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Supreme Court bound: An introduction concerning the intrinsic subjectivity of Supreme Court decision-making

Abstract

There are many theories behind Supreme Court decision-making that are primarily descriptive or normative. Descriptive theories attempt a hermetic explanation that sufficiently applies to all past decisions, and normative theories seek to create a rubric or method, also dependable, for how the justices of the Supreme Court should make decisions. Normative theories can be highly porous and problematic because they involve metaethical concerns like defining “the good.” Essentially, we must try to make “good” decisions all the time, but that ignores the problem of what “good” really means. The design of this essay is such that we will not deal with whether or not the Court maintains philosophical consistency through analyses of what makes an act good. The important point concerning normative decision-making is that justices, and various other scholars alike, feel that there is an objective good that can be reached through erudition. The “objective good” is, in fact, jurisprudence. Yet, again, we have not solved the metaethical problems, for no clear definition of “the good” in law actually exists. Many believe that the only way to maintain proper jurisprudential behavior is to “uphold the letter of the law.” Though ‘upholding the letter of the law’ sounds perfectly noble and acceptable and concurrent with jurisprudence, the expression is an illusion. It represents a notion or idea of propriety, by claiming to be tangible and practicable, but it unfortunately fails to produce dependable methodology for decision-making. To assume that such a method is possible is to impose a burden on the justices of principled and perfect propriety. It assumes that, if the justices can follow this guideline, they shall never falter in establishing strong jurisprudence. This aligns with many normative theories of judicial decision-making that assume that Supreme Court justices can make absolutely rational decisions. Since many normative theories rely on metaethical dilemmas that produce even more questions and ambiguities, understanding that Supreme Court justices make decisions through bounded/subjective rationality, not absolute/objective rationality is fundamental. Considering the bounded rationality framework, the Court is not perfectly or absolutely rational, and thus must rely on other tools to make legitimate decisions. One way the Court, and other scholars alike, can enhance a particular normative theory is by looking to accurate descriptive theories about the short-term and long-term effects of past decisions. Ultimately, there is a co-dependency and reciprocity in any erudite theory of decision-making, whether descriptive or normative. If one claims that historically the Court makes preferential decisions, that is decisions that rely on choice and discretion rather than precedent (Spaeth and Segal 1999), he can then ask if whether or not such decision-making has worked or failed, and in what context, such as legal or political. If preferential decisions are desirable—like Ronald Dworkin who contends that the Supreme Court must adapt constantly to reach the “best possible” decision—then one can say that the Court should make decisions preferentially. The two areas of decision-making theory are not necessarily connected, meaning the association is not a priori, but they do, in fact, benefit each other. This thesis will not focus on either approach definitively, because without conjoining both theoretical fields, one risks myopic results. The theories it discusses are the Supreme Court as republican schoolmaster, which is both descriptive and normative, and judicial realism, which is primarily descriptive, but still has proponents for its normative application.

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AN INTRODUCTION CONCERNING THE INTRINSIC SUBJECTIVITY OF SUPREME COURT
DECISION-MAKING

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Science

**THE SUPREME COURT:
The "Schoolmaster" Metaphor, Judicial Realism, Legitimacy, and Public
Attentiveness: Theory, Practice, and Efficacy**

Introduction:

There are many theories behind Supreme Court decision-making that are primarily descriptive or normative. Descriptive theories attempt a hermetic explanation that sufficiently applies to all past decisions, and normative theories seek to create a rubric or method, also dependable, for how the justices of the Supreme Court *should* make decisions. Normative theories can be highly porous and problematic because they involve metaethical concerns like defining "the good." Essentially, we must try to make "good" decisions all the time, but that ignores the problem of what "good" really means. The design of this essay is such that we will not deal with whether or not the Court maintains philosophical consistency through analyses of what makes an act good. The important point concerning normative decision-making is that justices, and various other scholars alike, feel that there is an objective good that can be reached through erudition. The "objective good" is, in fact, jurisprudence. Yet, again, we have not solved the metaethical problems, for no clear definition of "the good" in law actually exists. Many believe that the only way to maintain proper jurisprudential behavior is to "uphold the letter of the law." Though 'upholding the letter of the law' sounds perfectly noble and acceptable and concurrent with jurisprudence, the expression is an illusion. It represents a notion or idea of propriety, by claiming to be tangible and practicable, but it unfortunately fails to produce dependable methodology for decision-making. To assume that such a method is possible is to impose a burden on the justices of principled and perfect propriety. It assumes that, if the justices can follow this guideline, they shall never falter in establishing strong jurisprudence. This aligns with many normative theories of judicial decision-making that

assume that Supreme Court justices can make absolutely rational decisions. Since many normative theories rely on metaethical dilemmas that produce even more questions and ambiguities, understanding that Supreme Court justices make decisions through bounded/subjective rationality, not absolute/objective rationality is fundamental. Considering the bounded rationality framework, the Court is not perfectly or absolutely rational, and thus must rely on other tools to make legitimate decisions. One way the Court, and other scholars alike, can enhance a particular normative theory is by looking to accurate descriptive theories about the short-term and long-term effects of past decisions. Ultimately, there is a co-dependency and reciprocity in any erudite theory of decision-making, whether descriptive or normative. If one claims that historically the Court makes preferential decisions, that is decisions that rely on choice and discretion rather than precedent (Spaeth and Segal 1999), he can then ask if whether or not such decision-making has worked or failed, and in what context, such as legal or political. If preferential decisions are desirable—like Ronald Dworkin who contends that the Supreme Court must adapt constantly to reach the “best possible” decision—then one can say that the Court *should* make decisions preferentially. The two areas of decision-making theory are not necessarily connected, meaning the association is not a *priori*, but they do, in fact, benefit each other. This thesis will not focus on either approach definitively, because without conjoining both theoretical fields, one risks myopic results. The theories it discusses are *the Supreme Court as republican schoolmaster*, which is both descriptive and normative, and *judicial realism*, which is primarily descriptive, but still has proponents for its normative application.

The notion that the Supreme Court acts, or should act, as “republican schoolmaster,” is akin to the notion of judicial realism, for ‘schoolmaster’ personifies the Court, which is both an institution and a collection of

individuals, and judicial realism reveals that each justice is, above all, a "normal" human being. Judicial realism also deals with the Court as an institution, for, it must account for individual judicial behavior in the setting of a collective court that must constantly handle internal and external legal and political pressure. Therefore, these two theories compliment each other, and we shall see that "republican schoolmaster" is a role the Supreme Court either does, or ought to, play and that the efficacy of such a role is affected by whether or not the Court makes *realist* decisions.

This essay is organized into three parts: *Part I: Creating and maintaining legitimacy*, *Part II: The freedom of speech: pivotal cases and some effects of those decisions*, and *Part III: Efficacy: Can the Supreme Court assume the role of schoolmaster?* The first part demonstrates the Supreme Court's role as schoolmaster. Effectively, the idea behind the "schoolmaster" proposition is that the Supreme Court is seen as "teacher" and the collective American public as its subjects. The most important point here is that the justices are human beings entrenched in a deeply political and legal institution. They must deal with many influences while making decisions, such as their own preferences and the preferences of others. In this framework, the Court achieves the intimacy of "schoolmaster." As human beings, we are more likely to trust others who demonstrate that they share the same qualities we do, even if those qualities have different magnitudes. Justices are thus innately fallible because they are human; to assume that any justice could adhere absolutely to a certain normative principle, assumes both that the principle is perfect and that a human being can reach perfection. Both are idealistic. Humanity, defined provisionally as the quality of being human, limits one's subjectivity and cannot be ignored, because, no matter how diligently an individual self-governs, the conditions of his humanity are inescapable. Since the justices are human beings, rooted

in their own subjectivity, the struggle for establishing legitimacy endures. For instance, consider the relationship between the Court's use of judicial review and the fact that it can only make subjective decisions. This means that the Court, without the ability to be objectively rational, has the power to change precedent and to determine the merits of the law. As judicial review is the main source of the Court's power, and since the justices cannot be perfectly objective, they must temper the use of such power subjectively so as not be viewed as illegitimate. The last section of *Part I* is a brief overview of *Marbury v. Madison*, in which John Marshall lays the groundwork for judicial review. Judicial review is the mechanism that provides the Court with the ability to overrule past decisions and strike down unconstitutional governmental legislative or administrative acts. It is crucial when discerning the Court's legitimacy, for it is an endowment of power that, if abused, could damage the Court's legitimacy greatly. When, how, and with what frequency the Court uses judicial review can be seen through changes in the Court's agenda. Therefore, this essay includes a brief overview of that agenda during the twentieth century. Evidently, the Court changes its agenda to adapt to the saltation of the public's growing needs.

Part II explains some pivotal cases in the freedom of speech: *Masses Publishing Co. v. Patten* (1917), *Schenck v. United States* (1919), *Debs v. United States* (1919), *Abrams v. United States* (1919), *Gitlow v. New York* (1925). Since the freedom of speech is seen as one of our most fundamental rights, and because it is a fitting medium for studying how justices reconcile their own human subjectivity with attempting to create objectively good legal doctrine, it is the primary focus of this document. Ultimately, speech, in any form, is subject to intense scrutiny and interpretation; thereby, making it inexact even when it is most clear. Essentially, the justices of the Supreme Court must develop stable precedent in an unstable

arena; the result is that the Court must bear a heavy burden of creating legitimate law in the face of their own inescapable subjectivity. One of the main limitations to objectivity is the need for the Court to make decisions that are politically acceptable. Since all five decisions were handed down between 1917 and 1925 the justices had to handle both, the constitutional elements of each case and the public's reaction. When the country is involved in world war, and while tensions are amounting to the threat of revolution, the Court's ability to be objective is even more limited as they must consider the overly broad context of national security during "wartime." Its job becomes more complicated and its decisions will likely make a greater impact. Each case deals with sedition or political dissent; therefore, this document includes a brief synopsis explaining why the Court may have been unduly constricted by political acceptability. The cases reviewed in this section show how the Court's imperfection, the human subjectivity of the justices, could be the source of its aptitude as republican schoolmaster, and not merely a reason to disregard its limited objectivity.

Part III, finally, discusses whether or not the Supreme Court can be an effective schoolmaster. Its primary focus is on the audience: the public and esoteric communities such as lawyers and lower courts. Ultimately, though it lacks the capacity for objective rationality, the Court still teaches the public republicanism. Its role is similar to any teacher's in that it is rooted in trust and legitimacy and subjectivity. Audiences are typically willing to forgive even appalling decisions as long as the Court continues to demonstrate a desire for political acceptability. To be sure, even myopic decisions like *Dred Scott* (Scott v. Sanford 1856) are considered politically acceptable: upholding fugitive slavery does not appall a slave nation (Kennedy 1998, 17). In the course of this essay we will become well acquainted with many of the significant limitations on the Court's

objectivity and shall therefore come to realize how important it is for it to maintain legitimacy.

**PART I:
Creating and Maintaining Legitimacy**

The Schoolmaster Metaphor:

The role of republican schoolmaster is characterized by teaching the Constitution to the American public. In this particular role, the Supreme Court, and society in general, would certainly benefit from objective knowledge. Teacher and audience alike find comfort in the apparent objectivity of the teacher's message. Only, this is not a luxury the Supreme Court is afforded, for it cannot make objective decisions. Hence, the Court's obvious subjectivity. Every opinion handed down from the justices is mired in subjectivity, laden with constrictive elements that prevent any absolute truth from being reached. A comprehensive list of all the factors that contribute to the subjectivity of Supreme Court decisions would be impossible to draft. The several mentioned in this document are mentioned above. Essentially, the dynamic of the schoolmaster metaphor is that the Court must have a *voice* and an object or audience. The Constitution is its voice because it is the vehicle for all judicial decisions, as well as the source of the Court's legitimate mandate. The audience is the object and interpreter, and, for any voice to have necessary force, it must be interpreted. Superficially, the dynamic seems simple, but add to its placid appearance the subjectivity of the Constitution itself and the subjectivity of each interpretation of the Constitution by the Court and, further, each interpretation of the Court's interpretations. If we hark back to the founding of the US, we can see that the Founding Fathers also had their own voice and object. Today's courts and societies are the object/interpreters of the Founding Fathers' voice. This is only a surface-deep acknowledgement, but it helps to show that the desire for objectivity may be a futile one.

It is also the purpose of this essay to conclude that Supreme Court decision-making is inherently flawed, fallible, imperfect, and limited, and that such subjectivity is both inevitable and necessary. We will see certain absolute/objective positions diminish in their capacity to deal with an evolving public, and how "old" boundaries and justifications no longer have the weight of legitimacy. In these cases, the justices craft new doctrine, supported with new justifications and reasons, and therefore begin to establish new boundaries in a preceding issue. This is at the heart of the conception of the Court's role as republican schoolmaster. If all previous doctrines were absolutely true, they would not need to be altered to adapt to a new society, but, as we can imagine, no doctrine is absolutely true and many must be changed in the name of Constitutionality. Indeed, even "what is Constitutional," changes as history progresses and new societies interpret an old document. Therefore, when the Court makes new law that is intended to become "the law," it is extremely important for it to create practicable doctrine in the face of a practically infinite amount of limitations. When the justices draw new Constitutional lines, they must then teach us why and how they did so. This helps to characterize the Court as schoolmaster. History has shown that there is not only a need for such leadership in the relationship between the government and the people, but that the only branch of government that has proven its ability to assume such a role is the Supreme Court. For instance, Walter Berns says that the office of President "has been democratized, so that presidents, like the typical legislator, see themselves as servants rather than as teachers or the people" (Berns 1998, 7). Berns continues:

Or, like the first Roosevelt, they view the office as a "bully pulpit," it is only because it allows them to preach partisan sermons. No one objects, or no one except political scientist Jeffery Tulis who points out that the Framers say the office is above partisan politics and that, as late as 1840, a president was censured for delivering partisan speeches (Berns 1998, 7).

As Tulis reports, the days of censuring partisan speeches is a vestige of the nobility in the Framers' vision of what the executive was to be and to represent. In the past century and a half, since partisanism is growing in prominence, the Supreme Court appears to be the most capable in teaching republicanism. Though, the Court may in fact be capable, even in a limited way, there are surrounding questions like, do they succeed in teaching the Constitution, should they teach the Constitution, and why should it matter if they attempt to teach or not? Ralph Lerner acknowledges:

That judges are empowered to decide certain cases and controversies, not to serve as a "propagandist, haranguer, or part-time philosopher...[A] thoughtful judge, reflecting on the close connection between judicial power and public opinion, might have reason to wonder whether the judge's task narrowly conceived is adequately conceived" (Berns 1998, 7).

The narrow conception Lerner refers is of a judge's duty to decide cases and controversies while upholding and protecting the Constitution. They are also supposed to safeguard individuals' rights from those who make designs against them (Berns 1998, 7). Taking into consideration those things and elements outside of particular cases and controversies, the thoughtful judge expresses political concern that his decisions will most certainly be highly scrutinized in a democratic society. It is this awareness that makes him consider how to make his decisions acceptable to a polity that ironically judges his legitimacy.

The Constitution of the United States is not firmly cemented in the legal and political culture of this country in the first years of its ratification, and has to be justified by its supporters. On top of a common law tradition that helps legitimize the Court's decisions via *stare decisis*, the Supreme Court roots the legitimacy of the Constitution in the idea that it reflects the will of the people, and, subsequently, the Court legitimizes its own decisions as inherently rooted in the Constitution. According to Ralph Lerner,

[The early justices] were quick to see and seize the opportunity to proselytize for the government and to inculcate habits and teachings most

necessary in their view for the maintenance of self-government: that there is a connection between self-restraint and true liberty, that genuine liberty depends on law-abidingness, that it is the individual's interest to submit to decisions made by constitutional majorities (Berns 1998, 8).

"In a word, they instructed the people in republicanism, and what is striking is that they did so not with appeals to their authority but, rather, to a common interest, an interest shared by judge and people alike" (Berns 1998, 8). What inevitably emerges are numerous moral claims of duty, conceptions of justice, and physical restrictions. Although many do not specifically hold that it is the duty of the Justices to teach republicanism, there is a firm stance taken that even if it is not their duty, they should still try to do so. There is also a principle of justice rooted in trust between individual and judge, similar to what we might recognize in a classroom, where the teacher often instructs on moral life lessons and the students often trust that their teacher is correct. It is an implicit contract where the students follow the rules assuming the rules are "good for them." It is mutually beneficial. There are also physical restrictions that come to the fore. For instance, a teacher is not a teacher at all unless he teaches—his very status as "*teacher*" depends on his having students under his care—and reciprocally his students learn. To be sure, effective teaching produces knowledge that the audience retains. The completion of the teaching act rests in the students, or, in the case of the Supreme Court, the American public and various esoteric communities, such as lawyers and lower court judges. The issue remains convoluted, though, because we place upon the teacher a duty, a duty to incite their students or subjects to think; to learn. This duty is manifest in the vocation teacher itself, and is not intrinsically part of judicial decision-making. Therefore, such a duty is *consciously* accepted by the Justices, assuming that they see their function as teaching republicanism. What is debatable is whether or not that duty is inherent in the office of Supreme Court Justice, itself. If it is not, then

the Justices have no duty to be republican schoolmaster. If so, then they must adopt duties that may supersede those of the narrowly conceived functions, like avoiding making any claims regarding issues other than the law. Duty is binding, whether legal, metaethical, or absolute, and is more than any justice is forced to accept. Indeed, a justice that upholds the "letter" of the Constitution, although he makes no effort to teach any lesson whatever about the Constitution itself or republicanism in general, is applauded for adhering to his duty as a member of the Supreme Court. There is an implied obligation that the Court will not abuse its power, but not necessarily a duty, that is more objective. Any duty that they accept beyond those narrowly conceived are supererogatory and should be cherished, in spite of any fallibility, as an attempt to contribute to more than just legal matters. As I mentioned earlier, there exists no duty upon the student to learn, and as such, there is also no duty imposed upon the populace to learn from any extra-legal or extra-ordinary decisions, or even *jurisprudential* decisions for that matter. Those ancillary details, on morality and the virtues of constitutional government (Berns 1998, 8), are instructions, and like all instructions, they pertain to the means as well as the end, but are hardly the *only* means to that end.

Although most of our discussion thus far has focused on whether or not there is an inherent duty dispositive to the role of the Supreme Court, it seems that the Court does act as republican schoolmaster. It is perhaps more descriptive than normative. In fact, such a role is amenable to constitutional government in general, though the relationship is not a *priori*. It had to be taught and implemented. Chief Justice John Marshall, regarded by many as the harbinger of constitutional justice in the midst of strong Jeffersonian, governmental opposition and political uncertainty, "taught us to venerate the Constitution and its Founders. [And] he did this by initiating the process of determining the validity of legislation by its

compatibility with the Constitution, which has the consequence of identifying constitutionality not only with legitimacy but with wisdom, the wisdom of the Founders who, as Marshall would have it, could do no wrong" (Berns 1998, 8). The reason such a teaching was necessary in the dawn of this republic, is due to the reactions and responses from those within the dominion of a democratically enforced government. As Berns writes:

A constitutional government is first of all government by due or formal process, and that process, that *formal* process is prescribed in the Constitution. The problem, anticipated by the Framers and later elaborated by Alexis de Tocqueville, arises from the fact that "men living in democratic ages do not readily comprehend the utility of forms." Forms serve as restraints, but, Tocqueville points out, this is precisely what "renders [them] so useful to freedom; for the chief merit is to serve as a barrier between the strong and the weak." That, over the course of the years, we Americans have been willing to be governed "formally," rather than expeditiously, is largely Marshall's doing (Berns 1998, 8).

