The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar

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INTRODUCTION

The premise is by now familiar: constitutional adjudication—an integral feature of a constitutional scheme legally committed to the protection of rights and the separation of powers—pits one governmental branch against another and carries the risk of seriously deepening existing social divides over values[1] and symbols[2] in heterogeneous societies.[3] The

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1. *See, e.g.*, the contemporary debate surrounding the issue of same-sex marriage. While clearly it is a debate about values, the actions of the various protagonists are not divorced from symbols: Defense of Marriage Act, Pub. L. No. 104-199, 110 Sta. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)); Lawrence v. Texas, 539 U.S. 558 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986), and striking down Texas's prohibition against homosexual sodomy). The same can be said about the debate surrounding abortions in the United States. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914 (2000) (concerning partial-birth abortion).

2. For the general argument on the power of symbolism, see CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1983). For treating law as a reservoir of state symbols, see THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 34-35, 49-51 (1962). It is difficult to understand U.S. constitutional jurisprudence without being attuned to the symbolic element attached to the issues fought over, and to the symbols associated with the Supreme Court. Allan C. Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship*, 58 S. CAL. L. REV. 701, 703 (1985). For example, the jurisprudence governing the separation of church and state makes little sense if the role of symbols—be they religious symbols or symbols associated with the state or with the judicial function—is ignored. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (deciding an Establishment Clause case and weighing in on the public discourse on religion); McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (same). Yet sensitivity to symbols is not limited to church and state questions. Matters ranging from desecration of the flag, United States v. Eichman, 496 U.S. 310 (1990), and Texas v. Johnson, 491 U.S. 397 (1989), to affirmative action, *see* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S.Ct. 2738 (2007), inquire into the "symbols" and the "messages" embedded in the state actions.

3. For a comparative perspective, see Ruth Gavison, *The Role of Courts in Rifted Democracies*, 33 ISR. L. REV. 216 (1998).

complex role of the Supreme Court as a co-equal branch of government,[4] whose duty it is to enforce the Constitution,[5] places the Court itself—supposedly the "umpire"[6]—in an adversarial position vis-à-vis other

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4. The Madisonian notion of co-equal branches is often relied upon by the Court when confronted with constitutional questions:

> The exercise of the judicial power also affects relationships between the coequal arms of the National Government. . . Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 474 (1982). "The Congress is a coequal branch of Government whose Members take the same oath we do to uphold the Constitution of the United States." Printz v. United States, 521 U.S. 898, 957 n.17 (1997) (Stevens, J., dissenting);

> The doctrine of separation of powers is concerned with the allocation of official power among the three coequal branches of our Government. The Framers built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.

Clinton v. Jones, 520 U.S. 681, 699 (1997) (internal citations omitted).

5. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). *See also* Cooper v. Aaron, 358 U.S. 1 (1958).

6. In his confirmation hearings, Judge Roberts (as he was then) relied on the notion of the umpire: "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 the ballgame to see the umpire." *Text of Opening Statement by Judge John G. Roberts at his Senate Confirmation Hearings for Supreme Court*, N.Y. TIMES, Sept. 13, 2005, at A28. It should be noted that some justices rejected this image: "A court of equity is not just an umpire between two litigants. In a very special sense, the public interest is in its keeping as the conscience of the law." Chrysler Corp. v. United States, 316 U.S. 556, 570 (1942) (Frankfurter, J., dissenting). The same, for Justice Frankfurter, held for the criminal process:

> In administering the criminal law, judges wield the most awesome surgical instruments of society. A criminal trial, it has been well said, should have the atmosphere of the operating room. The presiding judge determines the atmosphere. He is not an umpire who enforces the rules of a game, or merely a moderator between contestants. If he is adequate to his functions, the moral authority which he radiates will impose the indispensable standards of dignity and austerity upon all those who participate in a criminal trial.

Sacher v. United States, 343 U.S. 1, 37-38 (1952) (Frankfurter, J., dissenting). Judge Roberts was perhaps purporting to counter Justice Brennan:

> Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a coordinate branch of government. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring). In any event, it seems that Chief Justice Roberts's analogy only goes so far. Unlike the popular image of a judge as an umpire in a ballgame, the judicial function—especially at the level of the Supreme Court—is more complex. First, it is deliberately not meant to be exercised instantaneously: the judicial whistle is designed to blow only after careful consideration of fact and law. Second, the "rules of the game" are far from being crisp and clear. After all, most cases that reach the Supreme Court are there precisely because a genuine interpretative controversy has arisen under the constitution. Lastly, it seems that the stakes are different. For academic discussions of the role of the judge as an umpire, see MARTIN SHAPIRO, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS (1981); JOHN HART ELY, DEMOCRACY AND DISAGREEMENT: A THEORY OF JUDICIAL REVIEW (1980). For a nuanced analysis of the role of the Court in particular cases, see PAUL FREUND, THE SUPREME COURT OF THE UNITED STATES: ITS

branches and/or social movements enjoying popular support.[7] Since the Supreme Court lacks control of the sword or purse, for its words to bind—for it to be able to carry out its duty to protect constitutional rights[8] and the separation of powers[9]—it must maintain public confidence in its performance as a court of law.[10] While the premise is clear, the question

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BUSINESS, PURPOSES AND PERFORMANCE (1961); PAUL KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1995).

7. Valid criticism to the contrary not withstanding, *see, e.g.*, Rebecca L. Brown, *Accountability, Liberty and the Constitution*, 98 COLUM. L. REV. 531 (1998), Bickel's words on the countermajoritarian nature of judicial review still shape the contours of the institutional debate. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-26 (1962).

8. Perez v. Ledesma, 401 U.S. 82, 119 (1971) (Brennan, J., concurring in part and dissenting in part) (arguing that "it is a principal function of the federal courts to vindicate the constitutional rights of all persons"); Reynolds v. Simms, 377 U.S. 533, 566 (1964) (stating that "[w]e are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."). *But see* Peter Wallenstein, *Race, Marriage, and the Law of Freedom: Alabama and Virginia, 1860s-1960s*, 70 CHI.-KENT L. REV. 371, 418-420 (1994) (describing the torturous trail of *Naim v. Naim*, 350 U.S. 891 (1955)); Thompson v. Coastal Oil Co., 350 U.S. 985 (1956) (refusing to address the constitutionality of anti-miscegenation laws). Justice Harlan noted the "moral considerations" for refusing to address the case, including "those raised by the bearing of adjudicating this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases." In other words, according to Harlan, the Court refused to hear the case for reasons of expediency—to avoid further depreciation of judicial stature and the risk of disobedience to *Brown v. Board of Education*. The memorandum containing Justice Harlan's words is reproduced in Dennis J. Hutchinson, *Unanimity and Desegregation: Decision Making in the Supreme Court 1948-1958*, 68 GEO. L.J. 1, 96-97 (1979).

9. In *Miller v. French*, 530 U.S. 327, 341 (2000), the Court reminded us that:

> [t]he Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this "very structure" of the Constitution that exemplifies the concept of separation of powers. While the boundaries between the three branches are not "hermetically sealed," the Constitution prohibits one branch from encroaching on the central prerogatives of another.

(internal quotations omitted) (citing INS v. Chadha, 462 U.S. 919, 946, 951 (1983)). *See also* Loving v. United States, 517 U.S. 748, 757 (1996) (rejecting Congressional encroachment on executive power); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (rejecting presidential encroachment on Congress's power); United States v. Nixon, 418 U.S. 683 (1974) (describing the reach of judicial power to both the political branches); TVA v. Hill, 437 U.S. 153, 194-195 (1978) (same). Needless to say, as recent cases reveal, the relationship between the three branches, especially in matters involving the protection—or violation—of human rights, is dynamic. See the debate between John Yoo and Jesse H. Choper in *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CALIF. L. REV. 1243 (2007).

10. THE FEDERALIST NO. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Baker v. Carr, 369 U.S. 186, 267 (1962) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."); *see also* Bush v. Vera, 517 U.S. 952, 1048 n.2 (1996) (Souter, J., dissenting); Canon v. Univ. of Chicago, 441 U.S. 677, 745 n.15 (1979) (Powell, J., dissenting). For the importance of public confidence as an ingredient of the court's institutional capital, see JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980) [hereinafter CHOPER, JUDICIAL REVIEW]; *see also* Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335 (2001) [hereinafter Choper, *Presidential Election of 2000*] (arguing that the Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), was "both unnecessary and unwise" and "carries the threat of diminishing the public's trust and confidence in the justices and endangering the Court's institutional standing and overall

remains: given that the law is a complex notion,[11] what does public confidence in a court demand? Surely, it cannot be reduced to a matter for public relations experts, for that would imply that judicial performance is but a show.[12] Nor does it mean that judges should engage in popularity contests.[13] Does it demand a meticulously articulated decision that is doctrinally sound and supported by precedent?[14] A just result—namely, a result aimed at ameliorating severe social injustices as understood in

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effectiveness."). Measuring public confidence is a complicated matter. *See* David Adamny and Joel Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL'Y. Q. 405 (1983); Gregory A. Caldeira, *Neither the Purse nor the Sword: The Dynamics of Public Confidence in the United States Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of High National Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998); Roger Handberg, *Public Opinion and the United States Supreme Court, 1935-1981*, 59 INT'L SOC. SCI. REV. 3 (1984); Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981); THOMAS MARSHAL, PUBLIC OPINION AND THE SUPREME COURT (1981) (analyzing the effect public opinion might have had on Supreme Court decisions, and finding little support that it did).

11. The 20th century saw dramatic developments in our understanding of law and legal institutions. From a jurisprudence of "natural principles" premised on the notion of self assertion and free will we have switched to man-made positive law premised on fulfilling wants and desires. ROSCOE POUND, THE HARVARD CLASSICS, vol. 51 (Charles W. Eliot ed., 1909-14). Legal realism introduced awareness to the gap betwcen the law on the books and the law in actual life, *see* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)), between the reasoning of the Court and the concrete result, and between law's professed neutrality and the policy preferences of judges. For an analysis of American Legal Realism, see N. E. H. Hull, *Reconstructing The Origins Of Realistic Jurisprudence: A Prequel To The Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302 (1989); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007). Law and eeonomics, law and narrative, critical legal studies and subsequent developments to theories and modalities of interpretation—such as "law and society" approaches—have all contributed to our understanding of the legal project. Yet the law remains, to an extent "effable." Philip Nonet, *What is Positive Law?*, 100 YALE L.J. 667 (1990).

12. Thinking of the judicial product—a decision or an opinion—as amenable to the assistance of public relations professionals raises issues of legitimacy; if judicial reasoning is a form of sugarcoating an otherwise unpalatable decision or worse, a form of obfuscating the real meaning or effect of the decision, a conflict arises between the language used by the Court (on the advice of the public relations agents) and the stated terms underlying thc practice of constitutional adjudication. Under conventional understanding of law, judicial reasoning is taken as providing the legal justification for the operative holding of a case and as laying down the criteria undcr which future decisions should be similarly decided (at least by lower courts). Transforming judicial reasoning into an exercise of pure public relations would strip the judicial reasoning of its justificatory power within legal discourse and debase its stature as controlling authority in future cases. Treating judicial reasoning as a mere exercise in public relations implies that judges are continuously and consciously engaged in an act of concealment with elements of deception, that the professional community of lawyers and scholars is either complicit or incompetent, and that the Court's more remote audiences—sometimes referred to as "the public"—are duped (or, at the very least, content with the "show" as it is).

13. "[I]t is the business of judges to be indifferent to popularity." Chisom v. Roemer, 501 U.S. 380, 401 n.29 (1991) (citing John Paul Stevens, *The Office of an Office*, THE CHI. BAR REC. 276, 280—81 (1974)).

14. "Our legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds." Bush v. Vera, 517 U.S. 952, 985 (1996).

reference to prevailing social values or principles of reason?[15] A result that is sensitive to clashing social symbols, including symbols associated with the judicial role?[16] A result reached through a fair process, anchored in accepted notions of institutional roles?[17] All of the above?

In his influential writings, Paul Mishkin put forward a cogent position: public confidence in the Court demands at least that it acts according to professional standards and adheres to principled reasoning in its decisions.[18] By that he meant the "demands of generality and fidelity—requiring sincere efforts to reason in terms of precepts that transcend the individual case and that are conscientiously seen as governing in all cases within their stated terms."[19] Mishkin acknowledged that sometimes—and these times are not necessarily rare—the very same considerations of maintaining public confidence constrain the Court's ability to meet this standard, prompting it to devise a doctrine that cannot be justified as a

15. The centrality of reason and reasoning in law requires no further mincing of words. *See* Rita v. United States, 127 S.Ct. 2456, 2468 (2007) (noting that the requirement to provide reasons "reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.") The relationship of legal reasoning to justice has also been explored in depth. *See* LON FULLER, THE MORALITY OF LAW (1969); RONALD DWORKIN, FREEDOM'S LAW (1996). Perceiving law as a system whose rationale is to promote justice, see WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS (1998).

16. See, for example, the opinion of Justice Brennan in *Texas v. Johnson*, 491 U.S. 397 (1989), analyzing the American flag as a symbol, but also the symbolic importance of freedom of speech. One cannot fully understand the debate surrounding judicial legitimacy without acknowledging the symbols associated with the judicial role: "It is crucial to understand that the *appearance* of encroachment is almost as pernicious as is actually overstepping constitutional boundaries." Juan R. Torruella, *On the Subject of Judicial Independence*, 44 DEC FEDRLAW 48, 49 (1997) (emphasis in the original).

17. Flast v. Cohen, 392 U.S. 83 (1968); Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464 (1982). *See also* Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1818-19 (2005) (identifying, amongst other forms of legitimacy, legal legitimacy, which includes concepts like abuse of discretion and jurisdiction. For example, "a claim of judicial legitimacy characteristically suggests that a court (1) had lawful power to decide the case or issue before it; (2) in doing so, rested its decision only on considerations that it had lawful power to take into account or that it reasonably believed it had lawful power to weigh; and (3) reached an outcome that fell within the bounds of reasonable legal judgment.").

18. Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 929, 930 (1983) [hereinafter Mishkin, *Ambivalence*] (arguing that "the Court . . . must rest its decision on an analytically sound principle"—that is, a notion "which transcends the particular case, [that] is rationally defensible on those general terms, and [that] is analytically adequate to support the result."). *See also* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

19. Mishkin, *Ambivalence*, *supra* note 18, at 909. Justices, of course, may have ideological preferences, and the critique that judges are guided by *their* values is too numerous to mention. *See, e.g.*, Francisco Valdes, *Culture by Law: Backlash as Jurisprudence*, 50 VILL. L. REV. 1135 (2005); Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779, 782-86 (2002). But there will come a point where these preferences will clash with a legal principle stated by the very same justices, at which point a judge will be confronted with a choice: result-oriented ideology or principle. *C.f.* DAVID O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 121-25 (3rd ed. 1993).

matter of principled reasoning.[20] This is because the various expectations from the Court are sometimes in conflict with one another.[21] The public may expect adherence to professional standards of legal reasoning premised on fidelity to the rationale underlying governing precedents, but they may also expect a just result and/or adherence to accepted institutional boundaries and/or respect for identity-forming symbols.[22]

Thematically, conflicts surrounding the notion of judicial legitimacy[23] could be understood as stemming, at least in part, from the friction between law and politics. Mishkin saw this cluster of conflicts as a prevailing element that goes to the root of constitutional adjudication, or more specifically, as embedded in the position of the Supreme Court as operating amidst a political context.[24] Some have suggested that these tensions between professional standards and popular expectations could be recast differently. I read Professors Post and Siegel[25] as suggesting that these tensions may be diffused significantly by re-conceptualizing professional standards, shifting the focus from the articulation of doctrine and adherence to role-related symbols to the underlying social values at the core of the judicial resolution of cases.[26] It then becomes a tension of social

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20. Mishkin, *Ambivalence*, *supra* note 18, at 907.

21. *See generally* Fallon, *supra* note 17, at 1841 (analyzing the pull between the different spheres of legitimacy). *See also* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW (1985) (depicting the difficult pulls faced by judges).

22. Mishkin, *Ambivalence*, *supra* note 18, at 921. For example, the public may expect the Supreme Court to adhere to the spirit of past precedent and protect the freedom of speech of those who express themselves by burning the American flag. Yet the public may also expect the Court to respeet the national symbol (as well as the role of the legislature in deciding whether or not that symbol may be kept above the fray) by deciding that burning the flag is not proteeted speech—in faet, not speech at all, but conduct. *See* Texas v. Johnson, 491 U.S. 397 (1989). Similarly, the public may expect the Court to adhere to professional standards, including *stare decisis*, and if it had allowed the state to place limits on the speech of doctors who participate in a government-funded program so that they cannot offer patients advice on elective abortions—a controversial decision in itself—it must also uphold the power of the government to ensure that lawyers who provide welfare-related legal services paid by the government refrain from launching constitutional challenges against the statutory scheme. *Compare* Rust v. Sullivan, 500 U.S. 173 (I99I) *with* Legal Servs. Corp. v. Velazquez, 53I U.S. 533 (2001). Other examples will point to the public demand for justice in a particular case versus public demand that the rules of due process will be adhered to, even if that means that a clearly guilty person is set free. For an analysis of publie attitudes toward such elashes see PAUL M. SNIDERMAN ET AL., THE CLASH OF RIGHTS: LIBERTY, EQUALITY, AND LEGITIMACY IN A PLURALIST DEMOCRACY 235-58 (1996).

23. Fallon argues that judicial legitimacy can be measured in three separate spheres: legal, moral, and sociological spheres. Fallon, *supra* note 17 at 1790-91 ("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 . . . Pursuant to moral concept, legitimacy inheres in the moral justification, if any, for claims of authority asserted in the name of the law.").

24. *See* Mishkin, *Ambivalence*, *supra* note 18, at 929.

25. Robert C. Post & Neil S. Siegel, *Theorizing the Law/Political Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473 (2007).

26. Yet would not sueh reconceptualization result in losing that which is distinctly legal? Is it not the fact that maintaining the boundaries of law as a distinct form of public discourse—as Mishkin insists we do—is essential precisely in cases where controversy around societal values might threaten

values (or, more accurately, a tension relating to the purposes of law regarding social values), and not a tension between law and public perception. Christopher Schroeder addresses the problem from an empirical perspective, referring to the scholarship that tracks public support of the Court and its decisions.[27] He suggests that at the end of the day it is judicial attitude that matters: neutrality and empathy play a key role is preserving judicial legitimacy.[28]

This Article suggests another way to think about the problem, one that looks closer at the concept of "the public" whose confidence is at issue. In a nutshell, this Article suggests that the tension is indeed unavoidable, because "the public" to which the Court is writing is not monolithic but multidimensional. Rather than approaching "the public" as a cluster of the different organic communities that comprise a given polity, this Article suggests that properly conceived, "the public" consists of different practices and professions (i.e., knowledge-based communities) that evaluate judicial performance according to their language and set of constitutive values and symbols. Since a judicial decision is an "event" in each of these systems, and since the systems' standards of excellence diverge, the Court must maneuver between its different audiences[29] in order to maintain public confidence. Such maneuvering entails a permanent tension between the different standards to which the Court is expected to adhere.

Part I will reexamine notions of public confidence and judicial legitimacy, given the countermajoritarian premise. Part II, will put forward a paradigm with which to analyze the tension between law, politics, and public confidence and its effect on the judicial craft. This paradigm—Luhmann's "system analysis" of society—allows us to appreciate the different practices that form "the public," whose confidence the Court seeks to maintain. I will argue that since a judicial decision "occurs" not only in law but also in neighboring systems (or practices) as well, the

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the faith not only in the rule of law but also in the cohesion of the social fabric? *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996) (especially chapter 6).

27. Christopher Schroeder, *Some Notes on a Principled Pragmatism*, 95 CALIF. L. REV. 1703 (2007).

28. *Id.*

29. Conceptualizing the relationship of the Court and its constituencies as one between author and audiences is not free from difficulties, yet is nonetheless useful—at the very least for judges themselves. *See, e.g.*, JOYCE J. GEORGE, JUDICIAL OPINION WRITING HANDBOOK (4th ed. 2000) (teaching judges how to address their various audiences). *See also* Abner Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357 (1988). After the completion of the paper I was delighted to read Lawrence Baum's book, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006), which I found consistent with the essence of the argument presented here, even if the thesis advanced here—the system theory—suggests a stronger analytical role for the various audiences than the role inferred from treating these audiences as merely another factor that influences judicial behavior.

legitimacy-generating audiences of the Supreme Court pull in different directions. Such pulls, in turn, are reflected back into the practice of constitutional adjudication (since the law views the possible reaction of the different systems as a legally-relevant information). The tensions identified by Mishkin are inevitable in a complex society. I will then elaborate on the salient "systems" or practices with which the law and specifically constitutional law intersects: the media, party-politics, the administrative realm, and ethics. This Part will conclude with revisiting the practice of constitutional adjudication, in light of its intersection with the aforementioned practices. Finally some words will be written about the legal profession and its role in maintaining public confidence.

I
"MAINTAINING PUBLIC CONFIDENCE"—INDEED?

