balancing and weighing of them too complex—to be reduced to a formula.[20] Put differently, any attempt to articulate criteria would be incomplete, and a formula would necessarily leave some components of excellence excluded or undervalued—and others elevated—with inevitable and potentially undesirable consequences for the nature of the sport itself. Judges possess what Polanyi terms "subsidiary knowledge"; they "can indicate their clues and formulate their maxims, they know many more things than they can tell, knowing them only in practice, as instrumental particulars, and not explicitly, as objects."[21] These sports thus rely on judges' internalization of what constitutes excellence within the sport. The judge has in mind an ideal performance, or a set of ideals corresponding to each component of a performance, and she scores each actual performance based on her assessment of where it stands in relation to the ideal.[22] One

---

acting in ways that require drawing on an understanding of the context in which a decision takes place. Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 CONST. COMMENT. 293, 302 (1999). "Most games, from little league baseball to professional basketball, would neither be as fun nor as recreational if sports officials understood their responsibilities as enforcing rules rather than as preventing teams from gaining unfair advantages in ways not intended by the laws of the game." *Id.*

18. Nicholas Dixon, *Canadian Figure Skaters, French Judges, and Realism in Sport*, 30 J. PHIL. SPORT 103, 104–05 (2003).

19. *See* Oldfather, *supra* note 2, at 1024–25.

20. *See id.* at 1025–26.

21. POLANYI, PERSONAL KNOWLEDGE, *supra* note 4, at 88.

22. *See* Bernard Suits, *Tricky Triad: Games, Play, and Sport*, 15 J. PHIL. SPORT 1, 6 (1988) ("In performances, ideals are the crux of the matter. Just these ideals generate just these skills.

of the criteria in figure skating, for example, is "[f]low and effortless glide,"[23] which is not a self-executing rule in the sense that someone not familiar with figure skating would be able to apply it in the appropriate way, but rather a standard that can be understood and applied only by someone who has internalized the norms of the sport.

The inherent imprecision of this structure means that no judge will judge in precisely the same way as any other. Each will have traveled a unique path of acculturation into the sport, and each will have developed a perspective shaped by that acculturation and its interaction with her unique personality. Judges will thus vary in terms of how they go about the process of observing competitors, what they look for, and how they prioritize what they see.[24] The result is that each judge will, to some greater or lesser degree, vary from the next in terms of her conception of ideas like "flow and effortless glide," of the nature of the ideal performance more generally, and of how well any given competitor measures up to them.

Significantly, none of this is to suggest that all bets are off and that judging in aesthetic sports is of the unmoored, "subjective" nature by which it is often characterized. The knowledge or sense upon which a judge draws did not spontaneously generate, but rather accreted over a long process of acculturation in the sport as the judge internalized the often unspoken understandings of how the sport is best undertaken. And the selection procedures for becoming a judge in aesthetic sports, which typically require prospective judges to undertake a process of apprentice judging in which they demonstrate that their assessments are sufficiently similar to those of established judges, provide a mechanism for ensuring

---

That is why it is possible to speak of a perfect performance, at least in principle, without fear of contradiction . . . .").

23. The concept is further explained as follows: "Rhythm, strength, clean strokes, and an efficient use of lean create a steady run to the blade and an ease of transfer of weight resulting in seemingly effortless power and acceleration." U.S. Figure Skating Ass'n, *Components with Explanations*, https://www.usfigureskating.org/content/JS08A-Programcompexplan.pdf [https://perma.cc/DR34-2JL9] (stating the various factors in figure-skating judging).

24. *See, e.g.*, Clare MacMahon & Bill Mildenhall, *A Practical Perspective on Decision Making Influences in Sports Officiating*, 7 INT'L J. SPORTS SCI. & COACHING 153, 160 (2012) (discussing officials' use of heuristics).

> Ideally, all stimuli that are relevant for judging a performance are processed. However, because the human capacity to process information is limited, a judge needs to select which stimuli should undergo further processing. At best, judges know how to allocate their attention. For instance, expert judges in gymnastics have been shown to differ from novices in their visual search strategies. By and large, this research shows that expert judges in sports develop effective anticipatory strategies that help to improve their decision making.

Henning Plessner & Thomas Haar, *Sports Performance Judgments from a Social Cognitive Perspective*, 7 PSYCHOL. SPORT & EXERCISE 555, 560 (2006) (citations omitted).

broad consistency in the standards that are applied.[25] In other words, a prospective judge must demonstrate that she has sufficiently internalized the understandings and expectations of the sport and its participants.

Of course, this lack of specificity and of an ability to resort to some external touchstone for purposes of detecting and correcting errors opens judging in aesthetic sports to charges that decisions are the product of improper criteria. The very nature of the system is such that judges cannot point to some external measuring stick by which observers can verify that their decisions were the "correct" ones.[26] The effect is exacerbated by the seeming inconsistencies resulting from the fact that each judge will hold a conception of the ideal that differs in some respects from that of her colleagues.[27] To a considerable degree, these sports ask participants and observers to take the legitimacy of judges' scoring on faith while at the same time making it easy to question that faith.

Let us take a step back to view the process from a slightly different angle. We can regard judges' decisions as being based in three broad categories of factors. The first category of factors (category-one factors) is a set of universally, or near-universally, accepted ideas about what constitutes excellence in the sport. Many of these are so basic as to be assumed obvious, such as the notion that, all else being equal, a figure-skating routine performed without a fall will be superior to one with a fall, or a jump with four rotations is superior to one with three. But certainly there are other areas of broad agreement concerning less-specifiable but nonetheless real aspects of posture or form as well as things we might regard as core components of the etiquette of the sport—certain things that one simply does or does not do and as to which transgressions are generally understood to be nonmeritorious behavior.[28]

The second category (category-two factors) consists of factors arising out of differing "schools of thought" regarding the nature of an ideal performance.[29] Differences of taste, as I have suggested above, are unavoidable. All the factors that combine to give us each personalities that are unique, but which nonetheless bear categorizable similarities to others, likewise do their work in this more limited space.[30] It should come as no surprise, for example, that a sport community in one country will have somewhat different visions of what constitutes the ideal than in

25. Oldfather, *supra* note 2, at 1035–36.

26. *Id.* at 1059.

27. *See id.* at 1028–29.

28. *See id.* at 1026.

29. *See id.* at 1029.