In any form of constitutional government, especially a constitutional democracy it is crucial that the Constitution is associated with, and inseparable from, wisdom. It is the duty of every republican schoolmaster, if they should so accept that role, regardless of what branch they belong, to respect the Constitution and uphold its wisdom, and in so doing, to also enforce and uphold the wisdom of the Founding Fathers. Ensclosed in this perspective the "Constitution [was expected] to influence the 'habits of thinking and acting,'" to form the collective, moral character of the citizens it governs (Berns 1998, 8).

Complexities Concerning Judicial Review and Legitimacy

To play the role of republican schoolmaster, the Court must have the capacity to do so. This means, that the Court must be afforded the power and opportunity to refine, even its own decisions. Judicial review is the fountain of that power. If the Court did not have the power of judicial review, the schoolmaster metaphor would not be relevant. Essentially, the Court is bound to *teach* every time it breaks from traditional arguments. When it overturns precedent it must be able to show why and it must be able

to show that the new decision is, if not constitutionally acceptable, at least politically acceptable. Judicial review is crucial to the Court's ability to act as republican schoolmaster, without it precedent would be the result of Congressional and other governmental acts. Meaning that when Congress makes a law, the Court cannot deem it unconstitutional. This would inhibit the Court's ability to create important practicable laws through overruling precedent, like the decision in *Brown v. Board of Education* (1954), where laws supporting racial segregation were traditionally accepted by society.

Origination of Judicial Review:

"Judicial review is the most powerful tool of federal courts and there is evidence that the Framers intended for courts to have it, but it is not mentioned in the Constitution" (Epstein and Walker 2001, 66). As Justice John Marshall wrote in *Marbury v. Madison* (1803), the Supreme Court has the power to say "what the Law is." The landmark decision in *Marbury* was motivated by the Court's desire to strengthen federalism in the wake of John Adams' defeat in the presidential election by Thomas Jefferson. Actually, it was John Adams, in his final six months of office who nominated Marshall as the Chief Justice of the Supreme Court, because the Federalists had lost their majority rule in the House and the presidency (Epstein and Walker 2001, 66).

In a brilliant decision, John Marshall instituted judicial review: the fountain for judicial power. As John Adams was leaving office, he appointed forty-two justices of the peace in the District of Columbia. In the political confusion of those last days in office, and since John Marshall was focused more on his newly acquired office of Chief Justice of the Supreme Court, he neglected to fulfill his role as Secretary of the State by not delivering the commissions. When Thomas Jefferson's reign began, he noticed that Marshall had indeed failed to deliver said commissions so he

countermanded them, denying four appointed justices of the peace, their federal positions. Among them, William Marbury, a federalist.¹ In the end, Marshall denied Marbury the writ of mandamus, by claiming that, although his appointment had indeed been officially delivered, and that he had in fact a legal remedy to seek, such a remedy was not the writ of mandamus. Marshall elevated the Court to a position of equal power among the branches of government, and by utilizing judicial review, established that the Court, upholding the Constitution, has the ability to deem Congressional acts, like the 'writ of mandamus,' 'unconstitutional.' He exclaims that the Framers acknowledge the Constitution as 'fundamental,' that the Supreme Court is to hear all cases concerning constitutionality, and that the Constitution is the supreme law of the land. The last claim makes the Constitution 'The Law,' and empowers the Court to say what the law is.

Although "[t]he Constitution did not spell out that the courts were to consider it superior to ordinary law while treating it in the same fashion as ordinary law," (Wellington 1990, 22) Article III of the Constitution establishes that "Judicial Power shall extend to all Cases...arising under this Constitution, the Laws of the United States, and Treatises made" (Wellington 1990, 22). Further, the supremacy clause of Article IV reads, "[t]his Constitution...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (Wellington 1990, 2). Arguably, the language of the Constitution supports John Marshall's decision, but in the same respect, the Constitution did not *require* Marshall to do so. When the language of the Constitution is not entirely clear, it opens political channels toward the usurpation of unenumerated powers.

¹ Further details of the case are not necessary for the purpose of this document. What is most important is the result.

Judicial review is anchored in legitimacy and validation, with one of its essential powers coming from the threat of invalidation. This serves as an implicit and explicit check on the powers of Congress. Congress, knowing that the Court has such power to invalidate may avoid ratifying constitutionally ambiguous laws. "The prime and most necessary function of the Court has been that of validation, not that of invalidation. What a government of limited powers needs...is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its life. And the Court, through its history, has acted as the legitimator of the government'" (Wellington 1990, 24). Moreover:

The power to validate is the power to invalidate. If the Court were deprived, by any means of its real and practical power to set bounds to governmental action, or even of public confidence that the Court itself regards this as its duty and will discharge it in a proper case, then it must certainly cease to perform its central function of unlocking the energies of government by stamping governmental actions as legitimate (Wellington 1990, 24).

As the executive and legislative branches continue to test their boundaries, the U.S. constitutional democracy requires that there be an umpire to resolve the issues they raise. However, the Supreme Court cannot, or, rather, has not been willing to act simply as an umpire concerning a statute's repugnancy to the Constitution. "[Its] repugnancy to the Constitution is in most instances not self-evident, [thus] it is, rather, an issue of policy that someone must decide" (Wellington 1990, 25). Naturally, it may be presumed that the governmental branch that should be entrusted to make such a decision is the Supreme Court. For, as Alexander Bickel once wrote, "government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. However, such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application" (Wellington 1990, 25). Since we seem to regard the Supreme Court as the most

adept governmental branch in making value decisions, we trust that the Court will make reasonable and trustworthy value estimations, and in turn will support their perduration. Of course, this applies to the value estimations the Justices make, that are agreeable. Egregious decisions, of which there are few in our history, are not typically tolerated by the populace.

Unfortunately, 'egregious decisions' is highly relative. For example, today we view the decision in *Plessy v. Ferguson*, infamously remembered for the doctrine of "separate but equal," as abhorrent, but to a racially segregated nation in 1896, it was more acceptable. Also, any time the Court delivers an opinion concerning a controversial subject like abortion or the freedom of the speech, certain sects of the American public will protest. It seems that there may be no such thing as an "egregious" decision, for decisions are usually, at least, democratically acceptable. Eventually history will prove us wrong, which merely suggests that the future's transvaluation of our current values will deem our value judgments more flawed and fallible than we view them now. Of course this does not make value judgment futile; all generations must refine and rebuild their subjective values. The resolution that the Court must make important value estimations comes from the idea proffered by Alexander Hamilton that Congress and the executive cannot be a fair judge of prohibitions on their own power. For example, *ex post facto* laws, the First Amendment, and prior restraints—for they would be just like the defendant who is judge in his own case (Wellington 1990, 24). This may be slightly paradoxical since the Court is not prohibited from making judgments on its power. The primary distinction seems to be that the Court is rarely a party to a case, even though it becomes an integral part of every case it hears. In the end, the Judiciary arbitrates when a legislative body is engaged as a party to a political dispute, by way of judicial review. For, can we really trust Congress to

thoughtfully deliberate about constitutional meaning during statutory application? (Fallon 2001, 130).

Although many view the Court as the primary political body entrusted with the sanctity of our delicate collective values, the Court deals with continuing scrutiny every time it uses judicial review. Therefore, the issue is not necessarily *when* the Justices should exercise this power, but *how* they should do so, although when judicial review has been used is not insignificant. It reflects deliberation and thoughtful analysis by a relatively intelligent, dependable governmental body (Fallon 2001, 129) Consider when the justices must compromise amidst reasonable disagreement. Sometimes decisions are put in the Court's hands that will affect almost the entire legal and political system. Just imagine if a compromise had to be reached by the thousands of municipal and state governments and millions of governmental employees. For instance, it is overtly impractical to expect a police officer "on the beat" to interpret the Fourth Amendment (Fallon 2001, 129). Judicial Review is also needed when we consider the relationship between all the legislative bodies in the United States, and could never be displaced or expended. If, for some reason, the power was abolished, something would be adopted in its stead, for it is simply too crucial.

It is easy, however, to see the importance of judicial review and then assume that when the Court utilizes it, they do so legitimately, but the full picture is much more vast and complex. If judicial review is the fountain of judicial power, and seems almost *a priori* legitimate, how is the power of the Court checked? Should any decision made by the Court be considered legitimate without a rigorous analysis of the factors involved in its decision-making process? How do the Court members reconcile their own personal differences, and how does the Court as an institution deal with reasonable disagreement amidst the manifold political lea? In the next section, "Limitations, Conditions, and Legitimacy," we shall see that the

Court has many different things to consider during the decision-making process, and also that the Court is limited by a copious array of factors attributed to the human condition itself.

Limitations, Conditions, and Legitimacy

The following section focuses on three main sources: *Implementing the Constitution*, by Richard Fallon; *On Phenomenology and Social Relations*, by Alfred Schutz; and *Human Nature in Politics: The Dialogue of Psychology with Political Science*, by Herbert A. Simon, and they appear in this respective order throughout this section. These sources are separated for several different reasons. One is to allow for a sufficient explanation of each author's ideas. Another reason they are not fully integrated is because this overall study is a study of certain elements that make the Court subjective in nature. Since there are so many different elements, from so many different fields of study that affect the Court's subjectivity, these main texts are treated individually for the sake of cohesion and clarity. For instance, it may be too difficult to understand the main premise if aspects of phenomenology and psychology appeared in a section concerning the implementation of the Constitution, assuming the reader has no previous knowledge of phenomenology or psychology. There is also a simple procession of ideas in this method of separate yet cohered analyses.

The process begins with Richard Fallon's work on implementing the Constitution. The Constitution is the basic document, or starting point, for legal debate. Fallon discusses how there are two constitutions: the written Constitution, and the unwritten constitution. Both reflect the nature of the Constitution in general. Fallon's work is crucial to this analysis because it demonstrates the subjectivity of interpretation and the subjectivity of creating practicable legal doctrine. He refers to the issue of legitimacy in that, many times, implementation requires a break from precedent in order to

create practicable doctrine. Also, Fallon's text is important because it shows the care that must go into creating legitimate doctrine that, itself, differs from precedent.

Schutz's *On Phenomenology and Social Relations* is the next and most important resource utilized in this essay. After discussing the subjectivity of the written and unwritten constitutions, Schutz provides essential insight into the human subjectivity of the justices and how they are confined within a subjective framework. Fallon reveals that the Court acknowledges the need to be pragmatic and realistic, while Schutz demonstrates how that ability is severely limited by many different phenomenological qualities of human nature. Fallon analyzes the nature of the instrument of constitutional government and Schutz analyzes the nature of the interpreter. The next crucial work explored is Herbert Simon's study of the extents of human rationality in a political framework. Importantly, he brings the overall analysis back to political science. Basically, Simon solidifies the phenomenology of Alfred Schutz in the context of political psychology and decision-making.

Implementation v. Interpretation:

The job of interpreting the Constitution is a highly complex one that the Supreme Court cannot avoid. The justices will always have to interpret its meaning, and all interpretations are essentially subjective, falling short of the idea that it is possible to objectively interpret the Constitution. In fact, we must understand the document itself as fundamentally subjective. The Constitution may be America's most important document, and in that sense U.S. citizens and scholars wish that it could be objective, but claims of objectivity are simply illusory, as objectivity itself eludes any product of interpretation. This is why some scholars have shifted focus from interpretation to implementation of the Constitution, where the most important thing is creating practicable law that can be

properly and constitutionally implemented, rather than identifying objective constitutional truths and applying them to new and evolving cases.

Richard Fallon, professor of law at Harvard's Law School, compares several theories of Supreme Court decision-making. The first view, which Fallon invalidates immediately, is originalism. Fallon holds that originalism is not a sufficient descriptive theory and thus it remains normative; however, it also fails as a normative theory (Fallon 2001, 1). One of the main reasons for this conclusion is that the Constitution is far from originalist at present; for, some of its most important legal doctrines, like those protecting free speech and civil liberties, cannot be justified on originalist grounds (Fallon 2001, 3). Many "non-originalist" developments came to be through political democracy, like the Federal Reserve Bank and various social programs. Essentially, the Supreme Court adds legitimacy to them by upholding them in court (Fallon 2001, 22).

Originalism, for its austerity, is irreconcilable with contemporary legal doctrines that must evolve and adapt with the evolution and adaptation of society. Also, originalism forces the justices of the Court to interpret archaic legal language, full of holes and "gray areas," flawlessly toward perfect jurisprudence. Firstly, the Founding Fathers did not create perfect legal doctrine, and secondly, no interpretation, especially of loosely defined doctrine and terms, like 'commerce' and 'liberty,' could supply objective, hermetic results. Probably the biggest obstacle for original intent theorists is the time gap. In 1789, society was more agrarian and the principle commerce was maritime; there was no conception of social security, Medicare, or welfare (Fallon 2001, 13). Even in 1865, after the Constitution was amended, women were prohibited from voting and public education was inchoate due to the fact that the Framers did not view education as a fundamental right. For originalism to sustain viability it requires perpetual translation, not just interpretation, because translation does not

ignore the subjective differences in values between the two temporal societies (Fallon 2001, 14). Thus, originalism calls for fixity (interpretation) but requires fluidity (translation/pragmatism), and inevitably renders itself inadequate for contemporary legal scholarship.

The other primary theory Fallon considers is Ronald Dworkin's "forum of principle." The forum of principle is, according to Dworkin, what the Supreme Court should be. Dworkin suggests that the Court needs to play the role of political philosopher. The forum of principle is adaptable, and claims to adhere to norms, values, and principles that the Constitution embodies (Fallon 2001, 4). This, of course, is the polar opposite to the originalist position, which does not leave room for pragmatic interpretation of the Constitution. Ultimately, both theories, originalism and the forum of principle, are too extreme to provide a reliable normative position. Where originalism lacks in adaptability the forum of principle lacks in moderation. Both theories provide incomplete pictures of what the Court does and ought to do.

Fallon thinks that the Constitution should be interpreted purposively and capaciously. The Constitution is better seen as an embodiment of resonant principles rather than a "code-like effort by past generations to dictate to future generations in precise, niggling detail" (Fallon 2001, 4). Fallon continues:

The term *implementation* invites recognition that the function of putting the constitution effectively into practice is a necessarily collaborative one, which often requires compromise and accommodation (Fallon 2001, 5).

Thus the Court's work is often practical and strategic. The Constitution provides a vision but no means to achieve it; therefore, the Court "devises and then implements strategies for enforcing constitutional values" (Fallon 2001, 5). Furthermore, the Court has a "shared responsibility" (Fallon 2001, 6) to implement the Constitution. An example is the *Miranda* rule, designed to prevent police from coercing confessions from detainees. Even though the

Miranda rule is broad, categorical, and over enforced, it remains a solid example of a collaborative, prophylactic doctrine, seemingly more beneficial than harmful (Fallon 2001, 6). In short, some doctrinal tests that the Court creates are distinct from the Constitution's meaning, but systemically helpful and maybe even necessary. One pinnacle example of practicable doctrine the Court supports is the protection of libelous speech under the First Amendment (Fallon 2001, 29). The Court must recognize its duty to uphold constitutional values and general moral directives while allowing the press some professional freedom to print the news without perpetual fear of backlash. For, if libelous speech was unprotected speech, it would surely strangle the press's already limited ability to be objective, forcing them to refrain from printing many things that might get them in trouble (Fallon 2001, 29). Such practicable doctrine is derived from the Court's recognition of the importance of implementation of the Constitution as well as interpretation.

Implementation characterizes the proper role of the Supreme Court. It is often collective and requires collaboration from various other political groups and administrators. Since Congress, the president, and the states take part in implementation, compromise and deference is sometimes necessary. There are two primary parts to implementation: identification of constitutional norms and specifying their meanings, and crafting doctrine and developing standards of review (Fallon 2001, 38). Essentially doctrinal tests are designed to protect and implement constitutional norms. Ultimately, the Court is better equipped to produce decisions of constitutional principle and better at implementing rules than "other, less focused, less deliberative institutions" (Fallon 2001, 40). However, most are willing to acquiesce to this conception of judicial role because it is coupled with the understanding that the Court must sometimes be deferential. A deference, such as to a military administrator, puts a responsibility on

other officials to maintain constitutional standards; therefore, implementation of constitutional norms is systemic rather than merely judicial (Fallon 2001, 41).

Doctrinal tests appear in two different ways: ordinary and extraordinary. Ordinary adjudication follows an existing test, and extraordinary adjudication creates a new test (Fallon 2001, 44). Generally, the Court is predisposed to ordinary adjudication, for, if a sufficient test already exists, it is prudent to use it, thereby reinforcing its legitimacy. Extraordinary adjudication, through the use of judicial review, is most beneficial when the Court proceeds with caution. In extraordinary cases: every argument must be reconcilable with the Constitution, and "value arguments" play a significant role in "shaping how lawyers, judges, and justices read the text, describe the Original Understanding, construe the precedents, and so forth" (Fallon 2001, 47).

A value argument is usually characterized by a moral interpretation. The main problem is of course objectivity and choosing the correct moral interpretation from various possible origins. Value arguments are a major part of Dworkin's "forum of principle," and aim to reach the ideal of constitutional justice. In extraordinary cases, value arguments are diverse and conflicting (Fallon 2001, 52). Value arguments are also a major limitation on the justices, just as basic reason is, for, the justices cannot possibly ignore their moral dispositions. They cannot just eschew moral judgment: sometimes they must choose that option conducive to making the Constitution "the best that it can be" (Fallon 2001, 48). This is not to say that the justices cannot ignore some of their own personal beliefs for the sake of reaching judicial agreement, but that they cannot simply set aside their own personal, subjective moralities. Thus, sometimes the concerns of the Court are greater than the individual's.

The Court is not only a group of individuals but it is also a collective body, an institution. Institutional concerns go beyond personal concerns at times, as each justice is part of a collegial body (Fallon 2001, 49). Though each justice undoubtedly has subjective beliefs, they understand that sometimes they must curb their own austerity in order to reach a consensus with the other justices. Thus, we have yet another limitation on the Court: its duality as a group of individuals and an institution.