Taking as a given that if perceived as exercised illegitimately, judicial authority in a democracy stands to depreciate, and that legitimacy, at least in part, is a function of public confidence, it is not surprising that judges directly address the issue of maintaining public confidence. For example, in cases like *Planned Parenthood v. Casey*,[30] *Bush v. Gore*,[31] and *Roper v. Simmons*,[32] the Supreme Court brings the question of public confidence in its decisions to the fore. Under the Court's analysis, public confidence considerations may serve as a limiting factor—barring the Court from a certain course of action[33]—or may be a *prompting* factor—calling upon the Court to either withdraw from an erroneous precedent or revisit its interpretation in light of new public perceptions and attitudes.[34] Yet the

30. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming Roe v. Wade, 410 U.S. 113 (1973), while rejeeting the trimester framework announced in *Roe* and adopting the viability framework).

31. 531 U.S. 98 (2000) (halting the recount of presidential election votes in certain Florida counties).

32. 543 U.S. 551 (2005) (holding capital punishment unconstitutional where it applies to defendants who committed their crimes while under the age of eighteen).

33. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 867 (1992) (arguing that the Court has an institutional interest in upholding *Roe* lest the public believe that the Court is subject to popular prodding in constitutional analysis. Justice O'Connor writes, "to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." This, according to Justice O'Connor, would be "surrender[ring] under political pressure); *see also* Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (*Brown II*). *Contra Casey*, 505 U.S. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that "the Justices should do what is legally right" "instead of engaging in the hopeless task of predicting public perception"). For a view from a lower court, sec *United States v. Coscarelli*, 149 F.3d 342, 350 (5th Cir. 1998) ("Frequent reconsideration of difficult issues may tax public confidence in the Court's good faith and discourage respect for the binding effect of existing precedent.").

34. Public confidence considerations may call for a cautious approach—lest the Court appear zealous and overreaching—or may call for proactive approach—lest the Court appear timid and shirking its responsibilities. *See* Norman Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U. L. REV. 249, 254 (1969); Skelly Wright, *The Role of the Supreme Court in a*

countermajoritarian nature of judicial review suggests that judges should *not* bow to popular sentiments.[35] The very structure of insulating federal judges from elections[36] and granting them lifetime tenure[37] with compensation[38] call for judges to uphold the law—whatever that may mean[39]—and not to engage in assessing what the public may wish them to do (result-wise or reasoning-wise, assuming the public reads the opinion or is aware of the nuances of the result).[40] Governance through ascertaining public preferences (or will) is left, under conventional wisdom, to the elected branches. Of course, there could be rare occasions when the very fabric of society may be at risk and judicial power may reach its limit and bend before the high gales of politics.[41] Yet aside from such unique crises, what role should public perception, and consequently, public confidence, play in judicial decision-making?

Some would say none. Judges should stick to the legal craft—understood as consistency with doctrine and underlying principles.[42] Realists would argue that judges are politicians with robes, promoting

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Democratic Society-Judicial Activism or Restraint?, 54 CORNELL L. REV. 1 (1968); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 389-90 (2006). The "evolving standards of decency" doctrine could be reflective of public expectations as a prompting factor. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958), as recently applied in Roper v. Simmons, 543 U.S. 551, 561 (2005) (striking down the death penalty for crimes committed while under the age of eighteen).

35. BICKEL, *supra* note 7. Central to the countermajoritarian dilemma is the desire to entrust judges with value-laden decisions—a political function, *see* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982), while maintaining their independence from the political processes. As stated, for example, by Paul De Muniz of the Oregon Supreme Court, judicial independence consists of "intellectual honesty and dedication to enforcement of the rule of law regardless of popular sentiment." Paul De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002).

36. U.S. CONST. art. II, § 2, cl. 2.

37. U.S. CONST. art. III, § 1.

38. *Id. See also* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59-60 (1982) ("These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations.")

39. As stated by Justice Frankfurter, judges are to have:

> allegiance to nothing except . . . the effort to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.

Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953).

40. *See* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (Stevens, J., dissenting) ("There is a critical difference between the work of the judge and the work of other public officials. In a democracy, issues of policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity.").

41. As Learned Hand noted, it would be unrealistic to expect that judicial power could save a democratic society gone awry. LEARNED HAND, *The Spirit of Liberty*, *in* THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 190 (Irving Dilliard ed., 1952) (noting that "[l]iberty lies in the hearts of men and women; [if] it dies there, no constitution, no law, no court can save it.").

42. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (suggesting that without "original understanding" law would disintegrate into politics).

values and policies, whether they like to or not, and should keep doing so to the best of their abilities.[43] Proponents of the latter approach would hail an explicit recognition by the Court that public perception matters because they believe that it is the truth and that such recognition would allow the Court to relate directly to social values and work towards their promotion.[44]

Implicit in Mishkin's approach is the rejection of the strong countermajoritarian position according to which judges ought to fully detach themselves from popular demands and proceed as if totally removed from widely held convictions. Mishkin acknowledged that the Court's legitimacy may suffer if it does not factor in popular attitudes, structural expectations, and strongly held beliefs and symbols.[45] Nevertheless, Mishkin submitted that relaxing the commitment to professionalism (understood as reflective consistency and coherency of doctrine and reasoning) while understandable, cannot be embraced.[46] Principled reasoning is the Court's ultimate refuge against the public outcry expected, at least on some occasions, as a consequence of the nullification of popular will. While the public may accept a decision invalidating the will of the majority on account of the majoritarian policy being *contra legem*, the public would be hard pressed to accept such a decision by an institution that is unprincipled in reasoning or outcome.

Yet, principled reasoning comes with a price. At times it constrains the Court's ability to promote (or at least not interfere with) an otherwise beneficial (and publicly demanded) state action. It prevents the Court from reaching decisions that the judges, the legal profession or the polity as a whole would have liked to reach had the Court been free from commitment to principled reasoning. While the Court may have certain room to maneuver between reasoning and outcome, and while the Court may on rare occasions sacrifice principled reasoning for a highly desired result

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43. *See* Michael C. Dorf, *Whose Ox is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497 (2007).

44. Interestingly, some scholars—and not necessarily from the Realist ilk—argue that even if the Court is not explicit about its role in promoting values, it nonetheless is effective in matching public expectations regarding the promoted values. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 8, 14, 210 (2006) (arguing that the Supreme Court often follows public opinion); *see also* Justin F. Marceau, *The Most Democratic Branch: How the Courts Serve America by Jeffrey Rosen*, 54 FED. LAW. 43, 43 (2007) (stating that "Jeffrey Rosen believes that the Supreme Court decisions tend to mirror public opinion, and that this is a good thing."); Jeffrey Rosen, *Center Court*, N.Y. TIMES MAG., June 12, 2005, at 17 (noting that the "unelected Supreme Court justices are expressing the views of popular majorities more faithfully than the people's elected representatives.").

45. *See* Paul Mishkin, *Great Cases and Soft Law: A Comment on* United States v. Nixon, 22 U.C.L.A. L. REV. 76, 86 (1974-75) [hercinafter Mishkin, *Soft Law*] (arguing that the Court must be mindful of its "own institutional position" in ruling against President Nixon).

46. Mishkin, *Ambivalence*, *supra* note 18, at 930.

without loosing its standing as a principled institution,[47] resort to these techniques is not without risks. In sacrificing reasoning for result, the Court may preserve its short-term legitimacy, but undercut its overall standing as a principled institution, a standing essential for cases in which the Court invalidates the popular will.[48]

Mishkin thus realized that the commitment to professional standards of reasoning and doctrine does not ease the tension associated with the exercise of countermajoritarian judicial review. In fact, in some cases the reasoning, not the result, may trigger conflicts over values and symbols. The Court may experience pressure to refrain from a certain line of reasoning—even if this line fits best with the rationale underlying existing case law—because that very line might be perceived as threatening or otherwise insensitive to some core identity-related values or symbols of the groups involved in the dispute: such was the case in *Bakke*.[49] In *Bakke*, the Court upheld the constitutionality of higher-education affirmative action schemes that grants minority applicants a "plus" and invalidated a quota-based system. [50] The latter seemed to treat race more rigidly, even though, result-wise, the system of "pluses" cannot be rationally administered without reference to the desired weight such pluses should have, and ultimately to the desired representation of the minority group in class.[51] At

47. It may be the case that *Bush v. Gore*, 531 U.S. 98 (2000), was such an exceptional case; many remain skeptical, especially given the political machinery that was in place in order to secure Bush's election. *See* Choper, *Presidential Election of 2000*, *supra* note 10.

48. Mishkin, *Ambivalence*, *supra* note 18, at 930-31; Gunther, *supra* note 18. With regards to *Nixon*, Mishkin argues that "misleading" (and therefore unprincipled) opinion could be tempting where the Court is trying to preserve its own institutional relevance and power because "[t]he misleading nature of what is written can be corrected by the Court later, and with relative ease. Damage to the Court's stature, prestige, or credibility is not so easily repaired." According to Mishkin, "[t]he fundamental question about *United States v. Nixon* then becomes whether the Court should have taken the case in the first place." Mishkin, *Soft Law*, *supra* note 32, at 90. Needless to say, Mishkin does not advocate that the Court adopt the jurisprudence of subterfuge, even if, empirically, it may be instrumentally useful at times (and therefore, were public relations experts called to consult, they would suggest its deployment). While maintaining public confidence may be viewed as an instrumental requirement, the reasoning of the Court is measured, among other things, according to the stated criteria internal to the practice (or system), which demand the "integrity" of law. RONALD DWORKIN, LAW'S EMPIRE 225 (1986). *See also* discussion *supra* note 12.

49. *See* Mishkin, *Ambivalence*, *supra* note 18, at 929 (stating that the "net outcome" in the *Bakke* case cannot "be supported by articulated principle"). Nevertheless, Mishkin considers the *Bakke* decision "to be a wise and politic resolution of an exceedingly difficult social problem" because the Court diffused a polarizing tension with each side claiming some victory. *Id.*

50. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-19 (1978) (examining the quota system versus the plus system).

51. *See* Mishkin, *Ambivalence*, *supra* note 18, at 924, 925 (arguing that "Justice Powell's position produces a result that makes a good deal of intuitive sense. But its justification on a principled, constitutional level is more problematic."). Mishkin added, "With all respect, I believe it is open to question whether the reasoning and 'principle' contained in this passage could be applied generally. There would seem to be no a priori reason why a 'minus' should be treated differently from a 'plus' factor—used in precisely the same sort of calculus—and yet I consider it most unlikely that the Court (or Justice Powell) would uphold a program seeking diversity by assigning such a 'minus' to

the end of the day, the Court was sensitive to the political message embedded in its decision, and apparently sought to preserve a semblance of individualism (i.e., the plus assigned to an individual) by rejecting deterministic group-affiliation and collective benefits (i.e., the quota). In so doing, the Court did not act in a fully principled manner. According to Mishkin, such a tension is inherent in constitutional decision-making. Legitimacy demands that judges adhere *in principle* to principled reasoning, yet such adherence cannot be *fully* principled because legitimacy demands that judges take into account the political context, the relevant symbols associated with the political and the judicial realms, and the possible reaction to the judicial craft as part of practicing it.[52]

In order to further understand the complexity of these seemingly "ambivalent"[53] positions, it is worth examining the law/politics distinction from a different perspective, one that looks closer at the law, the polity, and the structure of the relationship between them.

II
"DIMENSIONS OF LAW": A CONCEPTUAL FRAMEWORK OF THE LEGAL LAYERS

Anyone who had the privilege of studying under Paul Mishkin would no doubt remember the Socratic experience of pealing away layer after layer of the case under consideration, trying to reconcile the case with previous ones and predicting how future cases would come out under different set of facts. The process of reconciliation demands attention to the principles underlying the doctrine, to structural elements like the separation of powers, to institutional capacities, and to other aspects within which the law resides. Appreciation of both legal rules and their limits is thus gained. Yet such a revelation is achieved not by direct annunciation, but through developing a certain sensitivity to the multiple dimensions within which the judicial craft is exercised.

If forced to zoom-out—though Mishkin himself might squint at the prospect of ascending to the metaphysical spheres of law—the student of the Mishkinian approach would discover that this approach is closely aligned with the Luhmann-Teubner "system analysis" of society.[54] This

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membership in a racial or ethnic group considered to be overly represented in a student body chosen to achieve 'diversity.'" *Id.*

52. *See, e.g., id.* at 930 (arguing that the inability to fashion a principled reason should not prevent the Court from reaching a desirable result—for example, "if the total security of the nation depended upon" the result); Fallon, *supra* note 17.

53. *See generally* Mishkin, *Ambivalence*, *supra* note 18, at 919.

54. NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz & Dirk Baecker trans., 2004) [hereinafter LUHMANN, SOCIAL SYSTEMS]; NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (K.A. Ziegert trans., 2004). For critique, see Alex Viskovatoff, *Foundations of Niklas Luhmann's Theory of Social Systems*, 29 PHIL. SOC. SCIS. 481 (1999). For applications to law, see GUNTHER TEUBNER, LAW AS AN

approach, which has not gained much traction in United States' jurisprudential writings, understands society as if it was a living organism, organized into "systems" or meta-practices.[55] These social practices are sites of meaning (where information is processed and knowledge generated) and normativity (where the purposes of the practice, the purposes of those operating within the practice, and its dialect of popular culture, values, and beliefs are formed).[56] Each practice is constituted around defining core elements (such as its self-proclaimed *raison d'être* and the methodology with which it processes information); these core elements are viewed as the practice's genetic makeup.[57]

Practices develop a web of self-references by cross-linking core elements into "circuits": each core element may be validated by other core elements and may serve as a link in the chain that validates other elements.[58] Sophisticated practices thus enable us to challenge each and every core element, but not all elements at once. At any given moment, at least some aspects of the practice must be taken as a given, and thus other elements may be validated relative to the given. By constantly "rotating" the fixed elements and by establishing the network of self-references, practices avoid deep challenges to their foundations (since establishing foundations is beyond our ability)[59] while presenting themselves—to the practitioners and, to an extent, to outsiders—*as if* foundations do exist.[60]

AUTOPOIETIC SYSTEM (1993); GUNTHER TEUBNER, AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY (1987).

55. Alasdair C. MacIntyre defines "practice" as a

> coherent and complex form of socially established cooperative human activity though which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human conceptions of the ends and goods involved, are systematically extended.

ALASDAIR C. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187 (1984). A "meta-practice" is a practice which includes several practices. Law is a meta-practice which includes litigation, legislation, and scholarly analysis, among others.

56. In the terminology of system theory, each system contains its operative rules: how members should act when participating in the system, including what sources they may rely on as valid reasons for their actions and what justifies these various rules and codes. In that respect, each system is a site of normativity. Systems may turn to the law – itself a system – in order to manage clashes with other systems or to stabilize the relationship within the system, primarily when disputes among participants arise and the system's internal mechanisms were exhausted, were inadequate, or otherwise reacted so as to protect themselves by turning to the judicial process. *See* LUHMANN, SOCIAL SYSTEMS, *supra* note 54.

57. *Id.*

58. *Id.*

59. *See generally* ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFUNCTIONALIST ACCOUNT OF LAW AND ADJUDICATION (2000).

60. Some would refer to this aspect as a "myth"—a useful lie—and others would simply recognize the necessity of "as if" assumptions to the construction of social reality. See, e.g., PLATO, DIALOGUES, BOOK II, where the concept of useful lie is invoked to support the possibility of morality despite the fact that it may be more pleasurable to be immoral. Those who view myths as obsolete should consider the justification for equality without reliance on the notion that we were all created

Operationally, the practice constructs social roles (players): "office holders" are created, their "function" designated and their relationship with other participants—other office holders or individuals interacting with the office holders—is routinized.[61] An institutional framework within which the system self-governs is established, and a structure of functional authority emerges.[62] The practice also generates bases for what counts as a convincing reason (or justification) for the various moves available to the various players and sets procedures that regulate interactions among the players. Conventions, symbols and codes of behavior emerge.[63] All these, of course, are not static, as sophisticated practices contain conventions regarding the amendment of conventions, including the amendment of the emending conventions. Yet as dynamic as the practice may be, at any given moment within each practice, there exist "ideal types"[64] and "best ways" of practicing, which generate standards for "excellent" performance within the practice.[65] These standards define craftsmanship. They also establish a structure of authority, sometimes referred to as "professional" authority.[66]

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from dust, that we were all created in God's image, or some other metaphysical idea. For the philosophy of "as if," see HANS VAIHINGER, THE PHILOSOPHY OF "AS IF": A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND (C.K. Ogden trans., 1925) (1911); R. E. Watts & K.A. Phillips, *Adlerian Psychology and Psychotherapy: A Relational Constructivist Approach*, *in* STUDIES IN MEANING 2: BRIDGING THE PERSONAL AND SOCIAL IN CONSTRUCTIVIST PSYCHOLOGY (J.D. Raskin & S.K. Bridges eds., 2004); George A. Kelly, *The Language of Hypothesis: Man's Psychological Instrument*, *in* CLINICAL PSYCHOLOGY AND PERSONALITY: THE SELECTED PAPERS OF GEORGE KELLY 147, 147-62 (Brendan Maher ed., 1979).

61. It should be stressed that a system is not comprised only of the "professional elite" or the office holders. "Ordinary" members of the polity are also part of the system as individual participants, who engage with the system through its codes of behavior (or "rules of operation") for obtaining the knowledge, goods or services (or other resources, opportunities or capacities) available within the system. Each system recognizes, of course, that an individual may thus be a participant in many systems. Office holders, however, may be subjected to some restrictions, as systems may, and often do, limit the ability of office holders to hold offices in practices that are viewed as adversarial to or as otherwise in tension with the system. Such rules are sometimes classified as "conflict of interest" rules. Functionally, such rules participate in regulating the boundaries of the system and the degree of "closeness" or "openness" of the system.

62. *See* MACINTYRE, *supra* note 55, at 170-200. In the legal context, see JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1983).

63. Compare David Hume's definition of conventions, which relies on a "system of actions." DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 257 (L.A. Selby-Brigge & P.H. Nidditch eds., 1975) (1777).

64. *See* MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT [ECONOMY AND SOCIETY] (5th ed. 1980); SUSAN J. HEKMAN, WEBER, THE IDEAL TYPE, AND CONTEMPORARY SOCIAL THEORY 18-60 (1983); MAX WEBER, *"Objectivity" in Social Science and Social Policy*, *in* MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES 90 (Edward A. Shils & Henry A. Finch trans., 1949) (defining ideal type).

65. Ideal types are not static either, and ideal types may clash. However, if a practice reaches a point where its ideal types are irreconcilable, the practice stands to split into two (or more) sub-practices, or experience internal rifts.

66. *See* Nina Toren, *Bureaucracy and Professionalism: A Reconsideration of Weber's Thesis*, 1 ACAD. MGMT. REV. 36, 36-46 (1976) (analyzing the difference between hierarchical and professional authority).

Sometimes this structure of authority corresponds with the practice's institutional fabric (i.e., its functional authority), and thus those in charge of governing the practice are also recognized as its leading experts. In any event, professional expertise and authority are, under this paradigm, forms of social capital.[67]

Equally importantly, each practice establishes and sustains entrance-and-exit rules to and from the practice. Substantively, they regulate the initiation of practitioners into the practice (and their suspension or expulsion). They also regulate the entrance and exit of information (and norms) from other practices.[68] This may be referred to as the degree of "openness" or "closeness" of the system. By "guarding" the system's outer boundaries,[69] these exit and entrance rules sustain the operative independence of the system—the system controls the flow of information according to its core language and values—and at the same time these rules ensure that the system remains responsive to claims communicated from other systems. A system that erects strict barriers to the flow of information into the system (by instituting stringent procedures that determine "relevancy") is relatively closed (and *vise versa*). The same applies for codes governing the incorporation, assimilation or rejection of norms (or

67. Although Luhmann disagrees with Pierre Bordieu with respect to several aspects of Bordieu's approach to law—and in my mind, rightly so—Luhmann would not deny that systems generate social capital. But he would argue that reducing everything to social capital (and other types of power) misses the point. *Cf.* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805 (1987).

68. EMORY A. GRIFFIN, A FIRST LOOK AT COMMUNICATION THEORY (1997); KATHERINE MILLER, COMMUNICATION THEORIES: PERSPECTIVE, PROCESSES, AND CONTEXTS (2005); DAVID NELKEN, LAW AS COMMUNICATION (1996).

