UMPIRES AT BAT: ON INTEGRATION AND LEGITIMATION

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INTRODUCTION

During his confirmation hearings, Chief Justice Roberts captured the public's imagination when he offered an interpretation of the role that judges play in our society when interpreting the Constitution. "Judges and Justices are servants of the law, not the other way around," he said. "Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see an umpire."[1]

In this inquiry, I identify some tensions between the understanding of the judicial role animating the umpire analogy and the actual practice of constitutional adjudication in the race-conscious student assignment cases recently decided by the Supreme Court of the United States.[2] I argue that those cases vividly illustrate how inapt the umpire analogy is if one takes its ap-

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1. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of Judge John G. Roberts, Jr.) [hereinafter *Roberts Hearings*]. Full disclosure: I served as Special Counsel to Senator Biden during the hearings.

2. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007). For an analysis of the equal-protection issues involved in those cases, see generally Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006).

peal to formalism seriously as a statement about how judges can or should execute their responsibilities in constitutional cases.[3]

The umpire analogy would have judges "just" decide constitutional cases according to "the rules." Judges, however, cannot "just" decide constitutional cases according to "the rules" because they cannot agree on what the rules are in the vast majority of the most important cases. Judges cannot agree on what the rules are in such cases because a critical purpose of constitutional rules is to express a social vision, and many social visions in contemporary American society are deeply contested. Instead of pursuing the impossible task of simply applying "the rules," the judiciary does its job and sustains its institutional legitimacy over the long run in significant part by articulating a vision of social order that resonates with fundamental public values. The school cases exemplify a social practice in which judges make contested appeals to popular ideals in fashioning—not merely applying—the rules that constitute contemporary constitutional law.

In Part I, I examine the virtues and vulnerabilities of the umpire analogy. In Part II, I identify pertinent parts of the judicial opinions on voluntary integration plans. In Part III, I explore what those opinions elucidate—and what the umpire analogy occludes—about the preconditions of law's public legitimation and the purposes of the institution of law, particularly in the area of constitutional law.[4]

I. JUDICIAL UMPIRES?

Politically, Roberts' use of the umpire analogy was an instant success,[5] and it is worth considering why. The image may

3. Some readers may fear that this inquiry takes the umpire analogy too seriously. Chief Justice Roberts, however, used it in a serious context, and the analogy may have proved successful because it engaged popular beliefs or aspirations regarding the judiciary. *See infra* Parts I, III.

4. Although I focus on constitutional law in this piece, I do not mean to imply by omission that the umpire analogy accurately describes judicial behavior in cases raising questions of statutory interpretation.

5. *See, e.g.*, Stephen J. Choi & G. Mitu Gulati, *Ranking Judges According to Citation Bias (As a Means to Reduce Bias)*, 82 NOTRE DAME L. REV. 1279, 1279–80 (2007) ("Chief Justice John Roberts described his self-conception of a judge's role as akin to an umpire calling balls and strikes. Presumably this was the conception of a judge that Roberts thought would appeal to the public; the amount of press that the analogy received suggests that the strategy worked.") (footnote omitted). For example, CNN.com reproduced Roberts' opening statement and led with this headline: "*Roberts: 'My Job Is To Call Balls and Strikes and Not To Pitch or Bat,'*" Sept. 12, 2005, http://www.cnn.com/2005/POLITICS/09/12/roberts.statement/index.html.

have tapped into powerful myths about the judiciary. Much of the public may think—or want to think—that judges can and should decide even the most momentous constitutional cases according to "the law." They may further believe (or want to believe) that "the law" is autonomous of contested social values, fixed in advance, politically neutral, and susceptible of relatively uncontroversial application.[6] There is much to say about the disconnect between that view of judging and the realities of judicial practice. Initially, however, it is worth inquiring whether there are senses in which the umpire analogy conveys important truths about the practice of judging.[7]

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6. The political appeal of the umpire analogy to Americans who are not particularly ideological may be best explained on the grounds articulated in the text. So may be the appeal of statements to the effect that judges should interpret the law instead of making the law and engaging in "activism." After the Roberts hearings, for example, some of my non-lawyer friends and neighbors reported that John Roberts seemed to them to be a good choice for Chief Justice because they agreed with him that Supreme Court Justices should be humble and apply the law instead of making it up. For further discussion, see *infra* Part III.

7. I do not compare the roles of different kinds of judges. U.S. Supreme Court Justices are obviously less constrained than other judges, and trial judges are more responsible for factfinding than are appellate judges. It is thus unsurprising that many casual invocations of the umpire imagery have focused on the role of trial judges. *See, e.g.*, DAVID W. PECK, THE COMPLEMENT OF COURT AND COUNSEL 9 (1954) ("The object of a lawsuit is to get at the truth and arrive at the right result.... Counsel exclusively bent on winning may find that he and the umpire are not in the same game."); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976) ("[T]he traditional conception of adjudication carried with it a set of strong notions about the role of the trial judge. In general he was passive.... The judge was a neutral umpire.") (footnote omitted); Marvin E. Frankel, *The Adversary Judge*, 54 TEX. L. REV. 465, 468 (1976) ("[A] central core of agreed standards defines the trial judge as the neutral, impartial, calm, noncontentious umpire standing between the adversary parties, seeing that they observe the rules of the adversary game."); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1033 (1975) ("[W]e tend to select our trial judges from among people with substantial experience as trial lawyers. Most of us have had occasion to think of the analogy to the selection of former athletes as umpires for athletic contests. It may not press the comparison too hard to say it serves as a reminder that the 'sporting theory' continues to infuse much of the business of our trial courts.") (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395, 404 (1906)); Pound, *supra*, at 405 ("Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference."). *Cf.* KARL N. LLEWELLYN, THE BRAMBLE BUSH 20–21 (2d ed. 1951) (discussing some ways in which "(in the person of judges, police and sheriffs).... the law official functions somewhat like an umpire.... but not wholly").

Trial judges, however, also possess significant discretion. Appellate precedent often does not determine the answer to legal questions. *See, e.g., infra* Part II (discussing a district court opinion in a voluntary integration case). Notably, none of the above commentators focused on the question of judicial role in constitutional cases. *Compare, e.g.*, LLEWELLYN, *supra*, *with infra* notes 128–129 and accompanying text (describing his views of constitutional law). Moreover, the application of law to facts typically requires the exercise of discretion—for example, when a judge rules on evidentiary objections. *See*

There are at least two senses in which the umpire analogy captures part of the reality of judging. Like an umpire, judges are not supposed to consult certain considerations in certain contexts. For example, nearly everyone would agree that judges should not decide controversial cases like *Planned Parenthood v. Casey*[8] based on—that is, just because of—the platform of their political party. Relatedly, almost all would agree that judges should not render decisions according to their "first-order partisan commitments"[9] or personal policy preferences. Moreover, examples abound of instances in which Justices decline to do so,[10] examples that should not be readily dismissed.[11]

FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). I thank David Levi for underscoring that point.

8. 505 U.S. 833 (1992) (reaffirming the core of the constitutional right to abortion articulated in Roe v. Wade, 410 U.S. 113 (1973), while narrowing the scope of that right).

9. Don Herzog, *As Many As Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 609, 627 (1987).

10. For example, Justice Holmes famously disliked the *Lochner*-era progressive legislation whose constitutionality he defended. *Compare* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), *with* OLIVER WENDELL HOLMES, *Economic Elements*, *in* COLLECTED LEGAL PAPERS 279, 280 (1920). Moreover, only one current Justice has questioned the constitutionality of the death penalty in all cases, even though several Justices personally oppose capital punishment. *See* Baze v. Rees, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring in judgment) ("I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'" (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring))). In addition, Justice Stevens stated in a 2005 speech that he believed his opinions for the Court in Kelo v. City of New London, 545 U.S. 469 (2005), and Gonzales v. Raich, 545 U.S. 1 (2005), were, as Michael Dorf summarized, "correct as a matter of law," but "wrong as a matter of policy." Michael C. Dorf, *Justice Stevens Adds Fuel to the Fire Over the New London Eminent Domain Case*, FINDLAW, Aug. 29, 2005, http://writ.lp.findlaw.com/dorf/20050829.html. Further, Justices Scalia and Thomas have repeatedly voted against constitutional limits on punitive damages. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). In the political arena, Democrats are more likely to oppose limits on punitive damages than are Republicans. Finally, Justice Scalia voted to protect flag burning under the First Amendment in *Texas v. Johnson*, 491 U.S. 397 (1989), and Justice Thomas deemed "uncommonly silly" the ban on homosexual sodomy that he voted to uphold in Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)). For a more cynical view of judicial behavior in such cases, see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 50–51 (2005).

11. Stressing judicial independence from partisan politics may appear to be in some tension with "[e]mpirical literature in political science [which] reports that political affiliation serves as a remarkable predictor of how a judge will vote in a particular case. The more ideologically charged the court case, the better the predictive model works."