As both, the Court must face one of its largest constrictions: democratic acceptability. Since the Court is comprised of subjective individuals they must deal occasionally with reasonable disagreement. Reasonable disagreement is "a lack of consensus or convergence that results from the absence of shared premises, gaps in knowledge, and the limits of human reason" (Fallon 2001, 81). In short, it is the manifestation of the limits of human subjectivity and social relations described by Alfred Schutz, and those delineated in the theory of bounded rationality from Herbert Simon. Reasonable disagreement affects the Court's thinking about doctrinal tests in three ways: it makes agreement on how the Constitution should be construed and implemented difficult, it leads to an obfuscation of the Court's collective view, and it is essentially inevitable every time the Court reaches a new test (Fallon 2001, 81-82).

Also, since the Court is an institution it must deal with reasonable disagreement amongst other institutions. Reasonable disagreement, therefore, permeates the entire legal and political system, and, though seemingly negative, it is extremely valuable. Fallon describes it as valuable because it reveals the values that the Constitution encompasses (Fallon 2001, 51). The best explanation of this is the notion of adversarialness in the legal system, where the best possible argument will be reached when two adversaries fight relentlessly for their cause or position. Thus, when more people are fighting, more viewpoints and arguments surge forth. It is inevitable that

the justices will make their own individual assessments of how the Constitution will be implemented, but they still recognize the condition of democratic acceptability (Fallon 2001, 53). For example, many justices realize that the expressions "In God We Trust," emblazoned on U.S. currency and, "Under God" in the "Pledge" to the U.S. violate the Establishment Clause of the First Amendment. The Court's conclusion to leave the two expressions standing is from an "all-things-considered" balancing test. The Court holds, "all-things-considered," the democratic unacceptability of invalidation is far greater than the slight injustice of leaving the expressions alone (Fallon 2001, 54). The Court is well aware of the possibility of public recoil, and is not prepared to face such drastic sanctions as losing its jurisdiction for what it sees as a minor issue. However, despite public outcry, the Court must do what it knows is "right," such as when it handed down its decision in *Brown v. Board of Education* (1954).

In *Brown*, the Court was forced to reexamine constitutional principles and to reassess the nature and limits of its role (Fallon 2001, 56). Even though the justices viewed state-enforced segregation as morally wrong, and unconstitutional, supported by the Equal Protection Clause, the decision was not easy. The Court faced three major complications: the "separate but equal" doctrine set by *Plessy v. Ferguson* (1896), the fact that legally mandated state segregation was common throughout the South, and the rise of racism nationwide (Fallon 2001, 57). The Court could not just look to the plain language of the Constitution; they had to create new doctrine. Therefore, the justices deemed that education had become a fundamental right of all citizens since 1868 (Fallon 2001, 57). According to Fallon, "*Brown* reflects the Supreme Court at its best" (Fallon 2001, 58). *Brown* shows that a "moral reading" of the Constitution is sometimes appropriate and that the original understanding is a good reference point though insufficient at times. It proved that in the face of democratic unacceptability the justices

can aspire to a higher moral virtue. To complete the task, the Court offered acceptable plans for the implementation of the new doctrine by entrusting local government officials to follow suit and by providing them with ample time to respond to the Court's order (Fallon 2001, 58-59). Ultimately, the Court played a heroic role in defining previously unrecognized constitutional rights (Fallon 2001, 74-75).

Democratically acceptable tests are difficult to reach in the complex political system of the U.S.. Fallon writes:

In developing constitutional tests and other doctrinal formulas, the Supreme Court must struggle to meet challenges that neither the originalist nor the forum-of-principle model can adequately explain (Fallon 2001, 77).

The Court looks to history and then to the present for appropriate and sufficient tests, while at the same time it must supercede the limits of the abstract moral principles of the forum-of-principle model. To do this the Court searches the viscera of psychology, sociology, and economics in search of democratically acceptable tests (Fallon 2001, 77). Political outcry and democratic unacceptability will always be more prevalent in extraordinary decisions like *Brown*, because they seek to create new tests that typically come from reasonable disagreement.

Ordinary adjudication, on the other hand, reaps the benefit of the support of *stare decisis*, and thus does not have the same problems as extraordinary adjudication. The question arises however: how much force does *stare decisis* actually have? Two main points: the Court can overrule its own precedent and does so often, and justices who dissent from a particular decision do not typically use that opinion as precedent in later cases (Fallon 2001, 102). Historically, *stare decisis* promotes fairness, efficiency, stability, and predictability. It provides a response to reasonable disagreement, by presuming that a decision reached in a lower court was at least reasonable. It also becomes a focal point for possible agreement (Fallon 2001, 103). Though *stare decisis* is a doctrine of limited

weight, it curbs the personal views of the justices as they are often inclined to apply it to current cases, thereby revealing that their views are in fact shaped by the views of others (Fallon 2001, 104). This is part of the conception that the justices must act as "practical lawyers." Ultimately though, they have proven to be adept at reaching democratic acceptability amidst reasonable disagreement (Fallon 2001, 110).

The Written and Unwritten Constitution:

Legitimate implementation of constitutional principles that naturally become law exposes the penumbra between the actual written constitutional language and those principles that do not appear explicitly in the Constitution itself. Fallon writes that "the Supreme Court's characteristic role is to implement the Constitution by developing and applying doctrines that reflect, but do not always embody, the Constitution's meaning" (Fallon 2001, 111). In this perspective, the written Constitution warrants the unwritten constitution. To be sure, we should understand that the unwritten constitution ("c"onstitution) supplements and mediates the written Constitution ("C"onstitution), it does not supplant it. Therefore, the two are reconcilable (Fallon 2001, 111).

The Constitution, as well as the unwritten constitution, as law receives its legitimacy through practices of acceptance (Fallon 2001, 113). Sometimes, though, accepted practices can even legitimate poor legal doctrines. Constitutional practice establishes that *stare decisis* is legally binding. In the end, the unwritten constitution is imperative to the flourishing of constitutional democracies like the U.S.. Many current powers granted by the Constitution are really the result of the unwritten constitution. Fallon writes:

The currently prevailing bounds of presidential powers in the domain of foreign and military affairs, or of congressional power under the Commerce Clause, could not plausibly be derived from the written Constitution without heavy reliance on unwritten Constitutional norms" (Fallon 2001, 115).

Beyond the power of establishing binding precedent, almost the entire scope of judicial power to interpret and implement the Constitution is derived from norms that are extra-Constitutional (Fallon 2001, 116). Essentially, asserting the value of the unwritten constitution enhances intellectual debate about all constitutional issues. Introducing the notion of an unwritten constitution illuminates two important limits of the Constitution in the constitutional order of the U.S.. First, it shows that the Constitution has necessary limits with regard to its logic and language, and second, it proves the overwhelming significance of unwritten constitutional norms combined with strong argument and adjudication (Fallon 2001, 118). Fallon asserts that we should reject the notion that the Constitution/constitution is a set of self-willed prohibitions and obligations and see it "as the law that literally constitutes the people of the United States as a political community" (Fallon 2001, 122). In the end, legitimacy is essentially basic: acquiescence is its most common foundation (Fallon 2001, 122).

Judicial Realism and the Conditions of Being Human:

Indeed, the scope of this essay could never fully treat the issue of what it means to be human, and how those essentially human qualities alter a judge's ability to make clear decisions. However, that does not mean that we should ignore the qualities of being human in this essay, for such conditions and limits must be acknowledged if we are to reach a more complete understanding of how the Supreme Court makes decisions. To examine some of those qualities that make each of us essentially human, it is necessary to consider not only sociology and ontology but phenomenology as well. Such a wide perspectival position is manifest in the works of Alfred Schutz, one of the most important sociologists and phenomenologists of the twentieth century. Schutz is most well known for his work in revealing social *recipes*. Social recipes are those behaviors we learn of ourselves and expect from

others based on certain repeated conduct. For instance, when we ask someone a question, we can reasonably expect an answer. Or if we attend a class on Constitutional law, we can reasonably expect that the professor is going to discuss something pertaining to Constitutional law. It is by these recipes that we order our lives and develop cultivated experiences dependent upon reliability². We can also easily see how this methodology is rooted in our conceptualizations of institutions, as many institutions, although the definitions are manifold, are systems created by Man, and legitimized by a particular faith in that institution to procure consistency and reliability. Although Schutz did not directly address the Supreme Court of the United States, he did however examine Germany's Supreme Court. His extrapolation of the human condition irradiates and casts away many of the shadows of judicial realism. As a sociologist and phenomenologist, Schutz escapes, what John Locke calls metaphysical pitfalls, by employing theories in practice.

Stock of Knowledge:

The first condition or limitation of being human is what Schutz calls the "stock of knowledge." The stock of knowledge is limited and highly subjective. It is everything we already know, and only everything we know. The things that we "know," in this sense, are the things that we can recall completely and lucidly. This, however, does not mean that we must know the objective truth of a particular thing, but rather enhances the view that truth is subjective. Schutz writes:

Man in daily life...finds at any given moment a stock of knowledge at hand that serves him as a scheme of interpretation of his past and present experiences, and also determines his anticipations of things to come. This stock of knowledge has its particular history. It has been constituted in and by previous experiencing activities of our consciousness, the outcome of which has now become our habitual possession (Schutz 1970, 74).

The stock of knowledge is ultimately, our starting point and filter for interpreting each new experience. In the legal scheme, it could be characterized as the subjective knowledge of the justices of the Supreme

² Samuel Beckett's *Waiting for Godot*, is a direct breakdown of Schutzian ideas.

Court. Each has his own stock of knowledge, akin to what we commonly understand as his preferences. Thus, some preferences are so deeply rooted that only an objective principle, or the idea that an objective principle is attainable, can reconcile different interpretations of the same situation. For example, an objective principle that the justices of the Court might attempt to maintain is jurisprudence. The stock of knowledge shows a particular structure: there is a "small kernel of knowledge that is clear, distinct, and consistent in itself. This kernel is surrounded by zones of various gradations of vagueness, obscurity, and ambiguity. These follow zones of things just taken for granted, blind beliefs, bare suppositions, mere guesswork, zones in which it will do merely to 'put one's trust'" (Schutz 1970, 74).

The best way to analyze the structure of one's stock of knowledge is to consider the stock of knowledge itself at any particular "Now" (Schutz 1970, 74). This means, at any moment, any time can be characterized as "Now." As such, one can determine those things that are problematic and irrelevant, and those things that remain unquestionable (Schutz 1970, 74). As an individual encounters emerging problems or situations, he must decide "what has to be known and with what degree of clarity and precision it has to be known in order to solve the emergent problem" (Schutz 1970, 74).

In other words, it is the particular problem we are concerned with that subdivides our stock of knowledge at hand into layers of different relevance for its solution, and thus establishes the borderlines of the various zones of our knowledge just mentioned, zones of distinctness and vagueness, of clarity and obscurity, of precision and ambiguity (Schutz 1970, 74).

Our stock of knowledge serves as the stock of tools we have for interpreting certain problems. But the issue is slightly more complex than this, for an individual's stock of knowledge is in a flux, parallel to the Now (Schutz 1970, 75). When we apply this to the Supreme Court, we then begin to notice that not only is the stock of knowledge of each justice similar to what we call his "preferences," but that his stock of knowledge is perpetually

changing. It is evolving. This means that the stock of knowledge of the Supreme Court Justices, evolves even while they are on the bench. Though this appears to be a salient point, it reveals that even if we can know a justice's preferences, and everything else he knows before he accepts his nomination to the Court, our knowledge of him would be incomplete.

The Court adheres, in general, to the creed *stare decisis*, which, loosely, means "let the decision stand." This is the principle that establishes the basic foundation of our common law system. Repetition is, hence, crucial to decision-making. It is how justices utilize certain *relevant* parts of our stock of knowledge. We apprehend an experience, similar to an old one, and we can now respond to it with the advantages of what we learned from the first experience. Schutz writes:

By reference to the stock of knowledge at hand at that particular Now, the actually emerging experience is found to be a "familiar" one if it is related by a "synthesis of recognition" to a previous experience in the modes of "sameness," "likeness," "similarity," "analogy," and the like. The emerging experience may, for example, be conceived as a pre-experienced "same which recurs" or as a pre-experienced "same but modified" or as of a type similar to a pre-experienced one, and so on (Schutz 1970, 75).

Though this is relatively basic phenomenological reduction, it applies to grander schemes, like the law. The modes of "sameness," "likeness," "similarity," and "analogy," mentioned above are the same modalities the Supreme Court makes use of when it encounters different cases that it must apply stable law to. Essentially, stable law is law that endures as unchanged and, if objective, unquestionable, therefore, every new case is subjected to the application of old law or doctrine. "Old" law, in this context, is merely law that has already been settled, thus, even though the facts of every case are slightly different the Court sometimes must apply an old law. The proper course for judicial decision-making in such a case is to apply an already settled law, where it is applicable. Conversely, outdated law, law that is non-applicable to new cases of the same type, must be altered or changed completely. Either way, applying old-stable law to a new

case, or changing inapplicable law completely, the Court must acknowledge the sameness, likeness, or similarity of each new case to preceding ones. Cases that are similar typically involve the same legal principles.

This perspective is rather pragmatic overall. Each justice has an evolving-adapting stock of knowledge that he utilizes to make certain decisions. To consider that each individual's stock of knowledge evolves, assumes that certain timeless principles lose their magnitude. For, though these stocks of knowledge change, principles are unchanging. This is another complexity to the justices' duty: they must sustain certain principles, especially legal principles, during a changing epoch and evolving stock of knowledge. The saltating stock of knowledge is an unavoidable, natural phenomenon and, therefore, it would seem that adhering to immutable principles is unnatural. That is slightly short-sighted, however, as our stock of knowledge sometimes reveals the value of a perduring principle such as the separation of Church and State. No matter what situations the next epochs bring, it is hard to imagine the complete defenestration of that principle.

The Relationship of Contemporaries:

Supreme Court justices exist as "ideal types" and "historical types," that is, each justice represents a certain type of individual, and subsequently a certain type of professional. The position of justice of the Supreme Court yields certain conceptions of what the individual holding that position does. There are plenty of misconceptions outside of the Court itself, like presumptions asserted by outside observers. The most accurate conceptions of a justice's behaviors and responses to certain recurring experiences, is divulged by his contemporaries. Schutz says this about social contemporaries:

Each of the partners apprehends the other by means of an ideal type; each of the partners is aware of this mutual apprehension; and each expects that the other's interpretive scheme will be congruent with his own (Schutz 1970, 229).

Simply put, each justice can apprehend each other by apprehending his own subjective experience. Similarly, we can understand justiceship by what justices historically do, combined with normative theories of decision-making. Thus, by the very nature of being a justice of the Supreme Court, each individual justice is expected to act as a *justice*. It is crucial to understand that the position of Supreme Court Justice is not defined merely by previous behavior and decisions, because, if that were true, the members of the Court would be expected to do whatever they were to will, without the constraints of normative propriety. Thus, the understanding of justiceship that each justice has is an important limitation on the Court's power. First, the justices are highly aware of their responsibilities as social individuals, as is somewhat proven by their personal histories. We also believe this because we place so much trust in them to do the "right thing," as they are politically unelected officials. Second, since the justices are seen as less accountable to the general public than other government officials, it is important that they maintain temperance in terms of the power they could essentially wield.

The Relationship with Predecessors:

Aside from the relationship between contemporaries, there is also the relationship between predecessors and successors. The world of predecessors is one that is completed and over; there can be no dialogue with a predecessor, and there can be no future horizon with them. "The world of predecessors is what existed before I was born. It is this which determines its very nature" (Schutz 1970, 231). Concerning the behavior of a predecessor nothing is left undone, undecided, or uncertain. Schutz writes of the predecessor:

His behavior is essentially without any dimension of freedom and thus stands in contrast to the behavior of those with whom I am in immediate contact and even, to a certain extent, with the behavior of those who are merely my contemporaries...I can never set out to influence [him] (Schutz 1970, 231).

The influence in a relationship with one's predecessor is always passive, for one is only influenced by his predecessor. The predecessor's action "is the genuine because-motive of my own" (Schutz 1970, 232). As Schutz writes, "What at first glance may appear to be a social relationship between myself and one of my predecessors will always turn out to be a case of one-sided Other-orientation on my part" (Schutz 1970, 232). An example of this orientation is ancestor worship. There are only two ways to know our predecessors; either someone tells me about them or they write about them. In the legal community the most poignant examples of predecessors are the Founding Fathers. We know about them because others speak about them and because others write about them. Teachers, whether informal or professional, convey the story of the Founding Fathers and the Constitution, and though they are definitely part of the world of predecessors, they have, partly, the quality of being contemporaries. Schutz describes this relationship:

Even the past social experiences, direct or indirect, of another person are for me part of the world of predecessors, yet I apprehend them as if they were my own past social experience. For I apprehend them as the present subjective meaning-context of the person who is now telling me about them (Schutz 1970, 232).

Another avenue to come to experience one's predecessors is through records and monuments. "These have the status of signs, regardless of whether my predecessors intended them as signs for posterity or merely for their own contemporaries" (Schutz 1970, 233). In the case of the Founding Fathers of the United States, the Constitution is our primary "record" and we know that they most certainly intended for it to remain in posterity.

Predecessors differ from contemporaries in a very distinct way; there is no stream of consciousness. Contemporaries are connected by a stream of consciousness that is somewhat defined by the fact that they all exist at a similar time, and can experience the same situation. Knowledge of predecessors comes to us through "signs," such as words, monuments, et

cetera, and these signs are anonymous and detached from the stream of consciousness that contemporaries benefit from. "However," Schutz writes,

I know that every sign has its author and that every author has his own thoughts and subjective experiences as he expresses himself through signs. It is therefore perfectly proper for me to ask myself what a given predecessor meant by expressing himself in such and such a way. Of course, to do this, I must project myself backward in time and imagine myself present while he spoke or wrote (Schutz 1970, 233).

Historical research is primarily concerned with information and facts of events, without much regard to the subjective experiences of the authors of the original source materials. "Yet," Schutz describes, "these sources refer throughout to the direct and indirect social experience of their authors. As a result, the objective content communicated by the sign has a greater or lesser concreteness" (Schutz 1970, 233). Thus, the Founding Fathers of the U.S. experienced life subjectively, apart from any reality that we now face, barring a few kernels of knowledge and objective experiences that remain the same. The things that remain are the general characteristics of human nature that we use to interpret new experiences. For an accurate, objective understanding of what they actually mean and intend we must "project [ourselves] backward in time." Of course this is highly subjective. As Schutz writes:

My predecessor lived in an environment radically different not only from my own but from the environment which I ascribe to my contemporaries. When I apprehend a fellow man or a contemporary, I can always assume the presence of a common core of knowledge (Schutz 234).

In this respect we do not experience the same things as our predecessors, for the "same experience would seem to him quite different in the context of the culture of his time" (Schutz 1970, 234). Even calling it the "same experience" is meaningless. "The schemes we use to interpret the world of our predecessors are necessarily different from the ones they used to interpret that world" (Schutz 1970, 234). We can interpret the behavior of our contemporaries and assume that their experiences are similar to ours. "But," Schutz continues,

When it comes to understanding a predecessor, my chances of falling short of the mark are greatly increased. My interpretations cannot be other than vague and tentative. This is true even of the language and other symbols of a past age (Schutz 1970, 234).