69. The boundaries of the system are often fuzzy; their determination is not easy, because it is affected by one's vantage point. From within the system, the boundaries may look more expansive compared to the delineation assessed from outside the system (namely, from another system). *See* Brian Tamanaha, *The Internal-External Distinction and the Notion of a Practice in Legal Theory and Socio-Legal Studies*, 30 LAW & SOC'Y REV. 163 (1996) (noting the distinction between internal and external practices developed by H.L.A. Hart). It is often the case that viewed from within a practice, the social world at large could be explained as "behaving" according to the "rules" of the practice, or at least it would appear as if that practice is present everywhere. For example, sociologists (largely defined) would tend to explain society through their lenses, looking for behavior patterns, narratives and power relations to explain these patterns. For them, law would be just another social fact. Those operating within the practice of psychology would tend to explain the world through the psychological processes of its occupants; for them, the law would be a mental state. *Compare* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998), *with* Lynn M. LoPucki, *Legal Culture, Legal Strategy, And The Law In Lawyers' Heads*, 90 NW. U. L. REV. 1498 (1996). Ethicists would—must—approach the social world as if ethics is all-present, since one may not decide to relinquish ethical responsibility during certain times or with respect to certain activities. *See* Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, *in* THE POLITICS OF INTERPRETATION (W.J.T. Mitchell ed., 1983). Scientists, politicians, theologians (and others) would similarly operate within their respective systems, or meta-practices, so as to "explain" the social and/or physical world at large and "prescribe" (where prescription is an element of the practice) the appropriate course of action.

values) originating in neighboring practices.[70] A system may be relatively open to knowledge (or information) gained in other practices (or systems) and relatively close to values grounded in (or emanating from) other systems (or *vise versa*). Sometimes these rules of engagement are explicit—such as rules governing the admissibility of social evidence.[71] Other times, the rules are implicit.[72] In most cases, both explicit and implicit rules of import and export are at play. Practitioners thus not only correspond with their fellow practitioners within the practice, but also converse with other practices (and their practitioners) using the practices' modes of translation and communication. Ideas migrate from one system to the others, and facts and norms are exchanged between systems.[73]

Finally, according to this paradigm, some practices intersect, and therefore some social activities occur in several practices simultaneously. In such a case, the event is likely to have a slightly different meaning and/or effect in each practice, given the practice's internal logic and system of references. As will be elaborated below, it is this intersection of practices—where an event occurs in several practices simultaneously—that lies at the heart of the judicial dilemma regarding public confidence; it is this feature of the social world that sheds light on Mishkin's "ambivalence."[74]

At this stage, eyes slightly glazed, most lawyers would either lose interest or reaffirm their choice to engage in law, not social philosophy. Our legal craft resists grand theories about life, truth, method, meaning, reason, or language. We are in the business of analyzing legal problems (grounded in facts) and assessing the performance of legal institutions relative to these problems. Insofar as we do conceptualize, it is about legal concepts such as property, tort, or remedy. In other words, the previous paragraphs belong more to a neighboring practice—social theory

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70. *See generally* LUHMANN, SOCIAL SYSTEMS, *supra* note 54.

71. In *Lochner v. New York*, it may be recalled, the Supreme Court demanded that the government demonstrate that a certain infringement of a fundamental liberty is reasonably related to a legitimate governmental interest. 198 U.S. 45 (1905). *See also* Muller v. Oregon, 208 U.S. 412 (1908) (introducing the Brandeis Brief to appellate review, thereby elevating the importance of social science evidence); *Brown I*, 347 U.S. 483 (1954).

72. *See* United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting) (arguing that "[i]t is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live."). *Accord* Rust v. Sullivan, 500 U.S. 173, 211 n.3 (1991).

73. We may refer to cross-system communication as a form of "education". Such learning processes are mutual, although, on occasion, an institution in one system may be perceived as "teaching" members of other practices. *See, e.g.*, Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127 (1967); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) ("[The] Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.").

74. *See generally* Mishkin, *Ambivalence*, *supra* note 18, at 928-931 (attempting to reconcile the 'disconnect' in *Bakke* between principled reasoning and desired outcome).

perhaps—than to legal practice. Although theorizing about the "furniture" or "building blocks" of the social world is not what legal professionals do—"Legal Process" aficionados certainly avoid over-stepping the boundaries of law—such theory is nonetheless relevant for legal analysis, precisely because it sets the stage for what we do. It provides us with an unspoken and assumed structure, so that we can concentrate on analyzing cases and figuring out the scope, force, and limits of legal principles in actual litigation.

In light of the above construction of the social world, it is clear that we cannot simply talk about "public" perception. The public is, in fact, shorthand for *members engaged in the various social practices* that comprise society, not only the sum total of members in a certain polity, or the sum of organic communities, (Irish, Italian, Jewish, Southerners, Northerners, etc.), that comprise that polity. Because, as mentioned above, the law is not hermetically closed[75]—it communicates with other practices, and legal "events" radiate to other practices (and *vice versa*, non-legal events radiate into law)—a serious study of the law would require that we examine the relevant meta-practices that "intersect"[76]—or directly communicate—with the practice of constitutional adjudication. Five such "layers" stand out as salient because they intersect directly with the law or, put differently, because all legal events (in constitutional law) are events—or potential events—in these practices as well. More will be said about these practices below.[77]

Other less salient practices intersect with the law only to the extent that the law regulates activities within those practices. For example, religion and the defense system are impacted by Supreme Court decisions, but primarily by those decisions that pertain to matters of import to religion or to national security, respectively. Other systems may cross path with the

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75. In system theory terminology, the law is "cognitively" open, in the sense that it absorbs information and arguments from other systems by translating them to its own language and ineorporating them into its system of referenees and sources. Thus while law is operationally "closed" —it uses only its own ways of argumentation and relies only on its sources and its modes of developing these sources—it is nonetheless open to information stemming from other systems. NIKLAS LUHMANN, EINFÜHRUNG IN DIE SYSTEMTHEORIE 91 (2002). Some have referred to this eombination of operative autonomy (i.e., self-reliance on a self-referential eircle of sources) with information dependency (i.e., relaying on information from other systems) as law's "semi-autonomous" nature. *See, e.g.*, Richard Fallon, *Non-Legal Theory in Judicial Decisionmaking*, 17 HARV. J.L. & PUB. POL'Y 87 (1994). For a semi-critieal assessment, see Richard A. Posner, *The Decline of the Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 778-79 (1987).

76. By "intersection" I mean that information generated by these systems need not "migrate" into the practice of constitutional adjudication; onee generated, it is already within that practice. It is, in Mishkin's language, a "layer" of the Court's decision. In the terminology of Luhmann, I argue that the systems described below are "strueturally coupled" with the practice of eonstitutional adjudication (whieh is a sub-system of the legal system). *See* LUHMANN, LAW AS A SOCIAL SYSTEM, *supra* note 54, at eb. 10.

77. *See infra* Part III.

law on even narrower grounds; while legal institutions are prevalent in all social systems, the intersection between the law and these systems is limited to the subject matters around which these systems are organized. For example, the law plays a role in regulating the medical system, but the intersection is of a limited scope (and therefore many areas of the law, and consequently, most Supreme Court decisions, fall outside the overlap between the two systems). In that respect, systems such as the medical system are situated more remotely from the law. As concerned citizens, members of these practices may have strong convictions regarding the various social issues decided by the courts (and therefore may be sensitive to the message embedded in judicial decisions to the extent that such a message relates to their identity or values), but for their manifested conviction to be captured by judicial legal lenses it must be put forward as part of a concrete legal case or controversy[78] or be communicated via the systems situated in greater proximity to the law—i.e., systems whose degree of intersection with the law is more comprehensive—such as party-politics or the media. Members of the more remote practices may thus loosely be termed "the general public," although there is nothing "general" about these "publics." The various social systems that comprise the polity are merely remote; it is assumed that there is little distinction between the practices of medicine, education, sports, architecture, agriculture, and the like as far as the evaluation of the judicial performance that does not directly regulate these practices is concerned.

If the paradigm sketched above aptly describes the organization of the social world, then the public is a rather complex entity, and its confidence is no less so. Its engagement with the judicial craft is multifaceted. Much like the processes by which chemicals produced in one biological system "travel" to neighboring systems, judicial decisions traverse different social systems, each a site of public confidence. With respect to some systems, however, the travel is instantaneous, since these systems directly intersect with the law. I now turn to a brief overview of these salient systems, using both *Bakke* and *Nixon* to bring them to life.

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78. The law regulates the direct intersection with the more remote systems via legal rules such as standing or justiciability. It should be noted that judicial decisions migrate to the more remote practices through the media (itself a practice), through other practices that directly intersect with the law and may directly intersect with the remote practices as well, and through more diffuse channels of popular culture, to the extent that popular culture transcends the boundaries of specific practices. This Article will say little about the more remote meta-practices and their communication with the law since further conceptual and empirical work is required to tie these meta-practices to traditional conceptions of the relationship between law and society. For example, most (although not all) practices are hierarchical: their self-governance relies on the operation of elites. Is the perception of the judicial performance sensitive to structure of the elites in the different meta-practices? *See, e.g.*, MARGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); CHOPER, JUDICIAL REVIEW, *supra* note 10.

III
DIMENSIONS OF LAW: THE SPECIFICS

A. The Media

Approaching the question of public confidence in the Court without recognizing the role that the media plays is like assuming no friction in physics: it disregards the medium.[79] Surprisingly, few constitutional scholars have taken the time to examine the matter conceptually or empirically in depth.[80] Mishkin, as his students may recall, would stop on occasion and ask the class to reflect on the possible depiction of a judicial course of action by the media. He would then leave it at that, but the unstated tension was clear: public confidence in the judiciary relies, at least in part, on maintaining the symbols associated with the judicial role[81]—

79. "[B]ecause the judgments of the Court ought also to instruct and to inspire—the Court needs the medium of the press to fulfill this task." William J. Brennan, Jr., *Address at the Dedication of the S.I. Newhouse Center for Law and Justice in Newark, New Jersey (October 17, 1979)*, 32 RUTGERS L. REV. 173 (1979). *See also* David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993).

80. For a notable exception see Ariela Dubler, referring to the symbolic nature of constitutional adjudication in family law matters by reviewing, inter alia, depiction of decisions by the media. Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1179 (2006); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of Family and the State*, 112 YALE L.J. 1641 n.2, 1686 n.155 (2003). In a different context, see also WILLIAM HALTON & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS (2004). Judicial writing on point is also revealing. *See, e.g.*, Stephen Breyer, *Communication Media and its Relationship with Supreme Courts*, 42 ST. LOUIS U. L.J. 1083, 1085 (1998); Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U. CHI. L.J. 275 (1998); Gilbert S. Merritt, *Courts, Media and the Press*, 41 ST. LOUIS U. L.J. 505, 514 (1997). The news reporters themselves self-reflect on occasion on their role. *See, e.g.*, Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059 (1998); Tony Mauro, *The Chief and Us: Chief Justice William Rehnquist, the News Media, and the Need for Dialogue between Judges and Journalists*, 56 SYRACUSE L. REV. 407 (2006). For an illuminating discussion of reporting on lower court decisions, see Sylvan A. Sobel, *Off the Record*, 46 JUDGES' J., No. 2, at 14, 14 (2007). For an analysis of reporting on appellate courts (and more), see F. Dennis Hale, *Court Decisions As Information Sources For Journalists: How Journalists Can Better Cover Appellate Decisions*, 23 U. ARK. LITTLE ROCK L. REV. 111 (2000).

81. *See, e.g.*, Sandra Day O'Connor, *Commentary Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L. 1, 5-6 (2003) (arguing that "[j]udges must not only avoid impropriety, but also the appearance of impropriety, if public confidence in the judiciary is to be maintained"); *see also* Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (arguing that "the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary"). Another example of symbols related to the judicial role is the reference to "foreign law" in constitutional cases. While, as Daniel A. Farber argues, such references were accepted and in fact ought not raise legitimacy concerns, some judges feel that it conflicts with the symbol of self reliance. *Compare* Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335 (2007) *with* Roper v. Simmons, 543 U.S. 551, 561 (2005) (Scalia, J., dissenting), *and* Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting). In the context of international law and the International Court of Justice, see Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006). The symbolic element of independence was picked up by the spokesman for the Governor of Texas, in response to a plea from the European Union to commute a death sentence:

symbols which dilution or unraveling may trigger negative press coverage. Yet at the same time judges ought not pander to the media[82] or otherwise succumb to the media's talismanic veneration of institutional symbols and appearances.[83] Ignoring the possible media reaction to a judicial decision (or other conduct) would be poor judicial statesmanship,[84] yet catering to media expectations or caving in to what the media may portray as "the popular demand" would be equally corrosive.[85]

Theoretically, any judicial decision is a media event. Most likely, however, if we put pure gossip aside, fewer decisions would be reported unless the legal practice or other practices signal the importance of the cases to the media.[86] Supreme Court decisions are more likely to be

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> Two hundred and thirty years ago, our forefathers fought a war to throw off the yoke of a European monarch and gain the freedom of self-determination. Texans long ago decided the death penalty is a just and appropriate punishment for the most horrible crimes committed against our citizens. While we respect our friends in Europe . . . Texans are doing just fine governing Texas.

Texas Rejects EU Execution Plea, BBC NEWS, Aug. 21, 2007, http://news.bbc.co.uk/2/hi/americas/6957390.stm. For a different view from the bench, see Peter J. Messitte, *Citing Foreign Law in U.S. Courts: Is Our Sovereignty Really at Stake?*, 35 U. BALT. L. REV. 171 (2005). For the argument that the debate is primarily about matters of perception, see Mark Tushnet, *Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars*, 35 U. BALT. L. REV. 299 (2006).

82. United States v. Microsoft Corp., 253 F.3d 34, 115 (D.C. Cir. 2001) ("Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.")

83. *Cf.* Post and Siegel, *supra* note 25. The famous reproach of the dissent in *Baker v. Carr* is worth noting again:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in *appearance*, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (emphasis added). This admonition, while important in maintaining commitment to form and symbol is, of course, circular: the moral sanction of the Court depends on the appearance of staying above the political fray. Yet staying above the political fray may be the immoral thing to do, if the winning forces in politics use their power in an immoral way, for example, by preventing the losing forces from fair participation.

84. *See, e.g.*, RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS (1994).

85. In 1992, retired Judge Laurence Silberman of the D.C. Circuit dubbed awareness to possible media reaction as the "Greenhouse Effect", after Linda Greenhouse, the Supreme Court reporter for *The New York Times*. According to Judge Silberman, journalists "have a lot more impact [on the judiciary] than they think." He argued that judges decide and shape their opinion for favorable review by the academy and by reporters such as Linda Greenhouse. *See* Kristofor J. Hammond, *Judicial Intervention in a Twenty-First Century Republic: Shuffling Deck Chairs on the Titanic?*, 74 IND. L.J. 653, 710 n.276 (1999) (stating that "Judge Laurence Silberman coined the term 'Greenhouse Effect,' which refers to New York Times Supreme Court correspondent Linda Greenhouse").

86. Some studies sought to determine what influences the media selection process. *See, e.g.*, Jerome O'Callaghan & James O. Dukes, *Media Coverage of the Supreme Court's Caseload*, 69 JOURNALISM Q. 195 (1992); Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128 (1991). For critique see Wermiel, *supra* note 80 at 1066-67. *See also* Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO. L.J. 2119, 2121 (1995) [hereinafter Ginsburg, *Communicating and Commenting on the Court's Work*].

reported only because it is more likely that the matters decided are of importance to the different audiences catered to by the media. Since a core element in the practice of the media is to cover controversies, the media is likely to highlight elements it perceives as controversial or as likely to arouse a controversial reaction.[87] Similarly, the media may focus on fierce debates between the justices themselves,[88] or, as mentioned, it may focus on departures from protocol or on expressions that may be interpreted as disrespectful to institutional symbols. The media may pay special attention to treatment of symbols pertaining to group identity, given the presumption that people care about identity-related symbols. Moreover, the media is likely to perceive such matters as socially important because they reflect the image of who "we, the people" are.[89] Cynically, some may say that the clash of symbols generates a good drama, and good drama sells.

Furthermore, given the constitutive values and symbols around which the meta-practice of the media is organized, it is likely that the media will highlight the winners and losers in each case,[90] the "message" the case conveys,[91] the possible future implications of the case,[92] and an assessment

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87. The abortion debate in the United States is a clear example. *See, e.g.*, Robert Barnes, *High Court Upholds Curb on Abortion*, WASH. POST, Apr. 19, 2007, at A1. The reporting often intertwines the decision of the court and the reaction of activists. *See, e.g.*, *Top Court Upholds Ban on Abortion Procedure*, ASSOCIATED PRESS, Apr. 18, 2007, *available at* http://www.msnbc.msn.com/id/18174245/ (identifying the winners and losers' responses to the Supreme Court's decision in Gonzalez v. Carhart, 550 U.S. _ (2007)). Newspapers' websites now dedicate special sections to judicial controversies by including oral arguments, judicial opinions and journalistic analysis.

88. Strong dissents often attract the attention of the media: "Journalists are primarily interested in the story of one judge letting the air out of another judge's tire or when he throws an inkwell." LYLE W. DENNISTON, THE REPORTER AND THE LAW: TECHNIQUES OF COVERING THE COURTS 51 (1980) (quoting Justice William O. Douglas). It should be noted that strong and persistent dissents, or disrespectful dissents, may also be picked up by the media as undermining the collegiality of the Court or as exposing the Justices as governed by mere ambition, rather than by principles such as stare decisis. *See* Brennan, *infra* note 164; Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 YALE L.J. 2235 (1996). *See also* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185 (1992) [hereinafter Ginsburg, *Judicial Voice*].

89. According to one commentator, it is crucial for the Court that the media view the decisions as containing an important message regarding who "we, the people" are, rather than focus on the decisions as revealing who "we, the judges" are. DAVIS, *supra* note 84, at 134. More specifically, news reporters are sensitive to the import of a given controversy on what "we, the people", stand for. The debate around the execution of juveniles is an example. *See* Charles Lane, *5-4 Supreme Court Abolishes Juvenile Executions*, WASH. POST, Mar. 2, 2005, at A1; Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution of Juvenile Crime*, N.Y. TIMES, Mar. 2, 2005, at A1; Stephen Henderson, *Bans Executions of Juveniles*, AUGUSTA CHRON., Mar. 2, 2005, at A01; Bob Egelko, *Justices Bar Execution for Killers Under Age 18*, S.F. CHRON., Mar. 2, 2005, at A1; Jess Bravin, *Death Penalty for Juveniles is Rejected by Court*, WALL ST. J., Mar. 22, 2005, at A4.

90. *See, e.g.*, Tony Mauro, *High Court Says Detentions Can Be Challenged*, RECORDER, June 29, 2004, at 1 ("[C]ivil liberties groups rejoiced at what American Civil Liberties Union Legal Director Steve Shapiro called 'a very stinging and watershed defeat' for the administration's 'unprecedented claims.'").

91. *See, e.g.*, David G. Savage, *High Court Says Detainees Have Right to Hearing*, L.A. TIMES, June 29, 2004, at A1 ("[C]ivil libertarians hailed Monday's decisions for upholding the principles of

of judicial performance by the reporter and the different stakeholders.[93] If the media perceives the Court to have criticized the performance of the government, to have taken "a side" in an ideological debate, to have augmented or detracted from the social capital of a certain group or to have embarked upon an innovative doctrinal path that might alter the social status quo, it is likely that those features of the decision will be considered "media events" and will be transmitted to the other systems within the polity,[94] surrounded by commentaries and op-ed analysis.[95]

The foregoing, of course, should not be understood as implying that the media cares only about symbols and messages. Since constitutional judicial decisions contain instructions that control the possible tools available to the government, they affect, directly or indirectly—usually the latter, given the law of unintended consequences and the complex relationship between law and society—the state of affairs "on the ground.". As such, new modifications of past judicial decisions that are viewed by the various governmental agencies and lawyers as "shaping" or "controlling" the field are more likely to be picked up by the media, at least to the extent that the relevant field is one that is viewed as "important" and the modification is viewed as having actual ramifications.[96] Needless to

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due process of law."). The various stakeholders often battle about the "message" the case conveys. Sometimes the media refers to scholars, so that they may distill the message.

92. Jane Roh, *Supreme Court Rules Death Penalty for Youths Unconstitutional*, FOX NEWS, Mar. 2, 2005, *available at* http://www.foxnews.com/story/0,2933,149080,00.html ("[O]pponents would use the *Roper* decision to further chip away at fair punishments for the worst offenders . . . [They] would next go after life imprisonment without parole for juveniles, would lobby to raise the age of eligibility to 20 or 21 and would argue against the death penalty for the mentally ill." (referencing Professor Robert Blecker of New York Law School)).

93. *See id.* (assessing the Justices, Roh stated, "[i]n a somewhat surprising development, Justice Sandra Day O'Connor, previously seen as the 'swing' voter in the case, joined Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas in a dissent, while Justice Anthony Kennedy sided with the majority." "Kennedy," she continued, "who in 1989 voted in favor of upholding the death penalty for 16- and 17-year-olds, cited the court's requirement that it consider 'evolving standards of decency that mark the progress of a maturing society' in the reversal of its previous ruling on capital punishment for juveniles."). *See also infra,* note 95.

94. It is of course an empirical question whether other systems in the social polity, and, taken at large, "the public" indeed reads about the Supreme Court. At least one journalist believes they do not, but that elites do. Wermiel, *supra* note 80, at 1063-64.