Another sense in which the umpire analogy rings true lies in the notion of restraint. That idea includes an appreciation of the limits of the judicial process and an abiding respect for *stare decisis* and other governing institutions.[12] The Court does not have the same lawmaking latitude as the Congress or the same policymaking discretion as the Executive. The Court is also not well situated to decide every question anew, or to micromanage much democratic experimentation at the state and local levels. For example, a Justice who regarded him- or herself as an umpire in that sense might have approached the recent student assignment cases with some deference to the integrative aspirations of local communities, which have been struggling around the nation to craft "workable solutions to difficult problems."[13]

Accurate as the umpire image is in those hardly trivial senses,[14] it remains problematic. I begin with the question of judicial role. While there is much to be said for judicial restraint in appropriate cases, there is also much to be said for judicial boldness and even heroism in appropriate cases. Some of the most celebrated Supreme Court opinions in American history were hardly models of judicial restraint. A restrained approach in *Marbury v. Madison*,[15] for example, would have been to say nothing about judicial review after dismissing the case for lack of

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Choi & Gulati, *supra* note 5, at 1280–81 (footnote omitted). *See id.* (cogently describing the literature). The findings, however, may have much to do with the notoriously blurry boundary between law and politics, particularly in the area of constitutional law, not necessarily with inappropriate partisanship or "bias" on the part of judges. *See infra* notes 130–134 and accompanying text (discussing the law/politics distinction). More precisely, judges can and do decide cases by reference to a value set, and that value set may be highly correlated both with judicial outcomes and with first-order partisan commitments. It therefore follows that first-order partisan commitments are highly correlated with judicial outcomes. It does not follow, however, that judges typically decide cases just because of their first-order partisan commitments.

12. *See Roberts Hearings*, *supra* note 1, at 55 ("My personal appreciation that I owe a great debt to others reinforces my view that a certain humility should characterize the judicial role. . . . Judges have to have the humility to recognize that they operate within a system of precedent shaped by other judges equally striving to live up to the judicial oath, and judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.").

13. Siegel, *supra* note 2, at 829. *Compare id. with* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

14. *See, e.g.*, Herzog, *supra* note 9, at 626 ("[C]laims for the autonomy and coherence of law are . . . bids to take legal decisionmaking out of the hands of those with explicitly political interests who exercised their power arbitrarily, to make it more regular, more predictable, and more accountable. That was a real change: Law used to be transparently political. The history of early modern Europe is full of incidents that make it obvious why liberals pressed for a separation of law and politics.").

15. 5 U.S. (1 Cranch) 137 (1803).

jurisdiction on nonconstitutional grounds. A restrained approach in *Brown v. Board of Education*[16] would have been to reaffirm *Plessy v. Ferguson*,[17] either by declaring the schools separate but equal or, more accurately, by declaring the schools separate and unequal.[18] Whether a case calls for restraint or decisive action or something in between seems less a theoretical question and more a matter of tact, context, and judgment.

The umpire analogy, however, appears implicitly to embrace across the board a rather limited judicial role in vindicating constitutional rights, a judicial philosophy that is not easily reconciled with some bedrock precedents in the canon of our constitutional law and culture. Thus Chief Justice Roberts and Justice Alito felt compelled explicitly to endorse *Griswold v. Connecticut*[19] during their confirmation hearings,[20] and Justice Alito distanced himself from his past criticism of the Court's reapportionment decisions.[21] It apparently did not matter that a conservative President had nominated them and a conservative Congress would be deciding whether to confirm them.

The umpire analogy is more deeply problematic in other ways. It might even have proven problematic for the nominee himself had any Senator elected to hold then-Judge Roberts to his own imagery. If Supreme Court Justices are mere umpires—if their primary responsibility is to call balls and strikes and to determine whether a hit ball is foul or fair—then surely the nominee could have told us, say, whether the regulations of

16. 347 U.S. 483 (1954).

17. 163 U.S. 537 (1896).

18. *See, e.g.*, Neil S. Siegel, *A Theory In Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2015–17 (2005) (critiquing the minimalist option in *Brown* in defending the ideal of the "Court as Guardian").

19. 381 U.S. 479 (1965) (holding that a fundamental constitutional right to marital privacy prohibits the government from forbidding use of contraceptives by married couples).

20. *See Roberts Hearings*, *supra* note 1, at 207 ("I agree with the *Griswold* Court's conclusion that marital privacy extends to contraception and availability of that."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 318 (2006) (statement of Judge Samuel A. Alito, Jr.) [hereinafter *Alito Hearings*] (embracing *Griswold* and "the result in *Eisenstadt*"); *id.* at 380 (disagreeing with Judge Bork's view that there is no constitutional right to contraception). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended the right to contraception to unmarried individuals.

21. *Alito Hearings*, *supra* note 20, at 380 ("On the issue of reapportionment, as I sit here today in 2006—and I think that is what is most relevant—I think that the principle of one person/one vote is a fundamental part of our constitutional law."). *See* Reynolds v. Sims, 377 U.S. 533 (1964) (articulating the "one person, one vote" standard); Baker v. Carr, 369 U.S. 186 (1962) (holding reapportionment challenges justiciable).

abortion at issue in *Casey*[22] were a ball or a strike, foul or fair. That is, he could have told us whether the Constitution protects a right to abortion, and if so, to what extent. Why did Roberts refuse to talk about *his view* of *Casey*? Why would he not even say anything revealing about how he would endeavor to determine the contours of the strike zone? He declined to share his views because the umpire analogy is inaccurate in the sense that everyone cares about most during a confirmation hearing and beyond. His refusal to answer substantive questions about constitutional law reflects the obvious truth that Supreme Court Justices are much, much more than baseball umpires,[23] at least in the formalistic sense that Roberts was apparently conceiving of umpires.

Roberts was presumably relying on the fact that a hit ball is either foul or fair, and that the baseball rule defining the strike zone seems relatively clear.[24] Indeed, Roberts seemed to be assuming that controversy arises regarding particular instances of rule application—that is, whether a hit ball was in fact foul or fair, and whether a pitch was in fact a ball or a strike—not concerning the meaning of the rule itself. It turns out that Roberts was wrong about much of baseball (and about sports more generally), but that is not my main concern here.[25]

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22. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

23. A recent illustration is provided by the reasoning and outcome in Gonzales v. Carhart, 127 S. Ct. 1610 (2007), in which the Court upheld the federal Partial-Birth Abortion Ban Act of 2003. Whatever one thinks of the constitutionality of prohibiting abortion in general or the banned procedure in particular, I doubt any commentator would suggest what Justice Kennedy wrote in his opinion for the Court—namely, that the decision was consistent with precedent. As nearly every interested party seems to have registered and as Justice Ginsburg pointed out at length in dissent, the Court changed the constitutional law of abortion in several significant respects. For a discussion, see Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959 (2008).

24. *But see* GLEN WAGGONER, KATHLEEN MOLONEY & HUGH HOWARD, SPLITTERS, BEANBALLS, AND THE INCREDIBLE SHRINKING STRIKE ZONE: THE STORIES BEHIND THE RULES OF BASEBALL (2000); Jamal Greene, Selling Originalism 45–46 (2008) (unpublished manuscript, on file with author) ("The rules of baseball do not describe the strike zone as a matter of discretion. Rather, the strike zone submits to a specific anatomical definition that is written into those rules. Yet, any baseball fan will tell you that the strike zone is far narrower than what is described in the text of the rule and that, quite apart from several formal amendments of those rules, it has narrowed over time.") (footnote omitted). For a chronology of the history of the strike zone, see Baseball Almanac, The Strike Zone: A Chronological Examination of the Official Rules, http://www.baseball-almanac.com/articles/strike_zone_rules_history.shtml. The Official Rules of Major League Baseball define the strike zone as "that area over home plate the upper limit of which is a horizontal line at the midpoint between the top of the shoulders and the top of the uniform pants, and the lower level is a line at the hollow beneath the knee cap." Major League Baseball, Official Rules: 2.00 Definition of Terms, http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/definition_terms_2.jsp.

25. It suffices for my purposes to observe that Roberts was conceiving of the prac-

Rather, my primary concern is that Supreme Court Justices cannot even agree on the basic contours of the "strike zone" when it comes to such fundamental matters as whether the equal protection clause presumptively prohibits racial classifications or instead targets practices of racial subordination.[26] That is because the constitutional text itself is indeterminate[27] and the potential source materials for gleaning its meaning in particular settings are both numerous and contested.[28] Jurists and commentators offer diametrically opposed accounts of what authorizes judicial action while simultaneously restraining judges from becoming mere "players" in a litigative "game."[29] They agree that there are

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tice of umpiring as excluding the exercise of interpretive discretion. But it is worth flagging the significant distance between Roberts' portrayal of umpiring and the actual practice. *See, e.g.*, Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 CONST. COMMENT. 293, 295 (1999) ("[B]aseball umpires 'interpret' the strike zone and other rules, relying on the general principle that teams should not gain 'unfair advantages.'"); *id.* at 300 ("Major league umpires . . . do not engage in mere fact-finding when calling balls and strikes. Pitchers and hitters know that the strike zone in the National League is different than the strike zone in the American League. . . . These different interpretations of the strike zone *reflect different understandings of baseball*, not different understandings of the precise location of those parts of the body set out in the definition of strike.") (footnote omitted) (emphasis added). Likewise, officials in other sports are not umpires in the hyper-formalist way that Roberts suggested, which may tell us something about the limits of formalism. For example, basketball referees do not function exclusively as formalist martinets. When a referee in, say, the Duke-North Carolina game registers that emotions on the court are running high and the situation is about to get out of hand, he may call fouls in close cases that he might otherwise not have called; he may also elect *not* to call fouls in close cases and choose instead to talk with the players in an effort to calm them down. Such referees are generally thought of as good officials because one of their duties is to keep the game from getting out of hand. We want our officials to possess situational sense and to exercise sound judgment. For other examples from a former referee, see Graber, *supra*, at 298–302.

