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The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship

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THE USE AND ABUSE OF HUMANISTIC THEORY IN LAW: REEXAMINING THE ASSUMPTIONS OF INTERDISCIPLINARY LEGAL SCHOLARSHIP

CHARLES W. COLLIER*

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Our age is, in especial degree, the age of criticism, and to criticism everything must submit.

—Immanuel Kant

INTRODUCTION: LAW REFRACTED THROUGH THE PRISM OF LEGAL SCHOLARSHIP

In recent years legal scholarship has undergone changes so fundamental as to suggest the need for a reassessment of law as an academic discipline, as a subject of study, and as an intellectual institution. These changes have been wrought in part by a generation of new legal scholars with professional academic training in the humanities and social sciences, and in part by others who undoubtedly would have entered such disciplines in more auspicious times. Where legal scholars once confined themselves to modest contributions on such topics as *The Law of Ponds* and *The Meaning of Fire in an Insurance Policy*, this new generation of legal academicians is weighing in with elaborate, highly nuanced, and intensely ambitious treatises—published in the leading law reviews—on such heady subjects as *The Metaphysics of American Law* and *The Politics of Reason*. Even relatively established scholars, who once were content to tinker with refinements in judicial doctrine, are today viewing judicial decisionmaking—particularly that of the U.S. Supreme Court—from a new, more dramatic, and more portentous perspective. They are "set[ting] before us a constitutional epic of tragic conflict, along with a rich and evocative language with which to comprehend that epic." And
they are setting before us a more serious and sustained scholarly focus on judicial opinions than has ever been seen before.

As I see it, these developments present a dual aspect: First, contemporary legal scholars are moving away from traditional, doctrinal scholarship and its methodological assumptions. The best explanation for this departure and evasion is to be found in the theory of intellectual influence and revisionism. At the same time, they are moving toward other academic disciplines and the forms of external (non-legal) scholarly authority those disciplines seem to offer.

Legal study, teaching, and scholarship have been immensely enriched by the outpouring of interdisciplinary legal work in the 1980s. In many ways, this work represents, in law, the intellectual development of our time. Interdisciplinary legal work has now attained a level of maturity and development comparable to that of other established subfields of law. It is only to be expected that a period of reappraisal, reassessment, and selective criticisms of its overextensions will follow this evident popular success.

When a field of study and scholarship has become sufficiently established and institutionalized to withstand constructive criticism, the highest compliment one can pay it is to subject it to the most rigorous applicable standards of intellectual validity. At this relatively advanced stage in the interdisciplinary legal movement, one may be permitted the assumption that its contributions can be assessed, not only in terms of their enrichment of legal discourse, but also according to the criteria and professional canons of the non-legal disciplines from which concepts and methodologies have been "borrowed." It is on this basis that this Article proceeds. Without in any way deemphasizing or discounting the vast enrichment of law through its interdisciplinary associations, I take seriously the methodologies, working assumptions, and professional canons that those other non-legal disciplines have developed and deployed over lengthy periods of their history. Measured against these criteria, I find that the legal "use" of those other disciplines is in many ways, and in many instances, an "abuse" of them. This abuse has two distinct

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8. Cf. Francis A. Allen, The Dolphin and the Peasant: Ill-Tempered, but Brief, Comments on Legal Scholarship, in Property Law and Legal Education: Essays in Honor of John E. Cribbet 183, 189 (Peter Hay & Michael Hoeflich eds., 1988) ("[P]erhaps the most striking aspect of the current fascination with high theory is the absence of what might be called a redeeming skepticism, a failure to be sufficiently concerned with the characteristic limitations of theoretical systems."); Mark Tushnet, Legal Scholarship in the United States: An Overview, 50 Mod. L. Rev. 804, 812 (1987) (The "search by leading legal scholars in the United States for foundations of the law in
sources or causes: the particular characteristics of the non-legal disciplines involved; and the more notable peculiarities of law as an intellectual discipline, as a subject of scholarship, and as the social institution called "adjudication."

As legal theorists have become increasingly trained in and familiar with the methodologies of other disciplines, they have begun to acquire "the ways of the scholar." It is only natural that they will seek for law the forms of intellectual legitimacy and scholarly authority that those other disciplines possess and that the legal discipline and profession so conspicuously lack. It is here, however, that they must necessarily be disappointed. As I shall show, legal scholars today are, in effect, seeking in philosophy and humanistic theory generally something that law cannot offer and cannot even tolerate: "intellectual authority," an external, non-legal source of scholarly legitimacy.

This Article examines these developments, and it does so from a particular angle: I focus on the use of humanistic theory—especially philosophical theory, but also literary, cultural, and social theory—in contemporary legal scholarship, with special reference to the intellectual and institutional roles of the judiciary in our legal scheme. My thesis is that because of the radically different structures of authority in law and the humanities, the hope that humanistic theory will be able to provide a source of intellectual authority for law is largely a vain one.

Part I of this Article begins the discussion with a brief and selective contrast between contemporary legal scholarship and that of the late nineteenth century. Part II develops an account of humanistic methodology that emphasizes the "intellectual authority" of original texts and primary sources, but also explains the emergence of a distinctive humanistic skepticism of non-intellectual forms of authority. I then analyze the very different relationship of the judiciary to the forms of "institutional authority" that sustain its pronouncements. Part III documents my conclusions about the primarily institutional role of the judiciary through an analysis of the main factors that affect judicial selection, appointment, and confirmation. I then extend my analysis to the work of the judiciary

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other disciplines... is usually a sort of scavenging, motivated by the lawyer's effort to find something in the discipline that will help solve a predefined problem, rather than by the discipline's own definition of its problems and goals.

9. See Richard A. Posner, Law and Literature: A Relation Reargued, 72 VA. L. REV. 1351, 1351 (1986) ("After a century as an autonomous discipline, academic law in America is busily ransacking the social sciences and the humanities for insights and approaches with which to enrich our understanding of the legal system."); Joan C. Williams, Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. REV. 429, 430 (1987) (Contemporary proponents of critical legal studies are "attempting... to reinterpret law and legal education in the context of the most prestigious and authoritative intellectual currents available.").
and demonstrate the very limited intellectual authority of judicial decisionmaking. This discussion bears importantly on my analysis of legal scholarship because an improper conception of the judicial role often underlies legal theorizing. Finally, Part IV considers some prominent examples of contemporary legal scholarship in light of this Article’s analysis.

I. FROM THE LAW OF PONDS TO NOMOS AND NARRATIVE

Each generation gets the past it deserves.

—Grant Gilmore

A. The “Judicious Scholarship” of the Late Nineteenth Century

In this Section I undertake a brief and selective survey of legal scholarship in the late nineteenth century. One purpose of this is to provide a context for viewing contemporary legal scholarship. Use of a relatively long-term perspective heightens the contrast between earlier periods and our own, and allows the changes in legal scholarship to emerge most dramatically. The late nineteenth century is a particularly significant period for this purpose, because it was then that the modern, student-edited law reviews began, and it is also the period when Langdellian formalism, or conceptualism, began to emerge as a paradigm for legal scholarship. A secondary purpose is to provide a view of law as an intellectual discipline in comparison with other disciplines. Just as Dilthey sought the “structure of the historical world” in the human sciences, I seek the nature of law through the conditions of legal scholarship.

To peruse a nineteenth-century law review is to page through a world that no longer exists and to re-acquaint oneself with a vision of legal scholarship that has long since vanished. Legal scholarship has traditionally been conceived as a modest, unambitious enterprise. The doctrinal scholarship of the late nineteenth century is much like the work of a good judge: It is “judicious,” in the sense of being balanced, reasonable, moderate, temperate, and pragmatic; it is largely descriptive, respectful of previous authority, and faithful to existing law; and it recommends only modest improvements in the law—“the proposal of some well-crafted incremental change in the law which is the hallmark of the excellent judge.”

The proposition that legal scholarship has undergone fundamental changes in the past century or so may strike one initially as an almost unfairly "easy" thesis. But it is by no means a thesis upon which there is universal agreement. Before proceeding to my main theme, therefore, it may be useful to dispose of the counter-thesis that legal scholarship has not changed appreciably. The introduction to a recent symposium maintains, under the title Plus Ça Change . . . ?, that on the subject of legal scholarship, "there is little new under the sun."\textsuperscript{13}

I think this thesis is wrong—demonstrably wrong. Perhaps the simplest and most dramatic demonstration to the contrary is to juxtapose two issues of the \textit{Yale Law Journal}, separated by almost 100 years. Here are the contents of one of the issues:

\textit{Injunction in the Federal Courts}
\textit{When May a Railroad Company Make Guaranties?}
\textit{The Law of Icy Sidewalks in New York State}
\textit{Some Questions Relating to the Measure of Damages in Street Opening Proceedings in New York City}

And here are the contents of the other issue:

\textit{Unger's Philosophy: A Critical Legal Study}
\textit{Critical Legal Studies and a Liberal Critic}
\textit{Don't Know Much About the Middle Ages: Posner on Law and Literature}
\textit{The Structure of Blackstone's Commentaries}

It is not much of a challenge to locate these two issues historically (hint: The second issue also contains a student note entitled \textit{Figuring the Law: Holism and Tropological Inference in Legal Interpretation}). The discerning reader will have surmised that the first issue dates from the late nineteenth century,\textsuperscript{14} whereas the second is a product of the 1980s.\textsuperscript{15} One remarks immediately on obvious differences in titles and subject matter; these imply profound differences in what I shall term "intellectual ambitiousness" and in the authors' relatively theoretical or conceptual approaches. One remarks also that the 1980s authors are mostly not

\textsuperscript{14} 6 \textit{Yale L.J.} 245 (1897).
\textsuperscript{15} 97 \textit{Yale L.J.} 665 (1988).
even law professors: One author is a tutor in philosophy, another is a professor of religion. These two authors discuss the "philosophy" of a scholar who, though nominally a law professor, has also been described as a "prophet, if not [a] messiah" (at least of the Critical Legal Studies movement). A third author is a professor of English literature, who criticizes the writings of a federal judge—the only one involved who has a full-time legal occupation. The federal judge, though, is best known not for his judging, but for his work in law and economics; in this case, however, it is the judge's more recent delvings into law and literature that are at issue. These divergent intellectual pedigrees and persuasions illustrate a third recent trend—one toward the use of non-legal sources and materials in legal scholarship.

As for the 1897 Yale Law Journal, from today's perspective one is struck immediately by the lack of intellectual ambitiousness, the lack of conceptual or theoretical approaches, and the lack of non-legal sources and materials. The one moderately ambitious article in scope and potential generality, Injunction in the Federal Courts, is barely seven pages long. The Law of Icy Sidewalks in New York State is typical. The purpose of the article is "to recite briefly the present condition of the law of the Empire State bearing on this interesting question": whether a person injured as a result of falling on an icy sidewalk can recover from the city where the accident occurred. It has commonly been assumed, the author says, that our cities are some sort of "accident insurance companies to protect everyone against injuries occasioned by such accidents. The decisions of our courts have, however, very properly held otherwise . . . ." From the existing case law the author extracts two rules: (1) A

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16. William Ewald, author of Unger's Philosophy: A Critical Legal Study, was a Junior Research Fellow at The Queen's College, Oxford.
17. Cornel West, author of CLS and a Liberal Critic, is a Professor of Religion and Director of the Afro-American Studies Program, Princeton University.
19. Stanley Fish, author of Don't Know Much About the Middle Ages: Posner on Law and Literature, is Chairman of the English Department at Duke University and Professor of Law at the Duke University School of Law.
20. Richard A. Posner is a Judge on the Court of Appeals for the Seventh Circuit.
24. Id.
city is not liable in damages for any injuries resulting from slippery conditions caused by ice of recent formation; and (2) a city is not liable unless something about the sidewalk beyond mere slipperiness contributed to the fall. All in five pages!

"Intellectual ambitiousness" is perhaps the vaguest and most general of my categories of comparison, but I think it captures something important. The level of intellectual ambitiousness can be indicated indirectly by length, by title or topic, and by manner of treatment. Length is obviously the crudest proxy, but it is interesting that the length of lead articles in the *Harvard Law Review* and the *Yale Law Journal* during the 1890s averages only fifteen pages.25 My favorite example of a short article is one that appeared in the 1893 *American Law Register* (the predecessor to the *University of Pennsylvania Law Review*) entitled *A New Canon of Constitutional Interpretation*—all nine pages of it!26 The inferences that can be made from length are obviously very limited, but I think it is safe to say that a nine page article entitled "A New Canon of Constitutional Interpretation" would be a virtual impossibility today. In other interesting examples, Herbert H. Kellogg treats *The Law of the Telephone*27—including what appears to be the hottest issue of the day: the effect of electric railways on telephonic transmission quality—all in seven pages, which is nonetheless more space than Israel H. Peres needs to dispose of "the general rules regulating" horse and buggy traffic in *The Law of the Road*.28

When one turns to titles, topics, and manner of treatment in the late nineteenth century, one is struck by the preponderance of more modest contributions to an empirical project. A sampling of titles by prominent scholars is revealing: Louis D. Brandeis and Samuel D. Warren on *The Law of Ponds*29 and *The Watuppa Pond Cases*;30 Joseph H. Beale, Jr. on *Tickets*31 and *Taxation of Pipes in Public Streets*;32 Samuel Williston on *Successive Promises of the Same Performance*33 and *The Right to Follow

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25. This figure is based on a survey of 243 lead articles in the *Harvard Law Review* from January 1890 to December 1899, and of 163 lead articles in the *Yale Law Journal* during the portion of this period that it was in existence.


Trust Property When Confused with Other Property;  

The legal issues treated in the late nineteenth century seem to arise mainly out of pragmatic, everyday concerns. Lee Max Friedman's *The Bicycle and the Common Carrier,* for example, appears to arise from a pet peeve of the author, who vigorously defends the bicyclist's "right" to bring his bicycle on a train. With the general rule in mind that a common carrier must transport a passenger's "ordinary baggage," the author extracts from American and English case law a test for ordinary baggage, including length of trip, purpose of travel, and even wealth of the passenger. Generally the bicyclist is traveling a short distance on the train, such trains are slow-moving, and the bicyclist is usually traveling on a Sunday or holiday, when the trains are not full. From this the author concludes that, under "normal" circumstances, a bicycle is ordinary baggage.

Since the late nineteenth century, legal scholarship has overwhelmingly meant the production and publication of articles engaged in doctrinal problem-solving. The assumption of this form of legal scholarship is that doctrinal problems admit of doctrinal solutions: There is no need to go beyond or outside legal doctrine. Classical doctrinal scholarship represents in this sense an "internal" perspective—internal to (case) law, that is. In *The Bicycle and the Common Carrier,* for example, the author begins with the premise that the advent of bicycling "furnishe[s]" another interesting example of what has long been the chief boast and glory of our common law,—the flexibility of its precedents and the adaptability of its general principles to new facts and changed conditions.

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37. Id. at 123 ("[T]he Supreme Court of the United States has said that two hundred and seventy-five yards of lace worth $10,000 [is ordinary baggage to] a Russian lady of fortune.") (citing New York Cent. & H.R.R.R. v. Fraloff, 100 U.S. 24 (1879)).
38. Id. at 124-25.
40. See Grey, *supra* note 12, at 6 ("Classical orthodoxy was a particular kind of legal theory—a set of ideas to be put to work from inside by those who operate legal institutions, not a set of ideas about those institutions reflecting an outside perspective, whether a sociological, historical or economic explanation of legal phenomena."); cf. id. at 47 ("Classical scientists had purported to do no more than make precise and scientific what had always been implicit in the substance of the common law and the methods of common lawyers.").
41. Friedman, *supra* note 36, at 119.
On such premises, a classic pattern or "formula" for doctrinal scholarship emerges: (1) state the problem; (2) propose a solution; (3) show how the common law, properly reinterpreted, affords the proposed solution.\(^\text{42}\) Here the influence of and connection with Langdellianism must be noted.\(^\text{43}\) A central implication of Langdell's case method was that, in the study of law, one need not venture beyond appellate judicial opinions.\(^\text{44}\) If, as Langdell postulated, law is a self-contained science, with the law library as its "laboratory"\(^\text{45}\) and cases as its "specimens,"\(^\text{46}\) one need only study those appellate decisions. But, according to Richard Cosgrove: "For all the emphasis on law as science, Langdell's declarations had the curious result of limiting the field of legal inquiry rather than expanding it. . . . [T]he Langdellian account of law implied a closed, logical legal system where theoretical questions, if not exactly ruled out, never occupied a central position."\(^\text{47}\)

This deemphasis of theory implies a distrust of non-legal sources and materials, perspectives, and frames of reference. For the ultimate answers to all legal questions it was, according to Langdell, unnecessary to ponder considerations of justice and social policy, or study the evolution of legal institutions in their social contexts, or consider other sources of power and authority in social life, or even ascertain the actual effects of law on people. It was, in short, "unnecessary to look with any particularity at what was actually going on in the real world";\(^\text{48}\) and it was certainly not necessary to learn other disciplines or study non-legal sources or materials.\(^\text{49}\) That is, Langdell taught ("with a vengeance," according to Lawrence Friedman\(^\text{50}\)) that law is autonomous.

\(^{42}\) For another, more recent, paradigm of "the traditional goals of legal theory," see Robert M. Hayden, Social-Theory and Legal Practice: Intuition, Discourse, and Legal Scholarship, 83 Nw. U. L. Rev. 461, 461 (1989) (arguing that traditional goals are "to explain the existing law, to justify legal principles, to critique existing doctrine, and to prescribe the directions that law ought to take").


\(^{44}\) See White, supra note 43, at 217.

\(^{45}\) Christopher C. Langdell, Address to Harvard Law School Association, in A Record of the Commemoration, November Fifth to Eighth, 1886, on the Two Hundred and Fiftieth Anniversary of the Founding of Harvard College 84, 86-87 (Justin Winsor ed., 1887).

\(^{46}\) William A. Keener, Methods of Legal Education, 1 Yale L.J. 143, 144 (1892) (discussing the basic elements of the case method introduced at Harvard Law School).


\(^{48}\) Gilmore, supra note 10, at 56.

\(^{49}\) See Cosgrove, supra note 47, at 28.

B. The Current "Scholarship Amok" Muck

By the 1950s, the average length of lead articles in the Harvard Law Review, the Yale Law Journal, and the University of Pennsylvania Law Review had grown to about thirty-four pages, thirty-two pages, and twenty-eight pages, respectively. By the 1980s, the comparable averages for these same law reviews had increased to sixty-five pages, fifty-five pages, and seventy-one pages, respectively. Our contemporary counterpart to the nine page piece from 1893 on A New Canon of Constitutional Interpretation is Jesse Choper's 212 page article (with 1611 footnotes) on Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, or perhaps Donald Regan's 197 page article on the dormant commerce clause, "probably the dullest subject in constitutional law." (Regan's Introduction alone is nineteen pages long, and contains five sections.) G. Edward White has suggested that the inordinate length of modern law review articles may be due in part to a collapse of consensus; if nothing can be assumed as common knowledge and taken for granted, then foundations must be relaid completely for every argument. My colleague Frank Allen has remarked on "the fascination now revealed in some parts of the contemporary law school world with the creation of intricate theoretical systems" and observed:

"Often when I have seen an article in which the fledgling author is attempting to expand a modest insight into at least galactic significance, I am reminded of an incident in a Peter De Vries novel. A young man"

51. The period surveyed was January 1950, through December 1959.
56. See Regan, supra note 54, at 1091-109.
58. Allen, supra note 8, at 188.
much concerned with the problems of the Cosmos is consoled by a female companion: "The Universe," she said, "isn't everything."

Geoffrey Miller has offered this summary:

These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques. Strange-sounding jargon imported from other disciplines—the Frankfurt School of sociology, existentialism and phenomenology, neoclassical economics and capital-markets theory—is appearing in the law journals. New ideas are spreading across the empire of doctrinal analysis.

Even the parodies of legal scholarship of the 1980s are revealing:

We write, um, about metalaw.
Metalaw! What's that?
Oh, it's about—you know—the deep structures of law, its normative resonances, metaphorical power, and dialogic quality.

The term "postmodern" nicely suggests the plight of scholarship that has arrived, very late in the day, at a field that has already been thoroughly and exhaustively tilled by others. And there are suggestions that even postmodernism may have arrived too late. In an overall view, Paul Brest suggests that "the current ferment in legal theory" amounts to attacks on "the self-congratulatory and complacent reign of 'legal process.'" After the Legal Process project of the 1950s and 1960s had attained a certain state of development and completion, the question began to arise with particular urgency: What is left to do? Legal Process has run its course. In order to carve out creative space for themselves, contemporary legal scholars are forced—by default, and at all costs—to
do something else or, in any event, something different. This is the “negative moment” (to use a Hegelian term) in the contemporary scholarly situation; here the movement is viewed in its aspect as a movement away from something:

It is essential to this task and to this form of scholarship that the writer be skeptical of previous learning and to challenge what is the accepted wisdom. Indeed, to assert the primacy of his or her own ideas, the scholar must insist that the accepted wisdom is of little value at all. . . . [L]egal scholars, if they are to make any mark whatsoever, must be hostile to authority.65

As I have suggested, this phenomenon can best be explained in terms of the theory of intellectual influence and revisionism. This theory has been expounded and elaborated in the area of poetic influence, and I think the situation is formally and structurally the same for legal scholars of the 1980s. W. Jackson Bate has explored the melancholy that poets of the Enlightenment faced in trying to wrest themselves free of the embarrassment of riches deposited before them by the ancients and the Renaissance masters.66 Harold Bloom has carried the theme further in discussing the “anxiety of influence” that strong poets feel as they attempt to step out of the shadows of powerful—indeed, overwhelming—poetic predecessors and say something new.67 Legal scholarship of the 1980s exhibits all the symptoms of an “anxiety of influence,” and for good reasons: “There is no credit given in academics for the proposal of some well-crafted incremental change in the law . . . . There is no credit given in academics to fidelity to previous ways of thinking.”68

These observations capture well the interdisciplinary explosion in contemporary legal scholarship and the centrifugal force it has generated in progressively exfoliating and departing from traditional doctrinal approaches. To that considerable extent the movement is a movement away from something. But there is also a positive, “centripetal” moment, so to speak. In this departure and evasion, something is being affirmatively sought after: a source of scholarly authority outside law. Yet this perceived need for intellectual authority is not new at all.