95. *See, e.g.*, Transcript of Anderson Cooper, CNN Anchor, http://transcripts.cnn.com/TRANSCRIPTS/0306/26/se.07.html ("[T]he U.S. Supreme Court today struck down a Texas law prohibiting gay men from engaging in sexual relations in their own homes.") The particular segment featured Rev. Bob Schenk, President of the National Clergy Council, in opposition to the ruling and Ruth Harlow, legal counsel for Lambda Legal Defense Fund, who argued the case for the prevailing parties. *See also* Editorial, *Enemy Combatants; High Point for High Court*, PHILA. INQUIRER, June 29, 2004, at A18; *but see Supreme Foolishness*, N.Y. POST, June 29, 2004, at 28 (stating that the Court failed to "realize that the War on Terror is a different kind of war" that requires a strong executive branch).

96. See, for example, the report of the recent decision to change the interpretation of the Sherman Antitrust Act in *Leegin Creative Leather Products v. PSKS Inc.*, 127 S.Ct. 2705 (2007). Justice Breyer

say, the media also has an interest in reporting matters pertaining to its own privileges.[97]

Since the target audience of the general media includes non-lawyers, there are limits to the degree of technical analysis that the media can convey. Moreover, since in the present context the meaning of a judicial decision is assessed according to the media's internal language, a certain "distortion" is to be expected when a case is translated by the media into journalistic parlance.[98] Such translation may often include the infusion of a judicial event with the reactions of different stakeholders (as these reactions are understood by the media). And while newspapers may have the luxury of devoting space to the nuances in order to increase accuracy, the electronic media often has to reduce a decision to several sound bites.[99] It thus could very well be the case that the jurisprudence of the present time is the jurisprudence of sound bites rather than the jurisprudence of concept, interest, or value.

Judges are not necessarily experts in public relations, and they do not have spin doctors at their disposal. However, experience usually teaches judges how a certain decision might be received by the media, what parts of the reasoning might be quoted, and what is likely to draw the attention of the reporters in the form of asking for comments from the different

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signaled to the media that he was of the opinion that the decision of the Court stands to alter the situation for the worse by reading his dissent from the bench.

97. Accordingly, courts are sensitive to matters of media access. *See In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1352 (D.C. Cir. 1985) ("[J]udicial legitimacy depends on the public's assurance that when an important case arises the public will have a presumptive right of access to the bases of judicial decisionmaking at the time when that case is newsworthy."); Nat'l Broad. Co., Inc. v. Presser, 828 F.2d 340, 347 (6th Cir. 1987) ("Openness in judicial proceedings promotes public confidence in the courts."). However, the judiciary, at least thus far, was reluctant to provide any "strong" privileges to the press beyond those available to the general public. For more on the relationship between the Court and the Press, see Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007) (analyzing the tension between the judiciary and the media concerning reporter's privilege); Bob Egelko, *Journalist Jailed for Refusing to Give up Tapes of Protest*, S.F. CHRON., Aug. 1, 2006, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/08/01/MNGVQK97AK4.DTL. Josh Wolf, the subject of Bob Egelko's article, remains in jail and is serving the longest sentence by a journalist for contempt charges. *See also* Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979 (2006); Stephen Bates, *The Reporter's Privilege: Then and Now*, 38 SOCIETY 41 (2001).

98. "Mass Media reporters are the people in fact responsible for translating what courts write into a form the public can digest." Ginsburg, *Communicating and Commenting on the Court's Work*, *supra* note 86, at 2121; *see also* WILLIAM HALTOM, REPORTING ON THE COURTS: HOW THE MASS MEDIA COVER JUDICIAL ACTIONS 63 (1998).

99. For a discussion of TV coverage of the Supreme Court, see ELLIOT E. SLOTNICK AND JENNIFER A. SEGAL, TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR? (1998). For a discussion of the coverage of the judiciary in criminal matters see Harris, *supra* note 79, at 785 ("Because few individuals have direct experience with the (justice) system, the overwhelming number of citizens get their knowledge of the courts and crime through the media. This information comes through television in the form of news, entertainment programming with crime-oriented themes, and so-called 'infotainment.'").

figures involved so as to sharpen the debate.[100] Of course, judges may be wrong and thus may be surprised on occasion. Yet one would assume that if judges are socially attuned, that would be the exception. This is not to suggest that "what the media might say" does or should play a role in the holding of a case, but, to paraphrase Mishkin, it would be naïve to assume that the Court is not mindful of how the media might use the Court's reasoning in a high profile case.[101] It is in that context that we can understand Mishkin's analysis of the different options available to the Court in *Bakke*, regarding the message affirmative action in higher education sends to the American public.

At the end of the day, the media, and in particular, a relatively small number of Supreme Court reporters,[102] play an indispensable role in shaping the social meaning of a judicial decision, in part because the reporters infuse the holding of the case with the reaction of the parties, experts and members of various practices, and sometime add their own

100. See, for example, the oft-quoted portion of *Brown I*, 347 U.S. 483 (1954) ("[education] is a right which must be made available to all on equal terms"), which was rejected without much fanfare in *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *see also* Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (often cited for the caustic rhetoric that the "Court . . . has largely signed on to the so-called homosexual agenda" and that "the Court has taken sides in the culture war").

101. This may lead to the toning down of certain aspects of the decision, to using technical jargon, or, conversely, to the use of full-scale rhetoric of pathos, ethos, and logos. The former approach may result in the decision being less "newsworthy." SLOTNICK & SEGAL, *supra* note 99, at 62 (reporting on observation to that effect by reporter Lyle Denniston). For further discussion on the possible influence the media may have on the bench, see Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court*, 105 YALE L.J. 1537, 1555 n.66 (1996) (arguing that she is criticized "by conservatives for trying, through what some of these commentators have dubbed the Greenhouse effect, to confer on these Justices the blessings of the liberal establishment and hence to inspire them to stray even further from the true path"); *see also* John Fund, *The Limits of "Growth": Justice O'Connor Becomes a Full-Fledged Judicial Activist*, WALL ST. J., Dec. 13, 2003, http://www.opinionjournal.com/diary/?id=110004410; *accord* Thomas Sowell, *Injudicious Misnomers*, NAT'L REV. ONLINE, Mar. 1, 2007, http://article.nationalreview.com/?q=YmQ4ODczNzhkMzdhZDhkNDZmZTdmNGI5ZWI2ZTk0NDk=; Jonathan Broder, *The Attack Judge*, SALON, June 21, 1998, http://www.salon.com/news/1998/07/21news.html. *See also* discussion in BAUM, *supra* note 29.

102. Lawyers often refer to the media as a monolithic and opaque entity (similar to the manner in which some may refer to "the judiciary" or "Spain". However, a closer analysis reveals that it is in fact fewer than 30 reporters who cover the Supreme Court on a regular basis, and thus provide the members of the different professional communities the basic holdings of the cases. Among these reporters we can identify Linda Greenhouse for *The New York Times*, Joan Biskupic of *USA Today*, Nina Totenberg for *National Public Radio*, Robert Barnes of *The Washington Post*, David Savage of *The LA Times*, Jan Crawford Greenberg of *The Chicago Tribune*, Tony Mauro for the *Legal Times* and *American Lawyer*, Robert Egelko for *The San Francisco Chronicle*, Dahlia Lithwick of *Slate*, Allen Pusey of *Dallas Morning News*, Jeffrey Rosen of *The New Republic*, Charles Savage of *The Boston Globe*, Stuart Taylor of *National Journal*, Jess Bravin for the *Wall Street Journal*, Greg Stohr for *Bloomberg News*, Stephen Henderson for *McClatchy* (formerly *Knight Ridder*), and Gina Holland for the *Associated Press*.

assessment, tenor, or gloss.[103] The perception generated by the media coverage, both as a broker of information and as an independent segment of the "public," is thus an important layer in the management of public confidence in the performance of the Court.

B. *Party Politics*

At the risk of being trite, the political layer—the "system" where parties and interest groups operate—is the most obvious candidate for examination. While a judgment in law settles a dispute between litigants, the decision, especially in constitutional matters, affects the behavior of political parties.[104] By relegating some goals or means to the constitutional sphere the courts regulate both the tools available to politicians (namely, the means a given Act, or legislation in general, may deploy) and, on occasion, the goals towards which these tools may be deployed. The result of the case—the remedy—directly affects the "political goods" politicians may deliver to their constituents.[105] Seen from the practice of party politics, then, ordering elected officials to do or refrain from doing a certain act is certainly a significant political event.[106] Moreover, beyond instituting a

103. Interestingly, little serious research has thus far focused on the operation of the "court of public opinion" by analyzing the specific reporting of the long-standing reporters and its relation to "public opinion"; yet it would not be far-fetched to assume that judges may have an idea as to how their cases might be reported by the professional reporters.

104. Obviously, decisions dealing directly with the laws governing the political process affect political parties. *See, e.g.*, McConnell v. FEC, 540 U.S. 93 (2003) (upholding the key provisions of the McCain-Feingold campaign finance reform bill of 2002); Bush v. Gore, 531 U.S. 98 (2000). However, since the Constitution regulates state power, and since political parties perform their role by using or advocating the use of state power in a certain manner and for a certain goal, the intersection between the practice of party politics and the practice of constitutional adjudication is nearly definitional.

105. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). *Cf.* Fletcher, *supra* note 35. *See also* Stenberg v. Carhart, 530 U.S. 914, 921 (2000) (applying the undue burden test adopted in *Casey*, the Court declared a Nebraska law that prohibited partial birth abortion unconstitutional. This decision prevented pro-life lawmakers from delivering a ban on partial birth abortion to their constituents); *Contra* Gonzalez v. Carhart, 550 U.S. _ (2007) (upholding a federal ban on partial-birth abortion without overruling *Stenberg v. Carhart*). *See also* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action plan, thereby preventing opponents of affirmative action from overruling Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)).

106. Positive Theory of Law is sensitive to the role the judiciary plays in regulating and protecting the deals reached by politicians. *See generally* DENNIS C. MUELLER, PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK (1997). *See also* James Zagel & Adam Winkler, *Federal Judicial Independence Symposium: The Independence of Judges*, 46 MERCER L. REV. 795, 803 (1995) (describing how the exercise of judicial independence is used by politicians to manage their position on some issues: the politicians may take a strong stance, but refuse to actually change the law by stating that their hands are tied by a judicial constitutional decision). Beyond the realization that judicial interpretation directly affect the "chips" available to politicians (and their worth), some decisions are, by their subject matter, about the powers and immunities of the co-branches, *see* Clinton v. Jones, 520 U.S. 681 (1997) (holding that a sitting President is not immune from civil action against him for events that occurred before he became President); United States v. Nixon, 418 U.S. 683 (1974) (holding that the executive

certain legal rule a case also contains a direct statement or an indirect reference to the values and symbols for which "we, the people" stand.[107] Since politics is often not just about the distribution of risks and opportunities but also about ideals, visions, and identity—this ingredient cannot be ignored.[108] Related to this is the realization that the exercise of judicial review carries with it the possibility of shaming a certain political party (or ideology), or conversely, honoring it by providing social acceptance and legitimacy.[109] Such "shame" or "honor" may also be translated to political capital.

As mentioned above, the system of party politics, as any other neighboring system, does not "absorb" the legal judgment "as it is," namely as it is taken within the legal system. Even if politicians took the time to actually read a judicial decision, the system of party politics has rules "translation" into the political language. Legal advisors to politicians certainly play an important role,[110] yet they are not the sole mechanism that

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privilege does not shield the President from producing evidence that is "demonstrably relevant" in a criminal case).

107. Examples are numerous; observe the Court's language in *Gray v. Sanders*, 372 U.S. 368, 379-80 (1963)

> The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

See also Samuel R. Bagentos, *Justice Ginsburg and the Judicial Role in Expanding "We The People": The Disability Rights Cases*, 104 COLUM. L. REV. 49 (2004); Rostow, *supra* note 73; Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983).

108. AUSTIN SARAT AND THOMAS KEARNS, CULTURAL PLURALISM, IDENTITY POLITICS, AND THE LAW (1999); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

109. *See* Rasul v. Rumsfeld, 542 U.S. 466 (2007) (extending the right of habeas corpus to non-United States citizens who are designated as enemy combatants); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (rejecting President George W. Bush's claim that his commander-in-chief power allows him to declare a United States citizen as an enemy combatant without adhering to due-process requirements). In ruling against the government in both cases, the Court arguably "shamed" the executive branch and its Republican supporters in Congress. *See, e.g.*, Editorial, *Supreme Rebuke*, WASH. POST, June 29, 2004, at A22. This sentiment was picked up by seasoned scholars in their writings for the legal profession. *See* Erwin Chemerinsky, *Three Decisions, One Big Victory for Civil Rights*, TRIAL, Sept. 2004, 74, at 77 (stating that the decision "is a significant vietory for civil liberties"); Allison Elgart, Hamdi v. Rumsfeld: *Due Process Requires that Detainees Receive Notice and Opportunity to Contest Basis for Detention*, 40 HARV. C.R.-C.L. L. REV. 239, 239 (arguing that "[t]he Court's decision is rightly considered a victory for civil liberties and a defeat of tbe Bush administration's sweeping position on the power to detain enemy combatants.").

110. The role government lawyers play certainly warrants in-depth research, since their duties encompass not only "translating" judicial decisions to politicians but also formulating legally binding guidelines under the governing statutes, guidelines that integrate the policy decisions made by the elected politicians or appointed heads of the agencies and the legal mandate delineated by the Court in past decisions. Thesc guidelines may themselves be subject to judicial review. *See, e.g.*, Memorandum for Alberto R. Gonzalez, Counsel to the President, on Standard of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) (explaining the United States obligation under the Geneva Convention and defining torture. Infamously called tbe "torture mcmo," this document set forth what some believed was the United States's official stand on detainee treatment). Such aspects of the work

controls the meaning of a case in the political realm. For example, as noted above, the media's "translated" report of a certain case may cause politicians to lose political capital vis-à-vis their constituents or other political players, and consequently may prompt them to react in order to restore their standing; such a reaction may include criticizing the judiciary for the substantive result, the reasoning, or the "reach."[111].

This layer of "public perception" of judicial performance rests, then, on the assessment of the judicial craft by the practitioners in the meta-practice of party politics.[112] Pundits and political figures evaluate the holding of the case, its symbolic meaning and impact, as assessed from within the meta-practice of party politics. Consequently, the confidence that the political parties (and their constituencies) harbor for the judiciary increases, diminishes, or remains the same as a result of this assessment. It should be stressed, as Schroeder noted, that political actors may care about the result of a given case, but may care no less, if not more, about the attitude or patterns expressed by the courts.[113] More specifically, political actors may think a certain decision is wrong and should be overturned; they might, on occasion, think a certain case is even illegitimate because they believe that the judge exceeded her judicial authority.[114] Yet it seems a

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of government lawyers is also a subject of media coverage. *See* Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A01, *available at* http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html.

111. The most blatant reaction available to politicians is to attempt to strip federal courts of jurisdiction. *See* Yoo & Choper, *supra* note 9. Yet other forms are available as well, ranging from verbal critiques of the Court to attempts to impeach judges or otherwise curb their power. For a recent discussion on aspects of these reactions, see William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483 (2002). Critique—by politicians or their constituents—can also arise when the Court refuses to exercise its power and declare practices unconstitutional.

112. Michael J. Petrick, *The Supreme Court and Authority Acceptance*, 21 W. POL. Q. 5 (1968) (highlighting the validating function performed by the national government and its local counterpart of the judicial product).

113. Schroeder, *supra* note 27. If this assessment is true, the occasional clash between the elected branches and the Court does not necessarily detract from the judiciary's "institutional capital." *See* CHOPER, JUDICIAL REVIEW, *supra* note 10, at 129-170 (explaining the concept of institutional capital and its possible dilution and augmentation by the Court). In fact, it could actually increase institutional capital, since it means the judiciary is "alive"; it also means that the judicial validation of governmental policies—the common outcome of a constitutional challenge—is more than a rubber stamp. The tension between the branches is, in part, what keeps the systems, or layers, apart. We might call it a healthy tension.

114. That may entail occasions when the political branches observe irregular behavior by the Court, namely results that are hardly reconcilable with each other; or cases when the political branches see no other explanation for judicial behavior but the political affiliation of the judge; or cases when the judges base their review on interpretations of the Constitution that are not merely "wrong" but "groundless."

> In joining the election fray, the Supreme Court's ruling produced the most disappointing—and potentially destructive—outcome: a 5-4 division, creating the reasonable perception of partisanship (regardless of its existence in fact), halting the recount and making George W. Bush the President. The basis on which most of the general public understood the decision—that the five members of the Court who quite regularly make up its conservative majority

challenge of a different scale if they sense that the judiciary is hostile, either because it rejects a core element of their agenda altogether[115] or because the judiciary is systematically condescending.[116]

Judges, because they are not practitioners within that system—nor would they wish to be perceived as such[117]—can only guess how a politician would assess a given decision. Yet experience teaches us again that judges, in general, are politically astute.[118] Even judges who did not play a formal role in a politics[119]—and most state and federal court judges

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(Chief Justice Rehnquist, and Justices Scalia, O'Connor, Kennedy and Thomas) voted to end the recount, while the four usual members of its liberal wing (Justices Stevens, Souter, Ginsburg and Breyer) wished to continue the process in some form—makes it easy to understand why allegations of political bias erupted.

Choper, *Presidential Election of 2000*, *supra* note 10, at 345-46. The debate surrounding the judicial role in the districting process elicited similar concerns. This debate prompted Justice O'Connor to reply:

> [The dissents of Justice Stevens and Justice Souter] contend that the recognition of the *Shaw I* [Shaw v. Reno, 509 US 630 (1993)] cause of action threatens public respect for, and the independence of, the Federal Judiciary by inserting the courts deep into the districting process. We believe that the dissents both exaggerate the dangers involved, and fail to recognize the implications of their suggested retreat from *Shaw I*.

Bush v. Vera, 517 U.S. 952, 984 (1996).

115. Thus, their side of the political map will always lose in court; the judiciary can no longer be taken as neutral. Assume, for example, that the Court is systemically hostile to labor unions; this may lead to a loss of faith on the part of the unions in the judicial process, in favor of other means of struggle. In Canada, for example such worries were voiced by scholars after the adoption of the *Charter of Rights and Freedoms*. *See* ALLAN C. HUTCHINSON, WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS (1995); LEO PANITCH & DONALD SWARTZ, THE ASSAULT ON TRADE UNION FREEDOMS: FROM WAGE CONTROLS TO SOCIAL CONTRACT (1994); Andrew Petter, *Immaculate Deception: The Charter's Hidden Agenda*, 45 THE ADVOCATE 857 (1987). It is debatable whether these fears have indeed materialized.

116. "[R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches." United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring). *See also* United States v. Morrison, 529 U.S. 598 (2000) (striking down the federal civil remedies provision of the Violence Against Women Act); *but see* Gonzales v. Raich, 545 U.S. 1 (2005).

117. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." Republican Party of Minn. v. White, 536 U.S. 765, 802 (2002) (Stevens, J., dissenting). *See also* Paul L. Friedman, *Civility, Judicial Independence and the Role of the Bar in Promoting Both*, 2002 FED. CT. L. REV. 4 (2002) (lamenting the slew of accusations by lawyers and politicians that judges are partisans).

118. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961(1994); Mark V. Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992). It is difficult to find a serious biography of a justice that portrays the justice as unmindful of national politics. It would thus not be surprising if, for example, justices were to take political facts—such as a fact that a certain year is an election year—into consideration when deciding whether to grant certiorari for a particular case or whether to use a certain case to advance a legal principle to its next step, even if such a consideration would be inimical to the idea of separation between law and party-politics.

119. As we know, many judges have been active members of political parties and some have been elected as representatives. Justice O'Connor was first appointed to the state senate of Arizona and was later elected to two terms as a Republican. *See* Craig Joyce, *A Tribute to Justice Sandra Day O'Connor*,

were at least affiliated with a party in order to be elected or nominated—nonetheless understand, as a general matter, what matters to politicians,[120] and they are aware of the possible symbolic capital associated with their decisions.[121] At the very least, experience suggests that they are aware of which issues are highly charged.[122] Again, this is not to say that judges possess special expertise in this matter or that they are never wrong. Judges are not pollsters, and they hold very few tools to help them predict political reaction to a case.[123] Politics often has a non-linear pattern of progression, whereby certain developments end up being political chips in totally unrelated political struggles. However, it would be naïve to assume that judges are unaware of the neighboring system of party politics. They have a sense of what cases *might* trigger reaction, and what this reaction *might* look like.[124]

Accordingly, after cases like *Bush v. Gore*—which many agree was a highly irregular case that raised concerns regarding its legitimacy[125]—the

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119. HARV. L. REV. 1257, 1262 (2006). Earl Warren served as the governor of California, *see* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE (1982), and Hugo Black as a senator (and former Ku Klux Klan member), *see* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 3-37 (1994) (discussing Justice Hugo Black's background, including serving in the United States Senate from 1926 to 1937 as a Democrat from Alabama).

120. *See* Neal Devins, *Should the Court Fear Congress*, 90 MINN. L. REV. 1337, 1341 (2006) (arguing that the Court's decision in *Brown I* took Southern opposition into account when delegating desegregation to local judges).