26. *See generally, e.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470 (2004); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003).

27. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

28. In addition to the text, other conventional sources of authority in constitutional law include the original intent(s) of those who wrote or ratified the text, the original meaning(s) of the text, considerations of constitutional structure, Supreme Court precedent, American tradition and historical practice (stated at various possible levels of abstraction), fundamental social values, and possibly other considerations as well. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

29. Constitutional adjudication is ineluctably an interpretive practice, which means that it is non-falsifiable in the Popperian sense. *See generally* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959). Facts—such as whether a hit ball was foul or fair (as opposed to whether a pitch was a ball or a strike)—are falsifiable. Umpiring in the way that Roberts was invoking the practice always deals with a falsifiable phenomenon: the pitch was a ball or a strike, the ball was foul or fair, and computer technology can provide the answer with near-perfect accuracy. *Cf.* Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1064–71 (2005) (exploring the

still limits in a world without judicial umpires (that is, the real world), but they disagree sharply on what the limits are and where they come from.[30]

The existence of robust interpretive dissensus about limits—well beyond such disagreements in sports—is related to another problem with the umpire analogy, even considering the work of real umpires. Baseball umpires are not supposed to show up at the ball park with any advance inclination to rule in favor of one team or the other. Yet it is perfectly consistent with the faithful discharge of a Justice's responsibilities to approach a case with a strong predisposition to favor the arguments of one side, even though that predisposition may threaten to collapse the distinction between litigant and cause.[31] The Court has said—correctly in my view—that "[a] judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason."[32]

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distinction between facts and interpretations, and showing that one can disavow one's own interpretative agency only by falsely conflating the two).

30. Robert Bork made a similar point almost forty years ago:

> [I]t is naive to suppose that the Court's present difficulties could be cured by appointing Justices determined to give the Constitution its "true meaning," to work at "finding the law" instead of reforming society. The possibility implied by those comforting phrases does not exist. Every thoughtful working lawyer has shared the insight expressed by Willy Stark, the Huey Long-like politician in *All the King's Men* and a legal realist if ever there was one. The law, he said "is like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling. . . ."
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> The question, then, is not whether courts should make law, but how and from what materials. . . .
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> The primary traditional sources of constitutional law—the materials that courts, lawyers, and scholars usually cite to one another, and that laymen imagine do or should dictate results—are the text of the Constitution, history, and precedent. They often set the outer limits of inquiry, and they sometimes dictate results. But more often these sources suggest that the Court must enter a field and yet do not answer the important questions found there.

Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, 136, at 140–41. For a critical analysis of the evolution of Bork's thinking, see James Boyle, *A Process of Denial: Bork and Post-Modern Conservatism*, 3 YALE J.L. & HUMAN. 263 (1991).

31. *See* Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 597 (1963) ("The separation of litigant from cause tends to be another flight to that fictional land where legal issues present themselves abstracted from social and political situations."). To be sure, a relatively generous strike zone may favor certain teams over others, but that advantage is trivial when compared with the extent to which an anticlassification (as opposed to an antisubordination) view of equal protection favors, say, conservative advocacy groups over the NAACP.

32. Republican Party of Minnesota v. White, 536 U.S. 765, 777 (2002). The Court explained:

One could go on. No Major League ball player ever hung up his cleats in order to become a mere umpire. Roberts, however, was the legal equivalent of an all-star pitcher when the President nominated him to the United States Court of Appeals for the District of Columbia Circuit; he was widely regarded as one of the top Supreme Court advocates in the nation. I certainly thought he was one of the best of the very best, and I regret that I will never again watch him argue a case. Why would he "retire" as a "player"? So that he could call other people's balls and strikes? Perhaps he knew where the action was in law. He may be right that no fan "ever went to a ball game to see an umpire"[33] (except, perhaps, the umpire's family and friends!), but citizens certainly attend oral arguments at the Supreme Court in order to see the Justices.

To my mind, the above objections to the umpire analogy have force.[34] It is impossible for a Justice actually to satisfy the demands of the analogy because there is no near-determinate rulebook to consult. That is, Justices cannot "just" decide constitutional cases according to "the rules" because they cannot agree

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> [I]t is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice REHNQUIST observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835 (1972) (memorandum opinion). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.*

Id. at 777–78.

33. *Roberts Hearings*, *supra* note 1, at 55.

34. So do others. Umpires have binary choices: a pitch is either a ball or a strike, and a hit is either foul or fair. Judges tend to have many more options. Further, umpires have no need publicly to account for their decisions, nor do they have much opportunity or need to reason about their decisions. Judges are supposed to account for their judgments by offering reasons, as least much of the time. In addition, umpires confront nothing like the structure of decision making faced by members of a collegial court, nor are they required to relate their decision regarding the current pitch to any of the hundreds that came before it, nor can they accept the factfinding of others (as appellate judges can). Moreover, as Lon Fuller noted, "[a] baseball umpire, though he is not called a judge, is expected to make impartial rulings. . . . What distinguishes [him] from courts . . . is that [his] decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments." Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365 (1978). Finally, judges have personal biases that are similar to those held by the rest of us. One federal judge has criticized the umpire analogy from that perspective. *See generally* Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007).

on what the rules are.[35] And they cannot agree on what the rules are because they cannot agree on the social vision that the rules are fashioned to realize.[36] It is precisely because there is no remotely determinate rulebook that Justices can approach controversial cases with strong predispositions and can garner the power and prestige associated with a seat on the Court. It is for good reason that informed people care deeply about who *in particular* serves on the Supreme Court of the United States. Put differently, if the umpire analogy were persuasive, being a Supreme Court Justice would be nothing to write home about.

Thus, despite the limited sense in which "[j]udges are like umpires,"[37] the image is flawed because it is misleading—it is totalizing and false in all the ways that I just described. In wielding the umpire analogy, in other words, Roberts was right and Roberts was wrong. But in the ways that matter most, in the ways that are relevant for the potentially historic cases I am going to discuss, he was wrong. When pitched (so to speak) vaguely and at a high level of abstraction, the umpire analogy may seem persuasive. But it cannot survive concrete encounters with the actual practice of constitutional adjudication.[38]

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35. I use the term "rules" in a non-technical sense, one that encompasses both legal rules and legal standards. For discussions of the jurisprudential debate over the virtues and vulnerabilities of rules versus standards, see, for example, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 15–63 (1987); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1991); Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1663–66 (2005) (reviewing GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004)).

36. Originalism is no exception here. *See* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 549 (2006) (exploring "deep tensions between the jurisprudence and political practice of originalism").

37. *Roberts Hearings*, *supra* note 1, at 55.

38. I cannot say whether Chief Justice Roberts apprehended the vulnerabilities of the umpire imagery and thus was being disingenuous. I also leave aside the ethical responsibilities of a nominee in the political context of a confirmation hearing, as well as the consequences of misleading the public about the practice of judging. I observe here only that there are different ways to read what Roberts was doing. On the one hand, he may have been politicking by telling Senators and the public what he thought they wanted to hear. He also may have been anticipating his subsequent refusals to answer questions about constitutional law by implicitly suggesting that his views did not matter because he "merely" would follow the law if confirmed.

On the other hand, Roberts is hardly the only eminent figure to champion the umpireal image of the judge. *See, e.g.*, *infra* notes 96, 100 and accompanying text (quoting Chief Justice Marshall); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 226 (1988) ("In a 1968 television interview, Justice Black was asked about certain unpopular constitutional decisions of the Supreme Court. 'Well,' he replied, 'the Court didn't do it . . . .

A better view of judicial role begins with the understanding that Justices succeed over the long run when their judgments express fundamental social values—when they "bring the public administration of justice into touch with changed moral, social, or political conditions."[39] That could occur because the Court ultimately proves effective in shaping popular commitments when the culture is divided,[40] or because the Court is shaped by them.[41] Typically, the lines of causation run in both directions.[42] Those cultural values infuse the grand phrases of the Constitution with their contemporary meaning and help to imbue the Court's work with legitimacy. The umpire analogy, no matter how charitably it may be construed, erases the reality that the Court legitimates itself in history in significant part by functioning as an engaged participant in the constitutional culture of the nation, a culture in which competing visions of social order compete for popular allegiance.[43]

The Constitution did it.'"). It is not necessarily the case that all such statements are disingenuous. Other possible explanations include self-delusion, an attempt to fit within a cultural frame, and a desire to express a commitment to professional norms of independence, impartiality, and non-partisanship but misarticulating that commitment as "just following the law." *See, e.g.*, *supra* note 7 (quoting judges and commentators who have invoked the umpire analogy).