65. *Bork Hearings*, supra note 12, at 2440-41 (statement of George L. Priest); cf. *Richard Levin*, *New Readings vs. Old Plays* 196 (1979) (University teachers “know that their interpretations are not likely to be published unless they say something . . . that has never been said before, which all too often means . . . that they must say something very strange.”).


67. See *Bloom*, supra note 7; *Harold Bloom, A Map of Misreading* (1975). For further discussion of this theme, see infra text accompanying notes 315-42.

"I begin with Nietzsche, perhaps (un)fashionably," writes the author of a recent article on Section 1983 Discourse: The Move from Constitution to Tort.59 "No," I am tempted to reply, "you begin very fashionably indeed."70 Admittedly, it might upon first glance seem highly improbable that the work of an exotic, nineteenth-century German philosopher would provide telling glosses on the contemporary U.S. Supreme Court's section 1983 adjudication.71 (On second thought, it seems even more implausible.)

Undeterred, the author proceeds to an elaborate discussion of the work of Ferdinand de Saussure,72 Jacques Derrida, and Michel Foucault.73 Here in my exposition I was going to analyze how the author's use of Nietzsche, Saussure, Derrida, and Foucault contributed to his discussion of section 1983 "discourse," but I could not find a single instance in which their ideas were actually applied to the author's legal subject. The closest he came were these: "[Derrida's] deconstruction of margins helps us to understand the relative ease of the previously described shift in emphasis from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 case law."74 "As applied to the move from constitutional rhetoric to tort rhetoric in the Supreme Court's § 1983 jurisprudence, Foucault's approach suggests at the very least that an event of deep significance has occurred."75

70. It has been suggested to me that the objects of my criticism are merely fads or fashions. My response is that these are considered major or at least reputable scholarly works, published in the leading law reviews. If these are fads or fashions, then they are fads or fashions of genuine intellectual significance for the sociology of knowledge.

There is a second, perhaps deeper, basis for my concern. These and other similar works exemplify what I see as an emerging postmodern thesis to the effect that fashionableness or modishness is in itself a sufficient justification for legal scholarship. See David Kennedy, Spring Break, 63 Tex. L. Rev. 1377, 1423 (1985) ("Indeterminacy analysis might yield a situated anti-authoritarian practice, or might be simply the ultimate assertion of self: transforming the work of legal scholarship into either strategy or fashion, constantly shifting its ground.") This thesis tends to erode the crucial distinction between "intellectual authority" and "institutional authority." For further discussion of these issues, see infra Part II.

71. The reference is to 42 U.S.C. § 1983 (1988), a post-Civil War civil rights statute that has been the subject of a tremendous amount of litigation in recent years. See ERWIN CHERNIMSKY, FEDERAL JURISDICTION §§ 8.1-.11 (1989).
72. See Nahmod, supra note 69, at 1733 ("Structural linguistics, as formulated by Ferdinand de Saussure, provides valuable insights into the Supreme Court's § 1983 jurisprudence.").
73. See id. at 1734 ("Specifically relevant to my analysis of the Supreme Court's § 1983 jurisprudence are Jacques Derrida and Michel Foucault.").
74. Id. at 1736.
75. Id. at 1738 (emphasis added). After the sections of the article on Nietzsche, Saussure, Derrida, and Foucault, none of their ideas nor even any of their names is mentioned again—explicitly or implicitly—in the remainder of the article. The only possible exceptions to this are three mentions of the words "marginalize" and "marginalizing" (a term of Derrida's) at 1738, 1742, and 1750.
What does it mean that wholly gratuitous discussions of Nietzsche, Saussure, Derrida, and Foucault are now de rigueur in law review articles about section 1983, common law contract doctrine, poverty law, and even Uruguayan prisons? I think it means that legal scholars are desperately groping for an external, non-legal source of legitimacy or authority. The hope that this will be found in humanistic theory, however, is largely a vain one. These legal scholars' use of non-legal (primarily humanistic) methods and concepts is an attempt to bring greater "intellectual authority" to a form of scholarship that, nevertheless, remains intractably dependent upon and derivative of the "institutional authority" of the judiciary.

At the same time that legal scholars increasingly seek a source of intellectual authority outside of law, by a strange irony these same scholars focus attention as never before on judicial opinions as "original texts" or "primary sources" of theory. As I shall explain below, this focus on "texts" reflects an essentially humanistic technique or method, but the result is that adjudication remains the preferred theoretical model for scholarship, and the legal opinion is increasingly elevated to something it never was even for the classical doctrinal scholars. In this sense, and with a few notable exceptions, the widely advertised divergence between the work of the judge and that of the legal scholar has not in fact

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77. See, e.g., Anthony Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J. 2107, 2120 n.43 (1991) ("I attribute my analysis of power to Michel Foucault."); id. at 2120 n.46 ("Continental theory is represented here by Michel Foucault, Hans-Georg Gadamer, Jurgen Habermas, Paul Ricoeur, and Roberto Unger. I also count Clifford Geertz and Wayne Booth to be among this group.").
78. See Kennedy, supra note 70, at 1417-23; see also id. at 1422 (retracing the author's project of "decentering my own textual presence" to "illustrate the process by which the analyzing subject constructs itself out of ambiguity" and to "champion a practice of determinacy and indeterminacy analysis in which one is always both challenging particular assertions of openness or closure and maintaining an alternative position that asserts its openness and closure," and citing Derrida and Rorty for further illumination); id. at 1423 (posing but not answering questions like "Do we demystify a text or is the text always already self-deconstructing? Are we the shock troops of anti-authoritarianism or the genteel revealers of the full complex texture of legal writing and the mechanisms of its power of social persuasion?", and citing Foucault and De Man).
79. See Frederick Schauer, Formalism, 97 YALE L.J. 509, 525 n.56 (1988) (criticizing the use of phrases like "post-Wittgensteinian" as "attempting to lean on the argumentative props of associations with philosophers whose names are currently fashionable in legal circles"). *But see* Dennis Patterson, Law's Pragmatism: Law as Practice & Narrative, 76 VA. L. REv. 937, 945 (1990) ("The choice between the two readings of Wittgenstein has important implications for legal jurisprudence.").
80. See infra notes 83-101 and accompanying text.
materialized. The prominent examples of contemporary legal scholarship examined in Part IV all markedly exhibit this tendency to apply non-legal, humanistic methods and concepts to that quintessentially legal primary source—the judicial opinion.

In effect, these new legal scholars want to "have it both ways." They want to take a page out of the book of the poets and philosophers and bring to the study of judicial opinions the transferred intellectual authority and humanistic methods that are appropriate only in those other disciplines. As I shall explain, this strongly misconstrues the very different nature of scholarly authority in law and in the humanities.

In support of these conclusions I undertake in the following Part an examination of the different bases of authority in law and the humanities. Next, in Part III I explore the implications of these notions of authority for the work of the judiciary. These findings are, finally, applied to some prominent examples of contemporary legal scholarship.

II. INTELLECTUAL AUTHORITY AND INSTITUTIONAL AUTHORITY

With force I have subdued the brains of the proud.

—Contemporary epigraph engraved on the tomb of Cardinal Roberto Bellarmino, consultant to the Roman Inquisition\textsuperscript{82}

A. The Origins of Humanistic Methodology

In this Section, I elaborate an interpretation of humanistic methodology that emphasizes and draws upon two early stages in its historical development: (1) the Renaissance rediscovery and appreciation of classical texts and traditional authors; and (2) the development, which reached full fruition in the scientific revolution of the seventeenth century, of a decidedly skeptical attitude toward non-intellectual forms of authority. As I shall show, these two features are related, yet they coexist only uneasily. Because some of the classical texts and authors would eventually not stand up to modern scientific and intellectual scrutiny, in some instances their authority could be sustained only by reliance on non-intellectual forms of support.

\textsuperscript{82} See PIETRO REDONDI, GALILEO: HERETIC 7 (1987).
In the classical tradition of the humanities, authority derives principally from an original text or other primary source. Etymologically, the classical "authority" is the author (auctor, later auctour), the originator of something. The history of humanistic learning resembles a perpetual "querelle des anciens et des modernes," a "Great Conversation" across the ages. The source and subject of this dialogue is the ancient learning embodied in classical texts. Understanding these works, and comprehending their significance for modern times, are the traditional goals of education in the humanities.

The humanist tradition also has a normative significance; these are the issues, ideas, and thinkers we ought to be concerned with if we value our humanity and our humanistic heritage. They command our intellectual respect, if not assent.

"In a literary context, the term auctor denoted someone who was at once a writer and an authority, someone not . . ."


87. See id.:

The tradition of the West is embodied in the Great Conversation that began in the dawn of history and that continues to the present day. Whatever the merits of other civilizations in other respects, no civilization is like that of the West in this respect. No other civilization can claim that its defining characteristic is a dialogue of this sort. No dialogue in any other civilization can compare with that of the West in the number of great works of the mind that have contributed to this dialogue. . . .

. . . . [To the extent to which books can present the idea of a civilization, the idea of Western civilization is here presented.

These books are the means of understanding our society and ourselves. They contain the great ideas that dominate us without our knowing it. There is no comparable repository of our tradition.

Id. at 1-2.


89. As Edward Shils stated:

Tradition is . . . far more than the statistically frequent recurrence over a succession of generations of similar beliefs, practices, institutions, and works. The recurrence is a consequence of the normative consequences—sometimes the normative intention—of presentation and of the acceptance of the tradition as normative. It is this normative transmission which links the generations of the dead with the generations of the living in the constitution of a society.

merely to be read but also to be respected and believed." The pro-
nouncements of primary authorities are not necessarily true, but they are
entitled to be considered "presumptively important." The great classi-
cal thinkers provided "the great 'topics' of thought—the themes for dis-
ussion and the standard 'commonplaces' on these themes," as well as a
terminology "in the grooves of which thought could run."

In the European Middle Ages the development of commentaries and
glosses on primary sources became particularly marked when such great
thinkers as Averroes and Thomas Aquinas devoted the greater part of
their lives to the works of Aristotle. The "rediscovery" of Aristotle's
works, some of which had lain in desuetude and others of which had
actually been lost for centuries, was the primary and precipitating cause
of the great revival of learning and scholarship in the European Middle
Ages.

The core subjects of what are now termed the "humanities"
originated in the humanistic studies of the Renaissance. The aim of the
original humanists of the Renaissance was simply to get their contempo-
raries to read a few good books—the "primary sources" to which I

90. MINNIS, supra note 84, at 10 ("The writings of an auctor contained, or possessed, auctoritas
in the abstract sense of the term, with its strong connotations of veracity and sagacity. . . . [A]s
Aristotle says, an auctoritas is a judgment of the wise man in his chosen discipline.").
91. See SHILS, supra note 89, at 24 ("Scientific and scholarly propositions, once they have been
enunciated, have [a] factually normative character. Representing the state of correct belief in, let us
say, mathematics or chemistry, their assertion both assumes their correctness and recommends their
acceptance. This is the barest normative minimum of any tradition of belief.").
92. 2 ENCYCLOPAEDIA BRITANNICA ARISTOTLE 354 (1929) ("When thought had to be rebuilt
after the collapse of classical civilization, and while the middle ages were toiling at the work, it was
no small thing that men should have the tools of a terminology and the rules of accepted axioms.").
94. See generally PIERRE MANDONNET, SIGER DE BRABANT ET L'AVEROISME LATIN AU
XIIIe SIÈCLE (2d ed. 1911); ALEX FREISINGER ET AL., CLASSICAL AND MEDIEVAL LITERARY
CRITICISM 263-98, 341-48 (1974); RICHARD SHUTE, ON THE HISTORY OF THE PROCESS BY
WHICH THE ARISTotelIAN WRITINGS ARRIVED AT THEIR PRESENT FORM (1888). See also WERNER
JAEGER, ARISTOTLE: FUNDAMENTALS OF THE HISTORY OF HIS DEVELOPMENT (Richard Robin-
son trans., 1934).
On the medieval "rediscovery" of Aristotle, see DAVID KNOWLES, THE EVOLUTION OF MEDIE-
VAL THOUGHT 185-92 (1962); Paul O. Kristeller, Philosophical Movements of the Renaissance, in
STUDIES IN RENAISSANCE THOUGHT AND LETTERS 17 (1956).
referred. Unlike the Scholastics, “they exercised their scholarship only to [provide] reliable texts” of the classical authors.

But the development of Renaissance text criticism, of philology, had deeper implications, which came “in the most unlikely way from the study of Latin and Greek, which stimulated in literary scholars a feeling for exactness as passionate as the new-found Greek mathematics stimulated in scientists. As a result, they learned to analyse the grammar, the locutions, and the references in old texts precisely enough to challenge the traditional dates that had been accepted for these texts.” This development was of more than historical interest: It was revolutionary because it inaugurated in Renaissance scholarship the standard of tested truth and a corresponding new understanding of the relationship to “authority.” Eventually, then, even the humanists—those least inclined to scientific experimentation and most enamored of the classical book-learning—adopted a more skeptical and considered view of their primary sources.

This new relationship to authority is what I shall refer to as “intellectual authority.” It may be defined as “the authority exerted by arguments that make their way simply by virtue of a superior rationality and do not depend for their impact on the lines of power and influence operating in an institution.” Intellectual authority has withstood “the test of time,” in the sense of withstanding intellectual scrutiny in the free

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96. See Jacob Bronowski, Copernicus as a Humanist, in THE NATURE OF SCIENTIFIC DISCOVERY at 179 (Owen Gingerich ed., 1975) (“Humanism in any sense is by origin an academic movement, because the sources at which it seeks its new knowledge are classical texts.”); see also Kristeller, supra note 94, at 24 (“[T]he core and center of Renaissance humanism is the emphasis on the Greek and Latin classics as the chief subjects of study and as unrivaled models of imitation, in writing and in thinking and even in actual conduct.”); Cassirer, supra note 95, at 3-4 (“The major concern of the Humanists was an educational and cultural program based on the study of the classical Greek and Latin authors.”).


98. Bronowski, supra note 96, at 183-84.

99. See id. at 184; Roberto Weiss, The Renaissance Discovery of Classical Antiquity (2d ed. 1988); cf. Kristeller, supra note 94:

[T]he so-called philosophers of nature... emphasized the direct study of nature and their own originality... This claim of originality... undermined the accepted authority of Aristotle, opened the way for new alternatives and presupposed the notion, more or less explicitly, that human knowledge could make definite progress beyond the attainments of the ancients.

Id. at 28.

100. Stanley Fish, Fish v. Fiss, 36 STAN. L. REV. 1325, 1342 (1984) (summarizing Fiss and Toulmin). In some sense this is not “authority” at all. See Frederick Schauer, Precedent, 39 STAN. L. REV. 571 (1987).
marketplace of debate and in the history of ideas. In other words, intellectual authority is based not on power, but on conviction; not on rhetoric, but on rational persuasion. The contrastive notion of "institutional authority," which arises when these conditions are not present, will be elaborated in the following Section.

"In the Renaissance, as always, men turned to the careful observation of nature only after every other idea and authority had failed. But fail they did. Even among the classical humanist scholars of the Renaissance, it eventually became clear that the authority of many received, medieval, Aristotelian views extended far beyond what could be justified on purely intellectual grounds. For example, one of the Aristotelian treatises states that men have more teeth than women, and this was long believed, on Aristotle's authority alone, to be true. Finally, someone checked, and it turned out to be false. Similarly, Aristotle taught that a needle cannot float on water, which is also untrue and would have been easy to check. (I have performed the experiment myself.) The Scholastics maintained that Aristotle must have had in mind a large, heavy needle, or intended it to be placed erect in the water; Galileo, however, had the temerity to claim that Aristotle must never have performed the experiment.

In the scientific thought of the Renaissance, of course, a main thrust was the revolt against and rejection of Aristotle's authority. But perhaps what we see most clearly here is the evolution of Aristotle's intellectual authority into a form of "institutional" authority, and it is this that explains the durability of his thought even into the scientific revolution of the seventeenth century.

102. John H. Randall, Jr., The Making of the Modern Mind 218 (1976) ("What the revival of ancient learning did for science was to bring a wealth of conflicting suggestions into men's ken, and force them to appeal to reason to decide .... With so many newly-found doctrines in the field, bitterly fighting each other, ... one outcome of the whole period was the growth of skepticism.").
103. See Aristotle, Problems, in 2 The Complete Works of Aristotle 1519 (963b20) (Jonathan Barnes ed., 1984). This work was probably written not by Aristotle himself but by one or more of his later disciples. See Note to the Reader, in 2 The Complete Works of Aristotle, supra, at xiii. Nevertheless, it was accepted as canonical Aristotelianism throughout the periods in question here.
106. See, e.g., Alexandre Koyré, From the Closed World to the Infinite Universe (1957); Kristeller, supra note 94, at 28-30.
107. See, e.g., Alexandre Koyré, Galileo Studies (1978): [The scientific revolution of the seventeenth century] seems to have been the outcome of a decisive mutation. It is this which explains why the discovery of things which seem to us nowadays childishy simple required such prolonged efforts—and not always crowned with
Probably the most momentous conflict between intellectual authority and institutional authority ever recorded is that between Galileo Galilei and medieval Aristotelianism. But the picture is complicated, because Galileo may be regarded as struggling on two distinct fronts—one scientific and one religious—against both medieval Aristotelianism and its institutional patron, the Catholic Church. As Milton commented after visiting Galileo in Florence, "There it was that I found and visited the famous Galileo grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought."

Since the thirteenth century, Aristotelianism had been the model for science in European universities, partially because Aristotle's views were (or could be made) generally congenial to Church doctrine. For example, when a huge meteorite fell to earth at Aegospotami, Aristotle explained that "it had been carried up by a wind and fell down." The heavens (which were supposed to be light, luminous, spherical, perfect, and eternal) were thus spared the indignity of having harbored a heavy, ugly, odd-shaped, dirty rock—especially one that could accidentally come crashing down to earth.

By contrast, Galileo's Copernican, heliocentric views constituted an outright affront to the authority of Scripture. If the sun stood still, for example, the biblical story that God caused the sun to stand still at Joshua's request would be nonsensical. But Galileo remained stubbornly unwilling or unable to recognize or acknowledge that he was entangled in an essentially political, religious, dogmatic, institutional success—by the greatest of geniuses, by Galileo and Descartes. This is because it was not a matter of battling against theories which were simply inadequate or erroneous, but of changing the very intellectual framework itself, of overthrowing an intellectual attitude, one which was when all is said and done a perfectly natural one, and substituting for it another, one which was not natural at all.

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_id._ at 3 (footnote omitted).


111. Aristotle, Meteorology, in 1 THE COMPLETE WORKS OF ARISTOTLE, supra note 103, at 563 (344b32); cf. G.S. KIRK & J.E. RAVEN, THE PRESOCRATIC PHILOSOPHERS: A CRITICAL HISTORY WITH A SELECTION OF TEXTS 392 (1957) (discussing the meteorite and Anaxagoras's more "rational" belief that the heavenly bodies were made of stone); JOHN BURNET, EARLY GREEK PHILOSOPHY 252 (4th ed. 1957) (discussing the meteorite and Aristotle's explanation for its appearance).


thicket as well as a rational, logical, scientific, intellectual debate. Characteristic is his response to the charge of having undermined the Joshua passage. He offered, in all earnestness, an elaborate scientific proof that the Joshua story was self-contradictory and unintelligible, "regardless of the world system one assumes." Of course, Galileo had never heard of, much less read, the works of Thomas Kuhn, Richard Rorty, or even Stanley Fish, which perhaps explains his naive insistence on defending the Copernican system as physically real and actually true—and not merely as a simpler "working hypothesis" that yielded more precise results and agreed better with the observations.

Galileo's struggle with medieval Aristotelianism provides a key contrast between the scholarly, intellectual relationship to authority and what I shall discuss later as the different and specifically legal relationship to it. In a letter to the lawyer Francesco Ingoli, Galileo clearly stated the difference:

I must tell you that in natural phenomena human authority is worthless. Like a lawyer, you seem to capitalize on it; but nature, Dear Sir, makes fun of constitutions and decrees of princes, emperors, and monarchs, and at their request it would not change one iota of its laws and statutes. Aristotle was a man, saw with his eyes, heard with his ears, and reasoned with his brain. I am a man and see with my eyes much more than he did; as regards reasoning, I believe he reasoned about more things than I, but whether he reasoned better than I about those things which we have both examined will be shown by our arguments and not by our authorities.

As Galileo's favorite disciple Benedetto Castelli described him, "the truth... he fittingly places above everything else, just as, in natural questions, he puts nature above the authority of any famous author, as any one who wishes to philosophise properly ought to do." Similarly,

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114. FINOCCHIARO, supra note 108, at 110 (quoting letter from Galileo to the Grand Duchess Christina (1615)); see also id. at 52-54 (discussing letter from Galileo to Castelli (Dec. 21, 1613)); cf. id. at 114-18 (examining to what extent Joshua passage can be taken without altering literal meaning of words).

115. See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 329 (1979) (Galileo might have avoided difficulties by presenting his conception as "really just an ingenious heuristic device for, say, navigational purposes and other sorts of practically oriented celestial reckoning. . ."); see also id. at 327-33 (analyzing the difficulties Galileo faced in creating purely scientific questions).