121. *See Brown I*, 347 U.S. 483, 495-96 (1954) (writing for a unanimous Court, Chief Justice Earl Warren understood the symbolic importance of unanimity in judgment and reasoning).

122. Examples are too numerous to detail. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 833 (1997) (Souter, J., concurring) ("Intervention in [an interbranch controversy about calibrating the legislative and executive powers] would risk damaging the public confidence that is vital to the functioning of the Judicial Branch . . . by embroiling the federal courts in a power contest nearly at the height of its political tension.").

123. Perhaps the clearest example of judicial over-sensitivity to the potential fallout was *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting), itself; the dissent was worried that embarking into the political thicket would embroil the Court in endless controversies which would be bound to erode its neutral stance. It appears that this did not happen. *See also* Cannon v. Univ. of Chi., 441 U.S. 677, 732 (1979) (Powell, J., dissenting) (arguing that interpreting title IX to imply a private cause of action on the ground of sex discrimination would harm public confidence and "not only represents judicial assumption of the legislative function, but also lacks a principled precedential basis"). There is no evidence to support such a decline in public confidence. However, it should be noted that the fact the forewarning of the dissent did not materialize does not negate the force of their concern, since it could be the case that the danger was taken into account in applying and developing the law in subsequent cases.

124. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (upholding a Oregon law that criminalized the use of peyote against a First Amendment religious freedom exception). Congress responded to *Smith* by passing the Religious Freedom Restoration Act of 1993 (RFRA), which sought to preempt state laws that substantially burden the free exercise of religious freedom. The Court struck down the RFRA as unconstitutional as applied to the states four years later. *See* City of Boerne v. Flores, 521 U.S. 507, 511 (1997). Another example is discussed in Yoo & Choper, *supra* note 9.

125. *See* Laurence H. Tribe, *The Unbearable Wrongness of* Bush v. Gore, 19 CONST. COMMENT. 571 (2002); Choper, *Presidential Election of 2000*, *supra* note 10. *Contra* RICHARD A. POSNER, BREAKING THE DEADLOCK: THE 2000 PRESIDENTIAL ELECTION AND THE COURTS (2001).

judiciary would be less likely to show any leniency to the prevailing party in future cases. A "flexible" or "lax" application of doctrine, let alone a modification of precedent, in favor of the prevailing party in *Bush v. Gore* risks further eroding the Court's stature as an impartial umpire and/or diminishing its perceived fidelity to the Constitution. Furthermore, the Court would also be less likely to develop innovative or unorthodox theories or doctrines—regardless of whether they favor the "left" or the "right"—lest the losing side in the innovative case connects it to *Bush v. Gore* as evidence that the Court is unprincipled. The Mishkinian exercise of "pealing the layers" would then require us to be sensitive to the political context of cases decided during the terms immediately following *Bush v. Gore* (assuming, of course, no other political events intervened).[126] At the same time, understanding the political context (and political timing) should not be confused with a license for judges to become politicians, as this would signal the conflation of the meta-practices of law and politics.

C. *Administrative Realm*

While politicians and advocates tend to analyze cases for what they "stand for," judicial decisions in constitutional cases also operate as "events" in the system in charge of their enforcement: decisions have to be implemented and administered. As Hans Kelsen reminded us, laws are written, not only for the general public, but also for the state agencies in charge of their enforcement.[127] Similarly, a judicial decision has to be "translated" into action; while embedded in a Court ruling is the symbol of public enforcement, this symbol is meaningful because it is indeed backed by a system which duty it is to enforce "thc law". The system responsible of this "action" is the system responsible for state action in general: the state bureaucracy. In the realm of public administration the judicial decision is analyzed first and foremost for the set of instructions it contains, according to which the government must manage future interactions. This "layer" of constitutional adjudication is sometimes less visible to the media, but political scientists have long recognized that the reading of a decision is affected by how it "fits" into bureaucratic structures within which the decision operates.[128] This fit is premised not only on organizational and managerial features, but also on the

126. One such obvious intervention may be the attack on September 11, which necessitated that the three branches of government act in greater harmony, given the external threat.

127. *See generally* HANS KELSEN, PURE THEORY OF LAW 25-26 (Max Knight trans., 1967); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-34 (1984) (concerning acoustic separation).

128. *See* Herbert Harley, *The Argument for Judicial Rule-Making*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 91 (1933).

bureaucracy's symbols and constitutive values.[129] Within this realm, a judicial performance may lead to a loss of public confidence in the courts if, pursuant to the set of instructions contained in a decision, a constitutive element of the realm, its ethos, key procedures, sense of purpose, or efficient operation is challenged.[130]

It would certainly be crude and simplistic to suggests that judges should or do bend their decisions to fit bureaucratic realities—after all, the law should shape these realities, and not the other way around.[131] Yet, it would be equally wrong to perceive the administrative realm as fully subsumed in the legal realm. A gap between the rule of law announced in a case and the administrative apparatus within which this rule is designed to operate would, again, create a possible clash between the systems.[132] Even though the legal principle, technically speaking, knows no limit, the system theory would inform us that the law is not the only relevant system at play, and thus the administrative sphere may "radiate" into the law, thereby informing the judges of *their* realistic limits.[133]

The administrative system is organized around agencies (national and local), law enforcement entities, government lawyers and other auxiliary staff. Lower courts, although, technically speaking, not part of the executive, are also, to an extent, an aspect of the system of enforcement, administration, and application of official power. The administrability of Supreme Court doctrines in the lower courts—or lack thereof—is therefore often an aspect the Supreme Court either directly addresses, or indirectly considers.[134] If this is the case, the relationship between state and federal courts—as agents enforcing federal policies—is also revealed.[135]

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129. *See* Mishkin, *Ambivalence*, *supra* note 18 (analyzing the symbolism in the Court's analytical move to favor plus factor over quotas); *see also* Remarks of Deputy Attorney General James Comey Regarding Jose Padilla, June 1, 2004, http://www.usdoj.gov/dag/speech/2004/dag6104.htm (last visited June 17, 2007); Paul McNulty, *Transcript of Press Conference Announcing Indictment of U.S. Citizen for Treason and Material Support Charges for Providing Aid and Comfort to al Qaeda*, Oct. 11, 2006, http://www.usdoj.gov/dag/speech/2006/dag_speech_061011.htm (last visited June 17, 2007).

130. *See infra* note 132.

131. *See also Brown II*, 349 U.S. 294 (1955) (the "all deliberate speed" language is perhaps a bending of the Court's decision to fit bureaucratic realities). *Contra* Hamdi v. Rumsfeld, 542 U.S. 507, 535-39 (2004) (holding that some process is due to the defendant, but allowing the government to determine the nature of the process).

132. Thus, a challenge to the death penalty arguing that the death penalty violates equal protection because it discriminates against blacks—since blacks are disproportionately sentenced to death—requires the justices to review a substantial portion of the administrative realm. *See* McClesky v. Kemp, 481 U.S. 279, 297-99 (1987) (rejecting an equal protection challenge to the imposition of death penalty); *see also* Adam M. Gershowitz, *Pay Now, Execute Later: Why Counties Should Be Required to Post a Bond to Seek the Death Penalty*, 41 U. RICH. L. REV. 861, 870 (2007).

133. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) ("Courts attempting to strike a reasonable Fourth Amendment balance [recognize the government's] essential interest in readily administrable rules.").

134. Baker v. Carr, 369 U.S. 186, 226 (1962); Reynolds v. Sims, 377 U.S. 533, 557 (1964) ("We indicated in *Baker*, however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative

In this context it should be noted that public administration—and maybe any meta-practice—is rarely dramatically affected by a single judicial decision (putting the few exceptional cases aside). Rather, it is a language of trajectories and patterns. A judicial decision, then, does not just require that its direct holding be absorbed by the agencies. It also requires that the agencies review other policies, methods, procedures, and

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apportionment scheme."). The administrability of rules affects public confidence in the judiciary: "Few things have so plagued the administration of criminal justice, or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality," said Chief Justice Burger in his dissent in *Evitts v. Lucey*, 469 U.S. 387, 405-06 (1985), implying, in joining Justice Rehnquist's dissent, that the doctrine was non-administrable. The case examined whether the appellate-level right to counsel includes the right to effective assistance of counsel. *See also* Stephens v. Kemp, 464 U.S. 1027, 1032 (1983) (Powell, J., dissenting) ("[A] typically 'last minute' flurry of activity [i.e., application for stay of execution] is resulting in additional delay of the imposition of a sentence imposed almost a decade ago. This sort of procedure undermines public confidence in the courts and in the laws we are required to follow."). In *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988), the Court criticized the willingness of the lower court to reach the merits of the case despite its conclusion that it lacked jurisdiction. The lower court so acted for the "interest of justice"—to halt a prolonged adjudication about jurisdiction. *Id.* at 807. The Supreme Court noted that its criticism should

> not mean, however, that every borderline case must inevitably culminate in a perpetual game of jurisdictional ping-pong until this Court intervenes to resolve the underlying jurisdictional dispute, or (more likely) until one of the parties surrenders to futility. Such a state of affairs would undermine public confidence in our judiciary . . . .

Id. at 818. The Court then proceeded to announce what it perceived as an administrable set of rules. *Id.* at 819. In the context of separation of Church and State, the Court's inability to guide lower courts in the application of the test from *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), resulted in some lower courts being reluctant to apply the test, a result that was criticized by the dissent in *Bd. of Educ. of Kiyas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 750-51 (1994) (Scalia, J., dissenting). In the context of standing and justiciability, the justices wondered whether a legally administrable standard is available for lower courts in applying the Court's standing and justiciability doctrines in matters of politicization of districting. Vieth v. Jubelirer, 541 U.S. 267, 319, 327 (2004) (Stevens, J., dissenting).

135. Take for example Mishkin's contribution to federal question jurisdiction. Wechsler suggested that states are under an obligation to incorporate federal law in areas where Congress is empowered to legislate. Mishkin argued that state courts are so obliged only when there is a well developed federal policy in that area. Yet if Congress may legislate—as stipulated by Wechsler—why insist that there be a well articulated federal policy on point? After all, a "federal question" arises when Congress has enacted a federal law on point. Mishkin argued that for this law to carry the force of commandeering the states' machinery it should be a part of a well articulated policy; that means that the federal legislature did not merely enact certain standards, but that there is greater federal involvement than that—an agency to enforce the rules, or a set of secondary legislation that breathes life into the general words of the statute. It means that the federal government not only has the power, and not only exercised it, but has done so in a thorough enough manner to have appropriated the field and to have laid the clear intentions of its policy. This approach ensures political legitimacy (since it is assumed that the articulated federal policy reflects consent among state representatives in the federal government) and also solves the administrative quagmire that may develop if state courts try to figure out on their own the policy underlying the federal law on point. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 810-14 (1957) (stating that "Congress legislates against a background of existing state law"). For other aspects of the relationship between federal courts and states see Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

the like that may be affected by a certain case even if the case did not address these policies directly.[136] Since a future case is likely to follow on the heels of the case just announced, it would be surprising if bureaucracies would not view cases as elements in a chain, or a sequence, rather than in isolation (at least so long as the composition of the Court is unlikely to change). While the judicial craft tells us that judges insist upon adjudicating only the case that stands before them—especially in constitutional matters[137]—the very same craft generates the expected trajectory of a case. Once this trajectory is understood, a better understanding of the possible reception by the administrative realm is revealed, and, consequently, a better understanding of the possibilities open to the justices *ex ante* is gained. This point, of course, relates to the other practices as well, although it is arguably most pronounced in this sphere.

D. Economics or Market

Judicial decisions are events in another important meta-practice or system: the economy (or the market). Constitutional interpretation—while dealing with rights or the separation of powers, directly or indirectly (but tangibly)—affects the market.[138] In addition to litigation costs and enforcement costs, court decisions often alter economic relations by providing incentives or disincentives to the different market players.[139] Constitutional interpretation may result in groups of people migrating to or from certain areas;[140] it may regulate the flow of money to the political

136. *See* United States v. Virginia, 518 U.S. 515, 561 (1996) (Rehnquist, C.J., concurring) (stating that "Virginia [was] on notice that VMI's men-only admissions policy was open to serious [equal protection] question" in light of *Hogan* and *Reed*). *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Reed v. Reed, 404 U.S. 71 (1971). *See also* Blakely v. Washington, 542 U.S. 296 (2004) (casting doubts over the constitutionality of the federal sentencing guidelines, doubts that have materialized in United States v. Booker, 543 U.S. 220 (2005)).

137. This element was highlighted by CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

138. Arguably, all constitutional rights affeet, and are affected by, market conditions. This is particularly visible with respect to property and contractual rights. For example, the Supreme Court's interpretations of the intellectual property clause are fraught with economic or market implications. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study in Copyright of Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 291 (1970); Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Book: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971); Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972).

139. Early Supreme Court cases addressing the concept of public eonfidence often referred to public confidence in the Market, and the implicit judicial role in maintaining it. *See* Legal Tender Cases 79 U.S. 457 (1870) and 110 U.S. 421 (1884) (public confidence in notes); State *ex rel.* S. Bank v. Pilsbury, 105 U.S. 278 (1881) (concerning public trust in the financial market); Mercer County v. Hacket, 68 U.S. 83, 96 (1863) (concerning public trust in the railroad system). *See also* Silver v. N.Y.S.E., 373 U.S. 341, 368 (1963) (Stewart, J., dissenting) (concerning public trust in the securities market).

140. *See* Avraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965 (2000); Walter Berns, *The Constitution and the Migration of Slaves*, 78 YALE L.J. 198 (1968).

process;[141] it may burden the police with further costs;[142] or it may simply deal with property rights and the freedom of contract as constitutional liberties, (as was common prior to the *Lochner* era). Even matters closer to private law, such as punitive damages awarded in civil (or administrative) litigation, raise a constitutional question.[143] It is difficult to think of Supreme Court cases without economic ramifications. In fact, cases often get to the Supreme Court at least in part because of certain economic realities.[144] It is therefore not surprising that economists search for the optimal level of rights protection.[145]

Analyzing the economic implications of judicial decisions would require exploring not only of the holding of the case, but also other factors, such as the structure of the market within which the judicial decision takes place.[146] For example, First Amendment doctrines may seem blind to the economic realities within which free speech occurs; however, a complete understanding of "prior restraint,"[147] "overbreadth,"[148] or the holding of *New York Times v. Sullivan*[149] cannot ignore the economic background

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141. *See* Buckley v. Valeo, 424 U.S. 1 (1976).

142. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

143. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (holding that excessive punitive damages violated the Due Process Clause of the Fourteenth Amendment); *accord* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

144. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), a ninety-six-year-old precedent, which held that resale price maintenance agreements were illegal).

145. *See generally* ROBERT COOTER, THE STRATEGIC CONSTITUTION chs. 10-14 (2002).

146. This was in part the point of the legal process school, which incorporated the insights of the realists and set out to chart a rule-bound pragmatist course of understanding the legal craft in its institutional and economic setting. How else can we understand the case of the damaged cantaloupes, upon which many of us were raised? *See* HART & SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William Eskridge & Philip Frickey eds., 2001). For an interesting analysis of the relationship between the market and law, see Andreas Abegg, Marc Amstutz & Vaios Karavas, *Civil Society Constitutionalism: The Power of Contract Law*, IND. J. GLOBAL LEGAL STUD. (forthcoming 2007).

147. Near v. Minnesota, 283 U.S. 697 (1931) (holding that prior restraint violates the first amendment).

148. Coates v. Cincinnati, 402 U.S. 611 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967).

149. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (overturning $500,000 in libel damages against *The New York Times* and four civil rights leaders—Ralph Abernathy, S.S. Seay, Fred Shuttlesworth, and Joseph Lowery). Anthony Lewis, in MAKE NO LAW, reflected on the economic implication of the abridgement of the freedom of the press in the Alabama state court decision reversed in *Sullivan*. Lewis wrote,

> [t]he rule applied by Judge Jones made it forbiddingly difficult to write anything about the realities of Southern racism in the 1960's without risking heavy damages for libel. Any publication that sent a correspondent into Alabama, circulated a few copies there or sold a few ads could be forced into the state courts . . . A local jury could award damages in any amount.

ANTHONY LEWIS, MAKE NO LAW 34-35 (1991). The state court decision and four other ones "put the press to a grave financial risk." *Id.* According to James Goodale, who later became the general counsel for the paper, "[w]ithout a reversal of those verdicts [by the Supreme Court of the United States] there

within which the law operates and the possible effect judicial decisions may have on the market.[150]

Market-based public confidence in the courts may suffer if the courts are oblivious to the economic structures their decisions reinforce, stymie, or facilitate. Fortunately, it is rare that judges turn a blind eye to the market system. However, when changes in the market occur, judges are sometimes caught in a bind, creating a tension between the law and the market. *Lochner*[151] and subsequent Commerce Clause decisions during the New Deal era are perhaps the clearest examples of events simultaneously situated in law and economics that directly affect the "public" confidence in the courts (namely the reaction of market forces to the economic logic of the judicial performance).[152]

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was a reasonable question of whether the *Times*, then wracked by strikes and small profits, could survive." *Id.*

150. *See* Sole v. Wyner, 127 S. Ct. 2188 (2007) (holding that prevailing party status does not attach to preliminary injunctions for fee-shifting purposes); State Farm Mut. Auto. Ins. Co. v. Campbell, 584 U.S. 874 (2004) (holding that a punitive damages award could be so large as to violate the Due Process Clause of the Fourteenth Amendment); *contra* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part) (noting that the Constitution "does not incorporate the views of the Law and Economics School," nor does it "require the States to subscribe to any particular economic theory") (internal citations omitted)).

151. Lochner v. New York, 198 U.S. 45 (1905) (affirming that the Due Process Clause of the Fourteenth Amendment included the right to contract).

152. Between 1887 and 1937, the Supreme Court was hostile to the exercise of the commerce clause power, invalidating several acts of Congress as either exceeding its enumerated power or as being in contravention of the Tenth Amendment. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the wage and hours provisions of the Bituminous Coal Conservation Act of 1935, a key New Deal legislation); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating a federal law that restricted the interstate shipment of goods from child labor); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (invalidating federal anti-trust laws). The Court changed course in what has been famously dubbed "the switch in time that saved nine" from President Franklin D. Roosevelt's "court-packing" plan. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding federal legislation of the steel industry constitutional); *see also* Wickard v. Filburn, 317 U.S. 111 (1942) (upholding the Agricultural Adjustment Act of 1938); United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standard Act). *See* ROBERT JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941) (describing the "court packing" proposal of the FDR administration). Between 1937 and 1995, the Supreme Court did not find any federal law to exceed Congress's power under the commerce clause. *But see* United States v. Lopez, 514 U.S. 549 (1995).

Should judges become economists?[153] Mishkin would probably smile and tell us that we missed the point. Our constant—and almost instinctive—drive to conflate the different layers, or systems, into a single entity is understandable. It is also misguided, because it would entail the dissolution of law into a branch of the Market. Such dissolution would undermine the Court's triadic position as detached from rivaling parties, a position essential for maintaining its authority and for effectively resolving disputes.

E. Ethics—The Morality of Legal Decisions

Supreme Court decisions in constitutional matters are not only events in systems studied by social scientists (i.e., economists or political scientists); these decisions are also significant for their moral and ethical content. directly intersects Since key ethical concepts, such as liberty and equality, are embedded in law, the relationship between law and morality are such that one cannot ignore the claim that ethics has on the law.[154] Is not the law the institutional administration of justice?[155] Justice, of course, is a contestable term. Some would focus on corrective justice (vis-à-vis the petitioner);[156] others on distributive aspects (that may also include

153. Early realists, like Holmes and Jerome Frank, suggested that judges should be better attuned to economics. Judge Posner, though not an economist, is highly revered for his economic analysis in judicial reasoning. His early works encompass public law issues. William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest Group Perspective*, 18 J.L. & ECON. 875, 875-901 (1975); William M. Landes and Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 249-96 (1976). But later on he focused on private law matters, *see* RICHARD A. POSNER AND WILLIAM LANDES, THE ECONOMIC STRUCTURE OF TORT LAW (1987); Lawrence A. Cunningham, *Cardozo and Posner: A Study of Contracts*, 36 WM. & MARY L. REV. 1379 (1995). Yet as a judge, Posner does not play the role of an economist in constitutional matters, nor should he: the Constitution "does not incorporate the views of the Law and Economics School." Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part). *See also* Elena Kagan, Commentary, *Richard Posner, the Judge*, 120 HARV. L. REV. 1121 (2007).

154. For the famous debates between Hart and Fuller, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law-A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). The debate also includes parts of H.L.A. HART, THE CONCEPT OF LAW 200-12 (1961); H.L.A. Hart, *Book Review*, 78 HARV. L. REV. 1281 (1965), and LON L. FULLER, *A Reply to Critics*, *in* THE MORALITY OF LAW 187-242 (1969). Even if one is a Kelsenian positivist, morality cannot be completely ignored. Positivism realizes that if law becomes detacbed from conventional morality, the effectiveness of the law is likely to decrease, as more and more people would tend to find ways to circumvent the law; since Kelsenian positivists care about the actual law—not only the law on the books, but the law as a social fact—they would grant conventional morality a role, even if an "external" one. *See* LARS VINX, HANS KELSEN'S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY (2007); Frederick Schauer, Book Review: (RE)TAKING HART: A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM, 119 HARV. L. REV. 852 (2006).