30. "Some judges like a particular style of music or skating over another. Cultural differences often come into play. Eastern European judges often prefer classical performances . . . . Western judges tend to be more receptive to rock or movie music . . . . " Jere Longman, *Olympics: The Scorekeepers; Scrutiny Has Judges Feeling Unsettled*, N.Y. TIMES, Feb. 15, 2002, at D1.

another.[31] Nor should it come as a surprise that judges might exhibit what looks like "nationalistic bias"—that is, that judges conditioned to recognize and reward the particular version of excellences valued in their country will replicate that at the international level (and that their scores will therefore appear to favor their own competitors).[32] These sorts of differences will also manifest themselves on a smaller scale, both in terms of variances in regional preferences as well as differing sets of preferences or "schools of thought" that emerge around preferences for particular positions or ways of moving.[33] They might reflect intractable differences of emphasis that will never resolve into consensus, or they might be manifestations of an evolution or unsettling of some component of the performative ideal that will eventually resolve into a broadly shared understanding. Either way, their existence is inevitable and largely untroubling.

Notably, judges drawing on criteria from either of these categories will not be acting subjectively in any strong sense of the word. That is, they will not be basing their decisions on unconstrained personal preference. They will instead be channeling a shared vision of excellence that they have internalized, and as a result, be applying a standard that is, in an important sense, external to them. So long as they apply this vision consistently and act in good faith to apply the performative ideal as they understand it, they are acting in accordance with their role.

It is the third category (category-three factors) that provides the greatest cause for concern. Broadly speaking, it includes any reason for a judge's decision that does not fall within the first two categories. More narrowly, we can identify certain sorts of factors that might influence a judge's decisions but that are by all accounts improper. Thoroughly subjective judging, in the sense that it is intentionally based on some preference not among those viewed among the sports community as a legitimate component of the performative ideal, would certainly fall into this category. A judge who favored a competitor because of a relationship with that competitor, or because she was bribed, or because she happened

31. One of the theories for the relative decline in the success of American figure skaters in international competition is that the American system was not sufficiently quick to react to changes in the international scoring system, such that American skaters rising through the ranks were rewarded for excellences that are not well-aligned with those valued at the international level. *See* Tara Lipinski, Opinion, *It's Time to Take Risks in the Rink Again*, N.Y. TIMES, Feb. 20, 2018, at A19.

32. *See, e.g.*, Cheryl Litman & Thomas Stratmann, *Judging on Thin Ice: The Effects of Group Membership on Evaluation*, 70 OXFORD ECON. PAPERS 763, 774 (2018); Eric Zitzewitz, *Nationalism in Winter Sports Judging and Its Lessons for Organizational Decision Making*, 15 J. ECON. & MGMT. STRATEGY 67, 68–69 (2006).

33. Zitzewitz, *supra* note 32, at 68–69.

to find something about the competitor's appearance particularly appealing, would be acting within this prohibited realm.

There are also less pernicious ways in which a judge might be influenced by improper factors, and these, too, provide cause for concern. Research has revealed that a variety of factors can influence judges' scoring, including a competitor's reputation[34] or team affiliation;[35] whether a given competitor appeared earlier or later within a sequence;[36] and whether the judge has access to the scores of other judges.[37] These effects need not be, and likely are often not, intentional or even conscious influences. They nonetheless represent a skewing of scoring away from what a pure, good-faith application of the performative ideal calls for.

Aesthetic sports use a variety of mechanisms that can be viewed as attempts to either encourage greater reliance on category-one factors or to decrease reliance on category-three factors. One approach is to change the rules of the sport to more precisely specify the criteria that judges must use, including by placing greater emphasis on those that are objectively verifiable—in effect, to make the practice of judging relatively more quantitative and less qualitative in nature.[38] As an example, figure skating's International Judging System (IJS), put in place following a judging scandal in the 2002 Winter Olympics, places greater weight on verifiable, technical elements of skating relative to its predecessor, which has in turn changed the nature of the skating that is rewarded under that system.[39]

Other mechanisms exert a less direct influence. As noted already, the most basic of these is built into the processes by which one becomes a judge. Aesthetic sports almost universally require prospective judges to spend time in an apprenticeship of sorts, shadowing and scoring alongside accredited judges.[40] Becoming a judge in the first instance requires that the candidate establish that her scores are sufficiently similar to those of accredited judges, thereby supporting the conclusion that she

34. Leanne C. Findlay & Diane M. Ste-Marie, *A Reputation Bias in Figure Skating Judging*, 26 J. SPORT & EXERCISE PSYCHOL. 154, 161 (2004).

35. *See id.* at 164.

36. Iain Greenlees et al., *Order Effects in Sport: Examining the Impact of Order of Information Presentation on Attributions of Ability*, 8 PSYCHOL. SPORT & EXPERTISE 477, 485 (2007).

37. *See, e.g.*, Filip Boen et al., *Open Feedback in Gymnastic Judging Causes Conformity Bias Based on Informational Influencing*, 26 J. SPORTS SCI. 621, 626 (2008); Filip Boen et al., *The Impact of Open Feedback on Conformity Among Judges in Rope Skipping*, 7 PSYCHOL. SPORT & EXERCISE 577, 578 (2006) (describing research supporting the existence of six distinct biases, including a "*conformity* effect").

38. *See* Graham McFee, *Officiating in Aesthetic Sports*, 40 J. PHIL. SPORT 1, 6–7 (2013).

39. *Id.* at 8–9, 11–12.

40. *See, e.g.*, *School of Judging*, USA GYMNASTICS, https://usagym.org/pages/education/pages/judging/ [https://perma.cc/HJ3C-BFXV]; *So You Want to Be a Figure Skating Judge?*, U.S. FIGURE SKATING, http://usfigureskating.org/story?id=89433 [https://perma.cc/U25C-6SK8].

has internalized the norms of the sport to an adequate degree.[41] Moving up through the ranks of judges involves replicating this basic process at each succeeding level.[42] All of this, of course, is necessarily preceded by a period in which the prospective judge must internalize the norms of the sport and thereby formulate a concept of an ideal performance that is sufficiently like that of the existing set of judges.[43]

Sports use other mechanisms, as well, to attempt to channel judges' behavior in appropriate directions. To various degrees and in various combinations, aesthetic sports prescribe the locations from which judges view competitors,[44] the extent to which communication is allowed between judges scoring the same event and between judges and competitors,[45] and whether and to what extent judges provide an explanation of their scoring.[46] Sports also routinely police for conflicts of interest, either by prohibiting judges from concurrently serving as coaches for any competitors in any context or by putting in place more limited restrictions aimed to prevent judges from scoring competitors with whom they have recently had a coaching or other relationship, and by otherwise attempting to minimize conflicts of interest that might be perceived as influencing judges' behavior.[47] At least in some instances, such as the Olympics, widespread attention and media interest provide a further source of discipline.[48]