116. See infra text accompanying notes 149-64.

117. FINOCCHIARO, supra note 108, at 178 (quoting letter from Galileo to Ingoli (1624)).

118. WILLIAM R. SHEA, GALILEO'S INTELLECTUAL REVOLUTION 34 (1972) (quoting BENEDETTO CASTELLI, RISPOSTA ALLE OPPOSIZIONI (1615)). Consider Shea's further observations:

What strikes (and usually annoys) the modern reader of sixteenth- and seventeenth-century scientific literature is the constant appeal to the writings of great men of the past. Where a modern scientist introduces experimental evidence to prove a point, a medieval or a Renaissance scholar will quote a relevant passage from one of the Greek philosophers. . . .
in a letter to the Grand Duchess Christina, Galileo wrote: “I think that in disputes about natural phenomena one must begin not with the authority of scriptural passages but with sensory experience and necessary demonstrations.”

Although Galileo has often been described as “the father of modern science,” he is also at one with the humanists in his understanding of the intellectual’s uneasy relationship to institutional authority. In a Foreword to the Dialogue Concerning the Two Chief World Systems—Galileo’s main work and the work for which he was mainly condemned—Albert Einstein writes:

The leitmotif which I recognize in Galileo’s work is the passionate fight against any kind of dogma based on authority. Only experience and careful reflection are accepted by him as criteria of truth. Nowadays it is hard for us to grasp how sinister and revolutionary such an attitude appeared at Galileo’s time, when merely to doubt the truth of opinions which had no basis but authority was considered a capital crime and punished accordingly. Actually we are by no means so far removed from such a situation even today as many of us would like to flatter ourselves; but in theory, at least, the principle of unbiased thought has won out, and most people are willing to pay lip service to this principle.

Likewise, “[t]he humanist . . . rejects authority,” in the sense of institutional authority. “But he respects tradition,” which is another word for what I have termed intellectual authority. “Not only does he respect it, he looks upon it as upon something real and objective which has to be

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This attitude of mind irritated Galileo for whom the interpreter of nature was neither Aristotle, nor Plato, nor Democritus, nor any of the Ancients but nature speaking for itself. While the Aristotelians sought to solve a problem, as though it were a legal question, by appealing to authority, Galileo went directly to the tribunal of nature—albeit with Archimedes as his barrister.

Id. at 31, 33 (emphasis added). Let one assume, however, that we now have a regime of pure intellectual authority in science, see Gina Kolata, To Make the Big Time of Science, Better Take Your Show on the Road, N.Y. TIMES, Jan. 2, 1990, at C1.

119. FINOCCHIARO, supra note 108, at 93 (quoting 'letter from Galileo to the Grand Duchess Christina (1615)). These sentiments brought Galileo into direct conflict with the Roman Catholic authorities, and he was eventually put on trial by the Roman Inquisition on charges of heresy. In 1633, Galileo was convicted and sentenced as follows:

We say, pronounce, sentence, and declare that you, the above-mentioned Galileo, because of the things deduced in the trial and confessed by you as above, have rendered yourself according to this Holy Office vehemently suspected of heresy, namely of having held and believed a doctrine which is false and contrary to the divine and Holy Scripture: that the sun is the center of the world and does not move from east to west, and the earth moves and is not the center of the world, and that one may hold and defend as probable an opinion after it has been declared and defined contrary to Holy Scripture. Consequently you have incurred all the censures and penalties imposed and promulgated by the sacred canons and all particular and general laws against such delinquents.

Id. at 291 (quoting Sentence of June 22, 1633).

120. Albert Einstein, Foreword to GALILEO, DIALOGUE CONCERNING THE TWO CHIEF WORLD SYSTEMS at xvii (Stillman Drake trans., 1962).
studied and, if necessary reinstated.”121 The humanist may be obsessed with a few primary, original sources, but these are “authorities” that have earned their authority.

This perspective allows one to make some distinctions that were previously unavailable. We may safely discard the bulk of Aristotle’s cosmology, for example, as a quaint relic that did not pass “the test of time,” while still appreciating the importance and relevance of his ethical and political writings.122 In fact, even today, and even among legal scholars, those latter works retain considerable currency.123

In summary, the distinction between primary sources and secondary sources is basic to scholarly work in the humanities.124 That which is authoritative is original, unique, and complete unto itself; all else is secondary and derivative. Thus, in a “normal” humanistic discipline, scholarly authority resides in “primary” or original sources, which typically are few and far between. These primary sources have earned what I term “intellectual authority.” In philosophy, for example, the works of Plato, Aristotle, Descartes, Hume, Kant, and Hegel are generally acknowledged to be primary sources.125 They have earned their authority because, over the course of centuries, they have provided enduring

124. See, e.g., HUTCHINS, supra note 86, at xxiv (discussing the “cult of scholarship surrounding” Dante’s Divine Comedy, and telling the “ordinary reader” that he will be “surprised to find that he understands Dante without it”).

The slogan “Back to Kant!” summarizes an intellectual movement in the nineteenth and early twentieth centuries that illustrates the humanistic preoccupation with original texts and primary sources. See Lewis W. Beck, Neo-Kantianism, in 5 ENCYCLOPEDIA OF PHILOSOPHY 468, 468 (1967).

125. So too are, arguably, Nietzsche, Wittgenstein, Husserl, Heidegger, and Sartre. The jury is still out on Barthes, Derrida, Foucault, and Lacan. Richard Rorty is (perhaps even as a necessary implication of his own views) a secondary source. See, e.g., RORTY, supra note 115.

This book is a survey of some recent developments in philosophy, especially analytic philosophy . . . . Thus the reader in search of a new theory on any of the subjects discussed will be disappointed . . . . The therapy offered is . . . parasitic upon the constructive efforts of the very analytic philosophers whose frame of reference I am trying to put in question. Thus most of the particular criticisms of the tradition which I offer are borrowed from such systematic philosophers as Sellars, Quine, Davidson, Ryle, Malcolm, Kuhn, and Putnam.

I am as much indebted to these philosophers for the means I employ as I am to Wittgenstein, Heidegger, and Dewey for the ends to which these means are put.

Id. at 7.
responses to what have proved to be enduring concerns. In this sense, "survival is the test of greatness,"126 where "survival" is understood as withstanding the test of extended intellectual debate and discussion. Much (if not most) of the "secondary" work in philosophy consists in explicating, analyzing, and criticizing these primary sources and in developing their implications.127

The process of earning intellectual authority is thus a historical process, and "intellectual authority" is an inherently historical concept. True intellectual authority appeals to disinterested reason and objective observers, over widely separated historical periods.

B. Institutional Authority in Law

What are the "primary sources" of law? Since the late nineteenth century, at least in the Anglo-American legal world, the answer has been judicial opinions.128 A brief contrast with the civil law tradition is instructive.

In the civil law tradition, the scholar is the legal actor most responsible for the development and refinement of the law. In Germany, for example, one would cite as "primary sources" of legal thought such classic legal scholars as Savigny, Puchta, Windscheid, Jhering, Gierke, Heck, Kelsen, and Radbruch. In the civil law tradition generally, the legal scholar is the great man of the civil law. Legislators, executives, administrators, judges, and lawyers all come under his influence. He molds the civil law tradition and the formal materials of the law

126. Posner, supra note 9, at 1356 (pondering whether survival is the test of greatness).
127. It is sometimes maintained that "analytic" philosophy does not fit this mold because it is modeled on natural science and has no interest in its own history. See, e.g., THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 137-39, 165 (2d ed. 1970). I doubt, though, that analytic philosophy ever succeeded in being, or even seriously tried to be, rigorously ahistorical. As noted above, Wittgenstein has clearly been elevated to the pantheon of primary sources, such that his every pronouncement—however offhand or obscure—has become canonical. See supra note 125. A similar process can already be observed in the treatise of a few contemporary analytic philosophers. See, e.g., DAVID ARMSTRONG, THE NATURE OF MIND 85 (1981); JOHN BISHOP, NATURAL AGENCY 132-34 (1989); MYLES BRAND, INTENDING AND ACTING: TOWARD A NATURALIZED ACTION THEORY 18, 31, 35 (1984); CARLOS MOYA, THE PHILOSOPHY OF ACTION 118-25 (1990); JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 83, 108-09 (1990); RAIMO TUOMELA, HUMAN ACTION AND ITS EXPLANATION 257-58 (1977); Jon Elster, The Nature and Scope of Rational-Choice Explanation, in ACTIONS AND EVENTS: PERSPECTIVES ON THE PHILOSOPHY OF DONALD DAVIDSON 60, 61-62 (Ernest LeFoe & Brian McLaughlin eds., 1985) [hereinafter ACTIONS AND EVENTS]; Dagfinn Follesdal, Causation and Explanation, in ACTIONS AND EVENTS, supra, at 311, 322; George Wilson, Davidson on Intentional Action, in ACTIONS AND EVENTS, supra, at 29, 38-40 (all analyzing the same passage in Davidson). As Davidson himself has said, "[a]nalytic philosophy is not, of course, either a method or a doctrine; it is a tradition and an attitude." Donald Davidson, Preface to ACTIONS AND EVENTS, supra, at xi. See generally LUCIEN BRAUN, HISTOIRE DE L'HISTOIRE DE LA PHILOSOPHIE (1973); RORTY, supra note 115.
128. See Collier, supra note 83, at 809-11.
into a model of the legal system. He teaches this model to law students and writes about it in books and articles. Legislators and judges accept his idea of what law is, and, when they make or apply law, they use concepts he has developed. Thus although legal scholarship is not a formal source of law, the doctrine carries immense authority. In other words, the ideas of the Continental legal scholar carry weight because of their inherent intellectual authority—the judges are free to accept and adopt or reject and ignore them.

By contrast, in the common law tradition the legal actor most influential in shaping the growth and development of law is the judge. In a real but obviously very problematic sense, "the law is what the judges say it is." Judicial opinions—rather than legal scholarship, constitutions, statutes, regulations, or other forms of positive or enacted law—have assumed the status of original texts and "primary sources" of law. Historically, this view of law has three main sources.

One such source is William Blackstone. After explaining that "the authority of . . . [the common law] rests entirely upon general reception and usage," and that the only method of proving a maxim to be a rule of the common law "is by showing that it hath been always the custom to observe it," he notes that a basic question still remains: "[H]ow are these customs or maxims to be known, and by whom is their validity to be determined?" To Blackstone, the answer is obvious: "by the judges in the several courts of justice".

They are the depositories of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. The knowledge of that law is derived from experience and study . . . and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that

130. See id. at 60; see also John H. Merryman, The Italian Style, 18 Stan. L. Rev. 39, 396, 583 (1965-66).
131. See Collier, supra note 83, at 813-16; cf. James B. White, The Judicial Opinion and the Poem: Ways of Reading, Ways of Life, in Heracles' Bow: Essays on the Rhetoric and Poetics of the Law 108 (1985): In my own experience at least, the same central method was at work in both legal and literary education, for both to a remarkable degree proceeded by drawing the student's attention to a series of discrete texts, one after another, and holding it there. In law the text was typically the judicial opinion; in literary studies usually, though not always, the poem. In both fields the emphasis was on the text as a self-justifying, self-explaining, self-authenticating object.

Id.
133. Id.
134. Id. at 69.
135. Id.
can be given, of the existence of such a custom as shall form a part of the common law.\textsuperscript{136}

A second principal source of “law as what the judges say it is” may be found in the Marbury-Cooper doctrine of judicial review and judicial supremacy. In \textit{Marbury v. Madison},\textsuperscript{137} Chief Justice Marshall argued for the power of judicial review on the basis of institutional competence and notions of the judicial role: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”\textsuperscript{138} If a law and the Constitution both apply to a particular case, says Marshall, “the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”\textsuperscript{139} In \textit{Cooper v. Aaron},\textsuperscript{140} a unanimous Court carried this thought further and saw therein the seeds of judicial “supremacy”; quoting the above language from \textit{Marbury}, the \textit{Cooper} Court stated that the \textit{Marbury} decision:

\begin{quote}

declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. \textit{It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land.}\textsuperscript{141}
\end{quote}

The judicial gloss on the constitutional text has, it would seem, supplanted the authority of that text itself.\textsuperscript{142}

Finally, Christopher Columbus Langdell contributed a seminal conceptualization of law as case law. Langdell combined the “scientific”

\begin{footnotes}
\item[136.] \textit{Id.} (emphasis added) (footnote omitted).
\item[137.] \textit{5 U.S. (1 Cranch) 137 (1803).}
\item[138.] \textit{Id. at 177.}
\item[139.] \textit{Id. at 178} (emphasis added).
\item[140.] \textit{358 U.S. 1 (1958).}
\item[141.] \textit{Id. at 18} (emphasis added). Justice Frankfurter, writing separately in \textit{Cooper}, maintained that “[o]ur kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is ‘the supreme Law of the Land.'” \textit{Id. at 24} (Frankfurter, J., concurring) (quoting U.S. CONS.T. art. VI, § 2).
\item[142.] \textit{See} \textit{JOHN BRIGHAM, THE CULT OF THE COURT} (1987):

The authority of the institution over the Constitution comes from the practice of judicial review. We have come to speak of the Constitution as “what the justices say it is” and we look for “it” in their opinions. Their words are no longer authoritative gloss on the thing itself; they have become the thing itself.

\textit{Id. at 31.} For suggestions that the \textit{Cooper} doctrine still approximates current judicial practice, see \textit{NLRB v. International Bhd. of Elec. Workers Local 340, 481 U.S. 573, 597-98 (1987)} (Scalia, J., concurring) (“[T]he Court, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction.”).
\end{footnotes}
project of observing and classifying actual specimens, with the humanistic focus on original texts and primary sources. For Langdell it is self-evident that law is "embodied" in cases:

Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . .

Langdell freely indulges the humanist's assumption that knowledge is derived chiefly through the careful study and analysis of original texts and primary sources; the "printed books" of reported cases are, he says, "the ultimate sources of all legal knowledge." The textbooks, treatises, and "hornbooks" that had mainly been relied on up to Langdell's time are decidedly not "ultimate sources" for him or his followers. In fact, "the student should . . . be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access."

It follows, on Langdellian principles, that "the opinion of the court giving the reasons for the conclusion reached, is really the only authoritative treatise which we have in our law."

143. See Collier, supra note 83, at 809-11.
144. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS at vi (1871).
145. Langdell, supra note 45, at 85. Langdell states further: "Accordingly, the Law Library has been the object of our greatest and most constant solicitude." It is to the lawyer "all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists." Id. at 86-87. Langdell adds further that "a good academic training, especially in the study of language, is a necessary qualification for the successful study of law." Id. at 87 (emphasis added); see also Sanford Levinson, Law as Literature: Do Legal Texts have Authoritative Interpretations?, in THE AUTHORITY OF EXPERTS 242 (Thomas L. Haskell ed., 1984):

To an extent never sufficiently acknowledged by his many detractors, Langdell was altogether correct in linking the legitimacy of the law to the mastery of texts, whether of cases, statutes, or the Constitution. However much legal positivism justifiably emphasizes the origins of law in social facts, the ordinary language of all developed legal systems includes constant recourse to texts that authorize specific conduct. One does not have to accept the entire Langdellian system (indeed, I most certainly do not) in order to recognize the centrality of textuality to the lawyer's enterprise.

Id. at 242-43 (footnotes omitted).
146. See EUGENE WAMBAUGH, THE STUDY OF CASES 73, 81 (2d ed. 1894).
147. Keener, supra note 46, at 144.
148. Id. at 145; see also GILMORE, supra note 10, at 42-43 (describing Langdell's belief that legal truth is a species of scientific truth, and that once a true rule of law is discovered, it will endure forever); JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS 37 (1914) ("The whole law lies in the reports of single cases which have been accumulating for centuries."); White, supra note 43, at 220-32 (discussing Langdell's belief in the primary importance of judicial opinions in legal education).
To summarize, there is a long and complicated tradition (in the common law world at least) to the effect that judicial opinions are to the lawyer what original texts and primary sources are to the humanist. They are the lawyer’s “source of authority.” But here some crucial differences must be noted. How did the authors of those opinions get in a position to write the authoritative texts of the law? Granting, for purposes of argument, that these texts are indeed “authoritative,” what makes them so? I suggest that we can see here a crucial difference with the humanistic tradition.

Consider the very different “citation practices” in law and the humanities. In law, one can simply cite a case as authority for a proposition, or indeed for a legal conclusion or as the basis for a judicial decision. The mere fact that a case has been decided one way rather than another, or that a judge has made a particular pronouncement, provides grounds (“authority”) for deciding another case similarly or in conformity with the judge’s pronouncement—whatever it may be. In law, saying something “with authority” means, literally, saying it “with authorities.” In this sense, as Leonardo da Vinci observed, “[w]hoever . . . appeals to authority applies not his intellect but his memory.” But what would it mean to cite Plato as authority for a proposition in philosophy? In other words, the fact that Plato said something does not settle the issue in philosophy the way it would in law. At most, the reader is simply referred to Plato for an interesting or relevant treatment of a point under consideration; it always remains to be seen whether Plato’s discussion of the issue will be found persuasive or even helpful.

Judicial opinions are authoritative, not because of their inherent intellectual content, but rather because of the social or “institutional” position of their authors. Judicial opinions are authoritative because they are written by people who are already in a position of authority. More specifically, these people are in a position to enforce their decrees through

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149. See Collier, supra note 83, at 811-12; see also Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029 (1990); David Luban, Legal Traditionalism, 43 Stan. L. Rev. 1035 (1991); Schauer, supra note 100. For a comparison with “the overwhelmingly bookish or clerkly character” of medieval culture, see Lewis, supra note 112, at 5, 11.

The legal concept of authority also bears comparison with the medieval art of dialectic, which taught that there are three kinds of proof: from reason; from authority; and from experience. “We establish a geometrical truth by Reason; a historical truth, by Authority, by auctours. We learn by experience that oysters do not agree with us.” Id. at 189.

socially sanctioned physical force, should the persuasive force of reasoned argument and intellectual conviction be insufficient.¹⁵¹

Thus, the authors of judicial opinions have only the authority of an office, to which they have been appointed (or, in some states, elected). In “normal” humanistic disciplines, primary sources emerge through a process of intellectual recognition; in law the “primary sources” have, in effect, been appointed. They have not earned their authority, at least not in the sense that Plato and Aristotle have, by garnering support through centuries of reasoned debate and intellectual assessment. They command our obedience, but not necessarily our intellectual respect.¹⁵² As Justice Robert H. Jackson once remarked of the U.S. Supreme Court, “We are not final because we are infallible, but we are infallible only because we are final.”¹⁵³ Justice Jackson further stated that if there were a court above the Supreme Court, a “substantial portion” of the Supreme Court’s decisions would be reversed.¹⁵⁴ In the terminology of modern social science, “legitimacy refers to the capacity of an institution to confine political behavior to ‘institutionally relevant choices’ . . . . In practice, the Court’s place in the process has become the key to its authority. With the Supreme Court, a loss is the end of the line.”¹⁵⁵

Justice Jackson’s protestations notwithstanding, Alexander Bickel observes that “there is a tendency nonetheless to believe that everyone else is more fallible than the justices.”¹⁵⁶ Bickel contends that “this is only sentiment—understandable and gratifying to those who cherish the


¹⁵² See Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827 (1988): Judicial authority is essentially political: Decisions are authoritative because they emanate from a politically authorized source rather than because they are agreed to be correct by persons in whom the community reposes an absolute epistemic trust. The political connotations of the word “authoritative” are apt; the word evokes power and submission, not truth and conviction.

Id. at 842-43; see also Richard A. Posner, The Problems of Jurisprudence 79-98 & n.35 (1990).


¹⁵⁴ See id. (“[R]eversal by a higher court is not proof that justice is thereby better done.”).

¹⁵⁵ Brigham, supra note 142, at 31 (citation omitted); cf. Robert Grafstein, The Legitimacy of Political Institutions, 14 Polity 51 (1981):

In the purest sense, a legitimate institution secures obedience to its decisions by the very fact of having made them through appropriate institutional procedures. Its outcomes are accepted, in the behavioral sense, when they are generated through the decision-making process of the institution. The process might be a highly ritualized procedure used by a jungle tribe, or it might be a vote taken by the nine members of the United States Supreme Court.

Id. at 58.

¹⁵⁶ Alexander Bickel, The Caseload of the Supreme Court: And What, If Anything, To Do About It 13 (1973); see also Karl Llewellyn, The Constitution as an Institution, 34 Colum. L. Rev. 1, 37 (1934).
institutions, but sentiment nevertheless—not any sort of decisive con-

consideration.”157 Certainly, the development of a “cult of the Court” is a well
documented phenomenon, one whose provenance and explanation probably lie more in the realm of psychology than in law.158 But—cults
aside—there is no real, intellectually defensible reason to suppose that
the Justices merit serious consideration as intellectual titans alongside
Plato and Aristotle, Kant and Hegel. The fact that they have what I
shall term “institutional authority” simply obscures the fact that they do
not have “intellectual authority.” To my mind, these simple institutional
facts make inherently implausible any attempts to attribute grand, philo-
sophical doctrines to the judiciary—which is precisely what those I criti-
cize do.

But I do not rest my case on the theoretical level alone. As an em-
pirical matter it is not difficult to show that most pronouncements of the
judiciary owe their authority solely to their status in the institutional
scheme. The ideas and opinions of most Supreme Court Justices would
not be of the slightest general interest or importance, except for the fact
(which must be considered fortuitous from an intellectual point of view)
that they are the ideas and opinions of Supreme Court Justices. Cer-
tainly, they would not otherwise be assumed to be of theoretical or philo-
sophical significance. The presence on the judiciary of an occasional
John Marshall, Oliver Wendell Holmes, Louis Brandeis, or Benjamin
Cardozo in no way weakens this argument; they are decidedly the excep-
tions to the rule that most judges, even Supreme Court Justices, have
been plucked from well deserved intellectual obscurity.159 Yet, because
most of the “secondary” scholarly work in law consists in explicating,
analyzing, and criticizing judicial opinions, these opinions and their au-
thors have, by default, assumed the status of primary sources and, by
extension, suitable subjects for philosophical theorizing.