The legal community, however, treats the Founding Fathers as permanent contemporaries. They are perpetually available to us for reference and guidance. Ultimately, even though the Founding Fathers appear as addressable national patriarchs, they remain part of a past we know only through words and signs. We are distanced from them no matter how vehemently some defend the notion of "literal interpretation" of the signs they left for us.

Expert, Man On the Street, and Well-Informed Citizen:

This final group of limitations, illuminated of course by Alfred Schutz, is the understanding that every man is, at any moment, simultaneously "expert," "man on the street," and "well-informed citizen" (Schutz 1970, 236-42). It should be noted that if all men are constituted of this tripartite sociological manifestation then so too are the judges of our courts, and most importantly, the Supreme Court Justices. The section that Schutz's description appears in his book is titled *Distribution of Knowledge*, and is highly appropriate when we consider that the Supreme Court is seen as *republican schoolmaster*. He writes:

The expert...is at home only in a system of imposed relevances—imposed, that is, by the problems pre-established within his field. Or to be more precise, by his decision to become an expert he has accepted the relevances imposed within his field as the intrinsic, and the only intrinsic, relevances of his acting and thinking. But this field is rigidly limited. To be sure, there are marginal problems and even problems outside his specific field, but the expert is inclined to assign them to another expert whose concern they are supposed to be. The expert starts from the assumption not only that the system of problems established within his field is relevant but that it is the only relevant system (Schutz 241-42).

When an expert, such as a Supreme Court Justice, encounters instances of the law, he imposes those things relevant in such instances upon himself. A justice's decision to become a judge, to be entrenched in the law, is an implicit acceptance of all the limitations of expertise. As George Bernard Shaw once exclaimed, "an expert knows more and more about less and less."

The expert is restricted; confined to and by his subjective knowledge in his field, and the expectations from others to uphold his duty in his chosen field. This brings to mind the many expectations society imposes upon doctors, for instance, to not only uphold the Hippocratic Oath, but to stay in the confines of his field. Despite this, however, the justices of the Supreme Court often engage in decisions based on economics, politics, and sociology, but as we have seen, ignoring such broad fields of information is practically impossible. Justices also make decisions based on various value judgments and estimations, but we can hardly revile them for such conduct, as they cannot eschew their knowledge or beliefs completely. Above all else the justices are experts in the law, not economics, public policy, and sociology. Schutz continues with his description of the expert:

All his knowledge is referred to this frame of reference which has been established once and for all. He who does not accept it as the monopolized system of his intrinsic relevances does not share with the expert a universe of discourse (Schutz 1970, 242).

Here Schutz is describing those in the same field of expertise, because if one chooses not to accept certain imposed relevances, then he will not, and should not, be taken seriously. Of course we understand, especially in hindsight, that there are many cases where a Justice, writing for a majority, will make extralegal claims, such as Blackmun's insight into abortion in *Roe v Wade* (1973), but in the same respect we do not permit them to consult outside experts. The standard conception is that if the law cannot decide such an issue then the issue must be a "political question" that the Court is not equipped to handle. In light of the complexities of various fields of expertise, for our purposes the law and politics specifically, Schutz harks back to Clemenceau, who once wrote, "that war is too important a business to be left exclusively to generals" (Schutz 1970, 242). Such a statement says volumes for the tasks of Supreme Court Justices, because it at once claims that they have an important task to accomplish, but that they cannot be

trusted to be perfect in carrying out their duty, nor should they be entirely short-sighted. Indeed, it seems that almost every decision involves something political or economic or sociological.

The next partition, "the man on the street," is the antipodes to the expert. Schutz writes:

The man on the street...lives, in a manner of speaking naïvely in his own and his in-group's intrinsic relevances. Imposed relevances he takes into account merely as elements of the situation to be defined or as data or conditions for his course of action. They are simply given and it does not pay to try to understand their origin or structure (Schutz 1970, 241).

The man on the street is not concerned with any systems of relevance; he is only concerned with those things that impose certain conditions upon his daily activities. He thinks not of tomorrow, nor does he care for yesterday. He draws conclusions immediately and pragmatically (Schutz 1970). As Schutz says, "[h]e will not cross the bridge before he reaches it and he takes it for granted that the he will find a bridge when he needs it and that it will be strong enough to carry him. That is one of the reasons why in forming his opinions he is much more governed by sentiment than by information, why he prefers, as statistics have amply shown, the comic pages of the newspapers to the foreign news, the radio quizzes to news commentators" (Schutz 1970, 241). In short, if the origin of a thing the man on the street encounters does not concern his encountering and superceding of the conditions such a thing imposes, then he will disregard all unnecessary information. He takes for granted the founding of this country's freedom as he burns the flag on the steps of the White House. This of course makes the man on the street sound vapid and entirely ignorant, but remember that every man is at any instance simultaneously "man on the street," and "expert." When we consider the justices of the Court, this analogy is that of the judicial pragmatist. A Supreme Court justice as pragmatist, demonstrates how two completely different aspects to the human sociological condition congeal in one decision as the pragmatist will make decisions in terms of adaptability and aptitude,

while at the same time acknowledging that there is a rule of law that he is deviating from. He is not as ignorant as the essential "man on the street" but he has the tendency to be more concerned with the evolution of legal principles. He reckons that he can reach a final, general objective principle of law, but at the same time is constrained by his inability to perceive the vast sea of future crises.

The final distinction, "well-informed citizen," is the mean between the expert and the man on the street. This is primarily the mode in which all justices make decisions all the time. They are more "well-informed citizens" than anything else, and are not only aware of, but must be prepared to, deal with the manifold issues in the legal realm. Schutz writes:

The well-informed citizen finds himself placed in a domain which belongs to an infinite number of possible frames of reference. There are no pre-given ready-made ends, no fixed border lines within which he can look for shelter. He has to choose the frame of reference by choosing his interest; he has to investigate the zones of relevances adhering to it; and he has to gather as much knowledge as possible of the origin and sources of the relevances actually or potentially imposed upon him (Schutz 1970, 242).

The well-informed citizen restricts those things that are irrelevant to him, but, in the same moment, apprehends what is irrelevant as being possibly relevant in the future. In this way he is the most reasonable of the three. He recognizes and searches for what is the most appropriate course of action given those things relevant at the present time. "His is an attitude as different from that of the expert whose knowledge is delimited by a single system of relevance as from that of the man on the street which is indifferent to the structure of relevance itself. For this reason he has to form a reasonable opinion and to look for information" (Schutz 1970, 242).

Bounded v. Objective Rationality:

One of the limitations the justices cannot escape is reason. As humans they are essentially thinking-reasoning beings, but they can only be so reasonable. The limits of reason and rationality are twofold as the first a limit is a basic and highly bounded rationality, and the other is the

gradually escalating level of rationality. The first is rationality itself, and the second climbs toward objective rationality without ever reaching its actualization. Men are still restricted by their stocks of knowledge, though evolving, because they are never fully complete. Thus the stock of knowledge can never encapsulate the whole of Knowledge itself. Therefore, since the justices are human, we must acknowledge the objective limitation of human fallibility that is irreconcilable with the idea of achieving objective principles. There is this notion that the Court somehow has the ability to be able to utilize objective rationality; that they can see all the angles in a particular case, but such is an illusion. Alfred Schutz writes:

The rational course-of-action...[must] be constructed in such a way that an actor in the life world would perform the typified action if he had a perfectly clear and distinct knowledge of all the elements, and only of the elements, assumed [to be] relevant to this action and the constant tendency to use the most appropriate means assumed to be at his disposal for achieving the ends defined by the construct itself (Schutz 1970, 280).

The "rational course-of-action," thus, requires that one have a "perfectly clear and distinct knowledge of all the elements" in a given situation. Since no man is so intellectually endowed, we must hold that neither are the members of the Court. Therefore, the Supreme Court justices are limited to "bounded rationality" (Simon 1985, 293-304).

This essay considers a study by Herbert A. Simon of Carnegie-Mellon University that addresses the differences between subjective/bounded rationality and objective/substantive rationality. Simon compares and examines the relative roles played by both forms of rationality, and proves that a subjective rationality, contingent upon "auxiliary assumptions," is more apt to make political predictions, than the principle of objective rationality. To use Simon's own words: "The analysis implies that the principle of rationality, unless accompanied by extensive empirical research to identify the correct auxiliary assumptions, has little power to make valid predictions about political phenomena" (Simon 1985, 293).

The subjective and bounded form of rationality is a procedural rationality that is rooted in contemporary cognitive psychology. Objective rationality, on the other hand, is global and substantive and comes from economics; Simon refers to it as the "principle of rationality" (Simon 1985, 293). The basic feature of bounded rationality is that it is delimited by auxiliary assumptions. Auxiliary assumptions are assumptions about the content of an actor's goals and are used to explain human behavior in political contexts. Essentially, for the principle of rationality to make "valid predictions about political phenomena" it must be accompanied by auxiliary assumptions that are supported by extensive empirical research (Simon 1985, 293). Procedural rationality assesses fairness by the procedure used to reach a result, whereas substantive rationality looks to the substance of the result of the decision itself (Simon 1985, 293). Thus, a person is rational if they use a reasonable process for choosing or if they end up with a reasonable result. Substantive rationality is myopic in comparison to bounded rationality. The main reason is that substantive rationality deduces the substance or objectivity of a rational choice by only looking at the actor's goals and the external (objective) situation. Bounded rationality must take into account the actor's goals, the information and the conceptualization it has on the situation, and the actor's ability to draw inferences from that information; we do not need to know anything about the objective situation the actor finds himself (Simon 1985, 293).

"Rationality" denotes behavior that is appropriate to specified goals in a given situation, but to arrive at objective rationality one must ignore the subjective limitations of the choosing organism; limitations such as knowledge and computing ability (Simon 1985, 294). Thus the actor may be incapable of making objectively rational choices. This leads to the conclusion that observers must consider the actor when studying decisions in politics. Bounded rationality allows an actor to maximize his decision-

making potential within the constraints of knowledge limitation; within the constraints of both the external situation and by the actor's own capacities as "decision maker" (Simon 1985, 294). The concern with each choosing organism, and the consideration of that actor's relative mentalism as well as behaviorism, shows that human capabilities for rational behavior, described by contemporary cognitive psychology, are congenial to the paradigm of bounded rationality (Simon 1985, 295).

Each decision, especially those justices must make, involves problem solving. The justices, in the problem-solving structure, are the actors. As subjectively rational actors, they have a limited computational capacity. They must search for selective answers in a vastness of possibilities that renders the search incomplete, inadequate, and based on uncertain information and partial ignorance. Such a search usually terminates with the discovery of satisfactory, yet sub-optimal, courses of action (Simon 1985, 295). With this type of problem solver it is crucial to understand what he wants, knows, and can compute. Hence, we cannot assume rationality in the case of Supreme Court decision-making, for assuming rationality provides us with no real grounds for predicting future behavior (Simon 1985, 295). Ultimately, if we cannot predict future behavior, within reason, we cannot truly understand Supreme Court decision-making. Why make any normative suggestions at all, if we are not concerned with prediction?

The objective/substantive principle of rationality comes from neoclassical economics. This theory has developed into a form of rational choice theory, where it is assumed that an actor will always choose that act which produces the greatest utility. In cases where an available choice includes uncertainties, it is also assumed that the actor will choose another alternative based on the result he foresees (Simon 1985, 296). The assumptions are made concerning the actor's actions and choices, not his goals. Substantive rationality seeks to be able to record a person's

consistent utility functions; but, in practice, this is impossible because people are inconsistent. Thus, for objective rationality to be applied, auxiliary assumptions must first be applied (Simon 1985, 296). Objective rationality is irreconcilable with the uncertainty of the actor. Neoclassical economics, in many ways, ignores the factor of uncertainty, and assumes that the market will be in perpetual and empirical equilibrium (Simon 1985, 296). This is the myopia of objective/economic/substantive rationality, and why it fails to capture the essence of decision-making, especially Supreme Court decision-making.

An example of how economic/objective rationality fails to create valid conclusions of decision-making comes from Keynesian economics. The example concerns different actions by the labor class and the relative businessmen, such as a vast majority of actors at the labor level making financial decisions based on a simple confusion in the differences between their "money wage" and their "real wage." Any confusion at this point is subjective, thereby breaking down the objective principle. When an actor mistakes his "money wage" (his actual monetary worth) for his "real wage" (his purchasing power) the principle of rationality cannot make a proper accounting. For, if the objective principle of rationality assumes that actors are always rational, it would overlook the prevalence of irrationality in actors at all economic levels (Simon 1985, 297). Conversely, when businessmen interpret normal changes in the market, such as inflation, as changes specific to their industry, they are acting irrational and departing from objective rationality (Simon 1985, 297). In the end, the main conclusions that different economic theories reach are not simply objectively rational but conditioned by auxiliary assumptions about the process of decision-making (Simon 1985, 297). An example of such auxiliary assumptions would be businessmen or labor suffering from money illusions while making decisions.

Bounded rationality is not irrationality. There are many instances that are seemingly irrational, but, in fact, are decisions made through bounded rationality. For example: when a behavior is aberrant; when an actor makes a decision without the true facts or ignores whole areas of relevant information; when an actor has good facts but draws an incorrect conclusion; when an actor fails to consider important, relevant alternatives; or, if an actor makes a decision that does not adapt to the uncertainty of the future (Simon 1985, 297). It is obvious, in this respect, to see that so many of the decisions that the Court engages that seem irrational, are simply rational but bounded. There are simply too many relevant consequences to Supreme Court decisions for the justices to be able to understand more than a fraction of such breadth. They make decisions, even ones they think are objectively rational, through the filter of bounded rationality. The reality of human rationality is bounded rationality (Simon 1985, 297). This conclusion will frustrate many legal scholars and theorists, especially because the boundaries are extremely difficult to delineate and lack clarity. This is an expected reaction, though, because specialists refuse to leave any aspect of their profession or specialty to uncertainty.

Objectively rational choice theory assumes that there is an equilibrium that we can apply to human behavior. Simon considers how rational choice theory is applied in game theory; ultimately, game situations show that we must study empirical data to have any clear idea of how humans behave (Simon 1985, 300). Subjective/bounded/procedural theories of rationality rely, of course, on auxiliary assumptions that are observable through empirical research. Since empirical research seeks to determine what values people act on, and how they form expectations and beliefs, subjective/bounded/procedural rationality is more reliable and dependable than the objective/substantive/economic model. In the political scheme people are definitely rational, being able to show reasons for their actions, but, of

course, this is different from actually being able to apply the objective rationality principle to subjective situations and predict the actor's behavior.

Painstaking empirical research is the only way to establish strong, valid theories of decision-making. Any theory that claims to be able to explain the real phenomena of politics is hardly immutable (Simon 1985, 301). Simon writes: "People are, at best, rational in terms of what they are aware of, and they can be aware of only tiny, disjointed facets of reality" (Simon 1985, 302). Furthermore, we must be aware, when applying the rationality principle, of the "real" situation versus the situation as perceived by the actors. In the end, we must rely on subjective and bounded rationality that takes into account the fundamentally significant and manifold auxiliary assumptions. When we apply bounded rationality to Supreme Court decision-making we can account for, more accurately anyway, the various aberrations, inconsistencies, and irrational behaviors of the justices.

Other theories of Supreme Court decision-making compare the influence of precedent in the Court's decision-making process, and whether or not they adhere to precedent, or utilize each opportunity as a way to further their preferences. In *Majority Rule or Minority Will*, the authors argue that Supreme Court justices will always make decisions to expand their preferences. The idea is, essentially, that they are not burdened by precedent as much as many would like to believe. Now, consider objective rationality—the assumption that an actor chooses that act which will provide the most utility—and that such an assumption leads to highly fallible predictions of Supreme Court decision-making. The theory of preferentialism makes the same assumptions. It assumes, primarily that the justices of the Court not only try to maximize their own utility with every decision but that they have that ability as well. It should be clear, however, that justices lack such ability, and for analysts and scholars to reach a valid conclusion

about Supreme Court decision-making, they must acknowledge the manifold auxiliary facets to every decision and the subjectivity of the justices or actors.

Legitimacy Amidst Agenda Changes:

In *The Dynamics and Determinants of Agenda Change in the Rhenquist Court*, Richard Pacelle, Jr., illuminates different trends in Supreme Court agenda building, from 1933-1992. Although one does not determine the other we can see, using Pacelle's results, what kinds of cases were getting the most attention throughout most of the twentieth century. Thus, in areas where little has been settled, like in civil rights until *Brown v. Board of Education* (1954), there is greater room to speculate and draw the precedential guidelines using, of course, judicial review. The main agenda issues across the twentieth century are "Economic issues," "Federalism," "Regulation," and "civil liberties" (Pacelle Jr. 1995, 255). Without judicial review, supported by the Court's legitimacy and validity, any significant agenda changes would have been difficult to support, politically. The 1930s' 'Laissez-faire' Courts failed to establish reliable economic doctrine. That decade, overwrought with economic hardship, demanded immediate attention from the new president, Franklin Delano Roosevelt. Roosevelt proposed numerous legislative initiatives designated as the progressive "New Deal." Since the Court was not yet prepared for Roosevelt's New Deal they resisted his program initiatives. But FDR proposed another piece of legislation that would change the Court's "mind": the "Court-Packing Plan."³ When the Supreme Court realized that their small laissez-faire majority could suddenly become a disparate minority, they opened up to the president's suggestions. Meaning, quite frankly, they "began upholding the

³ The Court-Packing Plan was an initiative that was designed to appoint an extra Supreme Court Justice for every Justice over the age of seventy. Had the Court still been resilient and the plan succeeded, the Court's legitimacy would have been forever damaged, as packing the Court was the solution for correcting the incompetence of elderly Justices.

building blocks of the New Deal—sometimes called the switch in time that saved nine” (Pacelle Jr. 1995, 257).

The Court stayed in stride with the vast legislative measures of the New Deal and thus freed some agenda space to allow more economic issues to be reviewed. With economics brought to the fore and with a need to change some precedents, and to strengthen the federal government by striking down numerous state-endorsed labor and civil statutes as ‘unconstitutional,’ ‘Federalism’ became one the main issues on the Court’s agenda. Since the Court’s legitimacy seemed to slip as it was, at first, fettered to executive and legislative initiatives, it had to reestablish its validity. In 1938 Justice Harlan Stone did just that. He advocated that the Court defer economic cases to the Congress so that the Court’s power was not abused in setting too much economic policy. The contingency was, that the Court would hear economic cases if the “litigants challenging such regulations could demonstrate clear, inherent flaws” (Pacelle Jr. 1995, 258). This was called the “preferred-position” doctrine and it set the tone for the Court’s future agenda. The third agenda issue was U.S. regulation, along with economics and federalism, begins to diminish in frequency in the early 1940s. The remaining issue then is civil liberties. While economic, regulatory, and federalism issues waned, civil liberties catapulted to the summit of Supreme Court consideration. In 1933, civil liberties issues absorbed only nine percent of the Court’s agenda, but rose to almost seventy percent by the late 1980s, where it peaked (Pacelle Jr. 1995, 257). Between the mid-1960s and the mid-90s the weight of civil liberties cases on the Court’s agenda has oscillated between just under seventy percent and just above forty-five (Pacelle Jr. 1995, 257). Thus, judicial review was utilized in the twentieth century toward less political questions. Civil liberties questions, despite their inherent nature as political, public-policy questions, were more malleable in the twentieth century legal climate than issues about economics,

and federalism. What this means is that the Court focused its attention toward an area that had not yet become too convoluted with weighty precedent. The Civil War had only been buried for little over half a century and civil liberties slept in the womb of political disinterest. Little did anyone notice, other than the Supreme Court itself that the nascent hatchling would grow into a beast dominating the entire landscape of the Supreme Court Agenda.