Of course, even taken as a whole these processes combine to provide only partial constraint. The combination of substantially ineffable and therefore indeterminate standards, together with reliance on mechanisms that only indirectly and imprecisely channel judges' behavior, results in a world in which it is unrealistic to expect complete correspondence between existing judges or between existing and prospective judges. This leaves judging open to the critiques alluded to above. But there is another consequence, which is to allow for shifts in the content of the performative ideal. To the extent that incoming judges hold conceptions of the ideal that differ in consistent ways from the views of existing judges, the content of the ideal will shift with the changing pool of judges. The change will necessarily be gradual and will be inherently resistant to dramatic shifts of the sort that would have been necessary, for example,

41. *See* Oldfather, *supra* note 2, at 1035–36.
42. *See id.* at 1036.
43. *See So You Want to Be a Figure Skating Judge?*, *supra* note 40.
44. Oldfather, *supra* note 2, at 1062–64.
45. *Id.* at 1058.
46. *Id.* at 1057–58.
47. *Id.* at 1054–55.
48. Litman & Stratmann, *supra* note 32, at 766.

to accommodate a skater such as Surya Bonaly.[49] And at least in its particulars, that evolution might be regarded as good or bad from a normative perspective. Its existence, however, seems inevitable, and in a general sense necessary for the continued legitimacy of the process for the simple reason that the continued viability of the sport requires participants to buy into the idea that judges' decisions reflect the conceptions of excellence held generally in the sport.

B. *Aesthetic Judging as a Metaphor for Judging in Law*

All of this, or so it seems, looks quite similar to the situation confronted by judges in the legal system, especially in constitutional cases. To be sure, a considerable portion of judges' work is governed by concepts that are articulable and that have indeed been articulated in rules that provide a clear resolution to a case or some of the issues presented within a case.[50] This is true even in the Supreme Court, in which a substantial portion of decisions are unanimous.[51] In this respect the operation of the legal system resembles a purposive sport, and the familiar judge-as-umpire metaphor is, at the very least, not inapt.

But the easy cases do not represent the portion of the judiciary's work that provokes concern. As one moves from clear text to ambiguity, or from a situation clearly governed by past decisions to cases of first impression, or from situations where all available authority appears to support one result to those in which the authorities conflict, judges must draw upon a widening array of methodological tools.[52] Considerations such as "fit" take on an increasingly large role, and a conclusion that one approach or another better "fits" a given situation is often simply the assertion that, for reasons that are beyond the capacity of the judge to fully articulate, that approach best comports with her intuitive sense of

---

49. *See* Tik Root, *Twenty Years Later, Figure Skating's Most Famous Back Flip Remains Amazing (and Illegal)*, WASH. POST (Feb. 22, 2018, 9:30 AM), https://www.washingtonpost.com/news/sports/wp/2018/02/22/twenty-years-later-figure-skatings-most-famous-backflip-remains-amazing-and-illegal/ [https://perma.cc/8J3U-JRK6].

50. There seems to be general agreement on the proposition that most cases are easy, though estimates vary as to the precise proportion. *See, e.g.*, Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 286–87 (1997).

51. Since the 1940s, the Court has consistently decided roughly forty percent of its cases unanimously. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 249 tbl.3-1 (6th ed. 2015).

52. It would be more accurate to say that here is where they *consciously* draw upon such tools, as contrasted with the easier cases, in which the same forces are at work but are less likely to be consciously deployed. *See* Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1328 (1984) ("[R]ules, in law or anywhere else, do not stand in an independent relationship to a field of action on which they can simply be imposed; rather, rules have a circular or mutually interdependent relationship to the field of action in that they make sense only in reference to the very regularities they are thought to bring about.").

the significant features of a situation and how the law applies to them. Karl Llewellyn's notion of "situation sense," first invoked above, is the most prominent articulation of this idea in the legal world. This knowledge, too, is the product of immersion in the craft of law, of having refined one's sense of pattern recognition and thus internalized a sense of, if not the appropriate resolution to any given situation, at least the appropriate sorts of considerations to be taken into account in resolving it.[53] The net result bears a strong resemblance to the situation in aesthetic sports. There exists, as an analogue to the performative ideal, a conception of law that represents the distillation of all pertinent legal concepts bearing on the situation before the judge.[54] It, too, is diffuse and often indeterminate. It is not the "brooding omnipresence" that Justice Holmes derided,[55] but rather "the felt reconciliation of concrete instances" that he praised as necessary to give content to a general principle.[56]

Of course, no real judge has access to this ideal conception of law, and individual judges vary in their ability and inclination to approximate it, as well as in their views of how the ideal ought to be conceived. Here, too, one can imagine the judge's thought processes being influenced by three categories of factors, which are analogous to those identified above for judges in aesthetic sports. The first category includes generally accepted ideas about what counts as appropriate legal authority and how

53. Dan M. Kahan et al., *"Ideology" or "Situation Sense?" An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 356, 360–62 (2016); *see also* Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 27 (2011) ("Judges and lawyers subscribe to an elaborate network of craft norms. Acquired through professional training and experience, these norms generate a high degree of convergence among judges and lawyers on what counts as appropriate decisionmaking.").

54. In the constitutional context, I take my suggestion to be at least broadly consistent with Mitchell Berman's concept of "principled positivism." *See* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1331 (2018). Berman summarizes the idea as follows:

> Constitutional rules are determined by the interactions of our constitutional principles. In turn, constitutional principles are grounded in social and psychological facts—facts about what persons who make up the legal community say and do and believe. Principles exist in virtue of being "taken up" in certain ways by certain people. I will call this view "principled positivism": legal rules are constituted by the interaction of legal principles, and legal principles are grounded in social facts that make up a complex social practice.

Id.

55. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

56. Oliver Wendell Holmes, *The Use of Law Schools*, *in* SPEECHES 28, 35 (1913).

judges are to use that authority in their reasoning process.[57] It is generally understood that statutory and constitutional text matter and should play a prominent role in analysis to the extent they are sufficiently determinate to do so.[58] Past case law likewise provides a point of departure for reasoning in any current case. There are more diffuse ideas in this category as well, such as that the doing of law entails reasoning forward from premises rather than backward from conclusions, that "[r]easoned elaboration" is a hallmark of legal reasoning, and a host of other ideas associated with rule-of-law values, all of which typically remain in the shadows, unstated but understood.[59] This first category likely includes a broad swath of matters as to which there is greater reflective equilibrium than meets the eye. Our natural tendency to focus on difficult cases, both in law school and legal scholarship, may lead to a discounting of the degree of constraint provided by category-one factors.[60]

The second category of considerations, involving different "schools of thought," is large and the familiar topic of debate. Judges might generally agree that the text of a statute or constitution provides the beginning point of analysis, but there are differing views as to whether it should provide the end point as well, what it might mean for it to provide the end point, and how to make sense of the words that comprise a text.[61]

---

57. As Fish points out, it is tempting to overlook the fact that these factors, too, are rooted in shared assumptions and understandings:

> There is a temptation . . . to assume that . . . cases of perfect agreement are normative and that interpretation and its troubles enter in only in special circumstances. But agreement is not a function of particularly clear and perspicuous rules; it is a function of the fact that interpretive assumptions and procedures are so widely shared in a community that the rule appears to all in the same (interpreted) shape.