155. SIMON, *supra* note 15.

156. *See* Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249 (2000); Matthew S. O'Connell, *Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law*, 85 GEO. L.J. 1717 (1997).

groups);[157] some would highlight the restorative role of justice;[158] and others would view justice as fairness (or at least as fair process).[159] Be the appropriate theory of justice as it may, the relationship between justice and public confidence is difficult to disregard.

The Court itself is sensitive to the interplay between justice and public confidence, especially in matters of procedural fairness.[160] Similarly, rules governing judicial behavior—often referred to as "judicial ethics"—explicitly demand that judges "comport themselves as to promote public confidence by, among other things, avoiding morally reprehensible behavior.[161] Without delving any further into the metaphysics of jurisprudence, the relationship between law, justice, and public confidence suggests that the authority of the Court, while grounded in the practice of law, is also captured by moral lenses. More specifically, the performance

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157. *See, e.g.*, Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999).

158. JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002).

159. JOHN RAWLS, A THEORY OF JUSTICE (1971) suggests that we should see justice as fairness. In practice, the fairness of the judicial process is central to the legitimacy of the judiciary—or at least to the perception thereof. This, of course, is not to suggest that judges should guide their decisions according to what the public may perceive as a fair process—it is ultimately the judicial function to determine fairness—but neither are they allowed to ignore the appearance of prejudice. *See, e.g.*, Peter D. O'Connell, *Pretrial Publicity, Change of Venue, Public Opinion Polls: A Theory of Procedural Justice*, 65 U. DET. L. REV. 169 (1988); David M. Ebel et al., *Professional Responsibility: Comments on Recusal*, 73 DENV. U. L. REV. 919 (1996).

160. Miller-El v. Dretke, 545 U.S. 231, 238 (2005) (concluding that "the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication") (internal quotations omitted); Batson v. Kentucky, 476 U.S. 79, 87 (1986) (stating that "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice"); Johnson v. California, 545 U.S. 162, 172 (2005) (relying on this statement in *Batson* to address inferences of racial discrimination, and finding that such inferences shift the burden to the state to demonstrate race-neutral reasons for the strikes); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (concluding that "[c]ommunity participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system"). The notion of procedural fairness entails also the perception of fairness, especially in capital cases. *See, e.g.*, Mickens v. Taylor, 535 U.S. 162, 189 (2002) (Stevens, J., dissenting) (stating that setting aside the defendant's capital conviction "is the only remedy that can maintain public confidence in the fairness of the procedures employed in capital cases"). Fairness has also been related to professionalism and efficiency:

> We cannot fail to observe that a voir dire process of such length [six weeks], in and of itself undermines public confidence in the courts and the legal profession. The process is to ensure a fair impartial jury, not a favorable one. Judges, not advocates, must control that process to make sure privileges are not so abused. Properly conducted it is inconceivable that the process could extend over such a period.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 511 n.9 (1984).

161. United States v. Five Persons, 472 F. Supp. 64 (D. N.J. 1979); *In re* Williams, 169 N.J. 264 (2001); *In re* Schwartz, 755 So. 2d 110 (Fla. 2000); White v. Such Trust Bank, 245 Ga. App. 828, 538 (2000); *In re* Brown, 343 S.C. 296 (2000); Sears v. Olivarez, 28 S.W. 3d 611 (Tex. App. Corpus Christi 2000); *In re* Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So. 2nd 172 (Fla. 1978); *In re* Emmet, 293 Ala. 143 (1974); *See also* MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972).

of "Judges & Co."[162] is subject not only to legalistic analysis, but also to moral evaluation based on the ethical stance of the judges (and the bar)[163] as expressed by their decisions[164] and behavior.[165] Losing moral authority

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162. This term, coined by Jeremy Bentham, was meant to convey that 1) judges are not justice-promoting neutral umpires but are (and should be recognized as) a corporate entity (a company) that seeks to advance its own interests, primarily power and money; 2) in order to advance these interests, judges partner with lawyers and others power-wielding faetions (including, for example, the Monarch) and 3) the tactic used by judges is to compound, obseure and render the language of judieial decisions incoherent and thus amenable to manipulations. For Bentham, the term was meant to uncover the immoral and sinister character of judicial behavior as reflected in common law rules and practices. For example, Bentham broodingly noted that "[j]ustice, to *Judge and Co.* a game; *Judge and Co.* the players: stake, in different proportions, the means of happiness possessed by the aggregate of all litigants." JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM para. 4995 (William Tait ed., 1843); Scotch Reform, Real Property, Codification Petitions, Petition of Justice, para. 47, *available at* http://oll.libertyfund.org/title/1996/130691/2575015. And this game bodes happiness to the very few and suffering to the rest:

> As to all this suffering, what do *Judge and Co.* care about it? Just as much as they care for the rest of the mass of suffering which the system, in its other parts, organizes—what a steam-engine would care for the condition of a human body pressed or pounded by it.

Id. (*Result of the Fissure—Groundless Arrest for Debt,* para. 4907, *available at* http://oll.libertyfund.org/title/1996/130691/2574927. Referring to the powers conferred upon judges to incarcerate accused before the trial begins, he stated "with this arrangement, the contracting parties—*Judge and Co.* of the one part, and the rich and powerful of the other part—were, and continue to be, well satisfied". *Id.* at para. 271, *available at* http://oll.libertyfund.org/title/1996/130722/2575458. The idea that the law is not made by a judge alone, but by the *Judge and Co.*, was later developed by other, less critical, scholars in order to expose the inherently discursive nature of law (in common law systems), and specifically, in constitutional adjudication. For example, Paul Freud, whose work on the judicial role influenced many thinkers (including Mishkin), devoted a chapter in his book to this aspect. FREUND, *supra* note 6, at ch. VI. Mark Tushnet also relied on this notion. *See* TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 118.

163. The behavior of lawyers has been recognized as affecting public eonfidenee in the legal system and thus in the courts. Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287, 289 n.1 (1959) (ambulance chasing "impair[s] . . . public confidence in the Courts"); Sherman v. United States, 356 U.S. 369, 380 (1958) ("Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice [such as entrapment], and to refuse to sustain such methods by effectuating them . . . Public confidence in the fair and honorable administration of justiee, upon which ultimately depends the rule of law, is the transcending value at stake."). Miller-El v. Dretke, 545 U.S. 231, 238 (2005) (arguing that "the very integrity of the courts is jeopardized when a prosecutor's discrimination invites cynicism respecting the jury's neutrality, and undermines public eonfidence in adjudication") (internal quotations omitted); Georgia v. McCollum, 505 U.S. 42, 49 (1992) ("One of the goals of our jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. Selection procedures that purposefully exclude African-Americans from juries undermine that public confidence-as well they should.") (internal quotations omitted); *In re* Strickland, 453 U.S. 907, 909 (1981) (Burger, C.J., dissenting) ("The quality of this Court's Bar and the publie's confidence in the Bar is compromised by the retention, as well as the admission, of attorneys found guilty of unethical professional conduct."); Warren E. Burger, *The Necessity for Civility: Remarks at the Opening Session of the American Law Institute*, 52 F.R.D. 211 (1971); Paul Friedman, *Taking the High Road: Civility, Judicial Independence and the Rule of Law*, 58 N.Y.U. ANN. SURV. AM. L. 187 (2001).

164. "[W]hat must ultimately sustain the court in public confidence is the character and independence of the judges." William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 434 (1986) (quoting CHARLES E. HUGHES, THE SUPREME COURT OF THE UNITED STATES 67-68

may amount to a loss of public confidence, which, as the Court informs us, is a legally relevant matter.[166]

Once translated into the sphere of morality, moral philosophers—with or without legal training—stand to evaluate the performance of the Court and thereby participate in "judging the judges."[167] The legalistic language of judicial decisions notwithstanding, a case may be evaluated for its result, for the doctrine announced, for the reasoning judges put forward to support their legal conclusion and for the state of affairs that in fact transpired as a consequence of the decision.[168] Such judging of the judicial performance may be picked up by the media and broadcasted to other practices. Moreover, ethical sensitivities are not confined to "professional" ethicists or philosophers. Seen from the realm of ethics, we are all "practitioners" in the daily practice of ethics,[169] as are our future generations.[170]

We should not overplay this point. As it has refused to be subsumed by the practice of party politics, the law (and in particular, constitutional law) has demonstrated a rather persisting reluctance to be subsumed by ethics and moral philosophy. In our system, unjust laws—assuming we have figured out what justice demands—are still legally valid,[171] and

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(1929)). Justice Brennan acknowledges that maintaining unanimity "strongly commends the decision to public confidence" but only if such unanimity does not require the sacrifice of conviction. *Id.* For Brennan, conviction in the moral and legal soundness of a decision is a key component in maintaining the independence of each judge, and collectively, of the bench. Public confidence relies ultimately on independent judges.

165. Justice Abe Fortas was forced to resign over questionable financial dealings, in no small part in order to maintain public confidence. *See* LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1992); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

166. Baker v. Carr, 369 U.S. 186, 267 (1962). *See also supra* notes 30-32.

167. *See* Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER (1998).

168. Roe v. Wade, 410 U.S. 113 (1973) (adopting the trimester approach) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (upholding *Roe*, but rejecting the trimester framework in favor of viability, a less rigid standard) are the obvious examples. Ethical discourse analyzing aspects of these cases abounds. *See, e.g.*, BEN A. RICH, STRANGE BEDFELLOWS: HOW MEDICAL JURISPRUDENCE HAS INFLUENCED MEDICAL ETHICS AND MEDICAL PRACTICE (2001).

169. Dworkin, *supra* note 69. As mentioned earlier, all systems view the individual members of the polity as participants, or at least potential participants, in the system. *See supra* note 61. The system of ethics is somewhat unique, because the relationship between the "office holders" or the "professionals" of the system and the lay participants is not organized around the provision of goods or services but rather around the sharing of certain types of knowledge.

170. Brennan, *supra* note 164.

171. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 110 (1985) (arguing that "[i]f someone believes that a particular official program is deeply unjust, if the political process offers no realistic hope of reversing that program soon, if there is no possibility of effective persuasive civil disobedience, if nonviolent nonpersuasive techniques are available that hold out a reasonable prospect of success, if these techniques do not threaten to be counterproductive, then that person does the right thing, given his convictions, to use those nonpersuasive means."). *See also* the collateral bar rule, which states, "a court order must be obeyed until it is set aside, and that persons subject to the order who disobey it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional." Stephen Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539, 552

therefore, institutionally speaking, judges may not ignore them. Yet a full Kelsenian separation between law and morality seems difficult to reconcile with our case law. Although positivism prevails at least as of *Erie*,[172] unjust laws are nonetheless more likely to be struck down as contradicting the Constitution[173] or interpreted and applied "creatively" to ease the tension between the law and the demands of justice. A judge that ignores considerations of justice in interpreting and applying the Constitution may therefore be as disloyal to her institutional role as a judge who seeks to invalidate statutes "simply" because they contravene fundamental justice. A decision lacking a sound support in constitutional text and precedent may be seen as illegitimate; at the same time, as mentioned earlier, a decision perceived as unjust may bring the administration of justice into disrepute.

This, of course, does not mean that judges may adorn the philosophers' robe and embark on the pursuit of justice *per se*. As Mishkin would remind us time and again, ethical considerations are important, yet constitutional adjudication cannot be reduced to an exercise in moral reasoning (arguments by Ronald Dworkin to the contrary notwithstanding).[174] The authority of judges, resting on their role within the legal system and guarded and sustained by institutional symbols and values, depends upon maintaining a degree of separation between legal and moral reasoning. To preserve its status as a distinct system, law must retain its normative "closure": it must secure that its decisions, when announced, are based on legal sources (including moral sources incorporated into the law, according to law's rules for incorporation). The closure, however, cannot be hermetic; law must remain "cognitively" open to arguments emanating from the systems with which it intersects. We are left then with the realization that since judicial decisions "occur" simultaneously in the system of law and in the system of ethics, and since some tension between law and morality may be unavoidable, there is no simplistic resolution to conflicting pulls faced by courts mindful of preserving judicial legitimacy.

(1977); *see also* Richard Favata, *Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169, 193 (2003).

172. *Erie v. Tompkins*, 304 U.S. 64 (1938), departed from, and in fact repudiated, *Swift v. Tyson*, 42 U.S. (1 Pet.) 1 (1842), as legal analysis shifted from natural law to positivism. Mishkin, as is well known, has written about *Erie*, and more specifically, about the power of federal courts under the *Erie* rule. For his latest contribution on the matter, see Paul J. Mishkin, *Some Further Last Words on* Erie—*The Thread*, 87 HARV. L. REV. 1682 (1974).

173. Frankfurter himself suggested that we should abide by the "bad man test" as articulated by Holmes, namely that with respect to "substantive" due process: the courts should strike down only those laws that "shock the conscience." United States v. Rabinowtiz, 339 U.S. 59, 69 (1950) (Frankfurter, J., dissenting). While that test was meant to restrict the power of the judiciary to invalidate unjust legislation, it nevertheless relies on moral considerations.

174. *See* DWORKIN, *supra* note 48.

F. The Legal Craft—Inclusive Professionalism

1. Substance and Form

Having briefly touched upon the practices (or systems) that intersect with the law, a few words on law itself are necessary. Articulating the core elements that distinguish professional legal discourse from other forms for public discourse has attracted the attention of scholars for many generations,[175] and thus will not be addressed here. It is a point of social fact that the procedures (or forms) through which the legal discourse is engaged are distinct: we use certain terminology and follow certain modes (forms) of presenting arguments with respect to governing norms and facts.[176] Furthermore, we rely on—or correspond with—the products of certain institutions, such as courts and legislatures.[177] We may thus invoke notions of "institutional roles" (and "authority" attached to these roles and to their product),[178] and we may even address the modes of reasoning

175. The literature on this point abounds. I enjoyed reading: ROBERT POST, LAW AND THE ORDER OF CULTURE (1991); Paul W. Kahn, *Two Communities: Professional and Political*, 24 RUTGERS L.J. 957 (1993) (analyzing the professional legal and political discourse); Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MNTN. L. REV. 123 (1962); RICHARD ABEL, ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM (2004).

176. P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY IN LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS (1991); ROBERT SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY (2005); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Philip Soper, *On the Relationship Between Form and Substance in Law*, 20 RATIO JURIS 56 (2007).

177. H.L.A. Hart, THE CONCEPT OF LAW 100-110 (2nd ed. 1997) refers to the centrality of these institutions under the polity's "rules of recognition".

178. In one of the earliest references to the importance of maintaining public confidence in the judiciary, Chief Justice Taney commented on the importance of maintaining the authority of the legal sources: a decision of the Supreme Court as published. In *Smith v. Turner*, 48 U.S. 283 (1849), a debate ensued regarding the meaning of a case previously decided by the Court, and whether the case, as reported, authentically reflected the decision of the court. The Chief Justice noted:

> I had not intended to say any thing further in relation to the case of New York *v.* Miln, but the remarks of one of my brethren have rendered it necessary for me to speak of it more particularly, since I have referred to it as the deliberate judgment of the court. It is eleven years since that decision was pronounced. After that lapse of time, I am sensible that I ought not to undertake to state every thing that passed in conference or in private conversations; because I may be mistaken in some particulars, although my impressions are strong that all the circumstances are yet in my memory. And I am the less disposed to enter upon such a statement, because, in my judgment, its judicial authority ought not to rest on any such circumstances depending on individual memory. The court at that time consisted of seven members; four of them are dead, and among them the eminent jurist who delivered the opinion of the court. All of the seven judges were present, and partook in the deliberations which preceded the decision. The opinion must have been read in conference, and assented to or acquiesced in by a majority of the court, precisely as it stood, otherwise it could not have been delivered as the court's opinion. It was delivered from the bench in open court, as usual, and only one of the seven judges, Mr. Justice Story, dissented. Mr. Justice Thompson delivered his own opinion, which concurred in the opinion of the court, but which, at the same time, added another ground, which the Court declined taking and determined to leave open. This will be seen by referring to the opinions. And if an opinion thus prepared and delivered and promulgated in the official report may now be put aside, on the ground that it did not express what at that time was the opinion of the majority of the court, I do not see how the decisions, when announced by a single judge, (as is usual when the majority concur,)

unique to these institutions.[179] Beyond that, articulating the differences between law and other political processes (or discourses) is a rather challenging, if not vexing, endeavor. We realize, of course, the importance of maintaining the boundaries of law; for there to be "law," it must be distinct from other systems. Consequently, we realize the importance of codes governing infusion and diffusion of information and values (facts and norms) to the legal "system" from neighboring systems (and to the other systems from the law) is of great significance.[180] We also realize the important function symbols relating to the "proper" judicial role play in maintaining the operative "closure"—i.e., independence—and the cognitive "openness"—i.e., responsiveness—of law. But delineating the precise boundaries of legal reasoning is an ever-eluding task, in part because at the point of intersection of law and its neighboring systems, the legal language of rights and powers is also the moral language of values, the political language of identity, interests and power, the economic language of incentives and externalities, the bureaucratic language of means and ends, and the media language of messages and perception.

To compound matters, as mentioned earlier, legal events are communicated to a variety of the more remote social systems through the media and other channels, and therefore, a tension may arise between the popular notion of how the law operates (including its constitutive values) and the professional understanding of judicial discretion.[181] Given that the

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> can hereafter command the public confidence. What is said to have happened in this case may, for aught we know, have happened in others.

Id. at 487-88.

179. Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200 (1984); David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178 (1984); James Gordley, *Legal Reasoning: An Introduction*, 72 CALIF. L. REV. 138 (1984); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12-22 (1991).

180. Patricia M. Ward, *Making "Informed" Decisions on the District of Columbia Circuit*, 50 GEO. WASH. L. REV. 135 (1982), notes the opposite pull of judges as expounders of values found in the Constitution and judges as mere guardians of the political process. She also mentions the difficulties associated with judges having to become "instant specialists" on many important social issues. She emphasizes the importance of the adversarial process in maintaining judicial legitimacy. *Id.* at 152. *See also* David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977); Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974); J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974).

181. The public may think—and judges may on occasion convey the impression—that judicial hands are completely tied by text or precedent and no discretion exists; the profession, of course, knows better. *See, e.g.*, Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 44 n.29 (1978) (criticizing "the Positivist kiss-off: 'I'd like to help, but my hands are tied.'"). Alternatively, the public may think, and some judges may so express themselves, that discretion is open-ended and all that matters is the number of judicial votes a certain position gets. *See, e.g.*, JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 54 (1995). Again, the profession knows better. *See* Mark Tushnet, *Members of The Warren Court in Judicial Biography: Themes In Warren Court Biographies*, 70 N.Y.U. L. REV. 748, 763 (1995). For a recent analysis of the portrayals of judicial discretion in popular culture (in non-

media communicates both ways,[182] judges may sense that a certain result and/or reasoning, even if acceptable, indeed required by professional standards, might nonetheless be too at odds with the understanding of legal form or values prevalent in other meta-practices. This conclusion is not necessarily a result of misunderstanding the "true" role of courts (namely, the purpose and function of courts as understood within the legal system) by the participants of other systems (although lack of information may certainly contribute to commonly held yet inaccurate beliefs about judges). Rather, the deeper reason for the divergence of expectations is that different systems are likely to assign slightly different roles to courts and, primarily, the Supreme Court. This divergence may have special force regarding the role assigned to the Supreme Court—and therefore the expectations from this institution—by the systems that directly intersect with the law. If this is the case, then market players are likely to evaluate the Court's performance differently then moral philosophers or bureaucrats. When the various expectations from the Court overlap (generating a Venn diagram) the tension between the systems is manageable; but this may not always be so. While the Court (and the legal profession in general) may attempt to generate cross-system symbols or mediate some agreement regarding institutional values in order to mitigate this tension and establish a "zone of tolerance",[183] such maneuver stands to be only partly successful. This is because each system is likely to have its unique dialect of symbols and values, including its set of expectations from a court of law and its understanding of the role of the Supreme Court.

Since the law – or any other social system – is not fully detached from neighboring systems, judges may not ignore the tension between the various expectations from the Court, based on the various understandings of its role and institutional symbols. Yet since the law—as any other social system—is nonetheless sufficiently distinct, judges, as office holders in the legal system, are not at liberty to depart from legal form simply because

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constitutional cases), see Steven A. Kohm, *The People's Law Versus Judge Judy Justice: Two Models of Law in American Reality-Based Courtroom TV*, 40 LAW & SOC'Y REV. 693 (2006).

182. *See* Brennan, *supra* note 79, at 174 ("[T]he Court has a concomitant need for the press, because through the press the Court receives the taeit and accumulated experience of the nation.").