I do not argue that judicial opinions lack intellectual merit because
judges are not philosophers or experts in philosophical theory. There
are, of course, many kinds of intellectual merit or expertise other than

157. BICKEL, supra note 156, at 14.
158. See THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1969); JEROME FRANK,
LAW AND THE MODERN MIND (1930); Max Lerner, Constitution and Court as Symbols, 46 YALE
L.J. 1290 (1937).
159. See BRIGHAM, supra note 142, at 78-79 (“The rare case in which the vision of a judge . . .
overwhelm[s] nearly all political considerations tells us about factors that are otherwise muted . . . .
The Cardozo appointment is the exception that proves the rule and demonstrates the vision that
lurks in the background—the vision of a wise man . . . .”). In the context of Hoover’s nomination of
Cardozo, Paul Freund has suggested that a surpassingly strong Supreme Court nomination may be
understood simply as the attempt of a weak President to shore up his position. See Paul Freund,
the philosophical, and judges are, presumably, selected on some such ba-
sis. Rather, I argue that there is no reason to assume, from the obvious
institutional authority of judges, that they also possess intellectual au-
thority or produce primary sources comparable to those in other
disciplines.

An anecdotal illustration may clarify my thesis. In the Fall 1987
issue of The Stanford Magazine, the Senior Editor referred to Justice
Thurgood Marshall as an “authority on the Constitution.”\(^{160}\) When in a
subsequent issue of the magazine a reader questioned this characteriza-
tion of Justice Marshall, the Senior Editor offered a one-sentence rebut-
tal: “If a Supreme Court justice is not an authority on the Constitution,
pray tell, who is?”\(^{161}\)

There are at least two different senses of “authority” at issue here.
The author might have meant that all Supreme Court Justices are, in
fact, authorities on the Constitution because they all have (as it happens)
studied, pondered, and worked on constitutional issues long enough and
thoroughly enough to qualify as authorities. I suspect, however, that the
author is making the stronger claim that simply being a Supreme Court
Justice makes one, ipso facto, an authority on the Constitution. And
there is undeniably some truth to this: During his tenure as a Supreme
Court Justice, Justice Marshall was one of only nine people ultimately
empowered to “say what the law is” (as Chief Justice John Marshall put
it). Whatever he said (or even thought) undeniably mattered. And now
that Justice Marshall has retired, an even better way to make the distinc-
tion is to ask: In what sense, if any, does former Justice Marshall remain
an “authority” on the Constitution? Certainly, he is no longer an au-
thority in the second sense, but he might still be considered one in the
first, which did not depend on his institutional role.

In our institutional scheme, the opinions of a Supreme Court Justice
carry inordinate weight just because they are opinions of a Supreme
Court Justice. “Institutional authority stems from the place of the insti-
tution among the available channels of . . . political action.”\(^{162}\) Thus,
another implication of judicial authority is power. In this sense, Chief
Justice Marshall is more than a little disingenuous in claiming that “Ju-
dicial power, as contradistinguished from the power of the laws, has no

160. THE STANFORD MAG., Fall 1987, at 24, 74 (letters to the editor).
161. THE STANFORD MAG., Spring 1988, at 20, 21 (letters to the editor).
162. BRIGHAM, supra note 142, at 31 (emphasis added); see also Posner, supra note 152, at 841
(“‘Authority’ has a different connotation in law; indeed it is a different concept. Decisions are
authoritative not when they command a consensus among lawyers, corresponding to a consensus
among scientists, but when they emanate from the top of a hierarchy, normally a judicial one.”).
Existence.” Equally untenable is Alexander Hamilton’s related claim, which seems particularly remarkable today, that the judiciary will always be “the least dangerous” branch of government, because “[t]he judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment . . . .”

These claims sound strange and unconvincing today. Their authors want to maintain that the judiciary has only intellectual authority and no institutional authority. But as Alexis de Tocqueville observed 150 years ago, “[n]o other nation ever constituted so powerful a judiciary as the Americans.” In subsequent sections of this Article, I examine the judiciary’s questionable claims to intellectual authority and analyze in some detail its many forms of institutional authority. But for now it is important simply to distinguish institutional authority from intellectual authority—which is always independently persuasive regardless of social or institutional position, and regardless of power to impose one’s personal views on others.

III. THE DWINDLING INTELLECTUAL AUTHORITY OF THE COURT

It is strange to talk of Hercules when your starting point is Harry Blackmun.

—John T. Noonan, Jr.

A possible objection to my position is: Why should our analysis differ depending on how authority is generated? A preliminary answer would be that it should not. In the following Sections, I apply such an independent intellectual standard and demonstrate that the work of the judiciary falls short when measured against such a standard. These Sections show just how much of the judiciary’s authority might be termed “unearned.”


Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

Id.


Another way to phrase the objection is: Why isn’t the “humanistic theory of what judges do” related to “what judges do” in the same way that philosophy of science is related to what scientists do? Philosophers of science observe and record what working scientists do; they note, for example, how scientists define problems, what working hypotheses are employed, what standards of precision are appropriate, and what counts as proof. One answer is that institutional authority is dictated not only to and by judges; it also affects legal scholars. One can criticize *Plessy v. Ferguson*, but one cannot really “say what the law is” without referring to the institutional authority of the judiciary. In this sense, “what judges do” has an impact on the *substance* or *content* of legal theory.

Another reason the analogy does not hold is that humanistic legal theory does not try to be the “humanistic theory of what judges do.” It is possible to imagine approaching the work-product of the judiciary the way a philosopher of science approaches “what scientists do.” But it would not resemble the way “what judges do” is assimilated and appropriated in humanistic theories of law—where attention is firmly focused on the supposed *intellectual content* of judicial decisionmaking, and the judicial work-product is examined and interrogated with the same intellectual and methodological tools that are applied to any product of the human intellect.

One could look outside judicial doctrine, language, and opinions for other sources of law, but humanistic legal scholars do not. Rather, they focus exclusively on judicial opinions, but then use theories to explain them (from outside the law) that are conspicuously at odds with our judicial system and the institutional realities of adjudication.

To return to the analogy with philosophy of science, it is as if “what scientists do” is not simply being observed and recorded; “what judges do” is being grappled with intellectually. It is as if “what scientists do” has been elevated to the level of “philosophy of science.” (It is, however, easier to imagine such a study of “what judges do” being undertaken by a social scientist.) The following Sections document the inappropriateness of elevating “what judges do” to the level of “humanistic legal theory.”

**A. The Institution of the Judiciary**

Obviously, judges are “doctrinal” authorities. They have the power or institutional authority to shape—indeed, create—legal doctrine. But this does not mean that these judges are authoritative or even competent

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167. 163 U.S. 537 (1896).
legal theorists. A systematic examination of the institutional setting of adjudication makes this clear.

1. The Judicial Appointment Process—and Its Results. The constitutional process by which federal judges are selected, nominated, and confirmed has always been inherently political. It is not a process at all suited for filtering out and anointing those with superior credentials as legal theorists and philosophers. And today, as never before, the nation’s political processes practically guarantee that those who attain the offices of President and Senator will be eminently unqualified to undertake a searching, intellectually sophisticated inquiry into “judicial philosophy.”

The delegates to the Constitutional Convention of 1787 agreed that judicial nominees should be “fit characters,” of the “requisite,” “essential,” or “proper” qualifications. These terms were not defined, most likely because the delegates had no special requirements in mind for the judiciary, other than completely traditional, conventional ones. In designing an appointment process, the delegates to the Constitutional Convention were concerned primarily to ensure that “intrigue,” “selfish motives,” and “flagrant partiality or error” did not enter into the process. Even these modest goals seem to have been elusive. For better or for worse, the Supreme Court has never been, and never will be, a “meritocracy”—and for two main reasons: the President and the Senate. The Constitution did not spell out any criteria for the President to apply in making nominations, and it did not provide any institutional mechanism for securing meaningful “advice” from the Senate or set any limitations on its (essentially unreviewable) power to refuse “consent.”

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171. See Monaghan, supra note 169, at 1210; Bruce Fein, Comment, A Circumscribed Senate Confirmation Role, 102 Harv. L. Rev. 672, 673 (1989).
175. See Charles L. Black, Jr., A Note on Senatorial Consideration of Supreme Court Nominees, 79 Yale L.J. 657 (1970); Monaghan, supra note 169, at 1205.
According to Henry Abraham, there are four “historically demonstrable major motivations” or “ascertainable decisional reasons”\(^\text{176}\) for Presidents’ selections of Supreme Court Justices: (1) objective merit; (2) personal and political friendship; (3) balancing “representation” or “representativeness” on the Court; and (4) “real” political and ideological compatibility.\(^\text{177}\) In a similar vein, Charles Warren has noted that appointments to the Court “have not been made from a cloister of juridical pedants, but from the mass of lawyers and Judges taking active parts in the life of the country.”\(^\text{178}\) Presidents have felt free to emphasize personality, politics, geography, race, gender, and even religion in selecting Justices, often on the theory that the Court should be balanced or representative.

The Senate, too, has its role to play in what Justice Frankfurter called “that odd lottery by which men get picked for the Supreme Court.”\(^\text{179}\) And here Warren’s converse observation merits mention: “The Senate, in rejecting for partisan reasons nominees of eminent legal ability, has more than once influenced the course of history.”\(^\text{180}\) Although this result may seem undesirable, there is nothing to suggest that it is somehow unconstitutional; “all the relevant historical and textual sources support the Senate’s power when and if it sees fit to assert its vision of the public good against that of the President.”\(^\text{181}\) Short of breaching some independent constitutional restriction—such as the Equal Protection Clause—the Senate may, in effect, decline to confirm a judicial nominee for any reason it sees fit to invoke, or indeed for no reason at all.\(^\text{182}\) The primary restraint on the Senate’s confirmation power is thus political, rather than legal, accountability.

The most recent nomination experiences offer the best available evidence as to the standards and criteria now, and for the future, to be applied in the selection and confirmation of Justices to the U.S. Supreme

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\(^{177}\) Abraham, supra note 176, at 323-24.


\(^{180}\) Warren, supra note 178, at 2-3.

\(^{181}\) Monaghan, supra note 169, at 1204.

\(^{182}\) See Geoffrey R. Stone et al., Constitutional Law 74-76 (2d ed. 1991); Monaghan, supra note 169, at 1206-08 & n.20 (pondering an additional “structural” limitation—“the Senate may not act so as materially to impair the functioning of the Court”—without being sure, however, “where this potential limitation leads”).
The Senate, like the Presidency, is a historical institution that operates in a context of tradition, custom, and precedent. Especially where the Constitution is silent, the Senate defines its role and refines its rules through a political process of usage, acquiescence, and accommodation. The rules of the confirmation game have been changed, and in the future it will no longer be possible to play by the old rules.

As it is presently conceived, there is a perverse kind of logic at work in the judicial appointment process. As things now stand, the Senate is probably incapable of making a truly searching, sophisticated, and intellectually respectable inquiry into the “judicial philosophy” of a nominee—should it even attempt to do so. Usually, of course, it does not attempt to do so. But the Bork hearings set an unforgettable precedent to the effect that a more intrusive form of “philosophical” review is now available for nominees who invite it—for example, by publishing controversial and highly visible scholarly works that challenge the legitimacy of important constitutional doctrines. So now, instead of having just one way to curtail the intellectual authority of the Court, the Senate actually has three: It can misapply intrusive philosophical review for nominees who present strong, highly developed intellectual credentials; (more likely) it can scare away such nominees in the first place by discouraging their nomination by the President; and (most likely of all) it can confirm obscure, mediocre, and uncontroversial nominees. The “perversity” inheres in the circumstance that the very availability of a

183. The cases of the most recent nominees to the Supreme Court are particularly illuminating for what they reveal about the nomination process and the criteria now employed in the selection of Supreme Court Justices. Anthony M. Kennedy, like Harry Blackmun, was a third choice. Robert Bork, President Reagan’s first choice for the seat vacated by Justice Powell, was a prominent law professor at Yale Law School, had served as Solicitor General of the United States, and at the time of his nomination was a leading judge on the Court of Appeals for the District of Columbia Circuit. Judge Bork had developed and articulated over the years, in numerous influential scholarly writings, a powerful (if extreme) legal philosophy; he was, according to Senate Judiciary Committee Chairman Joseph Biden, “a leading—perhaps the leading proponent of a provocative constitutional philosophy.” Bork Hearings, supra note 12, at 95 (emphasis added).

184. See Madeline Morris, The Grammar of Advice and Consent: Senate Confirmation of Supreme Court Nominees, 38 Drake L. Rev. 863, 864 (1988-1989) (attempting to “articulate and then evaluate the practice that the Senate has developed to govern criteria for advice and consent decisions”).


186. See Monaghan, supra note 169, at 1203; see also Bork Hearings, supra note 12, at 2525 (statement of Thomas C. Grey).

187. See, e.g., Nomination of Judge Antonin Scalia to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 33 (1986) [hereinafter Scalia Hearings] (testimony of Antonin Scalia) (“I do not think I should answer questions regarding any specific Supreme Court opinion, even one as fundamental as Marbury v. Madison.”).
more intense, more intrusive form of scrutiny (whether used or not) is actually associated with a palpable lowering of intellectual standards. 188

The post-Bork appointment strategies (Ginsburg, Kennedy, Souter, Thomas) should thus be viewed not as anomalies, but as carefully—and painstakingly—calculated responses in, and to, a political and legal climate that tends to “skew the process in favor of judicial nominees who have eschewed writing and speaking on vexing and contentious legal issues.” 189

Seen in that light, these most recent experiences exhibit a certain internal logic, and they confirm that intellectual authority is, as never before, a precipitately vanishing factor in the appointment process. “[S]omething’s seriously amiss,” lamented one commentator in the Wall Street Journal at the time of the Souter nomination, “when an unknown record becomes a huge advantage in Washington.” 190 What is “amiss” is simply that the myth of judicial intellectual authority, despite all evidence and experience to the contrary, still persists.

2. The “Bureaucratic Writing” of Judicial Opinions. Even under the best of circumstances, judicial opinions only imperfectly approximate the unified intellectual product of a discerning mind. 191 As Harry Wellington has put it, “majority opinions are desperately negotiated documents and not the carefully crafted work of a philosopher.” 192 For the simple reason that judicial decisions are in some sense authored by a “committee,” it is difficult to conceive of them as primary or original sources. “Only a man wholly out of touch with reality could expect an opinion writer [holding together a 5-to-4 majority] to ‘illumine large areas of the law,’” 193 wrote Thurman Arnold. “He would find that men can sometimes agree on a result, but rarely on all of the reasons for that result, and that attempts to spell out reasons may be futile.” 194 More

188. See Fein, supra note 171, at 673, 683.
189. Id. at 683.
191. See PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1097-98 (1975) (quoting FELIX FRANKFURTER, CONVERSATIONS WITH MR. JUSTICE FRANKFURTER 292-96 (Oral History Collection of Columbia University (1956)) (“When you have to have at least five people to agree on something, they can’t have that comprehensive completeness of candor which is open to a single man, giving his own reasons untrammeled by what anybody else may do or not do if he put that out.”).
recently, the inconsistency and instability inherent in group decisionmaking have been explained in formal terms by Kenneth Arrow, and this analysis has been applied to the work of the Supreme Court by Frank Easterbrook.

At a second level, judicial opinions cannot be viewed as the unified product of an original mind because they are, increasingly, not even written by a judge or Justice. They are largely "ghostwritten" by law clerks. Such a procedure would never be tolerated in "normal" intellectual disciplines, and especially in humanistic scholarship—which again shows how much the humanists' original sources differ from judicial opinions. It has further been suggested that the increasing reliance on law clerks is at least partially responsible for doctrinal breakdown in the modern Supreme Court and the tendency toward separate opinions and plurality decisions: "Because each Justice has a number of law clerks and typically none serves more than one or two years, a heroic effort by a Justice would be required to inpart unity of philosophy and authorship to the law clerks' drafts."

In discussing the Court's steadily increasing workload, the Freund Committee warned in 1972: "If trends continue, as there is every reason to believe they will, and if no relief is provided, the function of the Court must necessarily change." There are increasing indications that the function of the Court has changed over time, and that one is no longer entitled to consider the work of a Justice as analogous to that of a poet or philosopher, i.e., as the intellectual product of a unified mind. In other words, at the same time that legal scholarship is becoming more ambitious, more theoretical, and more creative, Supreme Court opinions are becoming less so—less the product of an individual and powerful mind,

198. See Posner, supra note 9, at 1352 ("The literary character of judicial opinions ... is an interesting and significant phenomenon, though regrettable a diminishing one, as more and more opinions are ghostwritten by newly graduated law students neither chosen for nor encouraged in literary flair."); see also Patricia M. Wald, Selecting Law Clerks, 89 Mich. L. Rev. 152, 153-54 (1990).
199. Archibald Cox, The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court, 94 Harv. L. Rev. 1, 72 (1980). But see Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127, 1135 n.57 (1981) ("A Justice writing a lead opinion will value the support of his fellow Justices more than the good will of his clerks, and the Justices will surely make their own decision whether or not to write an opinion. It is also unlikely that the Justices would continue a practice they thought caused plurality decisions.").
less an original text or primary source providing a theoretical model for scholarship, and more the product of "bureaucratic writing" by law clerks. The point is not so much that the Justices have not written their opinions; no one has written them. They are the proverbial "work of many hands."

It is tempting to read the obscure, formulaic pronouncements of Supreme Court opinions as heavily freighted with deep significations that human language can only imperfectly capture. But perhaps a simpler interpretation is that:

most constitutional law casebooks are forced by coverage pressure to print only a small part of most opinions. The Court's formulas always survive the editing process. Supreme Court clerks mastered those formulas and were rewarded with high grades; the formulas may be the only way they know of doing constitutional law.202

It is difficult, for example, to imagine a present-day law clerk drafting the following passage:

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today's umbrageous disposition is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. It is as devoid of reality as "a brooding omnipresence in the sky," for it conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. . . .

That passage is unmistakably the product of a brilliant, original (if somewhat egotistical) mind. 204 The same inimitable judicial style and personal philosophy can be detected in Justice Frankfurter's West Virginia.

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204. See James F. Simon, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America 251 (1989) ("[T]he emotionally charged message was Frankfurter's own."). Of course, the true test of originality is whether one has inspired any parodies. See, e.g., Richard H. Field, Frankfurter, J., Concurring . . . , 71 Harv. L. Rev. 77 (1957).
State Board of Education v. Barnette dissent, which he insisted on beginning with a personal statement about belonging to “the most vilified and persecuted minority in history.”

In writing his Barnette dissent, Frankfurter included the passage quoted above against his law clerk’s advice (reportedly with the reminder that “this is my opinion, not yours”). Frankfurter also disregarded similar advice from two of his fellow Justices, who “called formally on Frankfurter in his Chambers to plead with him to omit or soften this opening paragraph. They said it was too emotional and too personal for inclusion in a Supreme Court opinion. Frankfurter said they had given him very good reasons for taking these words out, but he had even better reasons for keeping them in; and in they stayed.”

Robert Ferguson has also addressed some of the issues I have raised about the role of law clerks in the judicial process. In so doing, however, Ferguson only strengthens my case. He writes:

As judges relinquish more and more aspects of the judicial opinion to their court clerks, or even to groups of clerks, there is some reason to qualify the designation of “personal” or “individual” writing. But to qualify does not mean to discard the idea altogether. As long as the actual written product remains “the self-conscious measure” of judicial performance, clerks will write with the style and philosophy of their judge in mind, and judges will monitor language and ideas to make sure that opinions remain in some sense their own. Clerks, in other words, work within the assumption of a personalized authority in the genre of the judicial opinion. The same assumption, that of a personal authority in the very form of the statement, also nourishes the interest and involvement of the imputed author, the judge who signs the opinion.