Fish, *supra* note 52, at 1327.

58. Notably, this represents the sort of fluidity among the categories identified below. Many commentators regard the primacy of text as something that has moved into this first category only over the past thirty or forty years, and many further regard this as largely attributable to the efforts of Justice Scalia. *See, e.g.*, Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1296 (1990) ("Before Justice Scalia's appointment . . . the Court's approach to statutory interpretation could be described as eclectic, devoid of any unifying theory.").

59. Elizabeth Y. McCuskey, *Submerged Precedent*, 73 NEV. L.J. 515, 547 (2016); *see* Adam Rigoni, *Common-Law Judicial Reasoning and Analogy*, 20 LEGAL THEORY 133, 148 (2014).

60. The suggestion here is similar to the claim that research flowing out of the attitudinal model of judicial behavior overstates the influence of political factors by considering only those cases that are litigated. *See, e.g.*, Kahan et al., *supra* note 53, at 358.

61.

Is a search for the original understanding of the Constitution the only legitimate means of approaching it, or does that misconceive the appropriate nature of the enterprise? What is the proper way to approach stare decisis? Does empathy have a role to play in the judicial process? Does "judicial activism" entail a failure to adhere to the original understanding of the Constitution or a failure to be appropriately deferential to the political branches? These are but a few of the many issues as to which there are distinct positions, held in good faith, that are the product of each judge's balancing and prioritization of the many considerations at work.

As with judging in aesthetic sports, the third category includes any basis for reaching a decision that does not involve good-faith application of considerations from the first two categories. The spirit of the distinction, if not its precise content, was captured well by Justice David Souter in his response to an item on a questionnaire from the Senate Judiciary Committee in connection with his nomination to the First Circuit.[62] In providing his views on judicial activism, Justice Souter noted "the distinction between personal and judicially cognizable values."[63] The most obvious examples of the former include the sort drawn on in what could be characterized as purely political or otherwise "result-oriented" judging. Law, properly applied, will often require a judge to reach a result in a specific case or with respect to a particular issue that is different from the result she would reach if she were free to decide in an unconstrained fashion.[64] Stated generally, any reason that leads a judge to fail to meet that criterion would fall into this category. Other examples beyond a simple preference for a specific result include a desire to favor a specific litigant, a desire to please certain other audiences for a decision

> While nearly all theorists would agree that the text is the starting place for constitutional interpretation, and most even agree that text should be determinative if it clearly prescribes a certain result, there is a wide range of views on such questions as *when* the text is clear and *what* judges ought to do if it is not.

MICHAEL J. GERHARDT, STEPHEN M. GRIFFIN, & THOMAS D. ROWE, JR., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 175 (3d ed. 2007).

62. *See* Linda Greenhouse, *An 'Intellectual Mind': David Hackett Souter*, N.Y. TIMES (July 24, 1990), https://www.nytimes.com/1990/07/24/us/man-in-the-news-an-intellectual-mind-david-hackett-souter.html [https://perma.cc/554C-SBXN].

63. *See id.*

64. *See* Jeffrey Malkan, *Retrospective Justification*, 6 TOURO L. REV. 213, 238 (1990). The distinction is perhaps most evident in the different decision-making processes of courts and legislatures. Judges are expected to provide a justification for their decisions, and that justification is a key component of the legitimacy of a judicial decision. *See* Bruce Fein & Burt Neuborne, *The Case for Independence*, 61 OR. ST. B. BULL. 9, 12 (2001). Legislative votes need not be explained, by reference to principle or otherwise. *Id.*

(such as an appointing authority or a judge's social peers), or having an economic stake in the outcome.

Here, too, the operation of factors in this third category need not be intentionally or even consciously invoked to provide cause for concern. The evidence suggests that judges fall prey to at least many of the same systematic cognitive errors as people more broadly,[65] which can drive their decision-making away from that which might flow from a truly dispassionate analysis. And at least some of the observed correlation between judges' ideology and their decision-making is likely a product not of ideology's influence on good-faith differences concerning the nature of the judicial role, but rather its clouding of thought. As Justice Robert H. Jackson observed in his *Youngstown Sheet & Tube Co. v. Sawyer*[66] opinion,

> The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote . . . . The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences . . . .[67]

The legal system employs a variety of mechanisms to channel judicial decision-making toward factors falling into the first two categories. The norm is for judicial decisions to be accompanied by a written or at least oral justification in which the judge or panel of judges offers appropriately legal reasons.[68] Appellate courts, which are the sole source of precedential authority, and as to which there is thus greater need to ensure that decisions reflect a closer approximation of the ideal conception of law, engage in panel decision-making.[69] This is, in effect, a mechanism for producing decisions that are more likely to approximate that ideal.[70] Various ethical rules require judges to recuse themselves in situations presenting conflicts of interest or otherwise involving factors

65. For an overview, see generally Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 211 (2017).

66. 343 U.S. 579 (1952).

67. *Id.* at 634 (Jackson, J., concurring).

68. For an exploration of the norms and standards governing the issuance of judicial opinions, see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1288–97 (2008).

69. Arthur D. Hellman, *Precedent, Predictability, and Federal Appellate Structure*, 60 U. PITT. L. REV. 1029, 1037, 1044 (1999).

70. *See* Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 97–98 (1986).

that might cause an observer to call their impartiality into question.[71] The adversarial process itself is designed to provide judges with opposing perspectives advanced by parties with the incentive to offer the best version of their case.[72]

Acculturation and selection processes play a role as well, though their operation differs considerably from the arrangements in aesthetic sports. Judges' introduction to the profession occurs in law school, where, with some variation from one law school to the next, everyone studies the same core set of topics.[73] The remainder of law school provides considerable curricular flexibility, which, together with the influence of differing pedagogical tendencies and would-be judges' interaction with differing student cultures among law schools, limits the uniformity of this initial period of professional acculturation.[74] Things become even more diffuse as lawyers begin and progress through their practice careers, which tend toward specialization. Those lawyers who are litigators must of course pitch their arguments to existing judges, and do so by reference to past cases and other pertinent authority, and in that sense must continue to absorb the system's norms and understandings. But the content of the ideal itself, as conveyed through its most visible manifestations, will typically be less salient than in aesthetic sports, which often feature examples of excellence on the Olympic stage every four years. This will be so whether that ideal is imagined to exist in some global, Dworkinian sense or instead limited to more discrete subject areas.