39. Pound, *supra* note 7, at 398. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (observing that it is a function of law officially to endorse "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious").

40. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954). The *Brown* Court, it bears noting, almost lost its bet with constitutional destiny. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 43 (1995) ("*Brown* represented a courageous gamble. The Court's embrace of the value of racial equality could have been a misreading of the national ethos; indeed the Court's gamble was intensely controversial and came close to failing precisely because that ethos was in fact so divided.").

41. *See, e.g.*, *infra* note 99 and accompanying text (discussing the effect of the social movement to ratify the Equal Rights Amendment on the Court's subsequent sex discrimination jurisprudence).

42. *See, e.g.*, ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 91 (1970) ("Virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.").

43. There is nothing technical about the idea of a social order in the general way that I use the term here. I refer just to a vision of the country—its meaning and its prospects. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2836 (2007) (Breyer, J., dissenting) (noting "law's concern to . . . accomodat[e] different good-faith visions of our country and our Constitution").

II. A TIMELY AND MOMENTOUS CASE STUDY

During its October 2006 Term, the Supreme Court of the United States decided two critically important cases involving race, public schools, and the equal protection clause. They concerned the extent to which school boards may use racial criteria in assigning students to public elementary and secondary schools on a non-merit basis in order to advance racial integration. Although the cases generated a 4-1-4 split within the Court, there were five votes in favor of reversing the judgments of the lower courts,[44] which had rejected equal-protection challenges to the voluntary integration plans at issue.[45]

Appeals to core and conflicting social ideals are plainly and powerfully present in the judicial opinions on race-conscious student assignment plans. In this inquiry, I focus not only on the opinions of the Justices, but also on the lower-court opinions because they are remarkable in several ways and they should not be forgotten by commentators now that the Supreme Court has weighed in.

In the case involving the Seattle, Washington, student assignment plan, Judge Kozinski relied upon a particular interpretation of contemporary American culture in justifying his vote to uphold the plan:

> [T]ime spent in school . . . has a significant impact on [a] student's development. The school environment forces students both to compete and cooperate . . . . Schoolmates often become friends, rivals and romantic partners; learning to deal with individuals of different races in these various capacities

44. To support judgments of reversal, Justice Kennedy joined the plurality consisting of Chief Justice Roberts and Justices Scalia, Thomas, and Alito. The plurality appeared broadly to prohibit the use of race in student assignment, apparently perceiving no compelling interest supporting such use and concluding that Seattle and Jefferson County had engaged in unconstitutional race balancing. 127 S. Ct. at 2755 (plurality opinion). Kennedy strongly endorsed the authority of local communities to pursue racially integrated schools while restricting significantly the ability of school boards to classify individual students based on race. *Id.* at 2788–97 (Kennedy, J., concurring in part and concurring in judgment). Justice Breyer authored a long, passionate dissent that was joined by Justices Stevens, Souter, and Ginsburg. Breyer would have upheld assignment plans that employ racial classifications or other forms of race consciousness in order to increase racial integration, including the plans in question. *Id.* at 2800–37 (Breyer, J., dissenting). For a discussion of the opinions, especially Kennedy's, see Siegel, *supra* note 23.

45. The plans were voluntary in the sense that the school districts were not acting pursuant to court-ordered desegregation decrees. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006); McFarland v. Jefferson Co. Pub. Schs., 330 F. Supp. 2d 834 (W.D. Ky. 2004), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted sub nom.* Meredith v. Jefferson Co. Bd. of Educ., 126 S. Ct. 2351 (2006).

> cannot help but foster the live-and-let-live spirit that is the essence of the American experience. . . . Schools . . . don't simply prepare students for further education . . . ; good schools prepare students for life, by instilling skills and attitudes that will serve them long after their first year of college.[46]

In so declaring, Judge Kozinski was obviously not engaging the Constitution as if it were a typical statute or regulation, the correct interpretation of which could be gleaned by someone sufficiently skilled in the techniques of closely reading legal texts. That is, he was not practicing doctrinal interpretation and relying upon the authority of the Constitution as hard law.[47] He certainly was not stressing the importance of fidelity to the values of the rule of law.[48] On the contrary, Judge Kozinski wrote that "there is something unreal about . . . efforts to apply the teachings of prior Supreme Court cases, all decided in very different contexts, to the plan at issue here. I hear the thud of square pegs being pounded into round holes."[49]

Judge Kozinski instead pressed his understanding of what it *means* to be an American; he identified the general way of living and encountering social difference in this culturally heterogeneous society that he believes is constitutive of "the American experience."[50] Similarly, Justice Kennedy began his controlling opinion in *Parents Involved* by expressing his understanding of the social mission of public education in America: "The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to

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46. *Parents Involved*, 426 F.3d at 1195 (Kozinski, J., concurring in the result). In considering the import of Judge Kozinski's reference to "romantic partners," one might bear in mind the reasons for the Court's controversial disposition of *Naim v. Naim*, 350 U.S. 985 (1956) (dismissing for want of a substantial federal question a challenge to a Virginia antimiscegenation statute despite its incompatibility with the equal protection principles articulated in *Brown*). *See* Siegel, *supra* note 18, at 2017 ("Principle lost the battle . . . but at least principle put itself in a position not to lose the war.") (footnote omitted). When the legitimacy of *Brown* was more secure, the Court unanimously invalidated the Virginia law as a violation of equal protection and due process. Loving v. Virginia, 388 U.S. 1, 12 (1967).

47. *See* POST, *supra* note 40, at 29–30. While Philip Bobbitt usefully categorizes the different "modalities" of constitutional argumentation, see BOBBITT, *supra* note 28, at 11–22. Post distinguishes them based on the conceptions of constitutional authority that they presuppose. A conception of constitutional authority provides a justification for the practice of judicial review in a presumptively majoritarian society. For example, historical interpretation relies upon the authority of the Constitution as consent, and doctrinal interpretation invokes the status of the Constitution as law. *See* POST, *supra* note 40, at 30–35.

48. *See, e.g.*, Siegel, *supra* note 18, at 2015–16 (discussing rule-of-law values).

49. *Parents Involved*, 426 F.3d at 1193 (Kozinski, J., concurring in the result).

50. *Id.* at 1195.

the freedom of all."[51] Justice Breyer identified "an interest in helping our children learn to work and play together with children of different racial backgrounds"—"an interest in teaching children to engage in the kind of cooperation among Americans of all races that is necessary to make a land of three hundred million people one Nation."[52]

The approach to constitutional interpretation practiced by Kozinski, Kennedy, and Breyer in the examples above has been denoted "responsive"[53] because it is sensitive to contemporary conceptions of value. It relies upon the authority of the Constitution as *ethos*,[54] as the embodiment of our "fundamental nature as a people."[55] Because the Constitution functions in part as the repository of our very "national character," of the deepest values of the nation, "there is a sense, after all, in which our constitution is sacred and demands our respectful acknowledgement."[56]

Similarly, in deciding the constitutionality of the Jefferson County, Kentucky, student assignment plan, the federal district court looked beyond the authority of the Constitution as hard law. Chief Judge Heyburn put aside the question whether *Brown* as originally understood was primarily concerned to achieve racial integration or to end state-mandated segregation. He instead insisted that *Brown* has come to embody American ideals that transcend the Court's holding:

> Integrated schools, better academic performance, appreciation for our diverse heritage and stronger, more competitive public schools are consistent with central values and themes of American culture. Access to equal and integrated schools has been an important national ethic ever since *Brown v. Board of Education* established what Richard Kluger de-

51. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2788 (2007) (Kennedy, J., concurring in part and concurring in judgment). *See id.* at 2791 ("Our Nation from the inception has sought to preserve and expand the promise of liberty and equality on which it was founded.").

52. *Parents Involved*, 127 S. Ct. at 2821 (Breyer, J., dissenting). *See id.* at 2822 ("Primary and secondary schools are where the education of this Nation's children begins, where each of us begins to absorb those values we carry with us to the end of our days."); *id.* at 2823 ("The compelling interest at issue here . . . includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees."); *id.* at 2835 ("[T]he fate of race relations in this country depends upon unity among our children.").

53. POST, *supra* note 40, at 35.

54. *Id.* at 35–38.

55. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987).

56. *Id.* at 167, 169.

> scribed as "nothing short of a reconsecration of American ideals." What Kluger and others have articulated is that *Brown*'s symbolic, moral and now historic significance may now far exceed its strictly legal importance. . . . *Brown*'s original moral and constitutional declaration has survived to become a mainstream value of American education and . . . the [School] Board's interests are entirely consistent with these traditional American values. They reinforce our intuitive sense that education is about a lot more than just the "three-R's."[57]

Here the court was quite explicit about the pertinence of certain popular ideals to equal protection doctrine. Justice Kennedy also read *Brown* for more than its strictly legal authority, concluding that "[s]chool districts can seek to reach *Brown*'s objective of equal educational opportunity,"[58] and that "[t]his Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its citizens."[59] Justice Beyer emphasized emphatically—and repeatedly—"the kind of racially integrated education that [*Brown*] long ago promised."[60]

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57. McFarland v. Jefferson Co. Pub. Schs., 330 F. Supp. 2d 834, 852 (W.D. Ky. 2004) (quoting RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 710 (1975)). *See* James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327, 336–37 (2006) ("[R]acially integrated schools carry forward what might be called the moral ideal of *Brown*, namely that schools should not simply be desegregated but also integrated."). That moral ideal embodies the post-*Brown* judgment of "courts and federal officials, not to mention a large segment of the public" and now communities around the nation, "that black and white [and Latino and Asian American] children should actually go to school together." *Id.* at 336.

58. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2791 (2007) (Kennedy, J., concurring in part and concurring in judgment).

59. *Id.* at 2797. *See id.* ("The decision today should not prevent school districts from continuing the important work of bringing together students of different racial, ethnic, and economic backgrounds.").

60. *Id.* at 2800 (Breyer, J., dissenting). *See id.* at 2800–01 (referencing "*Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality"); *id.* at 2836–37:

> Finally, what of the hope and promise of *Brown*? For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. It was a promise embodied in three Amendments designed to make citizens of slaves. It was the promise of true racial equality—not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.
>
> . . . .

In the Seattle litigation, by contrast, Judge Bea invoked a distinct understanding of American identity in his dissent from the Ninth Circuit's decision to uphold the plan in question:

> The District's use of the racial tiebreaker to achieve racial balance in its high schools infringes upon each student's right to equal protection and tramples upon the unique and valuable nature of each individual. We are not different because of our skin color; we are different because each one of us is unique. That uniqueness incorporates our opinions, our background, our religion (or lack thereof), our thought, *and* our color.[61]

In Judge Bea's view, "[t]he District's stark racial classifications . . . offend intrinsic notions of individuality."[62] Chief Justice Roberts affirmed that understanding on behalf of the plurality in *Parents Involved*, underscoring the Court's previous assertions that racial classifications "'reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,'"[63] and that "'[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.'"[64] Justice Kennedy agreed:

> To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society. . . . Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.[65]

. . . The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise.

61. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 426 F.3d 1162, 1221 (9th Cir. 2005) (Bea, J., dissenting). *Contra* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (Seyla, J., dissenting) ("While no two cases are exactly alike, the function of the judiciary in passing upon a constitutional challenge is to read the pertinent text of the Constitution, examine the universe of relevant legal precedents, extract guiding principles from that case law, and apply those principles to the facts at hand."). The Court declined to review the Lynn, Massachusetts, student assignment plan before Justice O'Connor retired. *See* 126 S. Ct. 798 (2005).

62. *Parents Involved*, 426 F.3d at 1205 (Bea, J., dissenting).

63. *Parents Involved*, 127 S. Ct. at 2767 (plurality) (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

64. *Id.* (quoting *Rice v. Cayetano*, 528 U. S. 495, 517 (2000)).

65. *Id.* at 2797 (Kennedy, J., concurring in part and concurring in judgment).

Such statements sound in collective identity, not in constitutional commands that are autonomous of the ambient political culture.

Likewise, Justices Scalia and Thomas have drawn explicitly upon a cultural commitment to individualism in their equal-protection opinions. Rather than purporting to rely on the original meaning of the Fourteenth Amendment,[66] they have argued that "[t]he Constitution abhors classifications based on race"[67] by invoking "the lesson of contemporary history"[68] and "our Nation's understanding."[69] Those assertions, like those of the sev-

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66. Mitchell Berman has underscored the decidedly nonoriginalist approaches of Justices Scalia and Thomas in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Parents Involved*:

> While Justice Scalia proclaimed that "the Constitution proscribes government discrimination on the basis of race," Justice Thomas quoted and requoted the first Justice Harlan's famous declaration that "Our Constitution is colorblind." Yet the basis for these assertions was and is mysterious – at least for an announced (and proselytizing) Originalist. Not only does the constitutional text say no such thing, making it radically implausible to suppose that "no racial classifications at all" was the original public meaning, but the best evidence of the original intentions is that the framers did not intend to constitutionalize a principle of strict colorblindness.

Mitchell N. Berman, Originalism is Bunk (Feb. 18, 2008) (unpublished manuscript, on file with author) (citing ANDREW KULL, THE COLOR-BLIND CONSTITUTION 82 (1992); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–31 (1997); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789 (1985)).

67. Grutter, 539 U.S. at 353 (Thomas, J., joined by Scalia, J., concurring in part and dissenting in part) ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."). *See Parents Involved*, 127 S. Ct. at 2770 (Thomas, J., concurring) (quoting that language from his *Grutter* opinion). As is typical of the opinions of conservative Justices in race cases, Thomas's opinion in *Parents Involved* seems in places to gravitate back and forth between consequentialist arguments and arguments stressing constitutional compulsion. *See, e.g.*, *id.* at 2788 ("Can we really be sure that the racial theories that motivated *Dred Scott* and *Plessy* are a relic of the past or that future theories will be nothing but beneficent and progressive? That is a gamble I am unwilling to take, and it is one the Constitution does not allow."); *see also id.* at 2779 n.14 ("We are not social engineers. The United States Constitution dictates that local governments cannot make decisions on the basis of race. Consequently, regardless of the perceived negative effects of racial imbalance, I will not defer to legislative majorities where the Constitution forbids it.").

68. Richmond v. J.A. Croson Co., 488 U.S. 469, 521 (1989) (Scalia, J., concurring in judgment) ("I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.' A. Bickel, The Morality of Consent 133 (1975).").

69. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment) ("Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society.").

eral judges quoted above, constitute contestable cultural judgments about the American ethos.

Chief Judge Heyburn likely had the enduring American commitment to individualism in mind when he took his cue from the Supreme Court's opinions in *Grutter v. Bollinger*[70] and *Gratz v. Bollinger*.[71] The Court, with only Justices O'Connor and Breyer in the majority in both cases, approved the use of racial-minority status as a "plus" factor in university admissions but prohibited universities from explicitly awarding minority applicants a set number of points, even though the net-operative results produced by the two methods of increasing minority enrollment were essentially the same.[72] Chief Judge Heyburn wrote that the Jefferson County school district for the most part "has undertaken considerable effort to achieve its goals without the *overt* use of race in student assignments,"[73] and that "the racial guidelines play a *muted* role in the assignment process along with other factors."[74] He contrasted sharply such use of race with the

70. 539 U.S. 306 (2003).

71. 539 U.S. 244 (2003).

72. The Rehnquist Court, in turn, may have taken its cue from Justice Powell's controlling, singular opinion in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (allowing university affirmative-action admissions programs to use race as a "plus" factor but invalidating racial set-asides). *See* Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 927–28 (1983) ("Even when the net operative results may be the same, the use of euphemisms may serve valuable purposes; . . . they may facilitate the acceptance of needed measures. . . . A program formulated along the lines Justice Powell's opinion approves would, by the very lack of 'sharp edges,' avoid such visibility in its operations and tend to enhance the acceptability of the program."); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74–75 (2003) ("The potential for balkanization is muted within the Law School program . . . because the value assigned to race is camouflaged by an opaque process of implicit comparisons. . . . Racial inequalities can be addressed, but only in ways that efface the social salience of racial differences."). *See also* Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CAL. L. REV. 1473 (2007); Siegel, *supra* note 2, at 790–800; Siegel, *supra* note 23.

73. McFarland v. Jefferson Co. Pub. Schs., 330 F. Supp. 2d 834, 861 (W.D. Ky. 2004) (emphasis added).

74. *Id.* at 862 (emphasis added). One way that school districts can render the use of race less overt in the assignment process is by drawing attendance zones so at to increase integration. *See* Siegel, *supra* note 2, at 844. In Jefferson County, for instance, the school district ensured compliance with its racial guidelines primarily by drawing attendance zones with race in mind. *See McFarland*, 330 F. Supp. 2d at 843 ("The geographic boundaries of resides areas and cluster schools determine most school assignments."). That is likely why Chief Judge Heyburn wrote that the district avoided "the *overt* use of race" and that "the racial guidelines play a *muted* role." *Id.* at 861–62 (emphasis added). The school district may have concluded, similar to the implicit rationale of Justice Powell in *Bakke* and the Court in *Grutter* and *Gratz*, that implicit uses of race are less divisive—because less apparent and less seemingly "personal"—than granting or denying assign-

racial classifications deployed in the one part of the plan that he held unconstitutional: "The significance of separating traditional school applicants into *explicit* racial categories is that students are placed on separate assignment tracks where race becomes 'the defining feature of his or her application.'"[75]

So too Justice Kennedy. In *Parents Involved*, he approved efforts to address the problem of de facto segregation "in a *general* way"[76]—"by *indirection* and *general* policies,"[77] but not through "*individual* typing by race"[78] except as a last resort.[79] He feared that individual racial classifications that determine some student assignments "*tell*[] each student he or she is to be defined by race."[80] He was concerned that the "racial classifications at issue here" were "*personal*"[81] and "*explicit*"[82]—that the cases involved "official labels *proclaiming* the race of all persons in a broad class of citizens."[83] He even stated that "*individual* classifications" present "dangers that are not as pressing when the same ends are achieved *by more indirect means*"[84]—that "race-conscious measures that do not rely on differential treatment based on *individual* classifications present these problems to a lesser degree."[85]

Because race-conscious attendance zones classify groups of citizens in part based on their race, and because such zones may impose material burdens on individuals based on their race (the zones determine who goes to which schools), the primary difference between the methods Kennedy approved and those he disapproved may lie in the likelihood that the individual who is treated by the government in part as a member of a racial group will actually register that he or she is being so treated. In other words, the constitutional problem for Kennedy (and Powell and O'Connor) may lie not in "be[ing] forced to live under a state-

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ment or transfer requests based explicitly on the race of the requesting student.