183. Scholars, analyzing the performance of courts by identifying the reaction of powerful factions or institutions to judicial decisions, have suggested that these factions or institutions are willing to absorb certain deviations from their expectations, provided such deviations fall within a "zone of tolerance." *See* Jeremy Webber, *Institutional Dialogue Between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and Elsewhere), in* CONSTITUTIONAL JUSTICE EAST AND WEST: DEMOCRATIC LEGITIMACY AND CONSTITUTIONAL COURTS IN POST-COMMUNIST EUROPE IN A COMPARATIVE PERSPECTIVE 61 (Wojciech Sadurski ed., 2002); TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 68, 81-82, 92, 104 (2003). The concept of the "zone of tolerance" is based on the work of Walton Hamilton. *See, e.g.*, Walton Hamilton, *Institution, in* ENCYCLOPAEDIA OF THE SOCIAL SCIENCES vol. VIII, 84 (Edwin R. A. Seligman & Alvin Johnson eds., 1932); Walton H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1343 (1941).

they are concerned about how their decision may be perceived by members of the other meta-practices. There is therefore no easy way to describe (or prescribe) law's "closure" from or "openness" to its neighboring systems. The tension identified by Mishkin—and echoed by judges on numerous occasions[184]—is therefore enduring, and perhaps even not totally devoid of merit.[185]

While, as stated above, Mishkin was very much aware of the intersection of law with other practices—an intersection that radiates back to the law and affects the choices available to judges—Mishkin realized the paramount necessity of evaluating judicial performance for its adherence to principled reasoning.[186] This feature, for Mishkin, goes to the essence of the legal project. However Mishkin recognized that legitimacy is a complex notion and, if viewed from the perspective of a judge, there could be many occasions where obfuscating doctrine or legal principle might actually preserve public confidence in the courts.[187] By elevating doctrine

184. Without claiming to have completed a full survey of judicial writings off the bench, it appears that of the judges who published their lectures, essays or articles in law reviews or other scholarly fora, only few did not address the issue of public confidence (or a variation thereof) at least on one occasion. For a bibliography on judicial writings on judging (ending in 1993), see Shirley Abrahamson, Susan M. Fieber & Gabrielle Lessard, *Judges on Judging: A Bibliography*, 24 ST. MARY'S L.J. 995 (1993). Abrahamson herself is an example on point. *See* Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 995 (2001). *See also* Bruce M. Selya, *The Confidence Game: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909 (1996); Robert G. Flanders, *Chief Justice Weisberger: The Judicial Legacy*, 6 ROGER WILLIAMS U. L. REV. 451, 457-58 (2001). Judges often relate the issue of public confidence in the judiciary to the issue of judicial independence. *See, e.g.*, J. Clifford Wallace, *An Essay on Independence of the Judiciary: Independence from What and Why*, 58 N.Y.U. ANN. SURV. AM. L. 241 (2001); A.B.A., AN INDEPENDENT JUDICIARY: REPORT OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), *available at* www.abanet.org/govaffairs/judiciary/report.html. Matters of image are also prominent. *See* William H. Hastie, *Judicial Role and Judicial Image*, 121 U. PA. L. REV. 947 (1973). These concerns are not confined to constitutional issues. *See* Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 541 (1994) (claiming that "[a] rigid and unresponsive judiciary, blind to the needs of various communities and of society at large, is far more likely to cause an erosion of public confidence in legal institutions than a judiciary perceived as overly interested in resolving the problems before it"). For further insights, see the contributions in JUDGES ON JUDGING: VIEWS FROM THE BENCH (David M. O'Brien ed., 1997).

185. Clearly, it could very well be advisable that the tensions between the law and its neighboring systems be kept to a minimum; yet as long as law is a distinct system, and as long as this system is organized by our adherence to principled reasoning, the tension will not go away, if only because such principles are called to govern areas where social values are in dispute and where institutional considerations warrant against the explicit pronouncement of a "winning" value by the court. Some might even argue that, normatively speaking, this is a positive feature since it offers us, members of society, meta-practices from which to evaluate the law. The judicial craft, Mishkin taught us, is the art of being faithful to the modes of legal reasoning without losing sight of dialogue with neighboring practices. Trying to further analyze it would simply add words to that which words can hardly capture.

186. Mishkin, *Ambivalence*, *supra* note 18, at 907-909; Mishkin, *Soft Law*, *supra* note 45. *See also* Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963); Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

187. Mishkin, *Ambivalence*, *supra* note 18, at 929-931.

to the abstract, by merely asserting it without providing adequate reasoning, or by stating it in such a way that fails to meet the basic demands of rationality with the doctrine's own terms—and by other rhetorical tools[188]—the Court could be corresponding with the intersecting practices, and primarily with politicians and the media in such a way that allows it to offset some of the opposition its resolution of the case might attract. Vague, unstable, or otherwise conflicted doctrine may allow, on occasion, other meta-practices a way to reconcile the decision with their core elements.[189] Yet the pressures to blur legal reasoning should, argued Mishkin, be "cabined," given the danger they pose to the law's ability to retain its distinctive qualities. According to Mishkin,

> I am not so absolute or so unworldly as to say that results may not at times be a sufficient justification. Certainly, if the total security of the nation depended upon a particular Supreme Court result, I would not think the Court should be deterred from that result if it were unable to articulate at the time a satisfactory supporting principle. That is in one sense an essential element in successful government. But it is at the same time an exceedingly dangerous one. Unless cabined, it is an argument that will always justify desired social outcomes regardless of principled justifications.[190]

2. *Professional Community and Professional Legitimacy*

Mishkin's contribution gains further depth upon examination from within the law as a system. The meta-practice we call "law" is a site of intersecting practices.[191] Adjudication (a practice within law) is at the intersection of at least three sub-practices: lawyering, judging, and legal scholarship.[192]All three play important roles in establishing the legal

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188. CALABRESI, *supra* note 21, at 32, 42-44, 60, 116-17 (providing examples for decisions judges found too difficult to make and therefore obfuscated doctrine). For an insightful review, see Kathryn Abrams, *A Constitutional Law for the Age of Anxiety*, 73 CALIF. L. REV. 1643 (1985).

189. *See* Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1856-73 (1995).

190. Mishkin, *Ambivalence*, *supra* note 18 at 930.

191. In the common law world, adjudication and legislation—two distinct sub-practices—are recognized as normative sources that generate rules. Legislation itself is comprised of sub-practices: constitutional legislation, statutory legislation and subordinate legislation (by administrative agencies or local entities), and therefore a serious analysis of law requires analyzing each sub-practice separately, as well as analyzing the modes of communication between the sub-practice and other sub-practices. *Compare* G.A.C. GRANT, OUR COMMON LAW CONSTITUTION (1960) (analyzing the common-law roots of the Constitution and the use of common law methodology in expanding the Constitution) *with* Stanley L. Paulson, *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, 13 LAW & PHIL. 313, 342-44 (1994) (arguing that by not being sensitive to the different sub-practices that comprise the law, Fuller confused legal positivism and *statutory* legal positivism).

192. Kenneth F. Ripple, *The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237 (1989). *See also infra* notes 197, 214. This dialogue also attracts the attention of the press. *See, e.g.*, Adam Liptak, *A Liberal for Gun Rights Helps Sway Federal Judiciary*, N.Y. TIMES, May 6, 2007, at 1.

meaning of a case,[193] and generate confidence (or the lack thereof) in a decision or in the institution of law.[194] As is the case with the other systems discussed above, such "confidence" is sensitive to the values and symbols around which the roles of the different players are organized: performance that devalues a central professional value or disrespects a constitutive symbol thereof, stands to be viewed as failing to meet professional standards, and thus risks undermining an aspect of public confidence, namely the relevant social capital bestowed by members of the profession.[195]

The internal dynamics within the system are equally important. Often left unexplained by constitutional scholars, the relationship between the bar,[196] legal academia,[197] and *lower courts* play a crucial role in the

193. STANLEY FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETATIVE COMMUNITIES (1982); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399 (2002). Legal meaning may be unique, because legal meaning conveys also a set of instruetions; in law, words kill. *See* JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962); John R. Searle, *How Performatives Work*, 58 TENN. L. REV. 371 (1991).

194. Judges, lawyers, and academics all, in their own fashion, are in a position to bestow upon a decision—or the performance of the Court in general—the stamp of professional approval or disapproval. Some have analogized such approval or disapproval to the legitimacy conferred by the political proeesses. *See* Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 286 (1987) (referring to the "electorate of law"—that group of legal thinkers who participate in the evolution of law). While technieally speaking the legal authority of the nine sitting members of the Supreme Court is "independent," only under the most isolationist view of judging could one seriously argue that judges take no heed of approval or disapproval from the ranks of the legal profession. *Cf.* BAUM, *supra* note 29. For an interesting diseussion of the various roles judges and scholars play, see *Lawrence v. Texas*, 539 U.S. 558 (2003), as an example where the Court recognizes the reaction to its deeision. This, of course, is not to say that the academy governs, or that its role in the common law world is akin to its role in the civil-law world. *Cf.* Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM J. COMP. LAW 419, 428 (1966-1967). But neither would it be an accurate deseription of the law to ignore the intersection of the sub-practices and its effect on the development and application of the law.

195. As an anecdote, see Klarfeld v. United States, 962 F.2d 866 (9th Cir. 1992), in which the court rejected a petition to re-hear en bane a previous deeision reversing a dismissal of a suit brought by a lawyer who was made to take off his shoes and belt when entering a court house for failing to show a legal claim. In dissenting from the decision to refuse re-hearing, Judge Kozinski addressed the symbolic elements associated with the role of the lawyer in a courthouse (and the disrespect emanating from the request to enter the court house in socks), but found the eourt's reversal of the dismissal more troubling, as it would open the door for suits against the United States over matters that stand to belittle the judicial role. He also noted that "when a case rests on such a eatchpenny constitutional foundation it undermines public confidence in the court." *Id.* at 871.

196. *See, e.g.*, Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism*, 25 HOFSTRA L. REV. 703 (1997); Friedman, *supra* note 117.

197. *See, e.g.*, Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 296 (2000); Kenneth F. Ripple, *The Role of the Law Review in the Tradition of Judicial Scholarship*, 57 N.Y.U. ANN. SURV. AM. L. 429 (2000). For an earlier discussion, see Stanley H. Fuld, *A Judge Looks at the Law Reviews*, 28 N.Y.U. L. REV. 915 (1953); William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965); J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989); Dennis Archer, *The Importance of the*

operation of the law as a system and in regulating, "fencing in," or, in Mishkinian language, cabining, judicial discretion.[198] Appellate-court judges write not only to the "public" but also, if not primarily, to lawyers, to other judges (especially lower court judges), and to the academy.[199] These audiences are interactive in the sense that their assessment of judicial performance is part of the very structure of the law. For example, if lower court judges find the reasoning articulated by an appellate court as deeply[200] unprincipled it is not too farfetched to assume that (binding precedent notwithstanding)[201] the lower-court judges might distinguish their cases from the higher court's doctrine or attempt to read other Supreme Court cases as having amended the doctrine to avoid applying what they perceive as unprincipled reasoning.[202] While much has been

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Law Reviews to the Judiciary and the Bar, 1 DETROIT C. L. REV. 229 (1991); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). In this context, Justice Scalia's comments on the "homosexual agenda" subscribed to by the "law-profession culture" in *Lawrence v. Texas*, 539 U.S. 558, 602 (2003), are revealing, because Justice Scalia, a former scholar, blames the legal academy for doing precisely what it is there to do: conduct its business in a manner loyal to its constitutive values and core ethical precepts.

198. *See* Mishkin, *Ambivalence*, *supra* note 18, at 930.

199. Mikva, *supra* note 29. Uniquely, Judge Mikva suggests that the audiences are not constant, and that judges should define for themselves for whom they write a given case:

> Ask a group of judges for whom they write, and you will get at least as many answers as there are answerers. Some judges say they write for posterity; others say they write for the law school audiences to read and to teach; others say they write for the bar; some say they write for the parties; some get belligerent at the question. I took a survey of federal appellate judges some years ago, and received all of the above answers. I have tried to move a modest suggestion that judges ought to at least consider in advance of writing the makeup of the audience they seek to reach. That suggestion is perceived as a heretical idea: everybody knows for whom judges write, I am told, and in any event it ought to be the same audience in every case. My suggestion is perceived as an effort to diminish the worth of legal opinions by casting doubt on their efficacy.

Abner Mikva, *The Care and Feeding of the United States Constitution: The Intelligible Constitution*, 91 MICH. L. REV. 1131, 1134-35 (1993) (book review).

200. I do not suggest that lower court judges measure the performance of the Supreme Court for its *perfection*. As stated by Justice Marshall, neither "future litigants nor the lower courts will read our decision to require perfection." Mark Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1147 (1996). After all, any human institution, dealing with conflicting audiences, is unlikely to achieve perfection, even if we knew what perfection means. Yet at a certain point, the lack of an organizing theory or doctrine is bound to affect public confidence (the public here being the relevant community of lower court judges whose job it is to apply and effectuate the holdings of the Supreme Court's interpretation of the Constitution). *Compare* Vincent Blasi, Bakke *as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21 (1979) *with* Joseph Vinning, *Justice, Bureaucracy and Legal Method*, 80 MICH. L. REV. 248, 250-51 (1981).

201. It is interesting to note that federal judges in lower courts are also granted tenure with compensation. The Court noted that "[t]he guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and tbus promotes judicial individualism." *N. Pipeline Constr. Co.*, 458 U.S. at 60 n.10 (1982) (citing Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 713 (1979)).

202. For a glimpse on such a practice, see Roper v. Simmons, 543 U.S. 551 (2005). *See also* State v. Kennedy, 957 So. 2d 757, 779-91 (La. 2007), *petition for cert. filed*, 76 U.S.L.W. 3113 (U.S. Sept. 11, 2007) (No. 07-343) (holding capital punishment is not a disproportionate penalty for the rape of a child within the meaning of the Eighth Amendment, thereby distinguishing Coker v. Georgia, 433 U.S.

written about how the interaction or dialogue between the Supreme Court and the legislature constrains judicial discretion,[203] less attention has been paid to the internal dialogue that takes place within the judiciary and shapes the contours of the options available to the courts, including the Supreme Court.[204]

If judicial reasoning is an art, so is advocacy.[205] In fact, so is the travail of assessing both judicial reasoning and advocacy. Mishkin's scholarship is of such a high standard because he was able to capture the intersection from the perspective of all three sub-practices (namely lawyering, judging and scholarship). In his analysis of *Bakke*,[206] Mishkin argued in so many words that the legitimacy of the Supreme Court rests not only on the "general public"—a term this Article suggests is too amorphous—but also on the support it receives from the profession: other judges, lawyers and scholars. Mishkin, thus, put the Court on notice about the professional implication of the reasoning espoused in cases like *Bakke*, notwithstanding the decision's merit as measured by avoiding political pitfalls while delivering the advocates their coveted prize.[207] According to

584 (1977), which held that capital punishment for the rape of an adult woman violates the Eighth Amendment). *Compare* Gonzales v. Carhart, 127 S. Ct. 1610 (2007), *with* Stenberg v. Carhart, 530 U.S. 914 (2000).

203. Again, literature abounds, dating back to Thayer, who worried that imprudent and excessive use of judicial review might "lead to measures ending in the total overthrow of the independence of the judges." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 142 (1893). As one commentator notes, it was central for Thayer to promote public confidence in the judiciary. Jonathan R. Macey, *Thayer, Nagel and the Founder's Design: A Comment*, 88 NW. U. L. REV. 226, 230 (1993). Mishkin notes the possibility of legislative backlash were *Bakke* worded differently. Mishkin, *Ambivalence*, *supra* note 18, at 930, n.79. For a view that the countermajoriatarian dilemma and subsequent fear of legislative backlash have been exaggerated because dialogue exists, see Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993). For a recent analysis of judicial decisionmaking as seeking to avoid legislative backlash, see Tonja Jacobi, *Sharing the Love: The Political Power of Remedial Delay in Same-Sex Marriage Cases*, 15 LAW & SEXUALITY 11 (2006); Symposium, *The Legislative Backlash to Advances in Rights for Same-Sex Couples*, 40 TULSA L. REV 371 (2005).

204. *But see* THOMAS G. HASFORD & JAMES SPRIGGS, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT (2006); Tonja Jacobi & Emerson Tiller, *Legal Doctrine and Political Control*, 23 J.L. ECON. & ORG. 326 (2007).

205. *See, e.g.*, Brett G. Scharffs, *Law as Craft*, 54 VAND. L. REV. 2245 (2001).

206. Mishkin, *Ambivalence*, *supra* note 18, at 930.

207. As is well known, Mishkin argued the *Bakke* case for the University of California. While technically his arguments were rejected, the result of the case was such that universities were allowed to proceed with policies of affirmative action; despite the intellectual infirmity of the decision, its basic holding still stands. *See* Grutter v. Bollinger, 539 U.S. 306 (2003). In analyzing *Bakke*, Mishkin was very much the professional scholar, distancing himself from positions advocates would advance, without hiding his stance (legally and morally) on the merits. *Compare* Philip B. Kurland, *Harlan Fiske Stone: Pillar of the Law*, 70 HARV. L. REV. 1318 (1957) (book review) *and* LEARNED HAND, THE SPIRIT OF LIBERTY: PANELS AND ADDRESSES OF LEARNED HAND 98, 101 (Irving Dillard ed., Vintage Books 1959) (arguing that scholars should strip themselves from the one-sidedness of advocacy) *with* Jerold H. Israel, *Seven Habits of a Highly Effective Scholar*, 102 MICH. L. REV. 1701, 1712-1713 (2004) (concurring with Yale Kamisar that such is not human nature, at least with respect to things that matter).

my reading of Mishkin, the Court stands to lose professional support if it espouses unsound doctrines in an attempt to garner external support (or minimize popular and/or governmental opposition) for a controversial ruling.[208] While the Bar is far from monolithic—cause lawyers representing NGOs, government lawyers, corporate lawyers working in large law firms, solo practitioners dealing with personal injuries and other sections of the Bar may each have a unique angle—as *lawyers* the assumption is that they care about the rule of law (at least as a matter of professional identity or the ideal type thereof).[209] Popular but doctrinally unsound jurisprudence might (at the very least) reduce professional predictability, thereby preventing lawyers from being able to give sound legal advice. In the short run, such popular-support jurisprudence might be beneficial, but the lack of principle would ultimately lead to the erosion of professional confidence in judicial review. Public confidence, in that respect, will suffer.[210]

Some lawyers—those for whom the law is but an instrument—would not necessarily care. They will use whatever legal tools (coherent or incoherent) available to advance their cause. Others who aspire for unity between form and substance would find their job as consumers and custodians of the legal system difficult to fulfill. Those who view their profession as containing internal standards of excellence (beyond getting clients their preferred results)[211] might lose confidence if the courts act in

208. Mishkin, *Ambivalence*, *supra* note 18, at 928-30. A known example of trying to do the right thing but on shaky grounds is *Shelley v. Kramer*, 334 U.S. 1 (1948) (holding that judicial enforcement of racially restrictive covenants qualifies as state action within the meaning of the Fourteenth Amendment). While *Shelley*'s outcome is socially desirable, and probably sanctioned by the liberal members of the bar and the academy, its reasoning has caused a lot of consternation in the academy about the scope of the state action doctrine. *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451 (2007); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1697 (2d ed. 1990).

209. *See* Norman Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003). This is not to suggest that what "the rule of law" demands is clear; it does not possess talismanic features. However, legal reasoning allows lawyers to detach from their client's interests or, for that matter, from purely moral reasoning. *Cf.* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991). *See also* LoPucki, *Legal Culture*, *supra* note 69.

210. Once members of other professions (or people whose relation to the law is the relation of the citizen to the state) realize that the Court is acting as an institution which caters to result-oriented popular demands, the risk is that the Court will no longer enjoy the confidence the public entrusts with it *as a court of law*. *See* Fallon, *supra* note 17. For more on the role of the bar and its assessment of and influence on the performance of the Supreme Court, see BAUM, *supra* note 29. *See also* Kevin T. McGuire and Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda Setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993); RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995).

211. It would be tempting here to invoke the image of the lawyer as a statesperson. *See* ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993). Yet one need not subscribe to this view of the profession, neither to the view that lawyers serve as the high priests of (the capitalistic) democracy. GERARD W. GAWALT, THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (1984). Suffiee to say that the profession includes standards of excellence that rest, at least in part, on the commitment to principled reasoning, as defined by Mishkin.

an unprincipled manner. The clients, in turn, would distrust lawyers' ability to help them shape their behavior within the law, creating a perverse incentive to avoid seeking legal advice.[212]

In some cases—and *Bakke* may be one of them—the overall balance of legitimacy may still lie with the course chosen by the Court. But as a gatekeeper of the legal profession, I read Mishkin as withholding his support from this particular exercise of judicial discretion or from result-driven jurisprudence in general.[213] The role of scholars in assessing the performance of the Court is, under this vision,[214] distinct: scholars may understand and acknowledge all the variables that come into play as the Court seeks to balance between principled reasoning and expediency; they may even admit that under the circumstances—namely, under the pull from the various systems—the Court's course was the wisest. But, at the end of the day, Mishkin, in his own writings, exemplifies a scholar who withheld his support from decisions that cannot be reconciled with their own stated terms (even if *de facto* favorable to the cause for which he advocated as a lawyer).[215] The justification for such an approach, it seems to me, lies in

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212. Unprincipled decisions would create a perverse incentive because clients would be damned if they seek legal advice *ex ante* and damned if they do not. Cost-benefit analysis, therefore, dictates that clients should assume the risk of future liability rather than pay a legal cost that could not substantially reduce the risk of incurring future liability. *See* Jonathan R. Macey, *Judicial Preferences, Public Choice and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 642 (1994) (noting that legal precedents "lower the transaction costs of doing business." The predictability of the law through precedents enhances the importance of lawyers).