Judicial selection practices in law are likewise less well equipped to foster deep uniformity. The selection process for federal judges involves political actors in the form of both the President and the Senate, and especially in eras of political polarization seems likely to result in the selection of judges whose preferences with respect to the sorts of factors in category two will differ considerably depending on which party controls the selection process. These differences can be exacerbated by associated changes in the nature and scope of the generally accepted factors in category one because, as will be developed below, the boundaries between the categories are not fixed, and once-contested ideas can become bedrock principles and vice versa. These changes, of course, are connected to, if not products of, changes in the larger social and political context in which the judiciary operates.

---

71. "There is perhaps no more basic precept pertaining to the judiciary than the one holding that judges should be sufficiently detached and free from predisposition in their decision-making." JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 4.01, at 4-2 (4th ed. 2007).

72. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–305 (2004) (addressing the significance of party participation).

73. *See* Shawn P. O'Connor, *What to Expect as a First Year Law Student*, U.S. NEWS (May 21, 2012), https://www.usnews.com/education/blogs/law-admissions-lowdown/2012/05/21/what-to-expect-as-a-first-year-law-student [https://perma.cc/7PBS-ZYGU].

74. *Id.*

II. AESTHETIC JUDGING AND THE UNWRITTEN CONSTITUTION

A. *The Unwritten Constitution*

Viewed as a practice, constitutional law in particular bears a strong similarity to aesthetic sports insofar as it is replete with incompletely articulated concepts and understandings. Indeed, the idea that implementation of the Constitution by its very nature requires resort to extra-constitutional considerations is a familiar one. The document cannot legitimate itself,[75] provides no guidance as to how it is to be interpreted,[76] and requires the development of "decision rules" by which its provisions can be applied to specific controversies.[77] All of this, in turn, entails resort to larger ideas including those about the nature of the government created by the Constitution and the role of the judiciary within that government. There is much to constitutional law that is, in effect, unwritten[78]—even if one believes that the meaning of the Constitution was fixed at the time of ratification.[79]

---

75. Frederick Schauer, *Amending the Presuppositions of a Constitution*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 145 (Sanford Levinson ed., 1995).

76. *See, e.g.*, Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 45–46 (1994) ("[T]hat neither the constitutional text, nor any other internal conception of what the Constitution is, can provide, without fatal circularity, *any* guidance in determining what constitutes the Constitution."). But not everyone accepts this proposition. *See, e.g.*, Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 858, 861–62 (2009).

77. *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 113 (2004) ("[T]he competing demands of stability and flexibility might find more effective reconciliation in the development of stare decisis practices that allow decision rules to be modified or abandoned somewhat more readily than operative propositions.").

78. *See, e.g.*, AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, at xi (2012) ("The written Constitution cannot work as intended without something outside of it—America's unwritten Constitution—to fill in its gaps and to stabilize it.").

79. One who believes that the meaning of the Constitution is fixed, and that therefore the only appropriate method for implementing it as law involves some sort of originalism, must still select from among the many varieties of originalism, choose the level of generality at which to apply the concepts embodied in the fixed Constitution, and otherwise make decisions about application that are necessarily driven by arguments and considerations external to the document. *See* Kahan, *supra* note 8, at 17. One of the weaknesses in the originalist position is that it too casually equates the Constitution with ordinary law, thereby assuming that the Constitution should be treated in the same way a statute should be treated. But while there is a clear rule of recognition for statutes—more or less that they were enacted in accordance with the Constitution—there is not similarly a clear rule of recognition for the Constitution, and indeed at the time of ratification the notion that a constitution should be treated analogously to a statute was largely unknown. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 7 (2018) (noting that at its inception, the Constitution was not understood as a fundamentally written text or as "a conventional species of law—defined by its legal content and

The components of this unwritten constitution range from the concrete to the abstract. The most concrete manifestations appear in the context of the application of doctrinal tests to specific factual situations. The concepts lying behind some of the Constitution's open-textured provisions—things like equal protection, cruel and unusual punishment, the prohibition against unreasonable searches and seizures, and so on—cannot be completely articulated. Giving meaning to such general propositions requires, in Llewellyn's memorable phrasing, "the heaping up of concrete instances."[80] A court in applying the concepts to a specific situation relies as much on this accumulated, not-fully articulable "situation sense" in reaching its decisions as it does on the traditional tools of legal analysis. Justice Stewart's "I know it when I see it" standard, derided though it may be, embodies an important truth about the nature of judging in constitutional cases and otherwise.[81]

Slightly more general in nature are what Professor Mitchell Berman calls decision rules.[82] The underlying insight is that there is a distinction between determining the meaning of a constitutional provision and determining whether that provision is satisfied in a specific situation, the latter of which entails the development of a doctrinal framework for the provision's implementation.[83] There is, for example, the meaning of the Equal Protection Clause and also the tiered scrutiny framework that the Court has developed for its implementation.[84] To discern the clause's meaning, such as by concluding that the clause contemplates some version of formal or substantive equality, does not do all the work required to determine whether its requirements are satisfied in a given instance. Decision rules, or even what we might consider a nonbinding decision standard such as the *United States v. Carolene Products Co.*[85]

---

underlying legal purpose, susceptible to orthodox legal reasoning, interpretation, and adjudication, and thus the province of legal professionals to decode"). This is not to deny the possibility that whatever it is that provides contemporary legitimacy to the Constitution could also entail regarding originalism as the only legitimate means of interpreting the document, but rather to suggest that such an approach is not inevitable, nor does it appear to be an accurate description of the Constitution or constitutional practice as currently legitimated.

80. KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 12 (1930). Justice Holmes set forth a similar idea several decades before, observing that

> to make a general principle worth anything you must give it a body; you must show in what way and how far it would be applied actually in an actual system; you must show how it has gradually emerged as the felt reconciliation of concrete instances no one of which established it in terms.

Holmes, *supra* note 56, at 34–35.

81. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

82. *See* Berman, *supra* note 77.

83. *Id.* at 9.

84. *See id.* at 32–33.

85. 304 U.S. 144 (1938).

Footnote Four framework,[86] can easily be regarded as part of the unwritten constitution.

Finally, there are the more abstract principles and ideas that guide the formulation of the more specific doctrinal components. There is the basic question of what counts as a valid argument,[87] and it is fashionable for participants in constitutional debates to speak in terms of "arguments moving from off the wall to on the wall"[88] as the terms of the broader political and sociological contexts from which these arguments arise shift. This happens not in accordance with some clearly defined rule of recognition, but rather via subtle change introduced through the various mechanisms of acculturation that produce a substantial part of a judge's outlook. Shifts in these broader, less tangible aspects of the unwritten constitution in turn affect the content of its less abstract components (such as decision rules) as well as the accepted understanding of the written portions of the Constitution. This set of ideas includes as well the judiciary's conception of its own role within the system of government, including its view of its proper role relative to the political branches and its sense of its own institutional capital. Such considerations manifest themselves at a retail level in the contours of the various justiciability doctrines and the Court's exercise of the passive virtues[89] as well as at a more wholesale level through the terms of the Court's engagement with the other branches. *Marbury v. Madison*[90] was the work of a Court that

86. *See id.* at 152 n.4.