75. *McFarland*, 330 F. Supp. 2d at 862 (emphasis added) (quoting Grutter v. Bollinger, 539 U.S. 306, 337 (2003)). The Supreme Court did not review that part of the assignment plan.

76. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2792 (2007) (Kennedy, J., concurring in part and concurring in judgment).

77. *Id.* at 2796 (emphasis added).

78. *Id.* at 2792 (emphasis added).

79. *Id.* at 2796–97 (prohibiting racial classifications absent "some extraordinary showing not present here" and "absent a showing of necessity not made here").

80. *Id.* at 2792 (emphasis added).

81. *Id.* at 2792 (emphasis added).

82. *Id.* at 2793 (emphasis added).

83. *Id.* at 2788 (emphasis added).

84. *Id.* at 2796 (emphasis added).

85. *Id.* at 2797 (emphasis added).

mandated racial label," but in the individual's perception that he or she is living in that way.[86]

Like the approaches employed by Powell and O'Connor, therefore, Kennedy's rationale may depend for its success on the failure of citizens to recognize that certain instances of race-conscious government action are more similar in their net-operative results than they may at first appear.[87] Powell and O'Connor are gone, but "appearances" apparently still "do matter" in constitutional law.[88] When courts make a virtue of opacity in race cases[89]—when they insist that the government mask the

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86. Note, however, that schoolchildren in *Parents Involved* self-identified their race. *See, e.g.*, Petition for Writ of Certiorari, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, No. 05-908 (Jan. 18, 2006), at *3 ("A student is deemed to be of the race specified in her registration materials (and if a parent declines to identify a child's race, the District assigns a race to the child based on a visual inspection of the student or parent)."). It is thus not clear how the school district was imposing an identity on anyone.

87. Elsewhere I have explored why race consciousness might be deemed more suspect when expressed through individual racial classifications than through attendance zones:

> The answer lies in the concern animating Justice Powell's distinction between using racial quotas and using race as a "plus" factor, and the Rehnquist Court's distinction between a publicly declared award of twenty points and a publicly undefined "plus" factor. Judging from the Court's previous interventions, the felt impact of race-consciousness on those who are burdened by it is less acute when it is less publicly apparent. In other words, the individualized consideration requirement that I endorse would apply the lesson of *Bakke*, *Grutter*, and *Gratz* to a different setting: racial criteria are less likely to be balkanizing when government does not needlessly impress on people that they (or their children) are being treated in part as members of racial groups. In the assignment context, moreover, the use of race is more general and diffuse—that is, less seemingly "personal"—in drawing attendance zones than in disposing of individual requests for certain schools.

Siegel, *supra* note 2, at 849–50 (footnote omitted).

88. Shaw v. Reno, 509 U.S. 630, 647 (1993). The Court's approach seemed predictable before *Parents Involved* came down:

> In evaluating colorblindness discourse in this setting, it is important to bear in mind that a genuine commitment to colorblindness would prohibit any race consciousness even in drawing attendance zones, siting schools to increase integration, establishing magnet schools to prevent white flight, etc. Districts could be hard-pressed to achieve even modest levels of integration. The Justices presumably know this and care. If the Court invalidates the Jefferson County and Seattle plans, therefore, it is more likely to prohibit explicit racial classifications that impose obvious individual burdens (e.g., a race-based denial of an assignment request) than it is to prohibit implicit race consciousness that imposes non-obvious individual burdens (e.g., race-conscious attendance zones)—even when the former use of race is more limited than the latter. Justices Powell and O'Connor are gone, but appearances may matter to several current Justices.

Siegel, *supra* note 2, at 850 (footnote omitted).

89. To be sure, transparency is not always the practice, or even the ideal, in American law. Consider, for example, the institutions of the jury, the grand jury, and the Supreme Court's Conference. Consider also the Court's refusal to allow cameras at oral argument and the tradition of a single opinion of the Court. That said, transparency is certainly a core value of the rule of law. *See* Siegel, *supra* note 18, at 2015–16 (discussing rule-of-law virtues). Transparency is also prized in liberal political theory. *See, e.g.*, JOHN

very racial criteria whose use they allow[90]—they often are attempting to allay "the fear of racial 'balkanization'"[91] potentially associated with racial classifications.[92] Judges symbolically endorse an ideological commitment to individualism when the government is in fact treating people in part as members of racial groups, whether to redress enduring dislocations ultimately related to past racial injustices, to encourage the social transformation of race in America, or to advance some combination of both purposes.[93]

III. THE COURT AS ENGAGED PARTICIPANT

The judicial opinions on race-conscious student assignment plans reveal something important about the nature of constitutional adjudication. Whether privileging the ideal of racial integration or celebrating the uniqueness of each individual, whether addressing the compelling interest prong of strict scrutiny or the issue of narrow tailoring,[94] those opinions illustrate a critical but oft-neglected truth about where constitutional law comes from, why it changes over time, and how it legitimates itself.

According to the standard account, the Court is a countermajoritarian institution in an essentially majoritarian society that can legitimately invalidate democratic legislation only by apply-

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RAWLS, A THEORY OF JUSTICE 133 (1971) (conceiving the "publicity" of distribution systems as an ideal of liberal societies).

90. *Cf.* Siegel, *supra* note 26, at 1475 ("The debates over *Brown*'s implementation show the complex ways in which concerns about legitimacy have moved courts to mask and to limit a constitutional regime that would intervene in the affairs of the powerful on behalf of the powerless.").

91. Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 691 (1998).

92. Thus Kennedy warned: "Governmental classifications that command people to march in different directions based on racial typologies can cause a new divisiveness. The practice can lead to corrosive discourse, where race serves not as an element of our diverse heritage but instead as a bargaining chip in the political process." Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring in part and concurring in judgment).

93. For a development of those and related points, see generally Post & Siegel, *supra* note 72; Siegel, *supra* note 2; Siegel, *supra* note 23.

94. *See, e.g.*, *Parents Involved*, 127 S. Ct. at 2751–52 ("It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.... In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest."); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (noting that racial classifications trigger "strict scrutiny," meaning that they "are constitutional only if they are narrowly tailored to further compelling governmental interests.").

ing constitutional law that is autonomous of the contemporary constitutional beliefs and values of the nation—that is, a law that is antecedent, fixed, politically neutral, and capable of relatively uncontroversial application.[95] Chief Justice Marshall expressed that view forcefully when he asserted that "[c]ourts are the mere instruments of the law."[96]

Scholars who study how the Supreme Court actually functions in our society have little use for such declarations.[97] My col-

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95. Jesse Choper has offered a forceful statement of "the politically neutral and principled" view of judicial authority:

> Although I concur in Justice Robert H. Jackson's famous bon mot, offered to inform the Court's task of interpreting our fundamental charter, that the Justices should not "convert the constitutional Bill of Rights into a suicide pact," and I am not unsympathetic to the pragmatic notions about discretion sometimes being the better part of valor and living to fight another day, still, I would be much troubled in concluding that the Court's concern for individual rights should be affected by its judgment of whether a particular result will bring criticism, hostility, or disobedience. Such speculation must be based on social-scientific predictions that judges are not well equipped to make. More importantly, for the Court to make this an element of how it finally interprets the Constitution conflicts with the politically neutral and principled role supporting its antimajoritarian existence in a democratic government.

Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1478 (2005) (footnote omitted). The classic plea for "neutrality," "reason," and "principle" in legal interpretation, of course, belongs to Herbert Wechsler. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."); *id.* at 19 ("A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.").

96. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 866 (1824). Such utterances notwithstanding, the great Chief Justice was well aware of the role of political commitments in shaping an individual's views on constitutional matters. In his biography of George Washington, for example, Marshall wrote of both those defending and those attacking the constitutionality of a national bank that their "'judgment is so much influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided, that a contrariety of opinion on this great constitutional question ought to excite no surprise.'" H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 22 (2002) (quoting JOHN MARSHALL, 4 LIFE OF GEORGE WASHINGTON 243 (1805)). *See infra* notes 124–125 and accompanying text (quoting two famous Marshall opinions).

97. *See, e.g.*, TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 161–88 (1999); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309 (2002); Helmut Norpoth & Jeffrey Segal, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711 (1994); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

league H. Jefferson Powell, for instance, has shown that there has never existed an ahistorical, apolitical, and objectively correct view of the meaning of the U.S. Constitution. Instead, our "[c]onstitutional law is historically conditioned and politically shaped."[98] In other words, there is no view from nowhere in constitutional law, no place for a Justice to stand that is divorced from the culture and society in which the Court operates. The Court's interpretive task is shaped by the values of the society in which it is embedded, just as it helps to shape those values. Only that perspective can fully account for the various ways in which constitutional doctrine changes over time.