Now this is, to say the very least, a decidedly weak defense of the judicial opinion as an original text or primary source. It must be a very rudimentary and insubstantial judicial “style” or even “philosophy” that can be mastered so readily by the youthful law clerk, even one who is dutifully “work[ing] within the assumption of a personalized authority in the genre of the judicial opinion.” And presumably only very casual philosophers or literati would be content to “monitor language and ideas” to

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205. 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).
206. See Simon, supra note 204, at 118.
207. Max Freedman, Roosevelt and Frankfurter: Their Correspondence, 1928-1945, at 701 (1967).
209. Id. at 202 n.5 (emphasis added).
make sure that their works remained "in some sense their own." Ferguson, undeterred, devotes the remainder of his article to an extended analysis of the Minersville School District Board of Education v. Gobitis\textsuperscript{210} and Barnette cases, and mainly to Justice Frankfurter's opinions in those cases. My point precisely. Justice Frankfurter's opinions are exceptions, and rather notable ones at that; they are so exceptional and atypical that I used them myself in the above discussion, as an excellent point of contrast with current judicial practice. Ferguson takes what he terms his "proving ground" of examples exclusively from these two cases in the early 1940s, when the Court had far fewer cases—and the Justices had far fewer law clerks—than they do today. This is undoubtedly what made those examples seem "particularly useful for present purposes"; namely, for supporting the popular but largely unexamined assumption that judicial opinions are "uniquely personal literary product[s]" that form "a distinct literary genre."\textsuperscript{211}

B. The Unedifying Practice of Adjudication

A standard and familiar distinction used to provide context for explaining the practice of adjudication is the distinction between the work of the judge and that of the politician. Douglas Laycock, for example, gives one version of this familiar distinction:

Courts must give reasons, articulate general principles, and live with their precedents. A series of cases will pressure courts to draw precise lines—to say that this plaintiff wins and that a similar but not quite identical plaintiff loses. Judicial emphasis on principle tends to push arguments to their limit instead of toward acceptable compromise. Politicians and elected officials can finesse controversies with fuzzy language, by avoiding statements of principle, by agreeing on the result without agreeing on reasons, or by not offering reasons at all. Politicians can also engage in occasional emergency suppression without publishing records, without stating formal justifications, and without treating their actions as precedent. Judges have much more difficulty using these techniques.\textsuperscript{212}

Without putting too fine a point on the matter, it may be replied that judges use all of these techniques—naturally, regularly, and with no discernible "difficulty." Although common law judges may feel obligated to justify their decisions by providing reasons for them, the legal authority of judicial opinions rests not so much on the strength of their

\textsuperscript{210} 310 U.S. 586 (1940).
\textsuperscript{211} Ferguson, \textit{supra} note 208, at 202-03.
\textsuperscript{212} Laycock, \textit{supra} note 202, at 1714-15 (footnotes omitted). For another classic expression of this distinction, see Arnold, \textit{supra} note 193, at 1310-14.
reasoning as on the judges' place in the institutional scheme. As Goodhart observed, "[a] bad reason may often make good law."\textsuperscript{213} Our system of case law grants precedential authority to poorly reasoned and well reasoned opinions alike; indeed, the system offers powerful rationales for leaving legal mistakes in place, instead of correcting them. "[I]n most matters," noted Justice Brandeis, "it is more important that the applicable rule of law be settled than that it be settled right."\textsuperscript{214} This is because the concerns of judges are not abstract or theoretical, but practical and prudential—disposing of a contentious case, for example, in circumstances where the court's authority is delicately balanced between grudging acceptance by the public and lukewarm support from the other branches of government. The better part of judicial valor may be to "muddle through" (as Alexander Bickel put it\textsuperscript{215}) with a patched-together pastiche of partial reasons, rather than to construct a sweeping intellectual synthesis that is, however, wholly out of touch with social and political reality.\textsuperscript{216} In short, the philosophical virtues of rational coherence, consistency, and completeness are not the operative criteria of legal decisionmaking, and may even be detrimental to that enterprise.\textsuperscript{217} As Laycock also observed: "If coherence and stability are the criteria, almost any consistently applied theory could do better than the Court has done."\textsuperscript{218} It thus cannot be assumed that the body of judicial doctrine forms anything like a philosophical system. To base a legal theory on such an assumption is to build it upon a house of cards.

In effect, the distinction between the work of politicians and that of judges has been vastly but understandably overrated. "These are the clothes which the Court must wear in order to retain its authority and


\textsuperscript{214} Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

\textsuperscript{215} See Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 64 (1962).


\textsuperscript{217} See Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases."); Oliver W. Holmes, \textit{Codes, and the Arrangement of the Law}, 5 Am. L. Rev. 1 (1870). Our judges and Justices are not really "theoreticians"—they cannot afford to be—because "unlike their critics, [they] bear the responsibility of decision. People who bear that responsibility soon learn that the welter of life is constantly churning up situations in which the application of clear and consistent theories would produce unacceptable results . . . because the case has stirred some profound countervailing principle." Anthony G. Amsterdam, \textit{Perspectives on the Fourth Amendment}, 58 Minn. L. Rev. 349, 351 (1974). In a hard situation, the scholars and critics can "postpone their articles, change their topics, take a sabbatical, or otherwise procrastinate till muddy waters clear." \textit{Id.} at 351-52. By contrast, "[t]he Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old . . . ." \textit{Id.} at 352.

\textsuperscript{218} Laycock, \textit{supra} note 202, at 1715.
In the following sections of this Article, I shall document and explain this view of adjudication.

1. "The Passive Virtues" and the Pragmatic Judicial Role. In this first subsection I trace out some of the predominant ways and reasons that adjudication is and must be non-theoretical. These are at the same time ways and reasons judges do not provide apt models for theory, and legal opinions do not resemble original texts or primary sources like those in the humanities.220

One way of considering the non-theoretical nature of adjudication is to view it in relation to principles of judicial restraint. These principles make more sense in some contexts than in others, but in any event they are deeply embedded in our legal system.221 Numerous features of the Anglo-American legal system operate to restrain judges from "roaming the stormy fields . . . their black robes flapping in the winds of controversy . . .".222 Courts decide only questions presented to them by litigants who properly invoke their jurisdiction.223 Party presentation of evidence and argument is a mainstay of the adversary system of proof.224 These factors allow the judge to assume a passive role not unlike that of a referee.225 Common law judges do not seek out their cases or perform investigative functions, as they do in some civil law jurisdictions.

Article III of the Constitution provides that federal courts have jurisdiction to adjudicate various types of "Cases" and "Controversies."226 This has been interpreted to mean that "advisory opinions" will not be offered, as Secretary of State Thomas Jefferson discovered in 1793 when he asked the Supreme Court to construe certain treaties in light of the

219. Arnold, supra note 193, at 1311.
220. Again, the contrast with the civil law tradition is instructive. See Merryman, supra note 129, at 63-64; Redlich, supra note 148, at 36.
221. The civil law scholar does something very different from the task of a common law judge; the scholar develops theory. Elsewhere Professor Merryman describes the Continental legal scholar as "mold[ing] the civil law tradition and the formal materials of the law into a model of the legal system." Merryman, supra note 129, at 60 (emphasis added).
223. See Levy, supra note 221, at 31-32.
225. The normal passivity of the judge is described in Federal Rule of Evidence 103, which delineates the judge's role when ruling on the admissibility of evidence and the proper recourse for parties subjected to adverse rulings.
ongoing war between France and England. The Justices declined, citing separation of powers and checks and balances considerations. The federal Declaratory Judgments Act has similarly been interpreted to apply only where there is a justiciable "case or controversy" within the meaning of Article III.

These restraints on judicial intervention provide a useful background against which to view the roles of the judge and the legal scholar. Briefly, the requirements of Article III—justiciability, standing, finality, and narrow grounds of decision—all reflect an abhorrence of abstract judicial theorizing at the expense of actual litigants. To be sure (as I shall elaborate in the following subsection), an appellate court of last resort is not doing its job or its duty and is not fulfilling its "historic and essential functions" if it issues only narrow, fact-specific holdings that do not expound or explain the law to lower courts and to other potential litigants. But, as compared to philosophical or literary theorizing, the questions a judge or even a Justice faces are by nature more mundane, even when formulated generally. Relatively speaking, judicial doctrine is inherently empirical and specific—"case-specific" in this limited sense.

Between the two extremes I have indicated, it appears that the major participants have assumed the worst possible postures—that is, at the extremes. Anthony Kronman has documented the emergence of a new "rationalism" (actually, several new rationalisms) in legal theory, and the rationalist tendencies he describes can be detected in the specific legal theories and forms of legal scholarship that I criticize. Typically, these theories take their point of departure from a few abstract postulates about human nature and a conception of society as a blank slate upon which social and legal principles may be written. Other legal rationalists seek to expound deep structural regularities (usually expressed in philosophical terms of the utmost generality) that allegedly underlie the "surface confusion" of established legal doctrines. In general, these forms of abstract theorizing completely fail to consider the "details" of

228. See id.
231. See infra notes 240-46 and accompanying text.
232. See Federal Judicial Center Report, supra note 200, at 5.
234. See id. at 1571-72.
235. See id. at 1606-07.
social and historical context within which legal decisionmaking necessarily occurs. To the extent that they are supposed to be generalizations of judicial practice, they succeed only in abstracting from or ignoring the pragmatic, situated agenda of the judiciary, as I have described it above.

Where the legal theorists and scholars have taken an impossibly high road, the courts—and particularly the Court—have increasingly captured the low ground. I shall document and discuss these developments in the following subsections, but for now it is instructive to note that this striking divergence of legal theory from judicial practice makes the claims of grand legal theory even more implausible than they otherwise would be.

2. Adjudication as a Debate. The symbolism—perhaps unconscious, and certainly unexamined—of the "debate" is symptomatic of the problems I have pointed out, and the motif of the debate is often unthinkingly applied to adjudication on the grand scale, particularly that of the U.S. Supreme Court. The "debate" model has led to the attribution of important theoretical positions to courts and of significant intellectual roles to the Justices. Because the Justices often consider large, important issues, and continually issue position papers on them, it seems natural to think of adjudication as an ongoing debate. But in the broader sense of "public debate" on the great issues of the day, courts are structurally insulated from having to summon up popular support for their views and cannot in this sense really be characterized as carrying on a public debate in their opinions.

In the narrower sense of "a debate," adjudication presents even more striking differences. The prevailing side gets to enforce its victory at law; it prevails only because it has more votes, not because it has the stronger argument or is "right"—as determined by some higher authority, such as informed professional opinion, social consensus, or human history. Theoretically, the Court does not have to offer any reasons for its decisions; in practice, cases are disposed of more often than not in per curiam decisions or by "summary action"—without any argument, reason, or opinion.\footnote{236. See Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1, 3 (1957); Ernest J. Brown, The Supreme Court, 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77 (1958); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 22-23 (1959).\footnote{237. Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98 (1959).} The conception of the Court "as essentially a voice of authority settling by virtue of its own ipse dixit the questions that duly come before it, or that it chooses to permit to come before it... unhappily seems to underlie some of the Court’s own actions."\footnote{237. Henry M. Hart, Jr., The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 98 (1959).}
circumstances, adjudication exhibits only superficial similarity to a real
debate; in all its essential attributes, it is an exercise of institutional
authority.\footnote{238}

If the Supreme Court is carrying on a "debate" in its judicial opin-
ions, who or what is the audience? The other Justices? There is little
(and increasingly less) to suggest that the Justices are intent on persuad-
ing each other, through intellectual argumentation, to change their
minds on \textit{fundamental} issues—that is, on matters that might make a dif-
ference in "legal theory." The proliferation of separate opinions is only
the most visible symptom of this "pathological decisionmaking" that has left
"juridical cripples" strewn throughout the pages of the \textit{United States
Reports}.\footnote{239}

\begin{footnotesize}
\begin{footnote}{238.} In 1959, Henry Hart expressed his concern that the "process of collective deliberation of
individuals, gifted or otherwise, who recognize that the wisdom of all, if it is successfully pooled, will
usually transcend the wisdom of any," was not resulting in a consistent "maturing of collective
thought" at the U.S. Supreme Court. \textit{Id.} at 100; \textit{see also} HERBERT WECHSLER, \textit{PRINCIPLES,
POLITICS, AND FUNDAMENTAL LAW} 3 (1961); Erwin N. Griswold, \textit{Of Time and Attitudes—Professor
Hart and Judge Arnold}, 74 \textit{HARV. L. REV.} 81 (1960). \textit{But see} Arnold, \textit{supra} note 193 (noting cases,
primarily civil rights cases, that contradict Hart's conclusion).
\end{footnote}

\begin{footnote}{239.} If contemporary trends are any indication, the Court is rapidly moving ever farther from the
model of a Burkean "deliberative assembly" and the "process of collective deliberation" envisioned
by Hart. One such indication is the fact that, through the 1979 Term, the Burger Court had made
more decisions by a mere plurality than had been made in the entire previous history of the Supreme
Court. \textit{See Note, supra} note 199, at 1127 n.1, 1147. There were 45 plurality decisions between 1801
and shortly after the beginning of the Warren Court in 1955, 42 between 1955 and the end of the
Warren Court, and 88 from the beginning of the Burger Court through the 1979 Term. \textit{See John F.
Davis \\& William L. Reynolds, \textit{Juridical Cripples: Plurality Opinions in the Supreme Court, 1974
DUKE L.J.} 59, 60; Comment, \textit{Supreme Court No-Clear-Majority Decisions: A Study in Stare Decisis,
24 \textit{U. CHI. L. REV.} 99, 99 n.4 (1956). The trend toward split decisions has made a modern mockery
of "the opinion of the Court," \textit{see generally} Karl M. ZoBell, \textit{Division of Opinion in the Supreme
Court: A History of Judicial Disintegration}, 44 \textit{CORNELL L.Q.} 186 (1959) (reviewing the history of
split opinions on the Supreme Court, and its costs and benefits), with the nine separate opinions in
\textit{Furman v. Georgia} representing a low-water mark of sorts; in \textit{Furman}, none of the opinions of the
five Justices in the majority could obtain the concurrence of any other members of the Court. \textit{See
Furman v. Georgia}, 408 U.S. 238 (1972) \textit{(per curiam); see also BREST, supra} note 191, at 82 n.76
("[E]ach justice wrote a separate opinion concurring in or dissenting from the Court's judgment,
which was announced in a short per curiam opinion."); Robert Weisberg, \textit{Deregulating Death}, 1983
\textit{SUP. CT. REv.} 305, 315 ("Furman . . . is not so much a case as a badly orchestrated opera, with nine
characters taking turns to offer their own arias."). In Regents of the University of California v.
Bakke, 438 U.S. 265 (1978), four members of the Court found it necessary to remind four other
members of the Court—none of whom could find the right words to command a majority—that "[i]t
is hardly necessary to state that only a majority can speak for the Court or determine what is the
'central meaning' of any judgment of the Court." \textit{Id.} at 408 (Stevens, J., concurring in part and
dissenting in part, joined by Burger, C.J., Stewart, J., and Rehnquist, J.); \textit{see also} STEPHEN WASBY,
\textit{THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM} 233-36 (3d ed. 1988). Even the compar-
atively tame facts of Craig v. Boren, 429 U.S. 190 (1976)—concerning an Oklahoma statute that
prohibited the sale of beer containing 3.2\% alcohol to males, but not females, between the ages of 18
and 21—generated seven separate opinions. For other examples, see \textit{Note, supra} note 199, at 1128-
29.
\end{footnote}

\begin{footnote}{239.} \textit{See Davis \\& Reynolds, supra} note 238, at 77; \textit{Note, supra} note 199, at 1127-28.
\end{footnotesize}
When the Justices of the Court cannot agree on their *ratio decidendi* they abdicate the expository and explanatory function of adjudication. Bare announcements of decisions, unsupported by reasons, do not suffice as statements of the law; they do not illuminate, explain, expound, or declare "what the law is." One of the historically important functions of appellate courts, and particularly of courts of last resort, has been the heuristic function of teaching and educating parties and institutions as to their legal rights and duties.240 Another important function of appellate adjudication is to provide guidance to lower courts.241 Where it is impossible to integrate judicial opinions into a coherent body of law, these functions cannot be served.242

An obvious *external* manifestation of the Court's contemporary failure to fulfill its "historic and essential functions"243 is the emergence of fact-specific decisions that seem to turn on increasingly narrow distinctions. One cannot understand or learn from a bare decision, such as "judgment for the plaintiff," because one is not thereby enlightened as to "what it was" about the plaintiff's case that made the decisive difference. For that, one needs reflection on a higher order that makes sense of the particular facts of the specific case. We need to know what these specific facts "mean," and it is this that drives us beyond them. In other words, the Court must expound relatively broad, general rules and principles if we are to understand its decisions and learn from them.244

The *inner* manifestations of breakdown in judicial decisionmaking are the distrust of general rules, the avoidance of objective principles, the elimination of publicly ascertainable and demonstrable grounds of decision, and, finally, the abdication of reason and logic as primary bases for decisionmaking and of rational argumentation as the medium of legal discourse. As the following subsection demonstrates, judicial decisionmaking is always threatening to break down in this way, even in a highly developed legal system. Constant vigilance and enormous intellectual exertions are required to keep legal discourse artificially raised to the level


242. See *FEDERAL JUDICIAL CENTER REPORT*, *supra* note 200, at 9; cf. Bickel, *supra* note 156, at 32 ("[T]he function of the Court is not to correct error in individual cases, but to declare and harmonize national law."); Kelman, *supra* note 221, at 266 ("[T]he Supreme Court's *raison d'etre* is not to dispense justice in the relative handful of cases it is possible to hear but to settle the troublesome questions presented by these cases.").

243. See *FEDERAL JUDICIAL CENTER REPORT*, *supra* note 200, at 5.

244. See Collier, *supra* note 83, at 822.
of "a rational statement which formulates grounds and exposes connecting or logical links"; the natural, and much easier, tendency is a sort of regression to the mean, to "arbitrary dicta, accepted by the parties to a controversy only because of the authority or prestige of the judge." This regression may be considered complete when the Court no longer commands any "intellectual authority" at all but must rely solely on whatever "institutional authority" it retains as the basis for its decisions and influence. As Archibald Cox warned in 1980:

Perhaps the fragmentation is just one more symptom of a highly individualistic, inward-looking period. Perhaps it results from the breaking down of an older body of law under the pressures of legal positivism and legal realism. . . . But the Supreme Court has additional functions. . . . Continuous fragmentation could well diminish not only the influence of the Court but the ideal of the rule of law.246

3. The Calculus of Precedent. With the departure of Justices Brennan and Marshall, the role of precedent and the doctrine of stare decisis are certain to assume central importance in coming years, as a significantly more conservative Court confronts the increasingly inconvenient holdings of its predecessors.247 Timely new legal and policy rationales for the prevailing regime of institutional authority have been

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More recent judicial pronouncements indicate that Cox's concerns were, if anything, understated. In 1985 Justice Rehnquist, on the losing end of a five-to-four vote, penned a four-sentence dissenting opinion that mentioned—without discussing—no fewer than four separate approaches, "under any one of [which] the judgment in these cases should be affirmed." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting) (emphasis added). Without pondering further this remarkable case of multiple judicial oversight, Justice Rehnquist simply and abruptly ended with an ominous warning: "I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court." *Id.*

The final stage in the deterioration of judicial "debate" would be represented by the elimination of debate before it has begun. There are indications that this stage has now been reached at the Supreme Court. At the end of its 1989 Term, the Court carried over only 56 cases into the new Term; the comparable number for the previous year was 81 cases; the year before that, the number was 105. Linda Greenhouse, *Mystery for Court: Case of the Dwindling Docket*, N.Y. TIMES, July 9, 1990, at A10. Observers of the Court have noted for some time that the Justices are accepting fewer and fewer cases for decision, despite the fact that the number of appeals continues to rise. In terms of hours of oral argument scheduled at the beginning of the new Term, there has been a drop of 40% over the previous two years, while the number of appeals reaching the Court actually increased. *Id.*

obligingly provided by Justice Scalia. In *South Carolina v. Gathers*, a death penalty case, Justice Scalia impatiently urged the Court to overrule *Booth v. Maryland*, a two-year-old precedent set by Justice Powell shortly before his retirement. In so doing he addressed concerns, expressed by Justice Stevens in an earlier case, regarding:

> the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel. . . . Citizens must have confidence that the rules on which they rely in ordering their affairs . . . are rules of law and not merely the opinions of a small group of men who temporarily occupy high office.

Justice Scalia met the implied charge of head-counting straightforwardly: "I doubt that overruling *Booth* will so shake the citizenry's faith in the Court"—perhaps because the citizenry's "faith" in the intellectual authority of the Court is, for good reasons, already at such a low level that it cannot possibly be further shaken. He added that "[o]verrulings of precedent rarely occur without a change in the Court's personnel." It is but a short step from this to saying: "OVERRULING OF PRECEDENT OCCUR BECAUSE OF CHANGES IN THE COURT'S PERSONNEL," a position implicitly espoused by the dissenters in *Garcia v. San Antonio Metropolitan Transit Authority*, who noted approvingly that the unprecedented decision in *National League of Cities* had "follow[ed] some changes in the composition of the Court"—namely, the arrival of the four Nixon appointees, all of whom voted in the five-member majority.

For Justice Scalia, the only distinctive feature of *Gathers* was the fact that, as he blandly put it, "the overruling would follow not long after the original decision." But that in itself is, he continued, "hardly unprecedented"—there is no lack of precedent, as it were, for not following precedent. "Indeed, I had thought that the respect accorded prior decisions increases, rather than decreases, with their antiquity, as the society adjusts itself to their existence, and the surrounding law becomes

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251. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).
252. *Id*.
254. *Id* at 558 n.1 (Powell, J., dissenting).
255. *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).
256. For another case citing precedent for the power to overrule precedent, see Alferitz v. Borgwardt, 58 P. 460 (Cal. 1899).
premised upon their validity." 257 In other words, there is a kind of "reliance interest" in legal precedent. 258 Conversely, when judicial error has recently been made, its freshness "counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it." 259

There is a certain logic to Justice Scalia's position here. He seems to grant that the day-to-day decisionmaking of the Court is devoid of intellectual authority, although it still of course retains bare institutional authority. In close cases this can present a precarious appearance, as in the period following National League of Cities, when the law of the land seemed to depend almost entirely "on whether Justice Blackmun, the crucial vote to establishing a majority on this issue, would find that a federal law could or could not be applied to state and local governments through the use of his rather undefined balancing test." 260 Justice Roberts's role in West Coast Hotel Co. v. Parrish, 261 as the so-called "switch in time that saved nine," 262 and Justice Powell's role in Regents of the University of California v. Bakke, 263 as a kind of roving ambassador, presented similar situations. "The possibility that Justice Blackmun's votes will have first created and then destroyed a major constitutional doctrine obviously raises troubling concerns about the judicial process." 264 These concerns do not mean that the Court's institutional authority is or was seriously in question; but they do suggest that the meteoric rise and precipitate decline of the "National League of Cities doctrine" (whatever that was) had little to do with the internal logic of legal reasoning, and that the Court's pronouncements to the contrary cannot be taken at face value, as "doctrinal artifacts" requiring, or merit- ing, extended intellectual attention. 265 During the period following National League of Cities, of course, legal scholars were taking the supposed doctrine of that case very seriously, attempting to make some sense out of

257. Gathers, 490 U.S. at 824 (Scalia, J., dissenting).
259. Gathers, 490 U.S. at 824 (Scalia, J., dissenting) (emphasis added).
261. 300 U.S. 379 (1937).
264. Frickey, supra note 262, at 143.
it, and offering elaborate and imaginative glosses that had undoubtedly never occurred to the Court.\textsuperscript{266} It would appear in retrospect that those efforts were largely, if not completely, wasted. Perhaps the case was, as Philip Bobbitt has suggested, "not a major doctrinal turn but a cue to a fellow constitutional actor, an incitement to Congress to renew its traditional role as protector of the states."\textsuperscript{267} In any event, \textit{National League of Cities} certainly seems to qualify as the proverbial "restricted railroad ticket, good for this day and train only."\textsuperscript{268}

For Justice Scalia, \textit{National League of Cities} is not an aberration; it is a paradigm. The day-to-day decisionmaking of the Supreme Court is supported primarily by its bare institutional authority and only marginally by the limited intellectual authority the Court can claim on behalf of its adjudication. Just as no particular stigma attaches to changing one's mind when one never claimed to be "right" in the first place, there is no particular intellectual stigma attached to overruling routine decisions, because they had no real claim on our intellect to begin with. Thus, when a shift of voting power on the Court materializes, the opportunity to grab more power should, as Justice Scalia enthusiastically counsels, "be seized at once"\textsuperscript{269} before it slips through the judicial fingers. Recent decisions may be overruled at will, especially when there is a change in the Court's composition. And in fact, not long after the departure of Justice Brennan—and with the help (and vote) of his replacement, Justice Souter—both \textit{Booth} and \textit{Gathers} were unceremoniously overruled at the end of the Court's most recent Term.\textsuperscript{270} Chief Justice Rehnquist explained in his majority opinion that both of the overruled precedents had been five-to-four decisions, that "spirited dissents" had accompanied them both, and that in any event the Court had overruled thirty-three of its own decisions in the previous twenty years.\textsuperscript{271} As Plato has Thrasymachus say, "justice is nothing other than the advantage of the stronger";\textsuperscript{272} or, as Justice Scalia has a "cynic" say, "with five votes anything is possible."\textsuperscript{273}


\textsuperscript{267} BOBBITT, supra note 265, at 194.