213. I read Mishkin as counseling against prospective ruling at least in part because providing the Court with such a flexible tool releases it from an important constraint in favor of expediency. Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 65-66 (1965) [hereinafter Mishkin, *The Great Writ*]. For a different perspective, see Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (With an Emphasis on the* Teague *Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994).

214. The writings on the role of scholarship in constitutional law abounds. *See, e.g.*, Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615 (1992); Meir Dan-Cohen, *Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience*, 63 U. COLO. L. REV. 569 (1992); Edward L. Rubin, *What Does Prescriptive Legal Scholarship Say and Who Is Listening to It: A Response to Professor Dan-Cohen*, 63 U. COLO. L. REV. 731 (1992); Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792 (1991); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradiction of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Mark V. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981).

215. Compare to the point made by David Shapiro, commenting on the work of Guido Calabresi:

> Calabresi suggests that judges may well reject his plea for candor because of the fundamental difference between the role of the scholar and the role of the adjudicator. The scholar's obligation is to '*think*, lucidly and openly,' about the issues; the judge must *act* in a manner sensitive to political and other realities and thus may opt for something less, or at least different.

David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987) (examining GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 181-82 (1982)). Mishkin took that analysis a

the recognition that the academy itself is bound to *its* institutional role and constitutive elements, such as the search for coherency in the law.[216] Moreover, from an instrumental perspective, by withholding support, scholars—especially of the stature of Mishkin—may use their professional capital to balance the political and economic forces that often pull the Court (and its jurisprudence) towards expediency and away from treating law with integrity.[217]

3. *Form and Style*

Mishkin's careful analysis of doctrine highlights another important aspect of the dialogue between the Court, academy, bar, and external intersecting practices: appreciating that which the Court *did not* say. The art of judicial reasoning covers not only that which is said, but also that which is left unsaid.[218] Faced by the requirement to provide full reasoning

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step further. He recognized its validity, yet *because* of its validity he refused to act as a judge, and remained the thinking scholar.

216. Literature regarding the role of legal scholarship is voluminous. See, for example, the symposia published in 90 YALE L.J. 955 (1981) and 33 J. LEGAL EDUC. 403 (1983). Similarly, Richard Fallon has stated that "[a]dvocacy scholarship, written to show judges a clear path to a preferred outcome, has its place in the academy, but that place is only secondary. Exposure of conflict and uncertainty is often a way station to the deeper understanding that should be scholarship's ultimate goal." Fallon, *supra* note 75, at 96 n.45 (emphasis added). Others have stated the purpose slightly differently: "The main purpose of constitutional scholarship according to the learned tradition is to evaluate the Supreme Court's performance . . . [and] to carry on a learned conversation with the Supreme Court, in order to help the Court correct past errors . . ." Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 496, 498 (1989). *See also* Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1 (1986); Tushnet, *supra* note 214.

217. The question of the proper use of the academy's professional capital is not an easy question. For an interesting perspective, see David R. Barnhize, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127 (1988). Recently, the issue has come up regarding the proper reaction to *Bush v. Gore*—an ad signed by professors and published in national newspapers accused the Court of playing politics—and prior to that, regarding the illegality of Clinton's impeachment. For discussions on the latter, see RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 241-42 (1999); Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999); Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 195 (1999); Ward Farnsworth, *Talking out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals*, 81 B.U. L. REV. 13, 14, 30-41 (2001); Michael J. Gerhardt, *Impeachment Defanged and Other Institutional Ramifications of the Clinton Scandals*, 60 MD. L. REV. 59, 93-95 (2001); Stephen M. Griffin, *Scholars and Public Debates: A Reply to Devins and Farnsworth*, 82 B.U. L. REV. 227 (2002); Ward Farnsworth, *More Tales out of School: A Reply to Professor Griffin*, 82 B.U. L. REV. 281 (2002); Neal Devins, *Misunderstood*, 82 B.U. L. REV. 293 (2002).

218. "Personally, I think that judges will serve the public interest better if they keep quiet about their legislative function . . . The judge who shows his hand, who advertises what he is about, may indeed show that his is a strong spirit, unfettered by the past; but I doubt very much whether he is not doing some harm to general confidence in the law as a constant, safe in the hands of the judges, than he is doing good to the law's credit as a set of rules nicely attuned as the sentiment of the day." Viscount Radcliffe, NOT IN FEATHER BEDS 271 (1968); *but see* Aharon Barak, *The Role of the Supreme Court in a Democracy*, 53 HASTINGS L.J. 1205 (2002). *Compare* David McGowan, *Judicial Writing and the*

for their decisions and the requirement to avoid considerations that cannot be articulated in legal language, judges may find themselves in an "ambivalent" position regarding what to say and what to keep to themselves. For example, assume that a Supreme Court Justice is convinced that the position of the Court—or, for that matter, of the dissent—would undermine public confidence in the judiciary; should he or she explicitly call attention to that fact?[219] Or consider the matter of political timing. Clearly judges may not refer to the fact that a certain year is an election year as the basis for their decision to refrain from hearing a certain case, even though that fact might have played a role in their decision.[220] Fortunately (or unfortunately), such decisions do not require written reasoning, so judges may remain mum about the actual reasons behind their decision. If at stake is not the decision whether to grant certiorari, but whether (or not) the time is ripe for overruling a precedent some judges find erroneous, such "shelter" from reasoning is unavailable and the question of addressing the political context in its entirety is put before the Court in starker terms. While members of the profession would find it difficult to believe that political timing plays no role at all in judicial decision-making, the Court stands to lose public confidence—including the

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Ethics of the Judicial Office, 14 GEO. J. LEGAL ETHICS 509 (2001). *See also* ROBERT STEVENS, THE ENGLISH JUDGES: THEIR ROLE IN THE CHANGING CONSTITUTION (2005). The matter is sometimes raised regarding the proper judicial tone. Some argue that judges should not "descend" to the uncivilized world of vitriolic accusations but should rather maintain a "moderate and restrained voice." Ginsburg, *Judicial Voice*, *supra* note 88, at 1186. As stated by Justice Frankfurter:

> The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.

Offutt v. United States, 348 U.S. 11, 14 (1954). In a broader context, see also Geoffrey Hazard, *Securing Courtroom Decorum*, 80 YALE L.J. 433 (1971).

219. Bush v. Gore, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting) (arguing that split decisions "run the risk of undermining the public's confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. We run no risk of return to the days when a President (responding to this Court's efforts to protect the Cherokee Indians) might have said, 'John Marshall has made his decision, now let him enforce it!' But we risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.") (internal quotations omitted). *But see* Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 57 (2000) (criticizing the dissent for voicing such concerns because of their self-fulfilling tendencies).

220. The political timing of a decision is an illegitimate consideration from a legal point of view because the stated terms of constitutional adjudication postulate that constitutionally protected rights may be infringed upon only for the protection of other rights or to meet overriding public interests. Minimizing the negative political reaction to a judicial decision—for example, a reaction by one political faction that may use the decision in order to galvanize its political base by besmearing the Court—is arguably not in a relevant "public interest" within the legal meaning of this term. Moreover, the concept of rights presupposes an impartial and independent court for their enforcement. Such consideration of the political timing implies otherwise. *But see* Naim v. Naim, 350 U.S. 891 (1955).

support of members of the profession—if it discards the symbol of professional reasoning detached from political vagrancies by publicly addressing matters that belong to the political sphere.[221] Form and associated symbols therefore matter, because they inform practitioners and their audience—including the audience internal to the practice—that a player is acting in his or her institutional capacity and is therefore limited to the forms of action that fit the structure and framework of the role. Disregarding institutional symbols,[222] or misusing them,[223] risks, among other things,[224] chaffing the veil that differentiates between the office and the individual holding the office, as well as between law and the neighboring systems.[225]

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221. A similar analysis applies to judicial speech off the bench. *See* Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147 (2004). *See also* DAVIS, *supra* note 84; Symposium, *The Sound of the Gavel: Perspectives on Judicial Speech*, 28 LOY. L.A. L. REV. 795, 795-869 (1995); Michael Richard Dimino, Sr., *Counter-Majoritarian Power and Judges' Political Speech*, 58 FLA. L. REV. 53 (2006).

222. In arguing against prospective application of precedent, Mishkin stated:

> But far more significant, even the recognition of a need affirmatively to justify retroactivity [rather than retroactivity being the norm] and certainly the announcement that 'the rule adopted today is to be effective only from this date forward' are inconsistent with the basic symbolic view of the judicial process. Prospective lawmaking is generally equated with legislation. Indeed, the conscious confrontation of the question of an effective date—even if only in the form of providing explicit affirmative justification for retroactive operation—smacks of the legislative process; for it is ordinarily taken for granted (particularly under the Blackstonian symbolic conception) that judicial decisions operate with inevitable retroactive effect.

Mishkin, *The Great Writ*, *supra* note 213. For rebuttal, see Herman Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966).

223. "We are somewhat more troubled by petitioner's argument that the Judiciary's entanglement in the political work of the Commission undermines public confidence in the disinterestedness of the Judicial Branch. While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." Mistretta v. U.S, 488 U.S. 361, 407 (1989). The Court there ultimately was satisfied that there was no misuse of institutional symbols, because "the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch." *Id.*

224. For an analysis of other aspects of the tension between symbols and values in a comparative perspective, see Jeremy Webber, *Constitutional Poetry: The Tension between Symbolic and Functional Aims in Constitutional Reform*, 21 SYDNEY L. REV. 260 (1999).

225. System theory is sensitive to the various capacities or roles preformed by individuals as they interact with others within the system or with others in neighboring systems. Cases such as *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), raise the concern that judges will interact—or will be perceived as interacting—with others within the systems as if governed by the desire to repay political or financial debts. Such a behavior may fit with norms of other systems—such as the Market—but cannot be reconciled with the behavior of a judge in the system of law, whose role it is to act impartially. Allowing judges to serve as members of policy-making commissions raises the risk of chaffing the veil between two different offices—that of a politician and that of a judge. Regulating access of judges to such offices therefore influences the degree of openness (or closure) of the legal system. The Court eventually decided that since the subject matter of the commission in *Mistretta v. United States*, 488 U.S. 361, 407 (1989), was internal—developing sentencing guidelines—the risk of chaff was minimal.

In the terminology of this Article, the manners of speech and manners of silence are part of the mechanisms that regulate the communication of law with the "external" world and are also central to the forms of communication internal to law. They are part of the "membrane" that controls the flow of information and norms into the law and from the law to the neighboring systems, thereby maintaining its cognitive openness and securing its operative closure, features that are central to law's ability to manage social conflicts over values and goods.[226] The manners of speech and silence also play an important part in maintaining law's internal discursive logic. Insisting on the articulation of a principled doctrine, then, constrains judges precisely because some justifications are beyond the permissible justifications for a court of law adjudicating constitutional cases, or are otherwise difficult to reconcile with professional standards of consistency and coherence and with past holdings or the key structural elements of the constitutional system.[227] In such situations a judge mindful of the need to retain public confidence is faced with a choice: either search for other, more acceptable, justifications or modify the doctrine so that it comports with the demands of legal justifiability.[228]

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226. As Martin Shapiro noted, courts, and especially supreme courts, pay special attention to maintaining the detachments from the parties and their social agendas, lest they lose their triadic stature that allows them to elicit the necessary acquiescence from the rivaling parties. *See* Shapiro, *supra* note 6. Moreover, conflicts about "fundamental values" are difficult to manage not only because the Court lacks direct access to the masses or because the values themselves are hard to reeoncile (and therefore present "tragic choices." *See* Guido Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 428-30 (1979)). Such conflicts present a difficult challenge primarily because neighboring systems approach such conflicts through their own lenses, and the Supreme Court, as a legal institution, risks eroding the boundaries of the system of which it is a part if it invokes its legal authority through terminology over which the neighboring systems hold authority no less commanding than legal authority. Silence in such circumstances is a tool for maintaining the distinct nature of legal discourse. This has special force when the social issues are hotly disputed within the neighboring systems, and a judicial rhetoric may be seen by these systems as "taking sides" in a "non-legal" matter, namely a matter that falls within their domain. Such "taking sides" risks debasing the triad structure which elevates the Court from the fray.

227. Patricia M. Ward, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality under Challenge?*, 42 MD. L. REV. 766, 768 (1983) (arguing that "courts' opinions should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges"). In the context of *Bakke,* see Calabresi, *supra* note 226; Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 236-41 (1968).

228. To describe that phenomenon, scholars some time resorted to the metaphor of garb: "To win acceptance, the opinion had to wear traditional dress." Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 730 (1961). While dealing with conflict of laws, the analysis is illuminating regarding the role of judges and scholars. *See also* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÉCLE (1997) (explaining that while judges have ideological preferences, some legal arguments are easier to make than others, and judges, who realize that their work is being reviewed (at least by the profession) may avoid the path of greater resistance, or at least may chose that path only when the more acceptably path leads to results (or doctrines) too at odds with their values). *See also* FRANK COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1981). In reviewing the book, Paul B. Stephan addresses this matter:

Some might argue that form and institutional symbols raise issues of judicial candor.[229] Mishkin might reply allegorically by stating that an architect is not necessarily bound to place all the weight of a structure on the elaborate arch adorning the building; it could be assumed that some weight is held by structures hidden beyond the external edifice. At the same time, if the external edifice is merely a sham—just a decoration—it will be exposed as such and might lead to a loss of faith in the integrity of the building.[230] In other words, for Mishkin, symbols associated with the judicial role—such certain language, and correspondingly certain silence—were not merely decorative.

In his own scholarly writings and teaching, Mishkin has displayed equal care regarding the balance of voice and silence. Not only has he been painstakingly thorough in analyzing the stated terms of the cases—thus avoiding imposing his own normative theories on reality[231]—he often realized that exposing the various "layers" may detract from the Court's institutional capital. In order to avoid doing so, silence was sometime the most appropriate response. For Mishkin, meticulous awareness to language and aesthetics was not merely a matter of style. Noting the interplay between that which was (carefully) said and that which remained unsaid is central to understanding Mishkin's contribution, as it is central in peeling

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> At a minimum, [a judge] must write an opinion he can deliver with a straight face, and if he cares about the enduring impact of his decision he must do much better. If a judge wishes to obtain the respect and admiration of his colleagues, including law students and teachers as well as other judges and practicing members of the bar, he must set high standards for himself and refuse to make decisions that result in opinions that fall short of those standards.

Paul B. Stephen, Book Review, 67 VA. L. REV. 1447, 1449 (1981).

229. *See generally* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995); Shapiro, *supra* note 215; Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989); William V. Luneburg, *Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 48 U. PITT. L. REV. 757 (1987); Chad M. Oldfather, *Remedying Judicial Inactivism: Opinion as Informational Regulation*, 56 FLA. L. REV. 743 (2006). For an interesting perspective from the bench, sce *In re* Williams, 156 F.3d 86, 91-92 (1st Cir. 1998) ("If chastened attorneys can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment on attorney performance, trial judges are more likely to refrain from speaking and writing candidly. In our view, this chilling effect carries with it risks that are far greater than those associated with the evil of occasional overheated judicial commentary. Judicial candor is a trait strongly valued, both generally and in the sanctions context, and discouraging it will serve only to erode public confidence in the courts.").

230. *See* Turruella, *supra* note 16. Judge Turruella was addressing thc undue pressures placed on judges by politicians, but his statement about the importance of appearances goes beyond congressional pressures and applies also to the tools available for judges in their reasoning. In the eontext of recusal, see also *Liteky v. United States*, 510 U.S. 540, 548 (1994) (Scalia, J.) ("[W]hat matters is not the reality of bias or prejudice but its appearance."). *See also* Baker v. Carr, 369 U.S. 186, 204-08 (1962).

231. *C.f.* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 906-7 (1970) ("[If he] is to make good the boast that its legal rules are hammered out on the anvil of reality, then the common-law scholar, unlike his civil-law counterpart, must derive his unifying principles from the case law instead of imposing them upon it.").

the different layers of a case. Paying attention to the options *not* taken reveals the different gravitational forces stemming from the neighboring systems and uncovers the options realistically available to judges—and scholars—in light of precedents and similar internal demands.

If one was inclined to draw graphs, one could probably develop a kind of a "general theory of relativity" that explains the developments of legal doctrine based on the trajectory of the formal legal analysis and its intersection with the different gravitational pulls from the neighboring practices. The point of the exercise, however, would not necessarily be to predict future cases, but to understand how the Court operates. Put differently, unpeeling the case by searching for the different pulls generated by the different intersecting systems allows us to reassemble its layers by understanding the different options available to the Court with respect to each of the layers. Having reconstructed the case, the options not pursued and the reasons why they were not pursued remain the unarticulated scaffolding without which it is difficult to understand the articulated reasoning (and the resolution of the case) but which are nonetheless just that: unarticulated scaffolding.

CONCLUSION
PUBLIC PERCEPTION

This Article suggests that the notion of "public confidence" is more complex than the ordinary or conventional notion of "the opinion of the general public" on a given issue. It also suggests that legitimacy is such a complex notion because each social system offers a distinct analytical framework from which we can examine judicial legitimacy and often produces different interpretations of legitimacy. The performance of the courts could thus be evaluated through different lenses, informed by different ideal types of the various meta-practices. The dilemma Mishkin identified arises because several practices converge at the social "site" we call constitutional adjudication, and the legal "events" that site generates are also events in intersecting practices. Thus, the relevant interpretative communities within which the Court operates generate different pushes and pulls. The judiciary, therefore, is caught between the commitment to standards of legal professionalism and the commitment to perform as a political institution (broadly defined) whose products and pronouncements are adapted into the language of other systems and evaluated according to their core values. The communication between the courts and the different social systems is thus likely to implicitly or explicitly affect the judicial product.

Perhaps what was unique about the historical era addressed by Mishkin and his colleagues was that it was the legal profession—or a segment thereof—that demanded that the courts partake in social change,

in part to redeem constitutional law from past wrongs and in part to realize its promise. Professional legitimacy—at the time of *Brown*, *Loving*, *Bakke*, and *Nixon*—included the demand for substantive justice, not only the demand for coherency and consistency. Lawyers, judges, and academics—or at least, some of them—saw their role—or at least parts of it—as transformative. Aware of the realist understanding that "it only takes five votes", progressive segments of the profession pushed for change.[232] As the Rehnquist Court transformed the agenda of the federal judiciary by emphasizing the role of the states and by deemphasizing the role federal judges should play as agents (or sites) of reform, our contemporary context is different. Yet the issues addressed by Mishkin, such as affirmative action, remain and demand our continuous scholarly attention.[233] Moreover, as the twenty-first century brings its own challenges—perhaps relating to the relationship between the executive and the legislature or between the international community and the domestic legal system—the lessons learned from Mishkin's careful approach to law (and to its neighboring systems) do not lose their force.

As an exercise of multilayered communication, the work of Mishkin & Co.,[234] resembles, rather clearly, the Talmudic toil of taking a ruling and examining it from nearly all possible angles, contrasting it to other cases and looking for the different connecting patterns. And then searching for an argument to the contrary. Once completed—if such an exercise can be completed—another immediately begins: how, and what, to actually spell out. At the end of the day, one need not forget the old Talmudic lesson: do not hone your arguments too sharply, for if you do the devil may spin them against you and cut your tongue.

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232. *See* Tushnet, *supra* note 118. It should be stressed that the organized profession—the American Bar Association—was critical of these transformative efforts. However, given the active involvement of lawyers in the "civil rights revolution" of the late 1950s and 1960s, these times were somewhat different from the New Deal transformative pressures, which emanated primarily from the politieal braneh es (and elites) against the dominant paradigms of the legal profession. SHAMIR, *supra* note 210.

233. For a recent nuanced analysis, sensitive to the interplay between law and its neighboring systems, see Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

234. By that I mean the relatively small and highly sophisticated cadre of lawyers (judges, litigants, and scholars) who oeeupied themselves with the intricacies of the federal courts and the federal system between the 1930s and the 1990s. Though periodizations are always contestable, the era referred to here begins with the teachings of Justice Felix Frankfurter (himself a disciple of Justice Oliver Wendell Holmes, but, it is submitted, with a sufficient twist to distinguish his approaeh) and ends with the publication of the 4th edition of HART AND WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM. While retaining much of the spirit (and certainly expanding and updating the reader) the 4th edition nonetheless deleted key features of the study of federalism, such as Hart's famous dialogue, and therefore marks the end of an era.