Reva Siegel provides an instructive example. Analyzing the social movement to ratify the Equal Rights Amendment, she concludes that popular mobilization in support of the proposed amendment strongly influenced the future course of Supreme Court doctrine. "The ERA was not ratified," she notes, "but the amendment's proposal and defeat played a crucial role in enabling and shaping the modern law of sex discrimination. Yet constitutional law [as typically conceived] lacks tools to explain constitutional change of this kind."[99]

Assertions to the effect that "[c]ourts are the mere instruments of the law,"[100] therefore, are oversimplified to the point of being mythical.[101] At the same time, they cannot be casually dismissed because they appeal to important symbolic commitments.[102] As noted in Part I, much of the public may believe—or

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98. POWELL, *supra* note 96, at 6.

99. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1324 (2006). Siegel's work illustrates that cultural understandings affect judicial action in ways that are less direct and more subtle than what happens when a judge explicitly engages in cultural analysis. Because forms of cultural meaning constitute a key part of the environment within which people reason, cultural understandings affect judicial outcomes in ways that are not consciously invoked.

100. *Osborn*, 22 U.S. (9 Wheat.) at 866.

101. *Cf.* POWELL, *supra* note 96, at ix ("Like all social orders, American politics reflects both intersection and discontinuity between its official self-understanding and its actual practice, and untangling those relationships is difficult and often controversial.").

102. Paul Mishkin emphasized that point in his magisterial *Foreword*:

> Despite (and perhaps also because of) its shortcomings as a description of reality, the "declaratory theory" [associated with Blackstone] expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance. It is easy enough for the sophisticated to show elements of naivete in this view—and no more difficult to scoff at symbols generally. But the fact remains that symbols constitute an important element in any societal structure—and that this symbolic view of courts is a major factor in securing respect

want to believe—that constitutional courts decide cases according to "the law."[103] As also discussed in Part I, Chief Justice Roberts brilliantly appealed to that image of judging during his confirmation hearings when he stated that "[j]udges are like umpires."[104]

Indeed, Chief Justice Marshall's insistence that "[c]ourts are the mere instruments of the law"[105] sounds strangely similar to Chief Justice Roberts' assertion that "[j]udges and Justices are servants of the law, not the other way around."[106] To underscore

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for, and obedience to, judicial decisions. If the view be in part myth, it is a myth by which we live and which can be sacrificed only at substantial cost; consider, for example, the loss involved if judges could not appeal to the idea that it is "the law" or "the Constitution"—and not they personally—who command a given result.

Paul J. Mishkin, *The Supreme Court, 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 62–63 (1965) (footnotes omitted).

103. *Compare* Shapiro, *supra* note 31, at 601 ("The distinction between what the Court says to the public about what it is doing and what scholars say to one another about what it is doing must be held firmly in mind. . . . It would be fantastic indeed if the Supreme Court in the name of sound scholarship were to publicly disavow the myth upon which its power rests."), *and id.* at 603 ("If the Court is to be successful as a political actor, it must have the authority and public acceptance which the principled, reasoned opinion brings."), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–66 (1992):

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
>
> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

104. *Roberts Hearings*, *supra* note 1, at 55. In light of the pervasive relevance of social values to the outcomes of constitutional cases and the pervasive reality of doctrinal change on the Supreme Court, a question worthy of further exploration is why the umpire imagery and the idea of "just applying the law" seem to resonate with many people.

105. *Osborn*, 22 U.S. (9 Wheat.) at 866.

106. *Roberts Hearings*, *supra* note 1, at 55.

a point made earlier, few people seemed to notice that Roberts' statement was in serious tension with his refusal to answer substantive questions about constitutional law. It is in part (but only in part) "because much of the public believes that judges are merely umpires who apply pre-existing principles that judicial decisions have legitimacy with litigants who lose as well as with litigants who win."[107]

Like other nominees before him, Chief Justice Roberts likely counted to fifty—he had lots of experience counting to five as a Supreme Court advocate—and determined that answering questions could only jeopardize his nomination in light of the intense disputes about constitutional law that pervade American society. The reality of often reasonable, irreconcilable disagreement over constitutional meaning[108]—in which Chief Justice Roberts began to participate robustly on the Court after he was confirmed[109]—illustrates that conceptualizing judicial review as autonomous of popular beliefs is more ideologically useful than jurisprudentially persuasive. It captures how certain Justices and other defenders of judicial supremacy want the country to regard constitutional law; it does not accurately portray how constitutional law in fact comes into being, functions, and evolves.[110]

If it is unreal to conceive of any category of law as fully independent of popular beliefs, it is particularly important to resist the pull of that potentially pleasant image in the area of constitutional law.[111] As illustrated by the judicial opinions canvassed in Part II, the authority of the Constitution derives not only from

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107. Post & Siegel, *supra* note 72, at 1507–08.

108. *Cf. generally* JOHN RAWLS, POLITICAL LIBERALISM (1993) (emphasizing the reasonable yet irreconcilable disagreements about basic questions of religion, morality, and philosophy that characterize modern, heterogeneous, democratic societies).

109. *See, e.g.*, Gina Holland, *Roberts Dives into Debate on Suicide Law*, DESERET MORNING NEWS, Oct. 6, 2005, *available at* http://deseretnews.com/dn/view/0,1249,615155719,00.html ("Roberts, 50, was presiding over his first major oral argument and thrust himself in the middle of the debate. He interrupted Oregon's senior assistant attorney general, Robert Atkinson, in his first minute, then asked more than a dozen more tough questions."). *Gonzales v. Oregon* was not a constitutional case, but the Court's interpretation of federal drug law was informed by constitutional concerns sounding in federalism. *See* 126 S. Ct. 904, 923 (2006) ("[The federal Controlled Substances Act (CSA)] manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism . . . . The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.").

110. *See* Post, *supra* note 72, at 9, 35–36, 110–11 .

111. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 74 (1962) ("Judges and lawyers recurrently come to feel that they find law rather than make it. Many otherwise painful problems seem to solve themselves with ease when this feeling envelops people.").

its status as law, but also from its privileged position as the embodiment of our "fundamental nature as a people."[112] The Constitution has always gravitated between a document monopolized by judges and constitutional lawyers,[113] and a hallowed cultural text that both enacts and embodies the American collective identity.[114]

Constitutional law necessarily inherits that instability. That is evident throughout the *Federal Reporters* and the *United States Reports*. Examples include the question whether race-conscious student assignments advance a "compelling state interest" or afford "individualized consideration"[115]; the indeterminacy of legal concepts like "classifications based upon race"[116]; and the determination in federalism doctrine of whether an activity is a "traditional subject of state concern."[117] Whenever a court "'balances' or 'weighs' incommensurate and potentially incompatible values," it relies "upon contextual interpretations that are deeply influenced by implicit and inarticulate considerations characteristic of social values."[118]

Judicial opinions that rest on the authority of the Constitution as ethos are pervasive; the opinions on voluntary integration plans are distinctive only in their timeliness and unusual social importance. The judges who wrote those opinions were following the lead of former Justices all over the ideological spectrum. For example, Chief Justice Rehnquist supported his conclusion that the Constitution allows voluntary recitations of the Pledge of Allegiance in public schools by looking to certain significant events in American history—specifically, President Washington's first inaugural address and Thanksgiving proclamation,

112. Pitkin, *supra* note 55, at 167.

113. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 46 (1997) (The "interpretation of the Constitution . . . is . . . essentially lawyers' work— requiring a close examination of text, history of the text, traditional understanding of the text, judicial precedent, and so forth."). *But see supra* note 68 and accompanying text (quoting Justice Scalia's opinion in *Croson*).

114. *See* Pitkin, *supra* note 55, at 169 ("Except insofar as we *do*, what we think we *have* is powerless and will soon disappear. Except insofar as, in doing, we respect what we *are*—both our actuality and the genuine potential within us—our doing will be a disaster. Neglect any one of these dimensions, and you will get the idea of our United States Constitution very wrong.").

115. *See generally* Siegel, *supra* note 2.

116. *See* Balkin & Siegel, *supra* note 26, at 14–28.

117. *See generally* Neil S. Siegel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Neil S. Siegel, Dole's *Future: A Strategic Analysis*, 16 SUP. CT. ECON. REV. (forthcoming 2008).

118. Post & Siegel, *supra* note 72, at 1502 (citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987)).

President Lincoln's Gettysburg Address and second inaugural address, President Wilson's 1917 request for a declaration of war against Germany, President Franklin Roosevelt's first inaugural address, General Eisenhower's "Order of the Day" on D-Day, the initial appearance of the motto "In God We Trust" on the country's currency during the Civil War, and the opening proclamation of the Marshal of the U.S. Supreme Court, which dates back at least to 1827.[119] In Chief Justice Rehnquist's view, "[a]ll of these events strongly suggest that *our national culture allows* public recognition of our Nation's religious history and character."[120]

Rehnquist's understanding of the establishment clause was radically different from Justice Brennan's. Yet Brennan agreed with Rehnquist's implicit premise that the content of our national character confers constitutional authority:

> [T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. . . . [T]he Members of the First Congress should be treated . . . as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work.[121]

Similarly, Justice Holmes sought to understand "our whole experience" as a nation in interpreting the Constitution:

> [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be consid-

119. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26–29 (2004) (Rehnquist, C.J., concurring in judgment).