\textsuperscript{269} \textit{Gathers}, 490 U.S. at 824 (Scalia, J., dissenting).


\textsuperscript{271} See id. at 2610-11.

\textsuperscript{272} PLATO, \textit{REPUBLIC} 338c (Allan Bloom trans., 1968).

Nevertheless, exception must be made for “decisions that have become so embedded in our system of government that return is no longer possible.”274 In these exceptional cases, the opportunity to overrule them and grab more power has, for whatever reasons, been declined or unavailable for so long that they have acquired, by a kind of adverse possession, “the respect to which long-established practice is entitled.”275 Yet, this respect does not necessarily accrue to decisions on the ground that they are “right” or because they are made by an intellectually authoritative institution. It may just as readily be explained by factors wholly external to the Court, such as the fact that we have relied on these decisions and ordered our affairs around them for so these many years; overruling them now would cause the most dislocation. Thus, if Marbury v. Madison had been decided recently, the Court would not hesitate to overrule it at will. It is only Marbury’s historical pedigree and prestige that make it resistant to overruling this late in the day—not the fact that it was decided on true or correct reasoning or principles.276

Justice Scalia’s analysis provides the legal and policy rationales for “head counting” and the relaxed hold of precedent; his denial of intellectual authority to the Court’s decisions effectively implies the reduction of its authority to institutional authority alone. Justice Scalia’s views thus confirm my suggestion that the only real authority for the Court’s decisions emerges incidentally, through accommodation and acquiescence, and because it was a “court of last resort” that made the decisions, not because they were necessarily “right” or intellectually sound in the first place.

It might be argued that the “great” opinions operate like primary sources, and create ripple effects of increasing intellectual authority. But, to test this, what would one say about a case like Plessy v. Ferguson?277 It was a “landmark” case for almost sixty years, so it certainly had full institutional authority, but did it have “intellectual authority”? In my discussion of that concept I agreed that “survival is the test of greatness,”278 but by “survival” I did not mean bare persistence enforced by power; I meant continued acceptance in the free marketplace of ideas. Was the “Plessy doctrine” accepted as a result of intellectual debate? In fact, the authority of Plessy steadily declined; it did not “survive,” even in the limited sense of retaining institutional authority. And then when it

275. Id. at 824.
276. At his confirmation hearings Justice Scalia seemed to acknowledge, however grudgingly, that Marbury is for this reason probably safe from being overruled. See Scalia Hearings, supra note 187, at 104.
277. 163 U.S. 537 (1896).
278. See supra text accompanying notes 121-27.
was replaced by *Brown v. Board of Education*, did that mean that *Brown* had more intellectual authority?

Actually, *Brown* is perhaps even better explained against the background of a momentous social transformation, coupled with some fortuitous personnel changes and some extraordinary, non-judicial machinations behind the scenes. In other words, *Plessy* did not owe its ascendancy to its intellectual content, and its decline was not due to its lack of intellectual content either. Indeed, many of the great, "landmark" cases—e.g., *Brown, Roe v. Wade*—have been criticized as devoid of rational argument or true intellectual authority.

The consistent practices of the Presidency, the Senate, and the Supreme Court cannot all be "wrong"—at least not over long periods of time—because these practices eventually take on a normative significance. Historical institutions become defined by what they have been. These considerations force one to reconsider the received view of the judiciary, and particularly the Supreme Court, as a kind of intellectual meritocracy where logic and rational argumentation are the coin of the realm. That view is demonstrably unrealistic and sharply at variance with the institutional setting and contemporary practice of adjudication; it must finally be given up.

IV. STYLES OF LEGAL THEORIZING

Judges and scholars have... gone off in search of help from strange and alien gods. ... A wave of continental learning swept over England, leaving a thick deposit of its obscurant abstractions, and much of it still remains.

—Herman Oliphant


283. As Hegel more elegantly put it in German, "Wesen ist was gewesen ist." ("Essence is what has been."); *quoted in* Jean-Paul Sartre, *Being and Nothingness* 120 (Hazel E. Barnes trans., 1956). *See* Hegel's *Logic* 163 (William Wallace trans., 3d ed. 1975); 2 Georg W.F. Hegel, *Wissenschaft der Logik* 3 (Georg Lasson ed., 1934).

In this Part, I consider some prominent examples of contemporary legal scholarship in light of the analysis developed in this Article.

A. Drama at the High Court

Robert Weisberg's *Deregulating Death* \(^{285}\) is an excellent example of the new legal scholarship and of what may be termed the "dramatic" approach to judicial decisionmaking. Weisberg brings to his subject the heightened literary sensibilities that one would expect of a former professor of English literature. And indeed his subject is perhaps the most inherently dramatic in the entire legal repertoire: capital punishment.

*Deregulating Death* is an elaborate study—part doctrinal history, part documentary history, part rhetorical analysis,\(^ {286}\) and part philosophical speculation\(^ {287}\)—of the modern Supreme Court's efforts to contain capital punishment within the rule of law. Weisberg focuses on the penalty phase, as opposed to the guilt phase, of capital murder trials. Since *Furman v. Georgia*,\(^ {288}\) which (whatever else it did) condemned the "arbitrary" or "standardless" imposition of the death penalty, the Supreme Court has increasingly required state courts and legislatures to invest the so-called "penalty trial" with greater formal rationality.\(^ {289}\) But in an abrupt about-face at the end of the 1982 Term, the Court seemed to have despaired of carrying out its decade-long enterprise. It apparently decided to "deregulate" the penalty trial and essentially let the states decide what substantive and procedural protections—beyond a bare minimum—to provide.\(^ {290}\)

As Weisberg sees it, the legal history of death penalty doctrine traces out a grand intellectual struggle between a "romantic" and a "classical" view of law. Prior to *Furman*, Justice Harlan had warned: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond

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\(^ {285}\) Weisberg, supra note 238.

\(^ {286}\) See, e.g., id. at 310 (discussing "tone" of McGautha opinion); id. at 319 (discussing the "rhetoric of lament and exhortation" of *Furman* and the "rhetoric of subtle observation and approval" of *Gregg*); id. at 317 (extracting "unifying themes" from *Furman*); id. at 339 ("I am less concerned with specific issues than with the doctrinal rhetoric the courts have used."); id. at 342-43 (analyzing "metaphor" of the trial and "[t]he rhetoric of defense argument"); id. at 355 ("The Barclay case is as much a literary as a legal phenomenon. . . .").

\(^ {287}\) See id. at 383-95.

\(^ {288}\) 408 U.S. 238 (1972).


The "romantics" set out, with "good old American know-how," to prove Justice Harlan wrong. They relied on a separate penalty trial, rigorous appellate review to guard against inequality among sentences, and "a disciplined rational procedure to guide the sentencer in examining evidence . . . and applying it to a logical choice of sentence." Presumably Weisberg terms this view "romantic" because it reflects an almost naive or sentimental faith in the power of formal legal rules to guide and limit discretion. More generally, it suggests an unreconstructed optimism that basic social and political problems can be solved by the progressive refinement of legal doctrine.

The competing "classical" account of capital punishment offers a more mature, austere legal vision. It frankly acknowledges the practical limits and administrative costs of judicial doctrine-building, stresses the inapplicability of the trial metaphor at the sentencing phase, and patiently explains the logical irreconcilability of horizontal equity and individualized sentencing. In the companion case to McGautha, for example, "Harlan seems perfectly willing to concede that Cranpton's dilemma was unfair and even 'cruel.' But he insists that a bit of reflection shows that all trials are in some ways unfair. The tone of the opinion is that life generally is unfair, and the law need be no fairer." Philosophical skepticism and a certain "wizened pessimism" (if not cynicism) about death penalty doctrine-making are thus hallmarks of the classical view.

Weisberg's perspective on individual Justices and their legal opinions is an extraordinarily broad one. In his account, the Justices loom larger than life—larger than mere judges, certainly, and a fortiori larger than mere mortals. From this commanding height they represent and embody definite philosophical positions and attempt to implement sweeping—often extra-legal—philosophical agendas. Justice Harlan, for example, "does not simply rely on the conventional tools of precedent and analogy. He seems also to want to write a Burkean essay condemning the due process argument as romantic utopianism, a failure to achieve tragic wisdom." And Justice Douglas's opinion in Furman "is

292. Weisberg, supra note 238, at 318.
293. Id. at 319.
294. See id. at 307, 322, 346, 352-53.
295. See id. at 342, 346, 349-52.
296. See id. at 323-24, 327.
297. Id. at 310 (footnote omitted).
298. See id. at 314.
299. Id. at 310; see also id. at 309 ("[T]he McGautha opinion is now due for a bit of restorative interpretation, having proved partly prophetic in its technical holding, and generally prophetic in its
not so much a legal opinion as a cultural document, an emotive internal monologue of American political liberalism engaged publicly in moral self-criticism during the middle of the Vietnam era. It is a catalog of cultural embarrassments, not an analysis of legal error.\textsuperscript{300}

When the Justices square off against each other, moreover, it is a battle of intellectual titans we are observing, a struggle over immortal philosophical principles, not simply the petty, personal quarrels of mere judges over disputed points of law. In the \textit{McGautha} opinions, for example:

Harlan’s posture of Burkean skepticism is even more apparent in the second holding—that standardless jury sentencing does not violate due process. On that issue, Justice Brennan provides the perfect antagonist in the role of pedantic idealist—the Tom Paine to Harlan’s Burke—so that the two can conduct a rhetorical debate on legal philosophy.\textsuperscript{301}

And in \textit{Zant v. Stephens}:

Rehnquist is discovering and asserting Justice Powell’s view in \textit{Bullingon}: The penalty trial is an existential moment of moral perception, neither right nor wrong, and therefore largely unreviewable.

Justice Marshall’s dissent in \textit{Zant} is full of the outrage of one who has been cheated and lied to. He speaks in disbelief. . . . as one who has accepted the romantic due process account and now is bewildered as the Court reads it out of its own historical memory.\textsuperscript{302}

Similarly, in \textit{Barclay v. Florida}:

[Justice Rehnquist] makes a few specific legal points, but the opinion reads mostly like a laconic expression of annoyance that anyone could seriously imagine the Court’s being concerned with violations of the procedural niceties of Florida law. . . .

Justice Stevens expresses distress over Rehnquist’s repeated casual nihilism. But the disagreement is again one of attitude rather than of law. . . . Ultimately, Stevens, like Rehnquist, relies on the strong if Delphic authority of \textit{Zant} to declare Barclay’s claims worthless.\textsuperscript{303}

Weisberg’s study may be termed a “first-order” account in that his descriptions, though creative, probably do roughly approximate the Justices’ and the Court’s own self-understanding. The Justices probably do, in some sense, think of themselves as leading actors in an epic legal
drama (or as intellectual titans debating immortal philosophical principles). In Weisberg's "creative redescription," that is, the Justices would probably recognize themselves and what they have been doing and saying. Regardless of whether Justices do think of themselves in this way, however, the question still remains: Is it useful for us to think of them this way? As I have suggested throughout this Article, an uncritical adoption of the judiciary's own self-understanding cannot ordinarily be justified on the assumptions that prevail in a normal humanistic discipline, i.e., the assumption that the objects of its study and research are original texts and primary sources that deserve or have otherwise earned a degree of intellectual authority that warrants the extended intellectual attention that is lavished upon them. Weisberg's "dramatic" perspective involves such an assumption, although perhaps only in the most general sense.

The accounts to which I shall now turn, however, may be termed "second-order" accounts, because they impose more or less external paradigms upon what would be a more or less uncomprehending Court. These accounts go at least one step beyond the Court's own self-understanding; the Justices would probably not recognize themselves, or what they have been doing and saying, in these descriptions.

Frank Michelman, for example, offers a "version" of Supreme Court adjudication that is "largely an interpretation of the profound and extensive writings of one eminent historian of the republican tradition . . . leavened by some reading [of another]." It seems safe to assume that the Justices would not recognize themselves in Michelman's "version" of them, and it is probable that many others would not either. For Michelman, a case about an Orthodox Jew who wished to wear a yarmulke while on active duty in the Air Force involves, simultaneously, "themes of dialogue: conversation, inclusion, and recognition; themes of history: narration and continuation; themes of responsibility: contextuality and immediacy; and themes of identity: shared humanity (including difference) and common good (including confrontation with difference)." "Together," says Michelman, "these themes compose a loose unity of their own. . . . Happily for us, their conjunction is strikingly exemplified in Justice O'Connor's dissenting opinion in Goldman v. Weinberger." In that opinion, Justice O'Connor adopts a balancing test:

First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show

304. Michelman, supra note 6, at 36 n.175.
305. Id. at 33.
306. Id. (emphasis added).
that the opposing interest it asserts is of especial importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the interest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.307

Michelman asserts that adopting this balancing test is “a significant act of commitment on Justice O’Connor’s part,” and that in so doing she “displays both its reconciliatory spirit and its dialogic force.”308 For those who missed these aspects of Justice O’Connor’s balancing test, it is necessary to go through Michelman’s analysis in more detail:

Justice O’Connor’s particular choice of a test commits her . . . to a particular version of national normative history and, through it, of national normative identity. As narrator resuming *in medias res* a story of many threads—“this Court’s precedents”—it is she who decides which threads to pick up, where, in what combination. The subplot she chooses is that of the social conflict of religion and regulation. To see the commitment in that choice, one need only compare it with Justice Rehnquist’s for the Court. His subplot—no less fairly available than hers in the history—is that of separation of powers, of the articulation of government into agencies related by status. *These narrative choices express world views*: in her subplot, the setting is society, the protagonists are troubled persons, and the *agon* is social difference. In his, the setting is the state, the protagonists are abstract authorities, and the *agon* is institutional deference.309

It is probably safe to assume that neither Justice O’Connor nor Justice Rehnquist knew what an “*agon*” is, much less suspected that their “world views” included one, and even less dreamed, in their wildest dreams, that their disposition of the *Goldman* case could possibly turn on such a strange and obscure Greek word. For the uninitiated, Michelman patiently explains that “[a] drama’s ‘agon’ is its central field or argument of struggle. The Greek word literally describes an assemblage of people at a field of contest, perhaps initially and primarily an athletic field or race course.”310 And if Justices O’Connor and Rehnquist—those law school classmates, fellow law review editors, and long-time friends311—

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308. Michelman, *supra* note 6, at 34.
309. *Id.* at 35 (emphasis added) (footnotes omitted).
310. *Id.* at 35 n.172.
311. See *WILLIAM REHNQUIST, THE SUPREME COURT* (1987): “Sandra and I were classmates in law school, and my wife, Nan, and her husband, John, were undergraduate classmates there. We go back a long time, and I was overjoyed at her appointment to the Supreme Court.” *Id.* at 258-59.
indeed have incompatible "world views," we presumably owe that discovery to Professor Michelman as well. As Michelman himself concedes, "[t]his sounds like a pathology of court-fetishism, and it may be that."312

B. A Map of Judicial Misreading

David Cole's Agon at Agora: Creative Misreadings in the First Amendment Tradition313 is one of the most elaborate "second-order" accounts of the judicial process that draws explicitly on a specific non-legal theory. Cole "appl[ies Harold Bloom's] critical model for reading poetry to Supreme Court adjudication."314 To do justice to Cole's project it will be necessary to explicate Bloom's theory first.

1. Bloom's Theory of Poetic Influence. In The Anxiety of Influence,315 A Map of Misreading,316 and several later works,317 Harold Bloom charts a perilous course between the idealized formalism of the 1950s New Critics and the despiritualized structuralism of the 1980s deconstructionists. I can think of no better way to present Bloom's theory than to explicate three key terms from his main titles: influence, anxiety, and misreading.

"Influence" is in a sense the central concept, and it can be explored at several levels. Bloom insists from the very beginning that the writer—and in particular the poet—must always be situated within the rich, overlapping contexts of language, thought, history, tradition, and literary culture. To this extent Bloom's theory is "relational" (or contextual); like Hegel, he defines things in terms of what they are not, in terms of what distinguishes them from other things.

And how do poets distinguish themselves? One is tempted to say that "they write new, original, intensely creative poems"; yet upon closer examination this proposition becomes problematic. Even when poets defy the conventions of poetry they are still writing in reference to (in "negative reference," perhaps) those conventions; even when poets use

312. Michelman, supra note 6, at 74.
314. Id. at 858.
315. BLOOM, supra note 7.
316. BLOOM, supra note 67.
language in new and unusual ways they are still using language (and linguistic and literary conventions). 318

One may grant that all poets are in some sense trying to be different; they “differentiate themselves into strength,” says Bloom, by “turning from the presence of other poets.” 319 It is necessary to avoid the influence of previous poems in order to write a truly new one. In this sense, what a poem is essentially “about” is other poems—they are conspicuous by their absence. 320 “Precursor” poets and their poems loom so large, and cast such a profound and ominous pall over the creative world of later poets, that the hapless efforts of these “latecomers” to be original amount mainly to perpetual (and largely unsuccessful) efforts to avoid being influenced. 321

Bloom’s second key concept is “anxiety.” The “anxiety of influence” is the fear that there may be nothing new left to say, that the great thoughts have already been thought and the great poems already written. 322 The great poets of the past are overwhelming—they are too powerful, too influential, and too all-consuming to be faced directly and acknowledged fully. 323 “The precursors flood us, and our imaginations can die by drowning in them . . . .” 324

What do later poets do when faced with this potentially overwhelming influence of the great dead poets? They do what we all do in such a situation: They put up defenses, and they evade the full force of the onslaught by turning aside. Defenses and evasion are necessary because “if any poet knows too well what causes his poem, then he cannot write it,
or at least will write it badly. He must repress the causes, including the precursor-poems . . . .”

Bloom captures this process of defense and evasion with the concept of “misreading,” the basic paradigm for which is Freud’s so-called “family romance.” For Virgil the overwhelming precursor is Homer, for Wordsworth it is Milton, for Wallace Stevens it is Whitman, and so on. In every case, later poets make literary history only by “misreading” their poetic forefathers, “so as to clear imaginative space for themselves.”

Bloom has developed a detailed “map of misreading” that can only be hinted at here. In a legal context, three aspects of the process of misreading are of particular significance: It is willful and pragmatic; it is personal and subjective; and it is falsification. These aspects all have important implications for the theory of legal interpretation that Cole develops on the basis of Bloom’s ideas.

The poet’s need to misinterpret a dominant predecessor arises out of anxieties about originality, autonomy, and ultimately identity. “We read to usurp, just as the poet writes to usurp,” says Bloom. “Usurp what? . . . A place, a stance, a fullness, an illusion of identification or possession; something we can call our own or even ourselves.” Partly deliberately, partly unconsciously, the poet comes to realize that the influence of the precursor must be resisted at all costs—at least if any worthwhile new poetry is to be possible. This realization is not a cognitive judgment that the predecessor is “unworthy” of respect or admiration; quite to the contrary, the predecessor is all too worthy. Misreading is simply a willful, pragmatic refusal to follow in an illustrious predecessor’s more than ample footsteps. For the true poet, even striking out in a “wrong,” but new, direction may be preferable to merely following another.

325. Bloom, Poetry and Repression, supra note 317, at 5.
326. See Sigmund Freud, Moses and Monotheism 9-13 (Katherine Jones trans., 1949); see also Bloom, supra note 7, at 56-57 (“[T]he anxiety of influence, from which we all suffer, whether we are poets or not, has to be located first in its origins, in the fateful morasses of what Freud, with grandly desperate wit, called ‘the family romance.’”).
327. Bloom, supra note 67, at 19; see also Bloom, supra note 7:

[A] poet’s stance, his Word, his imaginative identity, his whole being, must be unique to him, and remain unique, or he will perish, as a poet, if ever even he has managed his rebirth into poetic incarnation. But this fundamental stance is as much also his precursor’s as any man’s fundamental nature is also his father’s, however transformed, however turned about.