Acknowledging the aforementioned trends spurs us to see what the Court is concerned with on whole, and how it *should* be making their decisions. If the tide of the country's interests and needs is rising with concern for their civil liberties, then naturally the Court should weight their decision-making process accordingly. If a large stock of precedent is available, then they should be more willing to accept precedent. Paying attention to precedent is a way for a justice to utilize not only his own genius, but the genius of all those before that adjudicated similar cases. Hence, if the precedent is scarce, or if the existing precedent is not conducive to the amelioration of society—like Taney's *Dred Scott* decision—then perhaps the Court should assume a more pragmatic approach. Therefore, the Court did exactly that moving into the 1950s. Since less precedent existed, and the precedent that did exist was erroneous, the Court needed to reestablish legitimacy (initially through the preferred-position doctrine); and the gargantuan body of civil liberties cases grew rapidly since its inception prior to the Civil War, the Court, pragmatically, adopted a pragmatic approach.

Since pragmatism is basically the method for making decisions based on subjective circumstances and looking ahead, toward new precedent, as opposed to back, toward *stare decisis*, it is a delicate approach to interpreting the law. It cannot be ignored as it is necessary in many cases, and requires a judge to extend himself (and along with himself, a policy, or directive) into

unfamiliar territory without the support of precedent. This is a radical notion concerning pragmatic judicial decision-making, however, for the bulk of it is not so alarming. Plus, with so many questionable Court decisions cluttering our Country's past we should welcome pragmatic decision-making, for it gives us a direction toward something more relative to us.⁴

⁴ An analysis of pragmatism would indeed be helpful here, especially in understanding its vast shortcomings, but due to length constrictions on this document, the analysis was omitted. For an in depth analysis, check *The Revival of Pragmatism: New Essays on Social Thought, Law, and Culture*, edited by Morris Dickstein, and *Law, Pragmatism, and Democracy*, Richard Posner.

PART II:
The Freedom of Speech: The Limits of Language

Possibly the most interesting scope of judicial decision-making and precedent occurs through the development of the principle of the freedom of speech. Freedom of speech is an area of the law that had many ambiguities at the inception of the Constitution. The questions addressed in most First Amendment, free speech cases concern the boundaries of acceptable and unacceptable speech, and whether or not the federal government has the constitutional right to censor speech previously deemed outside the Constitution's protection. Judicial decisions on the freedom of speech also have the special characteristic of sanctioning speech with speech itself. Supreme Court opinions, of course, are written and thus are speech. The speech of the Court is accordingly the starting point and is assumed to be Constitutionally protected. This means that when the Court writes an opinion, the opinion is interpreted as being, at least minimally, valid and legitimate. Speech, in any form, is inevitably subject to interpretation, and hence is not perfectly clear or objective. In speech cases, we typically have the justices interpreting speech, usually its acceptability, and then delivering a written opinion, that also must be interpreted. Therefore, when the Court hands down an opinion about the freedom of speech, it enters into a unique legal situation, and, because of this situation, the level of subjectivity is extremely high.

So far no perfectly objective or absolute doctrine exists, leaving many to hold we will never reach objective truth. Free speech is one of the most vast and relevant mediums for studying the subjectivity of legal decision-making due to the subjectivity of interpretation and creation. Despite the fact that there are many ancillary cases that construct the doctrines of free speech, certain cases reflect the pivotal changes. Therefore, the following analysis is a necessary truncation of the entire scope of freedom of speech

doctrine. This section explores the main philosophies supporting modern freedom-of-speech doctrine along with some important cases in the course of its development. It begins with John Milton's *Areopagitica* and then proceeds to the theories of John Locke and John Stuart Mill. These particular philosophers and jurists are included because they are a significant part of our legal and philosophical traditions, with the arguable exception of Milton. Milton's work is more political than legal, not to mention the vestige of his religiosity, but it reveals a common theme in even our modern free-speech doctrines: the benefit of pluralist speech and dissent. Locke also supports a limited view of freedom of expression. He believes that the search for objective truth is important and that suppression of various ideas prevents any better idea from arising. He does not trust that any current opinion is objectively true and proves to be aware that man is stuck with subjective rationality. Locke's primary importance in free speech is his acknowledgement of what would later be deemed 'bounded rationality'. J.S. Mill is necessary to this discussion because of his most important work: *On Liberty*. *On Liberty* procures the notion that government should embrace dissenting views because they may in fact be true or lead to truth. Like Locke, Mill aimed toward objective truth and never realized it. This, perhaps, portends the futility of such aims to begin with.

Along with the fact that legal decision-making is intrinsically limited and subjective, we add the subjectivity of speech. Speech utilizes language in order to communicate; communication involves interpretation. Therefore, in communication, there must always be a speaker and an interpreter. Considering the historical and preferential differences between each potential speaker and each potential interpreter in the world—and the malleability of the meanings of various terms and expressions, in any given language—communication seems to be the most subjective aspect of all social relations. Legalese is the language of the courtroom and has a wide variety

of interpreters: lower court judges, lawyers, media, politicians, general audiences, et cetera. This essay examines freedom of speech decisions because they are so highly subjective. The purpose of this examination even is to illustrate how subjective the Court and its decisions can be, compounded by the many indefinite external factors it must deal with. Therefore, to show the Court's subjectivity, it is important to look at cases that show its severely limited ability to be objective. Add to this, one of the Court's biggest constraints, the need to appear politically acceptable. Political acceptability is one of the main reasons the Court is a legitimate body of government, as it is how the Court remains politically accountable despite any illusion that the justices are otherwise because of their status and tenure.

Political acceptability is an ample guide for studying subjectivity in judicial decision-making because in any society there will be times of immense political strife. For example, war and poverty are two practically unavoidable consequences to the inter- and intra-relationships between, and within, governed states. If the country is experiencing a war, for instance, and the Court makes a decision that aggravates an already aggravated populace, the Court risks its acceptability.⁵ Though there are many perpetual pressures upon the Court, we will study the state of war, because of its uniqueness. Partly because it is mostly transient, but primarily because it puts such an extreme burden of stress on society. During the time between 1917 and 1925, the US was particularly strained in this way.

There are five cases at the focal point of this section: *Masses Publishing Co. v. Patten* (1917), *Schenck v. United States* (1919), *Debs v. United States* (1919), *Abrams v. United States* (1919), *Gitlow v. New York* (1925). The first four cases involve the Espionage Act of 1917, and the

final case involves seditious speech. Congress ratified the Espionage Act as the US entered WWI. It was designed to curb political dissension during wartime, and to quell the sparks of revolt before they gathered into a conflagration. The provisions of the act were supported later by the Sedition Act of 1918. These times in US history are highly tense and wrought with fear of revolution, for, if revolution can happen in, for instance, Russia, why not the US? This document will not attempt to supply a sufficient record of historical situations in order to qualify the cases it examines. However, a few examples of global, wartime stress may help to illuminate why these cases are the center of our focus and why the Court may have had to make difficult decisions. The purpose, again, is to show the incredible subjectivity of judicial decision-making.

Firstly, war is not isolated. Prior to its entrance into World War I (April 1917), the US was acutely aware of the many factors and ideas contributing to war and revolution around the world. One of the predominant concerns was communism. The rise of Bolshevist communism in Russia, during the early part of the twentieth century, ignited and incendiary fear in the US that such a revolt may be possible here. Even though it is easy to claim that such a thing is far from our borders, the US government could not ignore the conditions of Lenin's newly acquired state. For example, Lenin's first law was designed to give vast estates to the peasants who had worked them for so long. The law seemed to be what we might call "revolutionary," but really the peasants had already had control of the estates months before Lenin made it legal. Also, local workers' committees were already in control of many individual factories prior to Lenin's mandate that such factories be turned over to the workers' committees (McKay, Hill, and Buckler 1983, 1239). Revealed is the power of peasant revolt and of grass roots organization and

⁵ The common element in most times of "strife" for any society is fear. The more fearful society is concerning its security or survival the more it will be paying attention to the workings of

upheaval. Essentially, Lenin had no control of these instances and merely made legal what had occurred through revolutionary force. Therefore, even though the US may not have had to worry about its own Lenin coming to power, government officials, along with many others, were well aware that if widespread revolt was desired, it could also be possible. The fear of a possible revolution was the byproduct of the spreading contagion of communism that emerge in Germany, China, Japan, and others. This fact proves that the ideas behind revolution were not only spreading but that they were also resilient, leading many to believe that the ideas must somehow be squelched. Even though the core concern for the US was World War I itself, the threat of communist rebellion exists as long as the ideas exist. Therefore, ideas became the concern of government, and the only way to punish seditious ideas was to punish the speech they emanate.

Depending on the level of fear (or danger), the US government will produce provisional laws in order to safeguard its security. The Espionage Act and Sedition Act are two of those provisional vehicles the government used to subdue seditious dissent. The reality of the subjectivity of law and legal decision-making widens when we consider that Congress actually drafts provisional laws in the name of national security (something the American populace will desperately cling to), and then expects the Court to rule on any cases that may arise from them. In the following cases the Court delivers opinions with an already limited stock of knowledge and a bounded and limited ability to utilize such knowledge rationally, while considering the most subjective aspect of human social relations: speech and language. To complicate the process it must also review the constitutionality of newly ratified laws developed during, or in anticipation, of war. Plus, in the end, the Court must maintain legitimacy and political acceptability amidst

government.

the political tensions of other institutions like Congress and lower courts, et cetera, and the American public.

Considering the many limitations and conditions the Supreme Court faces, especially those dealing with the fact that the justices lack the capability to be objectively rational, and that they must uphold and create legal doctrines that are legitimate and democratically acceptable, and that they must do so with language that requires interpretation itself, the freedom of speech is one of the most apt mediums to express the complexities of Supreme Court decision-making. The result is a demand for rigorous debate, along with a series of ad hoc decisions that ultimately create a relatively solid foundation of free speech doctrine for proceeding generations. Language remains one of the fundamental barriers to all communication and, as such, objectivity as well.

Sculpting Free Speech:

Like *Part I* of this essay, this section also utilizes only a couple of main sources. There are two, specifically: *Agon at Agora: Creative Misreadings of the First Amendment Tradition*, by David Cole; and, *Constitutional Rights and Liberties: Cases—Comments—Questions: Ninth Edition*, edited by Jesse H. Choper, Richard H. Fallon, Yale Kamisar, and Steven H. Shiffrin. Cole's work is particularly important to this essay because he demonstrates the importance of dissent and subjectivity through the First Amendment tradition. He shows that even a right, seen by some as fundamental, is still incredibly subjective. He also illuminates an ancient Greek conception of polemical debate: the idea of *agon at agora*. *Agon* means "face to face" and *agora* is the place where such debate would take place, the battleground. In a realm so overtly subjective the most important aspect to developing legitimate legal doctrine is the source of adversarialness. *Agon at agora* is an article about political adversaries fighting and arguing rigorously. Only rigorous

and stringent debate can procure legitimacy in the subjective arena of freedom of speech.

The second source, *Constitutional Rights and Liberties*, is a standard legal reference text. It is used for the entire scope of cases illustrated in this section and illuminates different issues for consideration following each case. This book lists the aforementioned cases in its section on seditious speech. Seditious speech is the primary aspect of freedom of speech in this document, because it further pushes the threshold of subjectivity in legal decision-making. In particular, sedition and agitation are the spirit of *agon at agora*, where presumably traditional beliefs are challenged with new ones. Every act of sedition is the fight between different views. As such, the sedition cases relate well to Cole's article on adversarial political and legal debate.

Philosophical Origins:

In considering the Supreme Court's role as republican schoolmaster, whether we acknowledge such a role as a duty or merely as a description, in conjunction with the intrinsic subjectivity of the Justices, we turn now to the First Amendment, specifically the freedom of speech.⁶ Free speech is deemed by many to be one of our most fundamental rights. The First Amendment begins with "Congress shall make no law," and to many, "no law" means "NO LAW." Justice Hugo Black, dissenting in *Konigsberg v. State Bar* (1961), wrote that "the First Amendment's unequivocal command [that "no law" means "NO LAW"]...shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field" (Choper, Fallon, Kamisar, and Shiffrin 2001, 496). Speech, however, cannot be absolutely protected, for the law cannot possibly deem acceptable speech that itself is perjury, fraud, or blackmail (Choper, et al. 2001, 496). Thus we have upheld, as a nation,

⁶ For our purposes, the free speech clause of the First Amendment is all that we are concerned with.

the notion that we cannot say *anything* at any time, such as with Justice Holmes's 'fire' example. Essentially, since there is an ideological break from the absolute position of "No Law" the Court is required to delineate the new boundaries of First Amendment protection of speech. Whenever new boundaries are drawn, especially those drawn by a supreme legal body that does most of its work in secret, there is the necessity for teaching. The Court must draft practicable doctrine and must be able to show, or teach, how such doctrine was developed and why such doctrine should be implemented. In this way the Court is able to "teach" society while it acknowledges its own accountability by attempting to supply adequate reasons for its decisions, and thereby supporting its legitimacy.

The tangled roots of free speech, as we understand it, begin to take hold as far back as 1644, in John Milton's *Areopagitica*. The sinuous heritage takes its next foothold in the theories of John Locke, then Sir William Blackstone (Samaha 2002), and John Stuart Mill. Our modern conception of free speech developed amidst more pragmatic grounds revealing itself in the judicial decisions of Learned Hand, Oliver Wendell Holmes, Louis Brandeis, and William Brennan. Of course, these instances do not encapsulate the entire landscape of free speech doctrine or scholarship, but they are acknowledged as those instances that have shaped it so far in our history.

John Milton's essay *Areopagitica* is famous for denouncing prior restraints concerning the exercise of dissenting speech (Dworkin 1996, 197). However, what Milton is most worried about is speech against the Church. He insists that speech that is disrespectful to the Church can only be punished after its publication, but, after it is published, it can be punished by "fire and the executioner" (Dworkin 1996, 197). Milton's idea of freedom of expression is rooted in the search for an absolute Truth. He writes, "Truth is compar'd in Scripture to a streaming fountain; if her waters flow not in a

perpetuall progression, they sick'n into a muddy pool of conformity and tradition" (Cole 1986, 876). According to Milton, pluralism and public debate can eventually lead to Truth, a view that would endure and resurface in a twentieth century Supreme Court decision by Oliver Wendell Holmes, who further develops this concept into a "free trade of ideas" doctrine (Cole 1986, 876). Under Milton's stringent pedantry all men should search for Truth, and all searching for Truth is a form of good. He tolerates error and vice only because they allow depraved men to know good as it is contrasted to evil (Cole 1986, 876). As a sententious votary, Milton does not believe in free speech for all speakers, rather, anything against the Church does not belong in "the fountain of Truth." Later in his life Milton even suggests that important political discussion be spoken in Latin, which the masses could not speak. Milton's religiosity narrows his perspective of what was to become central in most conceptions of free speech. Ironically, the very speech he does not approve is protected under the First Amendment residually by a doctrine he invokes.

John Locke achieves petrification through his numerous philosophical achievements in epistemology, political theory, and law. Of particular concern here, though, is what he accomplishes in epistemology. Locke, also a firm believer in a transcendent god, argues for the freedom of expression insofar as it leads to an objective truth. Unlike Milton, however, he emphasizes the ignorance of *all* men, not just the masses (Cole 1986, 877). Locke's epistemological view says that true knowledge can only be reached through utilization of the sciences, because the sciences reveal true essences, and "true knowledge" is knowledge of true essences. But, as Locke says, science is constantly proving its own inadequacy by superceding itself with every new advent. Therefore, since science is unreliable and in perpetual flux, we can know only very little. What we do have, in the end, is a superfluity of "true beliefs," but no "real knowledge." In spite of

this, Locke is unyielding in his search for the Truth and in his support for others to search for the Truth, even though he denies that any man can prove that he has attained true knowledge of the objective truth. In this relentless pursuit for truth and denial of its verifiability, Locke builds upon Milton's theme and does not segregate and exclude others from an elitist perspective of humanity. Rather, Locke encourages all to search for Truth, and in such encouragement, he naturally believes that all men have the right to do so. Locke is mostly important because he acknowledges that objective truth, though desirable, is ultimately impossible.

Following Locke, John Stuart Mill solidifies much of what we see as commonplace constitutional dogma in his vastly contributive and prolific work *On Liberty*. His theory of *liberty* will doubtlessly perdure through many subsequent generations as it is regarded as the very heart of constitutional democracy. However, not far removed from Locke, he still aims for an objective truth. His arguments against the suppression of speech are as follows:

(1) The suppressed opinion may be true; (2) the suppressed opinion may bear a portion of the truth, and only through conflict with other partially true doctrines will the full truth be known; and (3) falsehood serves, by opposition, to ensure that living truth will not be reduced to stale dogma (Cole 1986, 877).

Mill says that "there are no objections, and no answers to objections. But on every subject in which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons" (Collini 2000, 38). He believes that through adversarial and argumentative confrontation we can reach the truth. Knowing merely what we already know proves little. We must be able to prove our adversaries wrong, not merely reaffirm our beliefs with our own proclivities and cultural upbringings. Mill writes:

Nor is it enough that he should hear arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from

persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never possess himself of the portion of truth which meets and removes that difficulty (Collini 2000, 38-39).

According to Mill, freedom of expression had importance on an individual as well as societal level (Cole 1986, 877). Mill provides us with enduring *doctrinal* "truths" that we indeed see as fundamental to our heritage. In this aspect, however, truth is always the product of bounded rationality, and hence is subjective by nature.

Milton, Locke, and Mill contribute much more to our philosophical, political, and legal traditions than this essay has the capacity to cover. However, one of the most important aspects of their combined works is the element of struggle. Each one stalwartly pursues Truth to no avail, and, in the process, proves that Truth may be further from man's comprehension than many are willing to believe. Objective truth is an obsession revealed by their works, but only subjective truth is result. To each of the three men, this may seem a terrible resolution, but, ultimately, what we can see now, is the value of subjectivity. Such subjectivity is evident in the following cases. What we will see in the next section is the development of the modern conception of free speech. Each case is listed to show a different aspect of not only free speech doctrine but how complicated creating practicable doctrine can be.