87. *See* Schauer, *supra* note 10, at 1960.

88. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/ [https://perma.cc/Q4SL-T8E6] ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them. The history of American constitutional development, in large part, has been the history of formerly crazy arguments moving from off the wall to on the wall, and then being adopted by courts.").

89. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 111 (1962).

> In a narrow sense, the passive virtues are techniques of adjudication (or rather, of non-adjudication). More broadly understood, they are the forms of practical wisdom, the modalities of prudence, whose mastery and proper exercise are essential to the external aspect of the Court's work—its effort to ameliorate the Lincolnian tension by fashioning a continually improving accommodation between the claims of principle on the one hand, and the resistant pressures of existing beliefs and institutions on the other.

Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1584 (1985).

90. 5 U.S. 137 (1803).

viewed itself as having a substantial role in checking the political branches but that was unsure of its institutional capital. *Citizens United v. Federal Election Commission*[91] was the work of a Court with high regard for its own power in both senses.

At any moment the sum of all of these unwritten, and to some extent ultimately inarticulable, factors produces in any given Justice—and through a process of simple arithmetic in the Court itself—if not a strong sense that there is a specific "right" answer to a given constitutional question, at least a sense that the range of possible acceptable answers is constrained. To be sure, that range may be broad, occasionally to such an extent as to appear to provide little real constraint. But the forces remain, even (and perhaps especially) in cases where the traditional material of legal reasoning cannot do all the work.

B. *Aesthetic Judging and Constitutional Change*

These unwritten constitutional concepts can potentially fall into any of the three categories of grounds for decision outlined above. Generally accepted, category-one factors include basic suppositions about the nature of the Constitution (such as that the text matters in more than an aspirational sense) as well as understandings of notions like separation of powers, the democratic process, and the nature of adjudication. Concepts with a more evident textual hook fall into this category as well. For example, *Matthews v. Eldridge*[92] states an accepted notion of the core of what procedural due process requires and provides a framework for application of that core to specific situations.[93] It is necessarily imprecise in doing so, however, simply because it is impossible even to identify in advance all the various settings in which the concepts must be applied, much less prescribe the process required in each of them. Ultimately, then, "due process" serves to invoke an idea that is akin to "flow and effortless glide," and its proper application requires immersion in the practice, in both senses, of law and the accompanying exposure to the factors that play into the determination of how much process is due in any given situation or situation-type. The scope and prevalence of factors falling into this first category are often overlooked, but the evidence suggests that their effect is considerably greater than meets the eye.[94] Roughly 40% of the Supreme Court's decisions in recent decades have been unanimous.[95] Of course, considering only the cases the Court elects

91. 558 U.S. 310 (2010).
92. 424 U.S. 319 (1976).
93. *Id.* at 335, 348.
94. FALLON, *supra* note 10, at 120–23.
95. *See* EPSTEIN ET AL., *supra* note 51.

to review certainly understates the extent to which the Justices agree.[96] Further, it seems reasonable to believe that much of that agreement relates to unwritten aspects of the constitutional order.

The second category includes the sorts of issues and questions that get most of the attention in constitutional law classrooms and scholarship. The participants in familiar debates over originalism and its alternatives,[97] the proper approaches to formulating and implementing ideas about federalism and separation of powers,[98] how to identify and develop unenumerated rights,[99] and the like bring with them good-faith differences in perspective, which function in ways that are parallel to differing schools of thought about the components and nature of an ideal figure-skating performance. These differing perspectives can, at least in general, be regarded as flowing from differences on more abstract matters about the nature and function of the Constitution, perhaps especially with respect to the appropriate nature and scope of the judicial role. Without question many of these differences are correlated with ideology, though the causation may lie elsewhere.[100] In addition, some of what drives preferences in this category may be the product of unstated assumptions about how worried we ought to be about factors in the third category influencing the Justices' behavior. One version of the argument for originalism, after all, is the claim that any approach that does not tether the Justices to a search for original public meaning leaves them free to insert their own, nonlegal preferences into their decision-making.[101] It is, in other words, an argument for a specific category-two approach based in concerns about the relative inability of other approaches to prevent resort to category-three factors.[102]

---

96. *See, e.g.*, Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 467–68 (2018) (suggesting that the Supreme Court will not be inclined to grant certiorari presenting issues as to which there is consensus among ideologically diverse courts of appeals).

97. *See generally* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES (4th ed. 2013) (surveying the judicial, political, and academic debates within the field of American constitutional theory).

98. *See, e.g.*, JOHN H. GARVEY ET AL., MODERN CONSTITUTIONAL THEORY: A READER, at iii (5th ed. 2004).

99. See Michael H. v. Gerald D., 491 U.S. 110 (1989), in which Justices Scalia and Brennan debated the level of generality at which to consult history in determining whether an asserted liberty interest is one that has been traditionally protected such that it can be deemed "fundamental." *See id.* at 127 n.6 (opinion of Scalia, J.); *id.* at 140–41 (Brennan, J., dissenting).

100. *See* Kahan et al., *supra* note 53, at 356–57.

101. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

102. Justice Scalia can be regarded as having made another such point in his essay advocating in favor of rule-based lawmaking by the Supreme Court:

Indeed, concerns about the influence of category-three factors are prevalent in debates about the functioning of the Supreme Court and of constitutional law more generally. The Court is often characterized as a political court,[103] the Justices are commonly described as being either "liberal" or "conservative,"[104] and many regard at least some of its higher profile decisions as the product of an only thinly veiled result orientation.[105] At the same time, the Justices themselves routinely employ rhetoric in their opinions that is consistent with the conclusion that they regard their colleagues as falling prey to the influence of such improper considerations.[106] Those influences, to the extent they exist, are certainly the product of unwritten factors, though, due to their acknowledged illegitimacy, not the unwritten Constitution.

Taking all of this as a whole provides a way of thinking about how the Court goes about its work. Ideally, in deciding cases, the Justices will draw upon factors in categories one and two in varying combinations depending on the case. Often the application of these factors will be clear, resulting in a unanimous or near-unanimous decision.[107] Often the factors will conflict. Sometimes, undoubtedly, the Justices will be making law, in the sense that none of the text of the Constitution, past case law, or settled norms provides any sort of constrained framework for analysis.[108]

> [W]e should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgement that we have passed the point where "law," properly speaking, has any further application.

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

103. Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 39 (2005).

104. Perhaps the strongest statement of the position comes from the architects of the attitudinal model of judicial behavior:

> This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.

JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

105. *Id.*

106. Perhaps the most prominent recent example is Chief Justice Roberts's dissent in *Obergefell v. Hodges*: "The majority's decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court's precedent." Obergefell v. Hodges, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting).

107. *See, e.g.*, Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004); PPL Mont., LLC v. Montana, 565 U.S. 576 (2012).

108. *Obergefell*, 135 S. Ct. at 2611–12 (Roberts, C.J., dissenting).

But often they can be regarded as, in a real sense, "finding" it.[109] This can be true in the sense that a case calls upon the Court to implement one of the open-textured provisions of the Constitution, involving a legal concept that can be stated only in generalities and can be fully appreciated only through its particular applications.[110] The Court in such a situation is not so much engaged in a quest to make law as to discover, apply, and refine as necessary the underlying concept. It can be true in a broader sense as well. A Justice confronted with a question of the sort that is not frequently contested might nonetheless perceive herself as (and perhaps be) engaged in a similar process. She, too, might be drawing upon a set of concepts that she has internalized and that she regards as leading her to a correct answer.[111] She will be acting in a manner akin to a judge in an aesthetic sport. And we might imagine that in many cases enough of her colleagues will find themselves guided by those same concepts in such a way and to such a degree that we can characterize the Court itself as acting in such a manner.

Viewing the Supreme Court and the nature of its work through this lens provides a useful perspective on change in constitutional law. As with aesthetic sports, change can come from outside, here in the form of constitutional amendment. But change is likewise inevitable within the practice itself and via mechanisms that the aesthetic-judge metaphor highlights. The members of the Court change over time, and with changes in personnel comes change in the Court's collective conception of the proper content and mechanisms of constitutional law.[112] Consider for example the evolution in understanding of what the Equal Protection Clause requires. For the iteration of the Court that was responsible for interpreting and implementing the clause in its early years, the classification of people based on race and sex was largely unremarkable in ways and to an extent that are unthinkable today.[113] But society's understanding of equality changed over time, and the legal profession's understanding of equality and of the sorts of factors that are pertinent to answering questions relating to equal treatment as a legal concept likewise changed as the composition of the Court was refreshed over

109. For a recent favorable treatment of the notion that it is entirely plausible to regard judges as "finding" law, see Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019).

110. *See* Holmes, *supra* note 56, at 34–35.

111. For a compelling discussion drawing primarily on Llewellyn's work, see ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 209–25 (1993).

112. FALLON, *supra* note 10, at 114–20.

113. Consider the apparent ease with which the Court decided *Plessy v. Ferguson*. *See* Plessy v. Ferguson, 163 U.S. 537, 550–51 (1896) ("[T]he case reduces itself to the question whether the statute of Louisiana is a reasonable regulation . . . . [W]e cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable . . . ."), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

time.[114] Such changes occur on a smaller scale as well—such as the Rehnquist Court's incremental adjustments in favor of federalism—via a mechanism that Professors Jack Balkin and Sanford Levinson called "partisan entrenchment."[115] New Justices generally "reflect the vector sum of political forces at the time of their confirmation," and as social and political tides shift so will the Court's jurisprudence and, in turn, the established understandings of constitutional practice.[116] Over time the contents of categories one and two, and perhaps even occasionally three, shift as ideas and understandings go in and out of fashion.[117] As with aesthetic sports, these sorts of shifts are necessary to maintain the perceived legitimacy of the Court and its decisions because a Court that falls too far out of step with society or the political branches runs the risk of being marginalized or even ignored.[118]

These shifts are aided and moderated by other, more procedural aspects of the unwritten constitution. The doctrine of stare decisis serves to provisionally fix our understanding of constitutional meaning in transitional areas.[119] The doctrine comes into play only in situations where a later court believes that a past decision was likely wrong, but not

---

114. The Court that decided *Loving v. Virginia*, 388 U.S. 1 (1967), manifests an entirely different attitude from that of the *Plessy* Court, noting that statutes making racial distinctions must meet a "very heavy burden of justification," *id.* at 9, and concluding that Virginia's miscegenation statutes were based in nothing but "invidious racial discrimination," *id.* at 11.

115. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

116. *See id.* at 1067–71.

117. As Richard Fallon puts it:

> [L]aw, in the relevant sense, resides in norms of judicial practice that structure and constrain but do not always uniquely determine legal judgment. Such norms allow room for reasonable disagreement but mark some positions as legally untenable or unreasonable. What complicates matters is that even the norms that exclude some conclusions as legally unreasonable can themselves have vague, disputable fringes. In other words, we have, and need to understand the possibility of, debates about whether some judicial rulings are beyond the pale of the legally tenable.

FALLON, *supra* note 10, at 7.

118. As Amnon Reichman has observed, law as a practice does not exist in isolation. *See* Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619, 1643, 1651–54 (2007). Rather, it affects and is affected by a host of adjacent practices, and at least sometimes the pull exerted by those practices will be sufficiently strong to lead the Court to depart from strict adherence to the norms of the legal profession. *See id.* at 1651–53, 1662–63. Given the interrelations among the various practices, it is unsurprising to see change over time, and changes in what counts as a legal argument can and will be influenced by forces located primarily outside of the legal system as we normally conceive of it.

119. Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1, 27–28 (2014).

wrong enough to merit overturning.[120] A past decision regarded as clearly correct does not need a thumb on the scale for a later court to adhere to it. Such a later court would have reached the same outcome even without the past decision and as such stare decisis will have done no work.[121] It thus serves as something of a shuttling mechanism between the first two categories of reasons, providing a steadying influence as ideas and interpretations come into and out of fashion.[122] We might similarly view aspects of the political question doctrine as part of a related judicial effort to police the proper bounds of decision.[123] Efforts to apply the "lack of judicially discoverable and manageable standards" and "initial policy determination of a kind clearly for nonjudicial discretion"[124] prongs of the doctrine can be regarded as attempts to delineate the boundary between categories two and three.

The final sense in which the metaphor of the aesthetic judge is useful is in serving as a cautionary tale. Judging, on this view, necessarily involves the invocation of a host of unstated or partially stated norms, practices, and understandings. Because and to the extent that these norms, practices, and understanding are generally shared among the community of judges, they serve as a critical source of constraint and regularity. Certain approaches and certain results will be instantly recognizable as inappropriate among those who share these understandings. But if they are not shared, the community of judges will not converge on the same set of answers. If the scope of disagreement is too large, and if the terms in which the practice is contested include the allegation that some subset of judges regularly draws on illegitimate, category-three factors, then the judicial system potentially faces its own version of a figure-skating-judging scandal. As Illinois Solicitor General Carolyn Shapiro has forcefully argued, "there is a difference between considering judicial decisions wrong and considering them illegitimate."[125] Such professed

120. BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 153 (5th ed. 2009) ("[P]recedent is only of crucial importance when the prior case was *wrongly decided* (or at least could have been decided in a different way with equal legitimacy).").