120. *Id.* at 30 (emphasis added). As the approach of Chief Justice Rehnquist suggests, appeals to the authority of the Constitution as ethos are more likely to prove persuasive when the contemporary commitments being asserted possess an historical pedigree. *See supra* note 114 (quoting Pitkin).

121. Marsh v. Chambers, 463 U.S. 783, 816–17 (1983) (Brennan, J., dissenting).

> ered in the light of our whole experience and not merely in that of what was said a hundred years ago.[122]

That is a classic statement by the Supreme Court endorsing the constitutional authority of American collective identity.[123]

So is Chief Justice Marshall's invocation of "the whole American fabric,"[124] and his assertion that "[t]his provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."[125] All of those data points, as well as many others,[126] suggest that constitutional law has been legitimated throughout history in significant part by the Court's continual renegotiation and ultimate expression of popular commitments.[127] There was much wisdom in Karl Llewellyn's reference many years ago to "the going Constitution," to "our working Constitution."[128]

> Whatever the Court has *said*, it has repeatedly made concessions to governmental practice and governmental need. Whatever the Court has *said*, it has repeatedly turned to established governmental practice in search of norms. Whatever the Court has *said*, it has shaped the living Constitution to the needs of the day as it felt them.[129]

Llewellyn's unblinking appreciation of the reality of Supreme Court practice seems as applicable today as it was in 1934.

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122. Missouri v. Holland, 252 U.S. 416, 433 (1920).

123. In his famous *Lochner* dissent, Holmes offered another endorsement of the constitutional authority of the American ethos:

> Every opinion tends to become a law. I think that the word liberty in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

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

124. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

125. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis in original).

126. *See, e.g.*, *supra* notes 67–69 and accompanying text (quoting Justices Scalia and Thomas).

127. *See, e.g.*, POWELL, *supra* note 96, at 6 ("However counterintuitive it may seem, the integrity and coherence of constitutional law are to be found in, not apart from, controversy."); Siegel, *supra* note 26, at 1547 (offering "a history of debates over *Brown* that suggests how the contours of constitutional principle emerge from the crucible of constitutional politics").

128. K. N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 14–15 (1934). Llewellyn viewed "the nature of any working constitution, and especially of ours, as being in essence not a document, but a living institution built (historically, genetically) in first instance *around* a particular Document." *Id.* at 3 (emphasis in original).

129. *Id.* at 40 (footnote omitted); *see id.* ("Theory that can face fact . . . is what we need.").

The Court will always be "torn between defining its audience as the community of professional lawyers, and defining its audience as the general American public."[130] Accordingly, the legitimacy of constitutional law does not lie in a single-minded embrace of the ideal "of the constitution as hard law, law written in virtually capital letters (LAW), law as meaning reliable law."[131] Rather, legitimation inheres in the mysterious and paradoxical tension[132] that persists between that source of judicial authority and another: the one whereby constitutional law is expressed by the very people whose conduct the Constitution controls.[133] That, in important part, is what makes constitutional law *our* constitutional law, and thus what lends it legitimacy.[134]

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130. Post & Siegel, *supra* note 72, at 1502–03. *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 407 (placing great importance on whether the Constitution can "be understood by the public").

131. William W. Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 J. LEGAL EDUC. 174, 179 (1987).

132. The tension between legal legitimation and public legitimation is paradoxical, not contradictory. The two grounds of legitimation may be irreconcilable in particular cases, but ultimately each must be fashioned out of the other. Public legitimacy without legal legitimacy cannot vindicate the values of the rule of law, which is itself a rare cultural achievement of enormous social importance. *See, e.g.*, Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, 15 LAW & SOC. INQUIRY 633, 642 (1990) (describing the rule of law as "a crucial and historically rare mode of restraint on power by law"). At the same time, legal legitimacy without public legitimacy is directionless and inevitably alienating. *See, e.g.*, JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW 228 (1979) ("Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values."); *id.* at 229 (noting that "the rule of law is meant to enable the law to promote social good" and cautioning that "[s]acrificing too many social goals on the altar of the rule of law may make the law barren and empty").

133. *See generally* Post & Siegel, *supra* note 72 (analyzing the relation between legal legitimacy and public legitimacy). Richard Fallon also distinguishes between "legal" and "sociological" legitimacy. Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790–91 (2005) ("When legitimacy functions as a legal concept, legitimacy and illegitimacy are gauged by legal norms. As measured by sociological criteria, the Constitution or a claim of legal authority is legitimate insofar as it is accepted (as a matter of fact) as deserving of respect or obedience—or, in a weaker usage . . . , insofar as it is otherwise acquiesced in."). *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1387 (2001) ("[T]he work of constitutional judges must have both 'legal' and 'social' legitimacy. Social legitimacy, as distinguished from legal legitimacy, looks beyond jurisprudential antecedents of constitutional decisions and asks whether those decisions are widely understood to be the correct ones given the social and economic milieu in which they are rendered.") (footnote omitted).

134. *Accord* Jack M. Balkin, *Respect-Worthy*, 39 TULSA L. REV. 485, 508 (2004) ("What gives the system of judicial review its legitimacy, in other words, is its responsiveness—over the long run—to society's competing views about what the Constitution means."). The legitimation of the American legal system, like the legitimation of any government institution, "is constituted by its collective acceptance." JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 117 (1995). As Searle observes, "[i]nstitutions

CONCLUSION

There is, of course, much more to be said. I have not here theorized the dialectic between legal legitimacy and public legitimacy.[135] Nor have I examined the many circumstances in which doctrinal or historical arguments appropriately carry the day. "Constitutional law" is not a contradiction in terms. There certainly are critical differences between law and politics, even if those differences must be apprehended contextually and carefully,[136] and even if the boundary between the two realms is "ragged and blurred."[137]

The current environment, however, is one in which the "law" part of the relation appears to be on steroids in the public mind—so much so that a nominee to lead the federal judiciary can analogize Supreme Court Justices to baseball umpires and receive widespread acclaim. Maybe, therefore, it is appropriate for me to focus on the critically important ways in which judges function as engaged participants in the constitutional culture of the nation. If people want—or think they want—judicial umpires, they also want judges who call the game their way, at least on the issues they care about most.

If there is truth in what I write, then the umpire analogy is disturbing at a deeper level than I had initially registered. The point can perhaps properly be put this way: I have watched or played in many baseball games over the past three decades, and only rarely have I witnessed attempts at dialogue with an umpire end well. Arguing balls and strikes is a very effective way to get tossed out of the game.

Over the next thirty years, let us hope that Chief Justice Roberts did not really mean[138]—or did not fully consider—what

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survive on acceptance." *Id.* at 118. *See, e.g.*, Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 309 (1968) ("[W]hether a designated requirement is to be regarded as obligatory will depend in part on whether those who have made that designation are regarded by those to whom the requirement is addressed (the target audience) as endowed with the requisite competence or authority for that role."); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 307 (2003) ("Legitimacy is the property that a rule or an authority has when others feel obligated to defer voluntarily.").

135. *See supra* notes 132–134 (citing relevant work).

136. *See, e.g.*, Herzog, *supra* note 9, at 629 (criticizing "writers [who] pose a stark binary choice: either the law tells passive judges what to do, either rules times facts equals decisions, or it is all up for grabs and anything goes," and counseling "defenders of legal interpretation to explore middle grounds, to articulate positions that differ from both").

137. Post & Siegel, *supra* note 72, at 1474.

138. *See supra* note 38 (declining to opine on Roberts' reasons for invoking the um-

he said. Let us hope that over the long run, the Roberts Court will be receptive to rational conversation with the American public about fundamental social values. If the Court elects instead to take the road far less traveled—if it chooses to be contemptuous of the commitments that constitute contemporary constitutional culture—then like the Taney Court's role in encouraging the Civil War[139] and the constitutional crisis of the New Deal,[140] it is the "umpire" himself who will ultimately strike out.

pire analogy).

139. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

140. *See, e.g.*, Friedman, *supra* note 133, at 1387 ("The proper lesson of *Lochner* instructs us that, even where it is possible to identify a jurisprudential basis for judicial decisions, if those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate. There will be attacks on judges and, ultimately, on the institution of judicial review. Even in the face of established precedent, law itself will come to be seen as nothing but politics.") (referencing Lochner v. New York, 198 U.S. 45 (1905)); BICKEL, *supra* note 111, at 45 ("Serving this value [of laissez faire] in the most uncompromising fashion, at a time when it was well past its heyday, five Justices, in a series of spectacular cases in the 1920's and 1930's, went to unprecedented lengths to thwart the majority will. The consequence was very nearly the end of the story."); *see also* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 279–311 (1998).