The Modern Conception of Free Speech:

Through *Masses Publishing Co. v. Patten* (1917), *Schenck v. United States* (1919), *Debs v. United States* (1919), and *Abrams v. United States* (1919), free speech doctrine develops significantly. First, Justice Learned Hand suggests that words, in fact, lead to action, and can therefore be harmful. Second, Holmes reinforces Hand's position by establishing the "bad tendency" test and holding that speech can be punished if its tendency is considered

"bad" and if Congress has the duty to prevent the potential outcome. The "bad tendency" test is coupled with the "clear and present danger" doctrine that expresses, one is not permitted in yelling 'fire' in a crowded theatre. Essentially, speech can only be punished if it presents a "clear and present" danger. Even though Holmes takes the opportunity to implement his own precedent immediately after his decision in *Schenck*, he dissents against that same precedent in *Abrams*. These few cases are adequate examples of highly subjective decisions and demonstrate that the Court has complicated questions to address and that its decisions are hardly ever perfect. When we consider that Holmes dissented against his own precedent, we can also see the value of subjectivity.

In *Masses Publishing Co. v. Patten* (1917), the Postmaster of New York advised plaintiff that an issue of his monthly revolutionary journal, *The Masses*, would be denied the mails under the Espionage Act since it tended to encourage the enemies of the United States and to hamper the government in its conduct of the war (Choper, et al., 2001, 502). Ultimately, the defendant's position was denied, as the Postmaster could not prove that suppressing the speech of the journal in question was not supported by the language of the statute he depended. Justice Hand acknowledged that there has always been a recognized limit on seditious speech, but that, in the same respect, Congress did not intend to suppress all seditious speech. "The Postmaster subsequently specified as objectionable several cartoons, e.g., "Conscription," "Making the World Safe for Capitalism"; several articles admiring the "sacrifice" of conscientious objectors and a poem praising two persons imprisoned for conspiracy to resist the draft" (Choper, et al., 2001, 502). Hand established that public utterances could be constrained only in "direct advocacy" of resistance to the recruitment process. He also wrote that "counseling" others to act is distinguishable from evoking emulation (Choper, et al., 2001, 502). Justice Hand uses what is called the "literal

test". The literal test looks directly to the text involved in the articles of the journal that Masses Publishing was going to circulate, and tries to determine what the articles literally meant to happen. This method is uniquely fallible for it recognizes its own limitations as to discovering the actual meaning of any text, as it does not take into consideration the intentions of the author. However, it can serve as a starting point for interpreting the text. Hand is well known, in this case, to have acknowledged the true power of actual utterances. He wrote, "Words are not only the keys of persuasion, but the triggers of action" (Choper, et al., 2001, 500).

In *Schenck v. United States* (1919), the defendants were convicted of conspiracy to violate the 1917 Espionage Act by conspiring to cause and attempting to cause insubordination in the armed forces (Choper, et al., 2001, 497). The defendants printed and circulated a document, while the U.S. was at war with Germany, urging men who had already been accepted for military service to fight conscription. "In impassioned language [the document] intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said, 'Do not submit to intimidation,' but in form at least confined itself to peaceful measures such as a petition for the repeal of the act. The other and later printed side of the sheet was headed 'Assert Your Rights'" (Choper, et al., 2001, 500). The reason *Schenck* has been treated as one of the origins of First Amendment law is because of Justice Holmes's rhetoric (Cole 1986, 879). The following passage from the Holmes decision was soon implemented as the classic standard in First Amendment cases:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done...The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a

clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree (Cole 1986, 879).

Unlike Hand's opinion in *Masses*, Holmes remarks that what adds to the meaning of the words is the context in which they are uttered. Shouting 'fire' in the middle of the desert would surely be less harmful than doing so in a crowded theatre where such an utterance might cause a panic. The pamphlets that were distributed were generally peaceful and basically about "asserting" one's right to protest the draft. In fact, the document included a petition to achieve such purpose (Choper, et al., 2001, 497). "Thus, the circular was first an argument for the right of free speech and petition, and only derivatively an opposition to the war effort" (Cole 1986, 880). Regardless of the pamphlet's true amiability, its author was convicted for violating the Espionage Act.

In Holmes's decision for a unanimous court, he cited not simply the content of the documents, but what he felt their intention was. Holmes, thus, implemented the "bad tendency" test. "Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out" (Cole 1986, 880). The crux of Holmes's decision is that the nation was at war; thus, in times of war, what he seems to suggest, the citizens will have to bear heavier constitutional burdens. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right" (Choper, et al., 2001, 498). Another problem with his reasoning is the heavy standard that he purports the language must meet, and that it certainly and clearly does not. The pamphlet was never proven to cause an actual obstruction of the recruitment process, but that fact had no bearing on the defendant's case.

What mattered to Holmes was that the defendant intended to bring about a particular cause. Also, that Holmes proclaimed that 'no Court could regard them as protected' is an extremely high standard. Another obvious question arises, were the words in the circular equivocal to 'shouting fire in a crowded theatre'? Were they conducive to creating a 'clear and present danger' that would surely bring about the 'substantive evils that Congress has a right to prevent'? According to David Cole, "Holmes established a new test, but applied an old one" (Cole 1986, 881). That Holmes's actions in *Schenck* seem questionable is not as important as the rhetoric in his decision. The 'fire' test and the 'clear and present danger' doctrine, became two staples of First Amendment adjudication. Interestingly, the rhetoric was so strong that it conditioned further decisions to follow its precedent even though the analogies and standards were quite extraneous.

Debs v. United States (1919) was decided only a week after *Schenck*. Just like *Schenck*, Eugene Debs was convicted for violating the Espionage Act. Unlike *Schenck*, however, Debs did not distribute pamphlets or hand out circulars; rather, he gave a public speech. Eugene Debs was a Socialist Party candidate for President, and for delivering a speech on "socialism, its growth, and a prophecy of its ultimate success," he received ten years imprisonment (Cole 1986, 882). Although Debs applauded others who interfered with the conscription process, he did not explicitly do so himself. Again, the question was of a contextual nature, and because Debs was a highly noticeable political figure, his speech was necessarily more dangerous, especially because it called for others to protest the government's actions. Holmes's decision cites *Schenck* as precedent leaving many to believe that *Debs* was merely a chance for Holmes to implement his own precedent. Peculiarly also, is the fact that these two cases are regarded as landmark cases in Free Speech, because it seems neither case strays very far from established precedent. In effect, the *Schenck* and *Debs* decisions hardly

upset the course of the Supreme Court during that time. The Court essentially wanted to suppress radical forms of protest, and they did so using the 1917 Espionage Act as the conduit to reach their desired ends. Since both decisions were unanimous, and given the rules of *stare decisis*, it hardly seems fitting to claim that either of these cases were landmark decisions. They certainly did not fit the criteria for even being "strong" decisions.

Essentially, the Court convicted both Debs and Schenck because they fear the masses. That fear is either rooted in guilt (manifested in the "truth" of claims made by both parties) or in the idea that the rabble is easily incited. The guilt comes from the fact that the justices may recognize the importunity of the masses, but simply cannot cater to communist revolution, as revolution would overturn the very government they work to uphold. Plus, revolutions are unavoidably violent and no justice could, in good conscience, allow for a revolution to occur. The other part, that the rabble is easily incited, refers to the ability of protestors to instigate a revolution, and that the masses would be willing to overthrow an already just government as long as someone urges them to do it. This decision is a valid example of the how the justices must sometimes deliberate while considering more than just the legal ramifications of their opinions. It is also an example of how bounded rationality and the other limits and conditions of the subjectivity of the justices leads the Court to an opinion fails to discern a hermetic standard for progress.

Indeed speech is indubitably powerful, and words *can be* the trigger for action, but the Court fails to achieve any reliable standard for suppressing otherwise peaceable speech. Speech case decisions have a hard time reaching such standards because ultimately they have to purport some standard that compares certain utterances with certain prohibited actions. Another shortcoming is the reliability on metaphor to prove such a point, like

'distributing unpatriotic circulars' is equal to 'shouting fire in a crowded theater.' Holmes's 'fire' example is hence weak and misleading. Shouting 'fire' in a crowded theater would certainly be prohibited speech. In fact, it would even be a clear-cut case of speech that should be suppressed. However, it says nothing about any other case that does not quite reach its peak of emergency. Holmes gives us a standard to impeach those guilty of that highest level, but he only triumphantly impeaches those who successfully reach it (Choper, et al., 2001, 500). Any utterance short of this standard should, in effect, be deemed protected speech. Another criticism is that the decisions are wholly apolitical, and as such are not fit to clarify the complexities of any free speech issue. For example, "the man shouting 'fire' does not offer premises resembling those underlying radical political rhetoric—premises that constitute criticism of government" (Choper, et al., 2001, 500). Poignantly, too, Holmes offers no discussion, of how the speech in *Debs* presented a clear and present danger. Furthermore, criticisms have been unleashed attacking Holmes's decision based on his routine handling of not only *Debs*, but *Schenck* as well, as criminal appeals centered on the issue of "admissibility of evidence," and not on the issue of "free speech" (Choper, et al., 2001, 501).

What these cases do emphasize is the absolute power of speech. The speech was so strong as to instill a breed of fear great enough to encourage Congress to pass the 1917 Espionage Act and to permit the Supreme Court to uphold it as legitimate. Relatively, though, we must recognize that the threat of a communist resistance was considered to be possible and immediate. We have the benefit of history's perspective, but during the early to mid twentieth century a revolution or violent revolt was more immanent. The language involved in the case as a whole is reciprocal and circular. What words were used by the defendants were somehow ignited by the actions of the U.S. government, and upon appeal, their language moved the Court to respond

using its own rhetoric to challenge it. We have not yet exhausted Holmes's 'fire' example, because his use of the word 'fire' is itself so formidable as to divert the attention of many scholars who initially followed such doctrine in spite of the fact that it is apolitical and disregards the complexities of free speech. Moreover, Schenck and Debs were both convicted of the same thing, on the same legal grounds, despite the disparity in facts between their individual cases, where Schenck played in role in the "action" of distribution, Debs merely spoke aloud.

Abrams v. United States (1919), another Espionage Act case, within a year of both *Schenck* and *Debs* represents a pivotal moment in our Constitutional history. Justice Oliver Wendell Holmes dissented in a decision relying heavily on precedent that he created. "His dissent may mark as strong a self-revision as American legal culture has known" (Cole 1986, 882). It is because of the dissent in *Abrams*, that *Schenck* was promulgated to be the beginning of modern First Amendment history. As was mentioned above, neither *Schenck* nor *Debs* required or revealed a break from precedent, and neither were seen as particularly 'strong' decisions (Cole 1986, 882). So, to say that the dissent in *Abrams* is to be credited with the prominence of the two earlier Espionage Act cases is to also recognize that Holmes' unexpected self-revision is what makes all three cases important. In a way, Holmes represents the majoritarian ideological perspective, but acknowledged that such a perspective was all too narrow, and was courageous enough, quixotic even, to dissent against his own precedent. As Cole recognizes, "In thus dissenting from himself, Holmes battled an authority more immediate and perhaps more powerful than any other precursor" (Cole 1986, 883).

"[In the summer of 1918, the United States sent a small body of marines to Siberia. Although the defendants maintained a strong socialist opposition to 'German militarism,' they opposed the 'capitalist' invasion of Russia, and characterized it as an attempt to crush the Russian Revolution. Shortly

thereafter, they printed two leaflets and distributed several thousand copies in New York City. Many of the copies were thrown from a window where one defendant was employed; others were passed around at radical meetings. Both leaflets supported Russia against the United States; one called workers to unite in a general strike. There was no evidence that workers responded to the call" (Choper, et al., 2001, 503).

Basically, on the same grounds as *Schenck* and *Debs*, where the state produced only *prima facie* evidence that the defendants in fact violated the Espionage Act, the Court upheld the defendants' convictions. Now, although the U.S. was not technically at war with Russia, and was only at war with Germany, the Court had to prove based on the guidelines of the Espionage Act that interference of a particular war effort was not necessary. They established, also *prima facie*, that any attempt to interfere with any war, was a hindrance on any war effort of the United States. The charges against the plaintiff were fourfold, but only the penultimate and fourth charge are of concern, for the Court did not rule on the Constitutionality of the first two charges. Charges three and four are as follows: "conspiracy to publish language 'intended to incite, provoke, and encourage resistance to the United States in [the war with Germany], '...and conspiracy 'to urge, incite and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war'" (Cole 1986, 883). It only took one sentence to strike down the defendants' First Amendment claims to free speech, as a mere citing of *Schenck* was sufficient to convince the majority. The Court ignored the contextual elements to the case most likely because the context was transparent at most. The Court then, grasping for some intangible reason to convict a couple of socialist Russian sympathizers, held that "[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce" (Cole 1986, 883). The Court, conscientiously acquiescing to an ad hoc

decision, failed to acknowledge, or rather chose not to acknowledge, that actual "likelihood that the defendants' speech would in fact obstruct the war effort" (Cole 1986, 883). One major premise of the Court's decision was that the defendants attempted to cause a nationwide strike, thereby "arresting the production of all munitions and other things essential to the conduct of the war" (Cole 1986, 883-84). The problem that now affronted the dissenters, Holmes and Brandeis, was that the Court was able to assert *stare decisis*, which, by its very design, strengthens and legitimizes current and future Supreme Court decisions. Stamping erroneous claims 'legitimate' is the cleverest guise the Supreme Court could ever utilize for masking fallibilities in their arguments. However, that is merely one bad side to *stare decisis*, and it is not common practice. Holmes, in contradistinction to the majority, would not settle for his previously adopted precedent. Thus, he strengthened the standards by claiming that the danger must not simply be 'clear and present' but 'immediate' and virtually revolutionary, so that 'an immediate check is required to save the country.' "The immediacy must also be tangible: 'Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception' to First Amendment protection" (Cole 1986, 884). Justice Holmes, in an oft-cited paragraph from his decision, ironically exclaims:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises (Choper, et al., 2001, 505).

It is apparent that Holmes is not only in disagreement with the majority but is also contemptuous toward their unwillingness to accept that their test may be flawed. He rebukes the majority for lacking the humility to understand the fallibility of their own designs, and the maturity to admit that they

could have been wrong. What follows has become the most important foundational development for all subsequent First Amendment decisions:

...When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the vary foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge (Choper, et al., 2001, 505).

In one of the most eloquent dissents in history, Holmes, in the eyes of many, proved that limiting First Amendment free speech protection to only that speech absent "bad tendencies" or to Blackstone's prohibition of prior restraints is clearly insufficient (Cole 1986, 886).

Holmes recognized that for the truth to be sought, and naturally if any semblance of truth is to be reached at all, we must tolerate even deplorable and loathsome opinions and ideas. It is in this that we can sufficiently challenge our adversaries in the marketplace. It is here that the bounded rationality of even the expert endures. It limits the notion that objective truth is even possible, and vaguely delineates the murky boundaries of the subjective capabilities of bounded reason. Eventually, according to Holmes, if debate is rigorous and meaningful, and we exhaust our positions, and attain new, more developed ones, in a perpetual cycle, we will arrive at the truth. The truth, in Holmes' view is positivistic, relying on the consent of the masses within the marketplace of ideas. But, as we have seen, the cycle of self correction and revision is a perpetual one, and, in it, resonates the lamentations of John Locke, who denied that any real knowledge was possible because it was impossible to have knowledge of the true essences of things, due to the fallibility of all our current practices.

Regardless of Holmes's conclusion on our collective ability to reach the objective truth, he galvanizes the importance of adversarialness in the marketplace. For, without a tolerance for the opinions of others, even

though they may be repulsive or offensive, we invalidate our own opinions. So not only does Holmes re-present the Lockean version of free speech, in terms of reaching an objective truth while relying on insufficient methods, he also re-presents Mill's more influential staple that we must challenge not only our personal beliefs but others' beliefs as well. Although an absolute objective truth is effectively chimerical, what we can reasonably surmise is that if levels of suppression of free speech increase across time, even episodically, achieving an objective truth of any sort, absolute or circumstantial, is incontrovertibly discomfited. Another difficulty is the proselytization of the populace *en masse*. For, necessarily, if one disagrees with the majority he has agreed conversely to ignore the truth. Even though Holmes respected many minority opinions as being fundamentally protected by the First Amendment, it would be a matter of imprudence to ignore the truth. However, the brilliance of Holmes' dicta is that if one chooses to be "imprudent," or "foolish," he should be allowed to do so within the protection of the First Amendment. Regardless of Holmes' insight, however, the debate is unresolved. As Nat Hentoff remarked in *Free Speech for Me—But Not for Thee*, in a chapter titled *The Dangerous Marketplace of Ideas*, "Attempts to crush someone whose speech and ideas have offended a particular group are a recurrent plague in all countries, certainly including this one" (Hentoff 1992, 295).

Ultimately, Holmes' market metaphor of 'free trade in ideas' invokes a laissez-faire conception of the role of government in the regulation of speech (Cole 1986, 886). At the core of the market metaphor is the Adam Smithian "invisible hand" theory. Some scholars believe that the "invisible hand," market metaphor was Holmes's way of cloaking his own uncertainty in scientific and economic theories of freedom (Cole 1986, 886). In the end, it seems that Holmes understands that an objective truth is unreachable by human beings, and, therefore, it would seem that any mention of truth by a

sententious polis is an over-valuation of truth itself, for truth is an illusion. Therefore, attempts to rid society of didactic verisimilitude are not only impossible but also pointless in the same respect. As Robert Wolfe said, in *The Poverty of Liberalism* (1968), "it is not to assist the advance of knowledge that free debate is needed. Rather, it is in order to guarantee that every legitimate interest shall make itself known and felt in the political [process]. Justice, not truth, is the ideal served by liberty of speech" (Choper, et al., 2001, 507). Wolfe's claim of justice being the ideal and not truth, exposes another relativity in Supreme Court decision-making; that of role. Should justices see their role as arriving at truth or justice?

As a teacher, a republican schoolmaster, a responsible individual, Holmes has taught by example and rhetoric the most valuable and enduring life lesson in the history of the Court: that it is never too late to rectify previous wrongs, and in fact, it is the duty of the Court to assume responsibility for its mistakes, whether those mistakes belong to its specific era or to a different generation. Accountability, in the political sense, is a misnomer, and entirely understates the magnitude of what the concept actually implies and demands. What makes the Court particularly unique in terms of accountability, is that, for the Justices, accountability comes from a more traditional, humanistic foundation. They are not held politically accountable, but they are indeed held accountable for their decisions. The Court, then, is held accountable as every other person is held accountable for his everyday commitments and routine mistakes. In this light, the Supreme Court is more closely related to the general population, and as many see the executive, and partly the legislative, branch as a 'ubiquitous and compelling' 'authority' (Graffin 1993), the Supreme Court is seen as having our true interests in mind. Although our Congressmen and women, and our President are elected authorities that indeed reflect the

general interests of a particular region, we can still not trust them as much as we must trust the Court. This of course rests on the Court's political unaccountability and its legitimacy, but we do not perceive the Court as compelled to act in our interests, or as worried about not winning the next election. Therefore, when the Court makes a truly contemplative and magnanimous decision, even if in a dissent, we see them as more trustworthy and respectable than our politicians, even though we really have no other choice.