121. *Id.*

122. Oldfather, *supra* note 119, at 15–16, 18.

123. *See* J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 101 (1998).

124. Baker v. Carr, 369 U.S. 186, 217 (1962).

125. Carolyn Shapiro, Remarks at the Law Day Lunch Held by the McLean County (Ill.) Bar Association (May 2, 2018) (transcript on file with author).

> If we deny that judges and justices exercise discretion and judgment, if we claim that there are logically deducible and objectively correct answers to even the most difficult or controversial legal questions, if we believe, or pretend to believe, that a nominees' past thoughts and statements and actions are simply irrelevant to their job as judge because all they are going to do is act as a legal

certitude about the rightness of one's own conclusions and the wrongness of those who disagree, particularly when it appears in a judicial opinion, can deepen the degree of conflict not only within the Court, but also among the audience for its decisions.[126]

The root problem in figure skating may have been as much a problem of perception as of the underlying judging.[127] The relevant public came to perceive judging in skating as driven by factors other than those by which it should have been driven.[128] Such a decay in perceived legitimacy need not involve judges relying on category-three factors. It might, instead, be the product of a perception that arises out of an apparent prevalence of category-two factors relative to category-one factors. If judging seems primarily to be a product of which school of thought one adheres to, then what follows is a breakdown of the performative ideal. There is not one ideal, subject to marginal disagreement as to some of its aspects. There are instead multiple ideals, subject to multiple allegiances. Such a loss of consensus in a sport can lead to a situation in which one of the rival schools of thought breaks off to form its own version of the sport.

What the metaphor suggests, then, is the importance of the cultivation and nourishment of shared norms in the world of law. This is especially challenging in a world of great social change and deep division. But it can take place in a number of ways, including civic and legal education, individual judicial behavior,[129] and structural design. The legitimacy of

---

> computer doing legal math—then what does that mean when judges and justices disagree, as in fact they often do? Logically, it must mean that some of them are not just wrong—but lawless.

Id.; *see also* Carolyn Shapiro, *The Language of Neutrality in Supreme Court Confirmation Hearings*, 122 DICK. L. REV. 585, 601–02, 637 (2018) (explaining that judges must exercise discretion and judgment because, in many cases, "there is no clear ball or strike to call" and that emphasizing neutrality and objectivity "could harm the Court's legitimacy"); Carolyn Shapiro, *What Members of Congress Say About the Supreme Court and Why It Matters*, 93 CHI.-KENT L. REV. 453, 458–59 (2018) (arguing that politically charged rhetoric undermines judicial legitimacy when the rhetoric not only disagrees with a court's decision but also states that the court's decision-making process was lawless or illegitimate).

126. *See* Kahan, *supra* note 8, at 60 ("Studies of motivated cognition and related dynamics show that pronouncements of *certitude* deepen group-based conflict.").

127. *See* Eric Zitzewitz, *Does Transparency Reduce Favoritism and Corruption? Evidence from the Reform of Figure Skating Judging*, 15 J. SPORTS ECON. 3, 25 (2014) (explaining that changes in the judging of figure skating may have been "to reduce the perception of corruption rather than actual corruption").

128. *See* Elena V. Stepanova et al., *They Saw a Triple Lutz: Bias and Its Perception in American and Russian Newspaper Coverage of the 2002 Olympic Figure Skating Scandal*, 39 J. APPLIED SOC. PSYCHOL. 1763, 1764 (2009) (mentioning the allegations of vote trading and a "perception of thievery" during the 2002 figure-skating scandal).

129. For example, Dan Kahan suggests that the Justices should alter their opinion-writing style to minimize the corrosive effects of motivated and identity-protective cognition. Kahan, *supra* note 8, at 28, 30.

the Constitution and the Court depends on the acceptance of, or at least acquiescence in, the legitimacy of the entire constitutional regime, including the judiciary's role within it.[130] It is, as the Civil War attests, not such an easy thing for a subset of the population to break off and form its own league if a portion of the population denies that legitimacy.

CONCLUSION

Among other things, viewing the role of judges in law by comparison to their counterparts in aesthetic sports highlights the critical role that socialization and acculturation play in the process of judging, as well as how the connection between acculturation and decision-making supports the perceived legitimacy of the entire enterprise. In an ideal world, or at least one version of an ideal world, there would be complete uniformity. Judges in aesthetic sports would share an understanding of the performative ideal, and there would be complete consistency in rankings from one judge to the next. Likewise, judges in the legal world would share an understanding of the content of law, in both its written and unwritten manifestations, as well as its application. Change would occur seamlessly. We do not live in that world.

Both systems strive for an approximation of the ideal, while at the same time implicitly recognizing that differences exist and that change will occur and must be accommodated. Aesthetic sports, perhaps due to their narrower domain, are able to achieve this more completely, in large part by conditioning entry into the judicial ranks on a demonstration of sufficient conformity with existing, shared understandings. Law provides fewer such assurances. The acculturation process is more diffuse, and the selection mechanisms are too susceptible to influence by partisans. Extreme political polarization seems certain to undercut the scope of shared understandings, and the growing influence of ideologically inflected groups within law schools and the profession may serve both to perpetuate and underscore the notion that there are "teams" not only in the political sense, but also the legal one, with a corresponding increase in the scope of category-two bases of decision-making and decrease in category-one.[131]

---

130. FALLON, *supra* note 10, at 9 ("We accept the Court's authority because we accept, and most of us feel obliged to support, the Constitution and the American legal system as a whole."). As Tara Grove has argued, politically divisive moments like the present one can present two sorts of challenges to the Court's legitimacy, one arising out of the conflict between its sociological and legal legitimacy and the other arising out of pressures arising out of dysfunction in the political branches. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2272 (2019) (reviewing FALLON, *supra* note 10).

131. In an important recent book, Neal Devins and Lawrence Baum persuasively argue "that the polarization of the parties has spilled over to Supreme Court appointments" and "that a less

In the midst of all this a metaphor may seem trivial. I would suggest the contrary—that a metaphor can function as a sort of meta-decision rule, an encapsulation of all the various factors that play a part in decision-making, a device for highlighting certain features of a situation and why they matter, and a useful shorthand in thinking about how we might assess the systems and processes of adjudication and constitutional change. It can also serve as a cautionary tale. Just as scandals in figure-skating judging led to outside intervention in the form of rule changes, so too might a Court regarded as departing too far from shared norms invite external intervention, whether in the form of court-packing or otherwise.

noticed phenomenon—the orientation of Supreme Court Justices toward elite networks whose approval is important to them—has also helped to create party-line divisions on the Court." NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT, at xvi (2019).