Id. at 71.
328. Bloom, supra note 7, at 5.
329. Bloom, Agon, supra note 317, at 17; see also Bloom, supra note 7, at 65 (“[T]he poet, in writing his poem, is forced to see the assertion against influence as being a ritualized quest for identity.”).
For these reasons Bloom terms the process of misreading “perverse,” in the root sense of “swerving” from a pre-established path.\textsuperscript{330} The latecomer poet’s decision that “the great masterpieces of anterior art must be destroyed, if any great works are still to be performed”\textsuperscript{331} has little to do with judgment, knowledge, and truth-seeking. It is, rather, an assertion of power that answers to practical, pragmatic, and emotional needs.\textsuperscript{332} Instead of asking “Am I getting this poem [or text] right?” the strong misreader asks “[W]hat is it good for, what can I do with it, what can it do for me, what can I make it mean?”\textsuperscript{333} Misreading the precursor is for Bloom “willing error,”\textsuperscript{334} “falsification,”\textsuperscript{335} “a lie against the truth of time.”\textsuperscript{336} The poet’s (and critic’s) agenda is “personal, agonistic and original,”\textsuperscript{337} so “[f]acts and arguments alike have little to do with” it.\textsuperscript{338} In this context, the only real requirement of a good reading is that it be strong.\textsuperscript{339} “For [poets], to be judicious is to be weak,” says Bloom, “and to compare, exactly and fairly, is to be not elect.”\textsuperscript{340} Indeed, Bloom approvingly cites Oscar Wilde’s warning that “the critical imagination [must] never fall into careless habits of accuracy.”\textsuperscript{341}

Complaints that Bloom’s theory of poetic influence is itself “perverse” are, in a sense, beside the point. One must constantly keep in mind that different criteria of evaluation apply in different intellectual contexts. Bloom’s elaboration of this theme provides a useful summary of his work:

Criticism is not a science, not even a “human science,” and it is not a branch of philosophy. The theory of poetry need not meet the tests by

\textsuperscript{330} See Bloom, supra note 7, at 14 (“A poet swerves away from his precursor . . . . This appears as a corrective movement in his own poem, which implies that the precursor poem went accurately up to a certain point, but then should have swerved, precisely in the direction that the new poem moves.”).\textsuperscript{331} Bloom, Poetry and Repression, supra note 317, at 4.\textsuperscript{332} See Bloom, supra note 7, at 29 (“You have only to think of the strong emotional factors that make it hard for many people to fit themselves in with others or to subordinate themselves.”); see also Bloom, supra note 67, at 69-70 (viewing Nietzsche’s “will to power” as “a paradigm for our understanding of intra-textual encounters”).\textsuperscript{333} Bloom, Agon, supra note 317, at 19.\textsuperscript{334} Bloom, supra note 67, at 93.\textsuperscript{335} Id. at 69.\textsuperscript{336} Bloom, supra note 7, at 130; see also Bloom, Agon, supra note 317, at 41 (“[P]oetry and criticism . . . are closer to lies and self-deceptions than to any other fictions. If we ever get a vigorous philosophy of the lie, then we may be close to a useful philosophy of poetry.”).\textsuperscript{337} Bloom, The Breaking of the Vessels, supra note 317, at 37.\textsuperscript{338} Id. at 26.\textsuperscript{339} See id. at 25 (“with the strength of usurpation, of persistence, of eloquence”).\textsuperscript{340} Bloom, supra note 7, at 19.\textsuperscript{341} Bloom, Agon, supra note 317, at 18 (“We must see the object, the poem, as in itself it really is not, because we must see not only what is missing in it, but why the poem had to exclude what is missing.”).
which science and philosophy rate theory, or by which they decide what is or is not theory. The theory of poetry, like all criticism, is an art, a teachable and useful art, and its true criteria are poetic: it must be memorable, pragmatic where it is most visionary, and it must give pleasure, even if only to an elite. . . . By these criteria, most current theory can be given back to the empirical scientists, to the social scientists, and to the dialectical philosophers.  

2. Judges as Poets. As noted above, David Cole has developed an ambitious and imaginative application of Bloom’s theories to Supreme Court adjudication. The first sentence of Cole’s article, however, is a concession: “Supreme Court Justices are not often mistaken for poets.” That observation seems almost to serve as a challenge for Cole—he proceeds to build his remarkable piece of misreading on the premise that Supreme Court Justices are very much like poets. Cole’s thesis, in a nutshell, is that the Justices experience the “anxiety of influence” when confronted with the texts of their great legal precursors; consequently, their opinions are “misreadings” (in Bloom’s sense) of those predecessors.

As Cole readily acknowledges, “seemingly fundamental” rationales underlie our expectation that the law will be ordered, principled, and predictable. Unlike the poet, who is presumptively free to create ideas out of thin air, the judge is expected to adhere to established rules and principles in construing and applying the law. “Indeed, the very legitimacy of judicial review seems to rest on the difference.” Here, obviously, “legitimacy” is the key term: Adjudication derives legitimacy, and thereby authority, from its apparent fidelity to original texts (e.g., constitutions, statutes, regulations) and its adherence to precedent. A quick look at representative lawyers and poets makes the point well. Here is Blackstone on precedent:

[I]t is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge’s opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments:

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343. Cole, supra note 313.
344. Id. at 858.
345. See id.
346. Id.; see also id. at 867 (“A legal order that was subject only to the whim and caprice of a few men in black robes who considered themselves divinely inspired would be little more than despotism; its legitimacy would likely rest on the threat of physical force rather than on the consent of the people.”).
he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land...\textsuperscript{347}

And here is Emerson on self-reliance:

To believe your own thought, to believe that what is true for you in your private heart, is true for all men,—that is genius. Speak your latent conviction and it shall be the universal sense...\textsuperscript{348} Familiar as the voice of the mind is to each, the highest merit we ascribe to Moses, Plato, and Milton, is that they set at naught books and traditions, and spoke not what men but what they thought...\textsuperscript{349} They teach us to abide by our spontaneous impression with good-humored inflexibility then most when the whole cry of voices is on the other side.\textsuperscript{348}

Cole nevertheless advances two reasons for treating Supreme Court Justices and poets alike: (1) Poets are not as “creative” as is commonly assumed; and (2) the Justices are more creative than is commonly assumed.\textsuperscript{349} As for the poets, their apparently creative acts are always breaks from a past tradition and are defined and understood in terms of their relation to that tradition.\textsuperscript{350} This is basically the Bloomian theory, as described above.\textsuperscript{351} As for the Justices, Cole observes that they inevitably engage in some degree of interpretation, because legal texts and precedents do not otherwise yield any meaning.\textsuperscript{352} “Supreme Court Justices are creative... insofar as the situations they face demand that a standing body of law be consistently reinterpreted and tailored to novel facts.”\textsuperscript{353} This is essentially the modern theory of meaning, as applied to legal method.

The picture that emerges is of a continuum. At one end are the poets; at the other end are those Justices who simply follow precedent. These Justices find legitimacy “in a kind of plodding belatedness.”\textsuperscript{354} Toward the middle are the “great” Justices who break sharply and creatively from precedent and tradition. Their greatness consists precisely in having abandoned mere legitimacy in favor of strong, constructive “misreadings” of important legal predecessors. “[A]s in poetry, those who ultimately succeed in the struggle and are viewed as great are not

\textsuperscript{347} 1 BLACKSTONE, supra note 132, at 69.
\textsuperscript{348} RALPH W. EMERSON, Self-Reliance, in \textit{2 The Collected Works of Ralph Waldo Emerson} 27 (Joseph Slater et al. eds., 1979).
\textsuperscript{349} See Cole, supra note 313, at 858.
\textsuperscript{350} See id.
\textsuperscript{351} See supra text accompanying notes 315-42.
\textsuperscript{352} See Cole, supra note 313, at 858. Some rather unremarkable consequences follow: “[T]he meaning of a text is... always open to question... A particular precedent may therefore appear to support several interpretations... .” Id.
\textsuperscript{353} Id.
\textsuperscript{354} Id. at 866.
those who follow precedent, but those who break radically from tradition by acts of 'misreading.'

According to Cole, the great "poets" of First Amendment law (the area he treats) are Justices Holmes, Brandeis, and Brennan. One might remark, in Bloom's terms, that they indeed share a certain "blindness towards the canonical authorities they sought to invert or subvert." But in Holmes's case, according to Cole, the "canonical authority" is Holmes's own opinion for the Court in Schenck v. United States.

Schenck was convicted under the Espionage Act of 1917 for supervising the printing of an anti-war circular that exhorted: "[M]aintain, support and uphold" the "right to assert your opposition to the draft." In affirming Schenck's conviction, Holmes's opinion for a unanimous Court disposed of the free speech issue in a single paragraph, which included the so-called "clear and present danger" test:

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Eight months later, the Court was presented with the similar case of Abrams v. United States, which involved the distribution of leaflets encouraging resistance to the United States and calling for a general strike in time of war. A majority of the Court dismissed the petitioner's First Amendment claims summarily, as "definitely negatived" by Schenck. This time, however, Holmes (joined by Brandeis) dissented, and in so doing he penned a ringing endorsement of First Amendment principles that hardly seems to have been written by the author of Schenck:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants

355. Id. at 859.
356. See id. at 866. Cole states that "nearly every free speech case since 1927 involves either an explicit or implicit misreading of [Holmes's and Brandeis's] theories." Id. at 892.
357. BLOOM, supra note 67, at 62.
359. Id. at 51.
360. Id. at 52.
361. 250 U.S. 616 (1919).
362. See id. at 617.
363. See id. at 619.
had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper... the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow... 

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition... I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.366

Cole explains this reversal as a classic manifestation of the “anxiety of influence”: “In Abrams, Holmes strongly misread not only binding legal precedent, but precedent that he himself had very recently authored. In thus dissenting from himself, Holmes battled an authority more immediate and perhaps more powerful than any other precursor.”365 Yet the invocation of Bloom’s theories does not seem to add any special or additional explanatory power to Cole’s discussion. He notes, for example:

The lasting power of the Abrams dissent lies in its restatement of the “clear and present” danger test... Holmes revised the test he had enunciated in Schenck by elaborating on the elements of proximity and degree. The danger must be “immediate” and of virtually revolutionary proportions, so that “an immediate check is required to save the country.” The immediacy must also be tangible...366

A standard commentary, however, makes the same point just as well:

[I]n Abrams, Holmes infused into his restatement of “clear and present danger” new elements that afforded greater protection for speech. Most strikingly, he now maintained that the proximity of the danger from speech must be “clear and imminent,” not just “clear and present.” He used variations of “immediate” and “imminent” with remarkable frequency throughout his dissent, and even appended “forthwith” and “pressing” for additional emphasis.367

364. Id. at 629-30 (Holmes, J., dissenting).
366. Id. at 884 (footnote omitted).
367. David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. CHI. L. REV. 1205, 1308 (1983) (footnote omitted); see also Laurence H. Tribe, American Constitutional Law 843 (2d ed. 1988) (“Justice Holmes... doctrinal approach was to infuse more immediacy into the Schenck formulation of the clear and present danger test and thereby sharply distinguish it from the loose predictions of remote consequence which had been sufficient to sustain criminal convictions in the previous cases.”).
Cole observes further that "[t]hese elaborations give concrete meaning to the formal outlines of 'clear and present danger.' It seems probable that had Holmes suggested these specific thresholds in his original formulation, he would not have enjoyed majority support, nor could he have upheld Schenck's conviction." Yet a standard casebook raises similar concerns, without benefit of Bloom's theories:

Did the Abrams dissent simply apply the Schenck standard, or did it give a new meaning to clear and present danger? . . .

. . . . Does Abrams give new content to "clear and present danger"?
Can it be said that the Schenck phrase was not turned into an effective safeguard of speech until the Abrams dissent? 369

Cole's final triumph is to explain Holmes's doctrinal transformation in "antithetical" terms:

[Holmes's] elaboration in Abrams reads as if it is only a clarification, rather than a revision, of the earlier test. Thus, he exploits the precedential weight of the Schenck formulation while infusing it with new meaning by an antithetical reading. So revised, the clear and present danger test had the potential to offer substantial protection for speech. 370

Yet, again, other commentators have reached the same conclusions (sometimes even formulated in the same words), albeit by more direct, pedestrian routes:

With the advent of the Holmes eloquence in Abrams, Schenck is infused with new vitality and Debs is conveniently forgotten. . . .

The strategy is . . . to read the burst of eloquence at the end of the Abrams dissent into the casual Schenck dictum and then to claim that it was there all the time, that it was this intense commitment to a stringent test for freedom of speech that the whole Court underwrote in Schenck. And in a curious extra-precedential way it works. 371

The main premise of Cole's "antithetical" reading is that Holmes's own eight-month old Schenck opinion created in him the "anxiety of

370. Cole, supra note 313, at 885 (emphasis added).
371. HARRY KALVEN, JR., A WORTHY TRADITION 138, 146 (1988) (emphasis added); cf. Tribe, supra note 367, at 843 (Holmes's approach was "to infuse more immediacy into the Schenck formulation of the clear and present danger test.") (emphasis added); KALVEN, supra:

Drawing on his opinion for the Court in Schenck, [Holmes] seeks to capitalize on the casual language about clear and present danger. Chafee sees in this a retrospective explanation of Schenck, and he joins with Holmes and Brandeis in an effort to alchemize clear and present danger into the test, a test ratified by a unanimous Court.

Id. at 138; see also Yosaf Rogat & James M. O'Fallon, Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases, 36 STAN. L. REV. 1349, 1383 (1984) (In Abrams, Holmes "argued that his clear and present danger dictum in Schenck should be taken seriously and promoted to a legal principle.").
Influence.

But it is highly questionable whether a Bloomian analysis even applies in this situation, where the misreader and the misread would be identical. In any event, much simpler and more plausible explanations of Holmes's transformation readily suggest themselves:

Holmes's concluding paragraph in his Abrams dissent . . . suggests that he himself recognized the vast change in his views on free speech during the eight months since he wrote Schenck, Frohwerk, and Debs . . . . The text . . . seems as much a confession of personal conversion as a statement of constitutional law. Holmes, perhaps unselfconsciously, appears to be commenting on himself and those of his contemporaries who came to a belated appreciation of the value of free speech.

In effect, the great Justice changed his mind, as all people do from time to time. The law, however, is not supposed to change (at least not that much, that fast). So Holmes did what judges typically do when faced with "a conviction so clearly wrong" as to require a departure from past precedents. He distinguished the new case from the old, by "investing [the] facts with a tone helpful to his result"—and insisted all the while that the old cases had been correctly decided and that the new decision represented not the slightest departure from them. The whole episode is easily understood as an example of standard judicial technique

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372. See Cole, supra note 313, at 882-83.
373. See supra text accompanying notes 365-71.
375. For discussions of the various considerations that may have been on Holmes's mind (none of which involved the "anxiety of influence"), see id. at 1311-17; Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 STAN. L. REV. 719 (1975).
376. ZECHARIAH CHAFFEE, JR., FREE SPEECH IN THE UNITED STATES 86 (1941); see also KALVEN, supra note 371, at 146 ("Justice Holmes's splendid indignation over the shabby draconian treatment of the radicals in Abrams, whom he saw as distributors of 'these poor and puny anony-

mities,' supplies a blood transfusion for the Schenck dictum.").
377. G. Edward White, Looking at Holmes in the Mirror, 4 LAW & HIST. REV. 439, 458 (1986); see also Rogat & O'Fallon, supra note 371, at 1387-89.
378. See Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) ("I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of Schenck, Frohwerk, and Debs . . . were rightly decided.") (citations omitted); TRIBE, supra note 367, at 843 ("Holmes' dissent in Abrams is marred by ambiguity and by his insistence [that] Schenck, Frohwerk, and especially Debs had been rightly decided. One cynical interpretation of Holmes' handiwork might be that speech is protected only as long as it is ineffective.") (footnotes omitted).
in a case law regime.\textsuperscript{379} One has to look much farther afield to see the "anxiety of influence" at work here.\textsuperscript{380}

3. \textit{Judges as Philosophers}. Philosophy is another prime discipline to scavenge for non-legal sources of legal theory, and there is no shortage of attempts to view judges and Justices as if they were philosophers.\textsuperscript{381} A recent article on \textit{City of Richmond v. J.A. Croson Co.}\textsuperscript{382} by Michel Rosenfeld is a good example of this phenomenon.\textsuperscript{383} Rosenfeld has a definite philosophical theory in mind, and the Justices generally fail to measure up to it.

After criticizing process-based constitutional theories, Rosenfeld states that "a principled assessment of the constitutionality of affirmative

\textsuperscript{379} See, e.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970) (eliminating common law rules that had favored landlords); Tedla v. Ellman, 19 N.E.2d 987 (N.Y. 1939) (eliminating the common law principle that a plaintiff who violates a statute designed to prevent the harm sustained is barred from recovery).

\textsuperscript{380} For discussions of how common this sort of "misreading" is (although usually without being called precisely that), see Paul Brest, \textit{The Misconceived Quest for the Original Understanding}, 60 B.U. L. Rev. 204, 228-34 (1980); Harry W. Jones, \textit{Precedent and Policy in Constitutional Law}, 4 Pace L. Rev. 11, 12-14 (1983); Henry P. Monaghan, \textit{Stare Decisis and Constitutional Adjudication}, 88 Colum. L. Rev. 723, 770-72 (1988); Weisberg, supra note 238, at 313-14.


\[\textsuperscript{[T]he pendulum among both legal academics and law students is swinging rapidly away from the past decade's infatuation with theory drawn from other disciplines, back in the direction of law's aboriginal grand tradition. . . .} \textsuperscript{[T]he backlash against philosophy, and more generally against "fancy theory," is a predictable and symptomatic response to the dislocations of modernity.}\]

\textit{Id.} at 1040.

\textsuperscript{382} 488 U.S. 469 (1989).

action can be made only by reference to a sufficiently developed conception of substantive equality”; indeed, “explicit reference” to such a conception is “essential to a coherent analysis of affirmative action.”

We can see already where Rosenfeld is heading: The judicial analysis will be wrong if it is incoherent, and the “only” way it can be coherent is to refer explicitly to “a sufficiently developed” philosophical theory of equality. Some of the philosophers next invoked to explain this theory are Nicholas Rescher, John Rawls, Robert Nozick, and Michael Bayles.

Not surprisingly, those Justices who adopt the “correct” or “preferred” philosophical theory of equality turn out to have made the right decision in _Croson:_ “This analysis suggests that there is sound support for Justice Marshall’s position in _Croson_ [because] a systematic and comprehensive justification for Justice Marshall’s position could be formed around a theory of substantive equality that promotes equal opportunity and that possesses a sufficiently developed conception of it.”

This raises the ante somewhat, as now the Justices must not only choose and refer explicitly to the correct philosophical theory—and do so coherently—but also the theory itself must be “sufficiently developed” to permit of a “systematic and comprehensive” justification for the position taken. Needless to say, this is a tough standard to meet: “[W]hen closely examined in light of a sufficiently elaborated conception of substantive equality . . . the respective positions articulated by Justices O’Connor and Scalia seem not only inadequate but, in fundamental respects, squarely at odds with that principle.”

In other words, the _Croson_ opinions of Justices O’Connor and Scalia are not merely “inadequate,” they are dead wrong—or “not even close” to the mark, so to speak—which is somewhat surprising since they are on the prevailing side of a solid six-to-three majority in an area where the Court has rarely been able to summon up even a majority, and because “[n]otwithstanding their disagreements on several other matters, all nine

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384. _Id._ at 1777 (emphasis added).
386. JOHN RAWLS, A THEORY OF JUSTICE (1971).
387. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).
389. Rosenfeld, _supra_ note 383, at 1790-91 (emphasis added).
390. _Id._ at 1791 (emphasis added); see also _id._ at 1793 (“Assuming the enshrinement of equal opportunity as the Constitution’s accepted conception of substantive equality . . . Justice Marshall’s opinion can be systematically rooted and justified, while those of Justices O’Connor and Scalia cannot.”) (emphasis added).
Justices seem to agree in *Croson* on the proper conception of constitutional equality at the highest levels of abstraction.\textsuperscript{391} Nevertheless, viewed in light of the correct or preferred philosophical theory of equality, the disagreements concerning the standard of review "evince a failure on the part of all the Justices to make necessary connections between different levels of abstraction \ldots."\textsuperscript{392} Evidently, sorting out "levels of abstraction" is not the strong suit of Supreme Court Justices, even those who have somehow arrived at the right result, but this should not be surprising. As explained in Part III,\textsuperscript{393} judges are not supposed to decide abstract questions or purely theoretical issues.

Rosenfeld concludes with perhaps the most amazing proclamation of all: "Under the \ldots approach suggested here \ldots *Croson* appears to be an easy case"\textsuperscript{394}—an easy case, that is, for upholding the affirmative action plan, despite the fact that it was decisively invalidated by six justices, five of whom had just agreed for the very first time on the applicable standard of review. "Easy" in relation to what? Evidently, not anything having to do with constitutional law or the past decade of affirmative action jurisprudence or the actual judicial practice of the U.S. Supreme Court.\textsuperscript{395} It can be “easy” only as a test case of cherished philosophical theories, and nothing more.