The following section considers only one case: *Gitlow v. New York* (1925). Though *Gitlow* is not necessarily the quintessential example of the complexities of speech countering speech, it illuminates some common problems the Court deals with regularly. The main aspect of this case is the subjectivity of speech and language in the judicial opinion itself. Since speech and language are, by nature, subjective and the focus of interpretation, *Gitlow* is a sufficient example of the reciprocity of subjectivity in legal adjudication.

A Problem With Using Speech to Suppress Speech:

The next relevant case is *Gitlow v. New York* (1925). *Gitlow* deals with seditious speech, in particular advocacy of anarchy. "[Gitlow] was a member of the Left Wing Section of the Socialist Party and a member of its National Council, which adopted a 'Left Wing Manifesto,' condemning the dominant 'moderate Socialism' for its recognition for the necessity of the democratic parliamentary state; advocating the necessity of accomplishing the 'Communist Revolution' by a militant and 'revolutionary Socialism' based on 'the class struggle'; and urging the development of mass political strikes for the destruction of the parliamentary state. Defendant arranged for printing and distributing, through the mails and otherwise, 16,000 copies of the Manifesto in the Left Wing's official organ, The Revolutionary Age. There was no

evidence of any effect from the publications and circulation of the Manifesto" (Choper, et al., 2001, 509).

The importance of this case for our purposes is to point out the vigilance of the Court to preempt revolution by suppressing speech, and to show that the legitimacy of any preemptive measure take upon speech wades amidst murky waters. The first problem with the case is that Gitlow was convicted under an anti-anarchy statute, when he was not an anarchist at all, but a socialist. Now, for most, radicalism is radicalism, but the difference between the two ideologies is significant. Socialism advocates large-scale government control, and anarchism advocates the exact opposite. In fact, the two camps are so diametrically opposed that there is no such thing as a "socialist anarchist." They are not harmonious concepts, and thus share different goals and different means for achieving those goals. Thus, either the statute is improperly designated and thus should be determined 'void' or the conviction of socialist under an anti-anarchy statute should be prohibited. Justice Sanford's decision rested on a particular provision in the statute that prohibited the violent overthrow of the government, and that this prohibition was not only applicable to anarchic apologists, but to socialist supporters as well. What Sanford portrays in his decision is inherent in totalitarian government. His decision is irrevocably insidious and detrimental to, not only the welfare of the State, but also to our First Amendment tradition. He writes:

[The State] cannot reasonably be required to defer the adoption of measure for its own peace and safety until the revolutionary utterances lead to disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency (Choper, et al., 2001, 510).

Justice Sanford confounds all structured delimitations for the sake of poetizing his language. In such poetizing he diverts attention from the fact that he offers no definitions or standard for determining the meanings of his own locutions. For instance, what is meant by 'revolutionary utterances,'

'disturbances,' 'threatened danger,' and 'incipiency'? And how are we to uphold the value of any interpretation of their meanings with the inclusion of 'in its own judgment'?

'Revolutionary utterances' is replete with an indefinite and prolific number of interpretations based on circumstantial situations. Among them are the political rest or unrest of society as a whole, and the likelihood of revolution. It has been stated that the U.S. has long since been a veritable hotbed for revolution. In our current two-party system, where the Constitution ensures the rights of everyone regardless of any affiliation, this country is hardly ripe enough for revolution. Currently, for any utterance to be deemed 'revolutionary' it would have to meet the highest possible legal standard to be prohibited. Even in 1925, when the threat of revolution was more probable, the standard for proving that an utterance was "revolutionary" was too lofty. The level of vivaciousness in the 'revolutionary utterance' would have been so incredibly high that a revolution would surely occur as a direct result of, and immediately following, dissemination. It is also true that many utterances are in fact 'revolutionary' but do not cause a revolution. It seems to be that the very nature of what might constitute a 'revolutionary utterance' would have to be that the utterance itself *is* revolutionary or that it will, without question, cause a revolution. The entire theory behind stopping revolution through the suppression of speech deals with prior restraint. It is a curious and amorphous quality, because the prior restraint is not upon speech, but on revolution. The inevitable pitfall of stopping revolutionary speech is that a revolution must in fact occur in order to verify whether or not the speech was revolutionary. The other option is to approve of suppressing speech that is revolutionary in its utterance. This last option is a cascading inimicality, for it would allow the suppression of certain speech deemed revolutionary, but since all utterances are inherently different, if even by

the plain fact that they are spoken at different times, no two utterances can be judged under the same standard.

'Disturbances' is also difficult to define. How can we ever draw the line for when a disturbance has or has not occurred? Just like a revolutionary utterance, that a disturbance had in fact occurred would indeed be unverifiable. Should it be left up to those disturbed to decide whether or not a disturbance has taken place? Loosely interpreted (and why not?) a disturbance occurs any time someone tries to change the mind of another. How would the Justices then determine how big the object group would need to be in order to suppress a speaker's utterances? Sanford, like many justices who also tried to suppress political speech, makes damaging insinuations about the public body. It appears that the public should never be trusted in the midst of radical speakers, because they cannot discern for themselves what is harmful. Sanford is claiming that the Justices know what is best, and that if the people would want to revolt and overturn the government, they are simply wrong in wanting to do so. It is the notion of insidiousness that worries our government, because the government does not believe that 'ordinary' citizens will be able to recognize the dangers of radical thinking. In the Court's willingness to punish advocacy of sedition, it not only underestimates the power of conditioning but also precludes that Americans are stupid, as well as ignorant. Although thought is not totally determined by our language, language cultivates thought into concepts and principles and is the tool we use for inquiry and uncovering our own conclusions about our environment. If the media is predominantly conservative, and, according to Edward Herman in *The Myth of the Liberal Media*, it is, and since the media is the primary information conduit for the U.S., the media determines much about what we think about the world. I have yet to hear any news station advocate revolution. However, the information we receive from the media is already packaged to be consumed by massive

general audiences. Thus, many "conclusive" opinions we are fed by the mass media are specious and lacking supportive premises. The problem is that most individuals receive information that merely reaffirms their own beliefs. For instance, the belief in a transcendent god that created the world, or that communism is bad, et cetera. Pedagogical truisms are numerous, amorphous, and utterly ubiquitous. Thus, although we have the power to question the validity and legitimacy of the information we receive, what we believe no less is, at least, partly a function of the information we have access to. The point is this: with constant indoctrination and strong propagandistic media, revolution in the U.S. is practically impossible, even though several unanimous Courts handed down convictions to advocates of sedition based on the grounds that their speech represented an immediate danger.

When and if a revolution is actually going to occur is the source of the next questionable locutions mentioned above, 'threatened danger' and 'incipiency'. 'Threatened danger' is less provoking than 'immanent and immediate' danger, but that does not imply that it is less problematic. For instance, what is a threat? This is a question that has plagued criminal law for years without much more than positivistic justification for its definition. And 'danger' is another word saturated with ambiguity. Does Sanford mean danger of having our minds changed or altered? Or, does he mean that our lives must be in danger, or that the government is in danger of being overturned? Is the worry in protecting the government or the people? And, if the worry is to protect the government, is it because the government protects the people and thereby any injury to it, inevitably, harms the people? It is thought provoking to consider that the U.S. government is tolerant of all seditious speech until it actually resembles an actual sedition. So what then of the power of words? *Schenck, Debs, Abrams*, and *Gitlow* are testament to the absolute power of words. Although the words they spoke did not ignite a revolution, they show that words indeed, especially

politically charged radical rhetoric, invoke fear in those entrusted with the power to run this country, and that words are acknowledged as the 'trigger' for action. Except, they did not actually trigger anything other than the paranoia and suspicions of the already paranoid and suspicious. The next quandary that confronts us is that, still, so much is left to conjecture because of stopping sedition at its 'incipience'.

If revolution is stopped always before it starts, then we will never know how much latitude citizens should be granted. It seems that the only way to be sure of the threshold of how far speech can progress while remaining purely speech, we would have to wait for revolution to actually reveal itself. This pushes to the fore a question not only of the meaning of 'incipience' but when, in fact, does incipience itself begin? Oddly stated, but this means, where is the beginning of the beginning? For, in all occurrences of revolution and political uprising the incipience of a movement or a revolution can take place across years of disenchantment. So the question of incipience, begs the question of temporal relativity. Since we understand that revolution can take years to foment, the point of incipience we are concerned with is the exact point the idea was invented, so that it put into motion the wheels of revolt. This impossible task is accentuated by the fact that a revolution is not official until it reveals itself, thus leaving us to deduce that the incipience could have been at any time before the revolutions nascence. Actually, in this convoluted form the revolution would be renascent, for if speech can be considered revolutionary, then so too can thoughts, thus the revolution would have been nascent in those impregnated thoughts of rebellion. As most standards in the law, 'incipience' would have to be understood as a condition, threshold, or limit. It must somehow be marked by a particular point in time where out of inexistence emerges incipience, and out of incipience emerges revolution. That is the only verifiable means, for to truly stop revolution at its

absolute incipience, at its most fundamental origin, one must find its precursors. The most obvious example is *The Communist Manifesto*, by Marx and Engels. That is where the true incipience of sedition lays, at least that of the socialist variety, the variety that terrified our government at the turn of the twentieth century. Thus, the only way to stop the nascence of revolution is to suppress not only speech but the ideas that led to the literature, that subsequently led to more ideas in the audience, then to seditious speech, and finally to revolution. To talk in terms of incipience locks the Court into determining a moment on a timeline, and the difficulty is prevalent: when is that moment and how could we ever be sure of its magnitude?

The last phrase for discussion is: 'the exercise of its judgment.' 'In the exercise of its (the Supreme Court's) judgment' means that the Supreme Court determines when all the previous locutions take root in action, and are factually actualized in society. It is in their judgment to decide when there has been a 'revolutionary utterance,' whether or not that utterance lead to a 'disturbance' of public peace, if that disturbance could be characterized as putting the State in danger of destruction, and in order to avoid all this, they must discern what this 'threatened danger' looks like in its incipency. Since the State cannot possibly required to wait until their own destruction begins; until the senescence of its control, the State, consequently, is encouraged to seek the stripling dangers in their incipience and within the liberties the State provides. It almost seems as if Justice Sanford never considered the ambiguities in what seemed to be an otherwise amiable decision. Presently, we think of seditious political speech synonymously with the protection of the First Amendment, but I did not cite this particular case to show weakness in our constitutional history. *Gitlow v. New York* marked one of the initial cases where the Court looked to the 'words' involved and, unlike *Schenck* and *Debs*, which involved questions of

proximity and evidence, whenever *only* words are considered, they must be held against the highest constitutional standards. The primary reason this case has been cited is that it shows the reciprocity of speech, and, the more times the cycle revolves, the more opinions it gathers, the more mistakes it assumes. For example, Gitlow's speech evoked a response from the Court of New York, and eventually a decision from the Supreme Court that, dealing with the words spoken, spoke its own words against the act. Words are battled with more words, and like Wittgenstein says, "There are words with several clearly defined meanings. It is easy to tabulate these meanings. And there are words of which one might say: They are used in a thousand different ways which gradually merge into one another. No wonder that we can't tabulate strict rules for their use" (Solan 1993, 171).

Justice Brandeis joined the dissent in *Abrams* even though it was in *Whitney v. California* (1927) that he made his mark on the constitutional evolution of free speech. Charlotte Whitney was convicted of 'assisting in organizing, in the year 1919, the Communist Labor Party of California, [for] being a member of it, and [for] assembling with it" (Cole 1986, 888). The majority discarded Whitney's free speech claim by citing *Gitlow v. New York*. Brandeis' concurring opinion, however, is focused directly on her claim to free speech. David Cole reports:

As Holmes had done in *Abrams*, Brandeis retained the outline of the *Schenck* clear and present danger test, but filled it with new meaning, substituting an essentially political justification for Holmes' quasi-economic reliance on the discovery of truth through free trade in ideas. Brandeis, who never used Holmes' market metaphor, shifted the focus of the First Amendment from the pursuit of transcendent truth to subjective individual freedom and intersubjective political deliberation (Cole 1986, 888).

Also, like Holmes, Brandeis issued his opinion separately from the majority, freeing himself from the restrictions of precedent, and allowing him also to create what would become a cornerstone to First Amendment theory (Cole 1986, 888). Brandeis bolstered Holmes's 'clear and present danger' test by imbuing it with political theory. He used the clear and present danger test to

illuminate "that political deliberation of public issues must be free from suppression in a representative democracy" (Cole 1986, 888). He wanted to redirect the focus from a concept of objective truth to a consideration for individual and minority opinions. According to Brandeis, the Founding Fathers:

[b]elieved that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government (Cole 1986, 889).

According to Brandeis the final end of the State should be to ensure that men had the liberty and freedom to develop their faculties and talents (Choper, et al., 2001, 514). "Most importantly, he allied order, freedom of expression, and reason against force, repression, and fear, and asserted that law falls in with the latter elements when it restricts free speech" (Choper, et al., 2001, 514). Brandeis writes:

[The Founding Fathers] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form (Choper, et al., 2001, 515).

The preservation of a democratic state depends upon free and fearless reasoning.

PART III:

Efficacy: Can the Supreme Court Assume the Role of Schoolmaster?

Visibility and Response: Mass Media and Outside Influence

This final section addresses the final aspect to the question of whether or not the Court can assume the role of republican schoolmaster: the audience. So far, we have determined that the Court's decisions are subjective and that subjectivity makes maintaining legitimacy difficult. We have also seen, in "Part I," that the Court's instrument, its "voice," is not only the written Constitution itself but also the unwritten constitution. The next step is to examine if the Court reaches its audience, while simultaneously acknowledging that *all* interpretations are highly subjective and circumstantial. Again, only two main resources are utilized in this section: *One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States, 1947-1992* and *Media, Knowledge, and Public Evaluations of the Supreme Court*, an article from *Contemplating Courts*, by Lee Epstein. These two resources address the Court's audience. The following section does not contain a complete analysis of every audience the Court may have, but, again, the purpose is to show the subjectivity in legal decision-making. Also, the next section deals with who is interpreting the Court's interpretation of the Constitution. Considering the audience is significant due to the fact that the Court draws different audiences with different decisions. Essentially, there will be a much different audience for abortion case decisions than there is for economic policy decisions. Audiences are typically all those concerned with the outcome of the case. They have something at stake, and in order to ensure the Court's opinion establishes the outcome they desire, they will use their influence on the Court. Therefore, adversaries are incredibly diverse and their influence intense. This is the final aspect debilitating

the Court's ability to be objective. This section also helps to illuminate whether the Court can, in fact, assume the role of republican schoolmaster.

Mass Media, the General Public, and Issue Attentiveness:

The economy of attention is highly important to political scientists, especially when attention to certain issues fluctuates greatly (Flemming, Bohte, and Wood 1997, 1224). The attention to particular issues is directly correlated to an issue's visibility in the public sphere. The amount of attention spent on issues, whether it rises or falls, expands or contracts the scope of conflict in policy arenas. In *Federalist 78*, Alexander Hamilton wrote that the Court would be the "least dangerous branch" of government. "Without the power of the sword or purse at its disposal, the Court's authority in American politics would ultimately depend on its ability to persuade. The Supreme Court, however, may be more effective in drawing attention to issues and problems than in changing preferences about them" (Flemming, et al., 1997, 1225).

When the Supreme Court hears any case it not only draws a significant amount of media attention but legitimizes and, in turn, galvanizes the issue at hand. One of the first expressions that comes to mind upon hearing about the Supreme Court is 'power.' Thus, naturally, of all issues that the Court reviews it has the power to confer and remove benefits and rearrange the distribution of political influence (Flemming, et al., 1997, 1225). "Decisions that rearrange political benefits or influence in the extreme, as for example in cases involving school desegregation, flag-burning, or public prayer, often expand the scope of conflict by activating new groups and accentuating old rivalries" (Flemming, et al., 1997, 1225). Hence, public and media attention increases and various other political groups seek involvement. The Court is not to be seen as an agenda-setting institution, although, if we follow Pacelle's table (mentioned above), showing that the Supreme Court's primary agenda issue was civil liberties in the better part

of the twentieth century, and add the results from this study, we shall see their congruency (Flemming, et al., 1997, 1225).

The main issues up for consideration are school desegregation, church-state relations centering on establishment questions, freedom of speech, and obscenity matters. As the Court opens up to questions concerning civil liberties they attract numerous interest groups. Many, instigating policy changes, responded to the Court's evolving role (Flemming, et al., 1997, 1226). The groups would appear, before the justice, sponsoring certain cases and as *amicus curiae* in these policy areas. Litigating groups also joined in the dogmatic frenzy seeking attention as interest groups vied for the Supreme Court's grant of legitimization, as if somehow they could achieve their sanctity through legal decisions. Thus interest groups sought justice for their causes, litigating companies sought profit, the Supreme Court needed to swing power back in its direction after the New Deal, and all the while attention to these issues amassed, and not coincidentally. After all, what they truly sought was attention: interest groups for their causes, litigators for market popularity, and the Supreme Court for the other branches of government to acknowledge their power and influence. So then, to what degree was the Supreme Court a dominant voice, altering the level of attention these issues received? The authors of this particular study observed "the impact of critical Supreme Court decisions on long-term media attention" (Flemming, et al., 1997, 1226).

The relationship between the media and attention is reciprocal in nature, where the media is partly driven by market incentives to follow certain events and stories, and the concerns over these issues reflect the media's coverage. This means that as media coverage increases over certain areas so too does society's attention. "Media attention, then, offers a surrogate indicator of what issues the system is attending to at any point in time" (Flemming, et al., 1997, 1227). And this is particularly true

concerning the Supreme Court. However, media coverage of the Court is scarce. Media attention in the courtroom pales in comparison to the magnitude of footage covering the politics of the executive and the legislative branches of government. "The Court's concerns are unlikely to arouse the public to the same degree as presidential pronouncements or congressional activities" (Flemming, et al., 1997, 1227). Even though this assertion may be true, Flemming, Bohte, and Wood see the issue as not yet settled and still problematic, therefore, also worthy of more attention. Thus, the research begins from a "null" point that suggests that the Supreme Court does not influence systemic issue attentiveness (Flemming, et al., 1997, 1227). The study does not pore over case-specific Supreme Court decisions, but, rather, entire policy domains, in order to see if the Court can "enduringly shift national attentiveness" to these broader issue domains over time (Flemming, et al., 1997, 1230). Ultimately, what the study seeks to reveal is "whether the Court's decisions definitively shaped the national dialogue about school desegregation and First Amendment controversies during the period of the study" (Flemming, et al., 1997, 1230).