Rosenfeld believes that "shifting the debate over the constitutionality of affirmative action to the terrain of substantive equality \ldots permits a more systematic assessment of the various positions thus far advanced in the debate."\textsuperscript{396} Thus, "if one is forced out into the open to defend one’s substantive values, it seems most unlikely that the respective positions of Justices O’Connor and Scalia in *Croson* \ldots could be reconciled with a

\textsuperscript{391.} Id. at 1749.
\textsuperscript{392.} Id. (emphasis added).
\textsuperscript{393.} See supra text accompanying notes 212-35.
\textsuperscript{394.} Rosenfeld, supra note 383, at 1792 (emphasis added).
\textsuperscript{395.} In fact, Richmond’s affirmative action plan presented some rather obvious difficulties. It was promulgated in a city with a black population of about 50% and a black majority on the governing city council, included preferences for groups—such as Hispanics and Aleuts—that were unaffected by discrimination in Richmond and that might actually constitute majorities elsewhere in the country, and called for a 30% minority participation in subcontracting, as compared to the 10% figure approved by Congress (in the exercise of its explicit enforcement powers under Section 5 of the Fourteenth Amendment) and upheld by the Court in *Fullilove*. "In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009 (1990). If this is an “easy” case, what would a “hard” one look like?
\textsuperscript{396.} Rosenfeld, supra note 383, at 1792 (emphasis added). I earlier analyzed and criticized the metaphor of “adjudication as a debate” in Part III(B)(2). See supra text accompanying notes 236-46.
genuine commitment to equal opportunity.”^397 And when is the last
time a Supreme Court Justice was “forced out into the open” to “de-
fend”—or, even more implausibly, “debate”—his or her “substantive
values”? In fact, the institution of the judiciary and the practice of adju-
dication are structured precisely to ensure that this does not and cannot
happen (as explained in Part III^398). But in Rosenfeld’s scenario, once
the errant Justices are “forced into the terrain of substantive equality”—
presumably by the theory’s inherent “intellectual authority” (which
judges by training and inclination are free to ignore and from time imme-
morial have been spectacularly successful in ignoring):

[T]he proponents of these positions would either have to invoke a con-
ception of substantive equality that does not rely on equal opportu-
nity—a risky proposition, given the special place held by the principle
of equal opportunity in the American ethos—or open themselves to the
charge of betraying their own professed values.^399

A third possibility seems not to have occurred to Rosenfeld: The Justices
might say nothing and, with bemused smiles, retire silently to their
chambers to resume work on actual questions of law. In other words, the
Justices might simply decline to participate in the imaginary “debate”
over philosophical theories that Rosenfeld has concocted.

A distinctly different approach to the Croson case, one that “is not a
traditional defense or critique of the decision,” has been offered by
Thomas Ross, who is simply “interested in talking about what the Jus-
tices, as storytellers, and what we, as story readers, ought to do in this
special and wrenching discourse about affirmative action.”^400 It turns
out that Ross will be talking in the distinctive cadences of abstract the-
ory. For those willing to listen, the discourse is special and wrenching
indeed.

Consider, for example, the final sentence of Justice Scalia’s Croson
opinion: “Since I believe that the appellee here had a constitutional right
to have its bid succeed or fail under a decisionmaking process uninfected
with racial bias, I concur in the judgment of the Court.”^401 Upon first
glance, this might seem merely to be the Justice’s boilerplate conclusion
summarizing his concurrence. As usual, Justice Scalia cannot agree with
anyone, so he grudgingly concurs in the judgment alone. At worst, the
sentence seems a bit awkward, with “the appellee” having been made
into an “it” that has constitutional rights, which are usually reserved for
persons (real or corporate); but this does not seem to portend anything

^397. Rosenfeld, supra note 383, at 1793 (emphasis added).
^398. See supra text accompanying notes 236–46.
^399. Rosenfeld, supra note 383, at 1793 (emphasis added) (footnote omitted).
that a crash course for the Justice (or his law clerk) on, say, Strunk and White's Elements of Style 402 (or, if more time is available, Fowler's Modern English Usage 403) would not solve. In any event, there is little to suggest that Justice Scalia is really trying to communicate anything here, other than to wrap up the opinion with a restatement of the obvious and perhaps get in one last dig at the idea of affirmative action.

For Ross, however, Justice Scalia's sentence is "a perfect composite of the abstract and vivid." To do justice to Ross's analysis and to convey its full flavor I must quote in full:

This sentence is abstract in several senses. First, it speaks of no names or places. It is universal in its ostensible implications. Second, the central and implicit assumption in this declaration is that once the bias of the ordinance is removed no other racial bias will exist. This assumption has compelling plausibility in an abstract conception of place and time. It becomes problematic in its real place and time. We would not realistically suppose that the public contracting process in Richmond, Virginia, or anywhere in America, would be wholly uninfluenced by racial bias once it is cleansed of the taint of affirmative action.

The last sentence of the Scalia opinion is also vivid and concrete in its final invocation of the metaphor of affirmative action as a societal cancer. The last sentence's proclamation of the "infection" of racial bias connects the white reader to the metaphor of affirmative action as the seed of our destruction. That metaphor, in turn, can take us again to the imaginings of oppression and revenge at the hands of black citizens. By this concluding sentence, Scalia has beautifully tied together his narrative. Scalia's narrative is one which, through its abstractions and metaphors, invites the reader to tell his own narratives and thereby make the abstract vivid and concrete. The individual pictorial imagination and the nonpictorial imaginations of the cultural influences are triggered again and again by Scalia's abstractions and metaphors. Scalia demands of his readers that they become more than mere readers—he demands that they become storytellers as well—and we do.404

For Ross, it seems, there is no such thing as overexplaining the obvious. If this single, rather unremarkable sentence of Justice Scalia is worthy of such extended intellectual analysis and exegesis, then we should probably consider publishing critical editions of the Justices' table talk.

4. Judges as Hermeneuticians. In recent years, legal scholars have frequently and increasingly turned their attention to the philosophical literature on "hermeneutics"—the general theory of interpretation.405

404. Ross, supra note 400, at 404-05 (footnotes omitted).
A burgeoning legal literature has developed numerous connections to legal interpretation. In constitutional law, for example, the debate over "interpretivism" and "non-interpretivism" is an indirect manifestation of such interest. Statutory interpretation is another area in which legal scholars have begun making connections to hermeneutic theory. Finally, and perhaps most obviously, the law and literature movement may be considered an essentially "interpretive" enterprise. According to one critic:

"These works attempt to distance their readers from the law by minimizing the coercive element in law, and then implicate the readers in the law by treating law as a literary expression of a community consisting of law's 'writers' and its 'readers,' including the readers of this sort of scholarship."


407. See GUNTER, supra note 369, at 20 n.9, 528-29 nn.10-11; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 759-68 (2d ed. 1991); Brest, supra note 380; Moore, supra note 405, at 873 & n.5.

408. See, e.g., Shirley S. Abrahamson & Robert L. Hughes, Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation, 75 MINN. L. REV. 1045, 1050-52 & nn.14-16 (1991) (citing examples of recent works on judicial interpretation of statutes based on established theories of interpretation); Arthur L. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 CORNELL L.Q. 161 (1965) (observing that notwithstanding the Parol Evidence rule, judges interpreting language always use extrinsic evidence in the form of their own experiences and views); Charles P. Curtis, A Better Theory of Legal Interpretation, 3 VAND. L. REV. 407 (1950) (arguing that legislative history is of limited value compared with traditional cannons of statutory interpretation); William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987) (endorsing dynamic statutory interpretation in which the interpreter weighs current policy considerations more heavily than legislative history); Eskridge, supra note 405 (applying Hans-Georg Gadamer's hermeneutic theory of interpretation to statutory material); Walter B. Michaels, Against Formalism: The Autonomous Text in Legal and Literary Interpretation, 1 POETICS TODAY 23 (1979) (arguing that pure formalism does not exist because the process of reading itself involves use of extrinsic evidence in the form of the reader's preconceptions concerning the meaning of language); Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation, 1990 Wis. L. REV. 1179 (examining the continued utility of historical and linguistic principles of interpretation in judicial analysis of statutes); Daniel B. Rodriguez, The Substance of the New Legal Process, 77 CAL. L. REV. 919, 928-29 & nn.50-61 (1989) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)) (describing statutory interpretation within the authors' New Legal Process theory and criticizing the authors' dynamic statutory interpretation as disjunctive).

409. Tushnet, supra note 8, at 815; see also Robert M. Cover, supra note 406, at 1602 n.2 ("The violent side of law and its connection to interpretation and rhetoric is systematically ignored or underplayed."); Robert Weisberg, The Law-Literature Enterprise, 1 YALE J.L. & HUMAN. 1 (1988) ("Much of the law-literature scholarship has produced skimpy intellectual results because it combines overly conventional readings of literature with a complacent understanding of law.").
Robert Cover's Nomos and Narrative is a justly celebrated meditation on "the problem of 'meaning' in law—of legal hermeneutics or interpretation." Cover's analysis brings him to a "simple and very disturbing" conclusion: "[T]here is a radical dichotomy between the social organization of law as power and the organization of law as meaning." In his own way, Cover keenly recognizes what I have analyzed as the displacement of intellectual authority by institutional authority: "The position that only the state creates law . . . confuses the status of interpretation with the status of political domination." In fact, "from a position that starts as neutral . . . in its understanding of law, the interpretations offered by judges are not necessarily superior," because "the commitment of judges [is] to the hierarchical ordering of authority first, and to interpretive integrity only later."

Cover acknowledges that he has "played out a fantasy to some extent" in focusing on "an imaginary world in which violence played no part in life [and] law would indeed grow exclusively from the hermeneutic impulse—the human need to create and interpret texts." He nevertheless holds out hope in the real world—precisely where I have seen none: "The challenge presented by the absence of a single, 'objective' interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one nomos over another." Cover seeks to meet this challenge by encouraging courts to articulate in greater depth and detail their "interpretive stance" and hermeneutic principles; that is, to "elaborat[e] the institutional privilege of force," "articulat[e] the constitutional mandate," and "express . . . judicial commitment to principle."

A similar but rather more extreme proposal has been advanced by William Eskridge. Eskridge seems to suggest not merely that judges should express or articulate their underlying hermeneutical principles, but also that they should adopt and apply those hermeneutic principles


411. Cover, supra note 410, at 18.

412. Id. at 43.

413. Id. at 29.

414. Id. at 58.

415. Id. at 40.

416. Id. at 44.

417. Id. at 63.

418. Id. at 54.

419. Id. at 66-67.

420. Eskridge, supra note 405.
that Eskridge endorses, namely, those of the German philosopher Hans-Georg Gadamer. As a former student of Professor Gadamer, I should be more than happy to see his ideas fruitfully applied to the study of legal interpretation. "The trouble is, as so often in philosophy, it is hard to improve intelligibility while retaining the excitement."  

Eskridge concedes at the outset that Gadamer's main work, *Truth and Method*, "may seem a very strange book to many American lawyers. Although interested in legal hermeneutics, Gadamer is very much a philosopher and historian and very much not a lawyer." Nevertheless, after a lengthy analysis, Eskridge concludes that it is safe to "[a]ssum[e] that Gadamer's hermeneutics represents a robust theory of interpretation and that his hermeneutics is applicable to statutory interpretation" (which sounds like a lot to assume). On this basis Eskridge proceeds to elaborate "implications . . . for theories of statutory interpretation."  

For Eskridge, various judges and Justices espouse and represent hermeneutical "theories" much as scholars and other theorists do. For example, there is "a 'textualist' approach, associated with Justice Scalia . . . an 'archaeological' [approach] recently associated with Judge Posner, [and a] 'present-minded' approach . . . developed by Professor Aleinikoff." In fact, when they are not busy judging, judges and Justices are arguing and debating "general theories" of statutory interpretation:

Most of the *general theorizing* about statutory interpretation is an effort to assert the primacy of one method or another for interpreting statutes. *The debate in the 1980s* saw Justice Scalia argue for textualism, as the only method consistent with the formal structures of the legislative process; Judge Posner argue for imaginative reconstruction, as the most uncontroversial evidence of what a directive utterance means; and Aleinikoff argue for a present-minded approach, as leading to the most sensible policy results. . . . [A] careful reading of these *apparently foundationalist theorists* indicates that they ought to be, and probably are, amenable to Gadamerian analysis of their theories.

In Justice Scalia's case, for example, "Gadamer would find such a 'textualist' approach curious," because "Gadamer's hermeneutics suggests that even the most avid textualist will not be able to avoid the influence . . .
of contextual considerations Justice Scalia denounces.\textsuperscript{428} In light of the proven philosophical superiority of Gadamerian hermeneutics, it is highly recommended that Justice Scalia change his ways: "In short, textualism alone cannot provide the interpretive closure usually expected of foundationalist theories, and it is to be hoped that even Justice Scalia would recognize that."\textsuperscript{429} Eskridge's guiding assumption seems to be that Justice Scalia would be a better Justice if he had a better "general theory" of hermeneutics. As I have argued in detail above,\textsuperscript{430} this assumption and its underlying premise of intellectual authority for the judiciary are highly questionable.

What the judicial articulation of hermeneutic principles means may best be seen in the context of a specific case. In \textit{Bob Jones University v. United States},\textsuperscript{431} the Court held that a religious but racially discriminatory university did not qualify as a tax-exempt organization under the Internal Revenue Code, and that contributions to such a university were not deductible as charitable contributions.\textsuperscript{432} Cover acknowledges in his Foreword that "[n]either the text of the Code nor the legislative history . . . seemed to compel [that] interpretation."\textsuperscript{433} Justice Rehnquist, writing in dissent, criticized the Court for holding as it did in the absence of congressional legislation.\textsuperscript{434} Cover, however, criticizes the Court for "avoid[ing] the question whether Congress could constitutionally grant tax exemption to a school that discriminates on the basis of race."\textsuperscript{435} (So much for "judicial restraint.")

As for the issues the Court did reach, Chief Justice Burger wrote:

> Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," or should be encouraged by having all taxpayers share in their support by way of special tax status.\textsuperscript{436}

According to Cover, "the force of the Court's interpretation . . . is very weak," because "the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an

\textsuperscript{428} Id. at 639.
\textsuperscript{429} Id. at 641.
\textsuperscript{430} See supra text accompanying notes 420-26.
\textsuperscript{431} 461 U.S. 574 (1983).
\textsuperscript{432} Id. at 598-99.
\textsuperscript{433} Cover, supra note 410, at 63-64 (footnote omitted).
\textsuperscript{434} \textit{Bob Jones University}, 461 U.S. at 612 (Rehnquist, J., dissenting).
\textsuperscript{435} Cover, supra note 410, at 66.
\textsuperscript{436} \textit{Bob Jones University}, 461 U.S. at 595 (citation omitted).
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exercise of political authority was not unconstitutional." But, contrary to Cover's suggestions, the Court canvassed some twenty-five cases, legislative enactments, and executive orders before reaching the conclusion quoted above. The Court specifically cites and discusses Plessy v. Ferguson, Brown v. Board of Education, Cooper v. Aaron, and other cases to support its conclusion:

Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.

An unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals.

The Court cites and discusses the Civil Rights Act of 1964 and numerous other acts of Congress to support its conclusion that Congress has "clearly expressed its agreement that racial discrimination in education violates a fundamental public policy." The Court also cites and discusses executive orders dating back to the Truman, Eisenhower, and Kennedy administrations, as "but a few of numerous Executive Orders over the past three decades demonstrating the commitment of the Executive Branch to the fundamental policy of eliminating racial discrimination." Yet, according to Cover, "[t]he grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong."

Surprisingly, for Cover, both sides in the Bob Jones University case "are right to be dissatisfied" with the Court's opinion. "The Amish, the Mennonites, and all insular communities, whatever their stand on race," and regardless of whether they were involved in the case, "deserved a constitutional hedge against mere administration." Similarly, the "winners" in the case, "the minority community deserved more—it deserved a constitutional commitment to avoiding public subsidization of

437. Cover, supra note 410, at 66.
438. 163 U.S. 537 (1896).
441. Bob Jones University, 461 U.S. at 593.
443. Bob Jones University, 461 U.S. at 594.
444. Id. at 595.
445. Cover, supra note 410, at 66.
446. Id.
447. Id. at 66-67 (emphasis added).
Cover fails to explain how these apparently conflicting demands are to be satisfied, but he does hint that it would involve an "interpretive gesture," the articulation of the constitutional mandate," and "the expression of judicial commitment to principle that is embodied in constitutional decision." Apparently, by elaborating its interpretive principles in more compelling ways, the Court would make both sides in the case more satisfied—simultaneously! The losers would have a more edifying explanation of why they should indeed have lost, and the winners would have more of a commitment from the Court to celebrate.

In a final footnote to Nomos and Narrative, Cover divulges that "such a commitment would necessarily have invited a host of problems" and would entail "massive potential change." "But," he cheerily adds, "that is as it should be." With the proper interpretive commitment from the Court, "we would soon be asking [questions involving] distinctions that can plausibly be drawn among the various cases" Cover has put, as well as "hundreds of others that might be put." But not to worry: "The Court could not and would not have had to decide all those cases now," although a Coverian approach to Bob Jones University "would certainly have invited an early encounter with them."

Cover has very high hopes for the quality of judicial and legal dialogue—hopes that, as I have demonstrated throughout this Article, are not justified by the current practice of adjudication or by any suggestions of intellectual authority on the part of the judiciary. But even if the judicial elaboration of interpretive principles he envisages were somehow to emerge, it is not at all clear that it would not bring with it far more problems than it solves. I have alluded to some of the more obvious difficulties above, and I previously discussed the divergence of legal theory and judicial practice as equally untenable gravitations toward the worst possible extremes of an opposition, with legal theorists taking an impossibly high road and judicial practice firmly in control of the low ground. Robert Cover’s vision, rich and evocative though it was, left the

448. Id. at 67.
449. Id. at 66.
450. Id.
451. Id. at 66-67.
452. Id. at 67 n.195.
453. Id.
454. Id.
455. Id.
456. Id.
457. See supra text accompanying notes 431-56.
basic opposition between intellectual authority and institutional authority unresolved. And since his time, there is every reason to think that it has grown even more intractable.

V. Conclusion: The "Anxiety of Influence" in Legal Scholarship

There is a real "anxiety of influence" in the law, but it is an anxiety not of judges or judicial decisionmaking or opinion-writing, but of legal scholars. These are the true "poets" of our profession—to the extent that it has any at all—and they are, like me, anxious to propound bold new theories, to cast off the smothering mantle of their predecessors, and to make a name for themselves in the larger world of the law. The plodding, stodgy analyses of judges and doctrinal scholars make the perfect foil for critical, creative legal scholars; but it is scholars from other disciplines who induce the anxiety.

It is the imperfectly assimilated methodology of the humanities that suggests judicial opinions can be made to yield up a rich, romantic, and evocative ore of systematic primary learning and original, theoretical wisdom. In seeking to make that humanistic connection, legal scholars seek the legitimizing aura of established intellectual authority to grace their efforts. No doubt, if judicial opinions had been written by poets and philosophers, they would merit critical comparison with the primary sources of those disciplines. Unfortunately, they are written under the severe pragmatic constraints of a most unusual social and historical institution that necessarily values institutional authority over true intellectual authority. Humanistic-style legal theorizing, which takes judicial opinions as its underlying basis, is thus limited by the inherently modest and rapidly dwindling claims that the work-product of the judiciary can make on our intellect. The willful disregard of these inherent limitations of legal method can be explained by an "anxiety of influence" notion, but it cannot be so justified.

These limitations do not, however, necessarily affect the discipline that is pointing them out. The true realm and métier of legal scholarship, like that of all scholarship, is the world of ideas. It bears approximately the same relationship to adjudication that poetry bears to nursery rhymes. The real, empirical world falls under the stern rule of physical causality and various forms of psychic determinism. Its dumbfounding array of unpleasantries includes incomprehensibly petty politics, intractable social and institutional structures that apparently bear no necessary relationship to anything, and all the old, familiar, immutable patterns of human development and behavior. Here it seems awkward and difficult to speak of being "free" in any important sense.
In the world of ideas, by contrast, everything appears bright, clean, pure, and potentially perfect. It is the world of Euclid's geometry at the dawn of creation, and everything serenely awaits the discovering, revealing, and redeeming articulation of a powerful mind.\textsuperscript{458} Within this realm, the scholar is free to soar as high and as far as native intelligence and imagination permit, for these alone are the coin of the realm. Intellectual merit is always immediately recognized in the world of ideas; time, and the often interminable delays that separate greatness from its recognition, exist only in the real world and are therefore not calculated. 

"[T]he voices in the Great Conversation tend more and more to speak in the present tense, as if all the authors were contemporaneous with one another, responding directly to each other's thought."\textsuperscript{459} Institutional authority carries no weight at all here; the only "laws" to speak of are the laws of logic and reason. Notions like "compulsion" and "authority" have meaning only in the context of more or less "compelling" or "powerful" arguments,\textsuperscript{460} "[f]or liberty of action and thought alone is capable of producing great things."\textsuperscript{461}

If things seem palpably otherwise it is because we are, despite ourselves, really unable to conceive of such a world. We are constantly importing into that realm obstacles and extraneous factors derived from the real world. But the "world of ideas" and true intellectual authority—as ideals—serve as indispensable \textit{desiderata} for the scholar and provide the common measure that unites such apparently diverse enterprises as poetry, philosophy, and legal scholarship.\textsuperscript{462}
What is being demanded is a procedural purity that matches, in the sense of being answerable to, the presumed purity of the enterprise. That is, if literary works are produced in a realm far removed from the pressures and temptations of the everyday world—the world of commerce, competition, and politics—the business (not really a business at all) of honoring and explicating those works should be similarly removed, at least insofar as is possible.

Id. at 198. I use this quotation advisedly; of course, Fish wants to caricature the notion that literary works are produced “in a realm far removed from the pressures and temptations of the everyday world.” But, in some deep sense, that is precisely where great works of the literary and legal imagination originate. See, e.g., Philippe Nonet, Reply, 100 YALE L.J. 723 (1990). This is not to deny that the subjects of literary or legal interest may be found in the most lowly, ordinary, grimy settings imaginable. Nevertheless, intellectual greatness may be understood precisely as the ability to rise somehow above the grimy details and see them from a universal perspective, or to set them in relation to enduring (if not eternal) human concerns. See, e.g., HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1964); FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT (1866); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959); VICTOR HUGO, LES MISÈRABLES (1862); FRANZ KAFKA, THE TRIAL (1925); JOHN STEINBECK, THE GRAPES OF WRATH (1939). The fact that this is so difficult merely explains why it is so rare. In that sense, the critical, intellectual, and scholarly enterprise does have the redeeming “purity” Fish disparages. For further discussion of these issues, see Charles W. Collier, Intellectual Authority and Institutional Authority, 42 J. LEGAL EDUC. (forthcoming 1992).