If the Court is, in fact, America's republican "schoolmaster" then a connection between its decisions and systemic attentiveness and social dialogues should also be prevalent (Flemming, et al., 1997, 1230). As we shall see, however, it is mostly such decisions, that David Cole calls 'strong decisions,' that typically affect levels of attentiveness. These strong cases are one's where precedent is overruled and the decision is upheld and subsequently becomes the new precedent. These decisions can "alter political relationships between individuals, groups, or institutions" (Flemming, et al., 1997, 1231). Thus, "conflict and controversy are key contextual conditions for expecting Supreme Court decisions to reshape the national agenda" (Flemming, et al., 1997, 1231). Such conflict and controversy, as far as they remain focused in issues without resolution,

continuously fuel media stories and have the constitution to endure constant systemic attention. This of course provides the Court with more attention than it normally receives. Although "immediate political opposition creates a spurt of media of coverage...[the] level of coverage persists over time because the Court's decision is seen in terms of fundamental cleavages or national values around which there are established interests or around which political interests mobilize and then polarize" (Flemming, et al., 1997, 1231). "Long-term agenda change occurs when landmark decisions hit the nation like a fire alarm in the middle of the night" (Flemming, et al., 1997, 1234).

According to the results of the study (Flemming, et al., 1997, 1243) the number of stories reported reached their highest ebb around 1965 and again in the late 1980s. For the sake of clarity it may help to acknowledge one case in particular that proves that the Supreme Court does in fact affect systemic attention: *Texas v. Johnson* (1989). *Johnson* is noted because of its immediate effect, and that the Court's decision incited public outrage due to their "failure" to protect the flag (Flemming, et al., 1997, 1243). "In this case the Supreme Court was a catalyst, sparking system-wide concern over an issue that previously was not under active consideration by other institutions. The decision mobilized the media and a concerned public, which in turn resulted in increased attention both by the president and Congress" (Flemming, et al., 1997, 1243). Public opinion upsurged and in various polls demanded that Congress enact a constitutional amendment to overturn the Supreme Court decision. Hence, the Flag Protection Act of 1989 was the result of public outcry to overturn a Supreme Court decision. To further illustrate the Court's influence, when they struck down the Flag Protection Act less than a year later in *United States v. Eichman* (1990) the public once again grew infuriated, and once again Congress and the president were pushed to propose various constitutional amendments to overturn both *Johnson* and

Eichman (Flemming, et al., 1997, 1243). Once again they suffered discomfiture at the hands of the Court.

The same uninformed, erroneous opinions we think account for knowledge, not only plague politics but the Supreme Court as well. Their "mass" opinions are often predispositions that determine how particular individuals will view Supreme Court decisions (Franklin and Kosaki 1995, 352). This ignorance concerning certain issues and policy decisions is due in large part to the Court's lack of visibility. For instance, "studies of public opinion often find low public knowledge of the Court," such as when a poll by the *Washington Post* revealed that "more people could identify Judge Wapner...than could identify Chief Justice William Rhenquist" (Franklin and Kosaki 1995, 352). Too many cases are neglected by the mass media, and, when the mass media in many ways sculpts what issues America will pay attention to, and, in part, what conclusions the American citizenry will reach, when they ignore the Court's decisions, so too will the citizens. "In 1989 the Court handed down full decisions in 144 cases. Of these, less than a quarter (35 cases) received any network television news coverage, and only 16 (11 percent) were covered on all three networks" (Franklin and Kosaki 1995, 352).

Media coverage is the primary way Americans follow Supreme Court decisions, but it is still uncertain why the general population either favor or disfavor their decisions. What decisions Americans will either favor or disfavor has much to do with what debates they frequently engage. Like when *Brown* and *Roe v. Wade* made significant legal leaps and somehow affected, collectively, the entire population, few did not hear about them. As we saw in the Texas A&M study on changing agenda of the Supreme Court, decisions that affect major swings in political influence, and decisions that affect large groups people personally, like desegregation and abortion, systemic attentiveness intensifies. Such decisions "draw the Court into the spotlight" (Franklin and Kosaki 1995, 353) for the general public.

According to Franklin and Kosaki, it is the Court's legitimacy that accounts for attentiveness levels and consequences to its decisions. Like was noted earlier, since the Court lacks the power of the sword or the purse, it must depend on persuasion, and the higher the Court's legitimacy the greater its persuasive ability (Franklin and Kosaki 1995, 353). Public opinion can either mitigate or elevate legitimacy, as it is of course the public who perceives such legitimacy. Thus, massive systemic attention when a Court passes an unpopular decision, like that in *Johnson*, can negatively affect the Court's image, where low levels of systemic attention in unpopular decisions do not significantly affect the Court (Franklin and Kosaki 1995, 353).

Although media coverage is a major factor in shaping public opinion, public opinion is driven in large part by the issues of the day. "Thus, although levels of awareness are correlated with levels of media attention, the relation is far from perfect and varies, depending on the type of issue" (Franklin and Kosaki 1995, 354). So then, of particular importance are the other factors that contribute to systemic awareness like: "media coverage of the decisions, elite response, preexisting personal interest, prior media coverage of the issue involved, and social interaction" (Franklin and Kosaki 1995, 355).

The cases that were decided during the study in July of 1989 were: *Webster v. Reproductive Health Services*, an abortion case, *Texas v. Johnson*, the notorious symbolic speech case, *Martin v. Wilks*, concerning affirmative action, *Stanford v. Kentucky*, dealing with minors facing the death penalty, and *Sable Communications v. FCC*, a case concerning the regulation of telephone porn services (Franklin and Kosaki 1995, 355). Though the issues vary greatly in subject matter, there is a disparity in prominence and media coverage (Franklin and Kosaki 1995, 355). Unlike most institutions in the government the Supreme Court's activity is highly secretive and private.

Since most of the Court's work is done in closed quarters where the Justices mostly read and write, and deliberate amongst themselves, the only instances that receive media coverage are the oral arguments and their decisions. This is indeed an idiosyncrasy affixed exclusively to the Supreme Court, in light of other institutions like Congress holding "hearings, committee and subcommittee meetings, and floor debates, [where] party leaders and other members make statements, visit the White House, and appear on television interview shows" (Franklin and Kosaki 1995, 356). Thus, although the judiciary is a co-equal branch of government, it is far inferior considering its camera time, and naturally the citizens' awareness of its functions. To solidify this conception a study, using the Vanderbilt University Television News Index and Abstract, showed that over the course of nineteen months beginning with January 1989, there were 3,566 stories about the president, 1,754 about Congress, and only 429 about the Supreme Court. In short, the president receives 8.3 times the coverage of the Court, and Congress gets 4.1 times that much (Franklin and Kosaki 1995, 357). Since the Court hands down most of its decisions in June, June is the best month to study awareness. Surprisingly, during the month of June the Court was featured in seventy-seven network news stories, which proves that the Court occasionally attains a visibility plateau equal to, or greater than, that of Congress (Franklin and Kosaki 1995, 358). This maintains that the Court's visibility is high only episodically, compared to the constant coverage of the other branches of government. Ultimately, a "seeming paradox is now quite clear: the Court is often ignored and invisible, but at times it becomes quite visible indeed. Thus, citizens may know little about the Court in general, yet be exposed to quite a lot of news about it in a short period of time" (Franklin and Kosaki 1995, 358). Of the five policy areas aforementioned, abortion received far more attention than flag-burning, even though the impact of the flag-burning case may be far greater. The coverage of the abortion case was immediate and

evanescent, whereas the flag-burning case received attention a week after the decision and, while President Bush was seeking a constitutional amendment to ban the protection of desecrating the flag (Franklin and Kosaki 1995, 360). Had political and public elites not urged the amendments, coverage of the *Johnson* decision would have surely diminished. "The lesson to be learned from this is that even controversial and unpopular decisions, such as the flag-burning case, are likely to vanish quickly from the media unless they provoke sustained elite reaction. By the same token, elites can keep some Court decisions on the media's agenda if they sustain a reaction" (Franklin and Kosaki 1995, 360).

Next, for Supreme Court decisions to truly affect levels of sustained systemic attentiveness, the public must be able to recall its decisions and must have a reason to recall them. For this consideration the individual is more important than the issue of the case. Individuals who are attentive and concerned with politics and legal matters are generally aware of Court decisions, but for other individuals, generally disinterested in politics, court decisions are of little significance unless they reflect controversy and seep into daily conversations, or affect the individual directly (Franklin and Kosaki 1995, 361). For example, abortion cases may concern women more than men, and may also be more relevant to religious sects that associate their moral creeds with such public policy issues. Affirmative action cases would most likely affect minorities and others who worry about job security and acceptance into universities in regions with high minority populations. Death penalty cases would be important to conservatives and liberals alike as both express strong concern for the future of the death penalty as a major crux for civil and human rights debate. Of course, in addition to these specified groups, anyone who has had personal experience in any one of these areas, would most likely also be concerned. Like Franklin and Kosaki write: "there may be complex interactions between individual

characteristics and the nature of cases" (Franklin and Kosaki 1995, 361). Ultimately, where the awareness probability of the three less influential cases was low, the abortion and flag-burning cases "show that it is possible for large portions of the public to be very likely aware of some Court decisions" (Franklin and Kosaki 1995, 366). So, although awareness of phone porn services, affirmative action, and the death penalty, was systemically unlikely, it was reversed for abortion and flag-burning where, essentially, unawareness was unlikely (Franklin and Kosaki 1995, 366).

The Supreme Court's legitimacy, probably the most important aspect to its position, rests heavily on the trust and approval of the public. Although the Court is a non-elected, unaccountable governmental body, it is still a political body inherently entrenched in politics, from the appointment process of the Justices, beginning with a presidential nomination and ends with the approval of Congress, to the entanglement of the Justices in their own political ideologies (Franklin and Kosaki 1995, 370). It is those ideological leanings of the individual Justices and their decisions and dissents that the citizens identify with. Thus, those who agree with the Court look at the Court more favorably than those who do not (Franklin and Kosaki 1995, 370), and whether or not citizens have reliable knowledge of Court's decisions depends largely on whether or not they have an interest in legal and political matters. Of those most interested, "[w]e would expect their evaluations of the Court to be based on reasonably accurate perceptions of the ideological cast of recent Court decisions. As we move to where those who have less interest in the Court, however, we expect two things to occur. First, there should be less information. Second, what information exists is likely to be a combination of relatively old knowledge and some newly acquired perceptions" (Franklin and Kosaki 1995, 370). Those less knowledgeable, who have old conceptions of how the Court makes decisions, are typically unable to discard irrelevant information in order to clear room for

relevant facts. For example, "Having once thought the Court to be liberal, they have less ability to know when it has turned in a conservative direction" (Franklin and Kosaki 1995, 371). As we know, knowledge has nothing to do with opinion in general, and in turn has nothing to do with many beliefs, but knowledge does play an important role in whether our opinions and beliefs are accurate (Franklin and Kosaki 1995, 373). This is seen because considering evaluations of the Court, those evaluations depend upon current patterns of Supreme Court decisions. Those who are more aware of the Court's decisions and thus are more concerned with what the Court is doing, are more likely to form either favorable or unfavorable feelings toward the Court. Those with less awareness tend to be indifferent. Naturally, the more knowledgeable citizen will notice trends in the Court's decision-making, like that of moving in the direction of conservatism after Nixon and into the Reagan era. Unfortunately, the knowledgeable citizen is disparagingly a minority. So, if the knowledgeable citizen is the citizen with an accurate perception, and he is also part of only a minority, how then does the Court control and uphold its legitimacy? Of the knowledgeable citizens they are divisive concerning favor or disfavor of the Court, leaving an even smaller minority that favors the Court and recognizes its legitimacy. This trend has given rise to this conclusion:

[It] suggests that the dynamics of the public's evaluations of the Supreme Court may be much like those for Congress and the presidency. Thus the stability of the Court's evaluations over time may be a function of insufficient knowledge...If this is so, then we might well wonder if greater awareness of the Court would result in more volatile evaluations and more problems of enforcement and compliance for an institution whose major concern is legitimacy (Franklin and Kosaki 1995, 373).

The Legal and Political Community:

The general public does not reflect, nor does it parallel the levels of attentiveness of the legal and political community. The primary reason for this is that members of the legal and political communities have more to gain and more to lose from particular judicial decisions. The legal and political

communities are comprised primarily of litigants, attorneys, political parties (including Congress and the president), and interest groups. These participants not only focus on the consequences of certain judicial decisions but play a major role in influencing the selection of the justices, the Supreme Court's agenda, and the decision-making process. Also once a decision has been made, they also affect its implementation, and subsequently its legitimacy. Considering that the Court is firmly entrenched in the political process and the high levels of influence from various political bodies, the Court inevitably makes decisions about politics and public policy. Public policies are the "authoritative rules by which government institutions seek to influence the operation of government and to shape society as a whole" (Baum 2004, 3). The Court, of course, cannot simply fabricate public policy; it must be brought to it in the form of a legal question. This is one of the restrictions on the Court's jurisdiction. Affecting public policy may or may not affect the Court's legitimacy. Regardless, however, the Court *does* make public policy, even in its most restricted legal conception. It is a relative truth in a political, Constitutional, representative democracy like that of the United States. As Alexis de Tocqueville says, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Thus, politics and law are congealed, but we must learn to realize that that is not so bad after all. The Court is a manifold institution, embodied by individuals with various beliefs, whose members are politically appointed and confirmed. The justices cannot make decisions in a legal vacuum, and must acknowledge the views of outside parties partly to: maintain legitimacy; include various perspectives; appease friends of the Court; and, reach more objective legal doctrines; but, mostly, to form practicable doctrines that can be implemented in the face of even political dissent.

Like all Courts, the Supreme Court has a specific jurisdiction. The jurisdiction is ultimately set by Congress and therefore if the Court makes too many judicially activist decisions that Congress disagrees with, then Congress can reconfigure the Court's jurisdiction. This is part of the general cooperation mentioned earlier as the Court realizes that it definitely has limits to its power. The Court's jurisdiction has three categories: criminal and civil cases that arise under federal law and the Constitution, cases where the U.S. government is a party, and civil cases involving citizens of different states that involve an amount of \$75,000 or more. The Court can decide on legal issues only if such legal issues exist in cases brought to the Court. Outside parties know this, and consequently act toward getting certain cases and legal issues on the Court's agenda so that their cause can be acknowledged. This part of the process is highly competitive as the Court hears less than one percent of the cases brought to it (Baum 2004, 11). Therefore, the competition must be fierce.

Broad Conception of Institutional Cooperation:

Of the many ways to understand how the Supreme Court Justices, and all other judges alike, make decisions, there may be no better explanation than "realism." Judges are only human. According to the Constitution, the Justices are non-elected, politically unaccountable, presumably non-political figures. This approach, though inaccurate, expresses the language and constrictions of the Constitution itself. For, we know that judges make mistakes and are held accountable for those mistakes in the public and political sphere, as their power is concentrated in their legitimacy. "Without the power of the sword or purse at its disposal, the Court's authority in American politics would ultimately depend on its ability to persuade" (Fleming, et al., 1997, 1225). Thus, the Court is held accountable for its decisions; the only problem is that if the Court were to grow tyrannical, seemingly, there would be no way to check its power. Actually,

this claim is specious as well, for the most concentrated level of power in the United States lies in the Congress, which can, by constitutional amendment, not only overturn Supreme Court decisions (Franklin and Kosaki 1995, 360), but also change the Court's jurisdiction, severing the Court from its very source of power. Many scholars remark, though, that this "amendment process" is arduous, and should rarely be utilized. One particular reason for this might be that if Congress begins to invalidate the Supreme Court, and the Supreme Court attempts to overturn Congress, the legitimacy of our entire legal system would be endangered. Thus, the three branches would be engaged in a power struggle that would ultimately render at least one of the three branches unequal to the other two. The remaining power would be distributed amongst the other two branches (or one, depending), and would cause a severe disparity among our system of checks and balances. With such usurpation of power, there would be deterioration of legitimacy that would implicitly brand the remaining branch, or branches, of government "tyrannical." Therefore, it would appear that a power struggle amongst our three branches of government, on any grand scale, would be undesirable. Hence, in the name of prudence, it is much more conducive to the political harmony of this country (no matter how dissonant it has been at certain times in our history), for our government to be in general agreement, and acquiesce to upholding some idea of justice. Of course, what *justice* definitively is, is subject for debate, although, it seems that a general consensus can be made that no branch of government should viciously usurp the power of any other branch in the treacherous, depraved swath of tyranny. This is something that most Americans simply understand as a truth in a constitutional democracy. So, with this conception of loyalty among the branches of government, and legitimacy of the government as a working whole, we expect the, although fallibly human, Court to make reasonable decisions.

Conclusion

The purpose of this essay is to explore part of the vast breadth of subjectivity and relativity concerning the Supreme Court as an institution and as a collection of individuals, and to seek to discover whether or not a hermetic descriptive or normative theory would suffice to encapsulate Supreme Court decision-making. It is important, when exploring subjectivity, especially in systemic contexts, to examine the area or medium most subjective: hence, the inclusion of the freedom of speech section. Understanding the relativity and subjectivity of speech itself, curbed by more speech, and then interpreted into new speech, is a fascinating journey through the viscera of legal ambiguities. We arise at another extremely important issue: how can the Court maintain legitimacy as a subjective institution and how can the individual justices maintain legitimacy as subjective individuals? Ultimately, this essay shows that no true objectivity can be reached by subjective individuals who, endowed with limited means (stock of knowledge, political pressure, et cetera), must perpetually interpret new situations within their changing environment.

The initial question that must be answered, at least provisionally here, is, "Can the Supreme Court act as schoolmaster?" The question is not one that leads to a description of the Court's role, nor does it lead to a normative promulgation. The question aims toward ability. Does the Supreme Court have the ability to act as republican schoolmaster? Of course, this does not mean in an episodic way. In the end, the Court can indeed act as republican schoolmaster to the public; and, most importantly, because it is imperfect and subjective. Nothing it says or does, and nothing the individual justices say or do, is fixed. The Court's incredible abilities lie in its nature to be fluid: to meet the demands of a technologically telescoping society with increasingly greater ideological and economic concerns. The fact that the justices are part of a vast political system

makes them closer to the people, and hence adds to their legitimacy. We should applaud them for their imperfections and embrace the institution of the Court as one designed and prepared to adapt; with the contingency that it limit its eagerness to make new law. Pragmatists too often call for swift adaptation; an evolution that would soon flee the horizon before the masses were able to overcome it, or even understand it. However, general publics do not change swiftly. In fact, (in the US particularly) they must change slowly with regard to public security and political cohesion. The republic of the United States of America is an extremely inefficient, slow moving organism that changes cyclically. An entire society that swings from left to right on an endless politico-historical pendulum only ends up where it started, all the while only an illusion of change revealed. Such "swinging" can be seen through the kinds of issues the Supreme Court deals with as epochs collide, congeal, and then fade.

It is true that the justices of the Supreme Court are highly limited by their own human nature and the subjective institutional limits of the Court's place in the political and legal schemes; and it is also true that complicating the whole picture, the justices utilize a bounded/procedural form of rationality, instead of objective rationality. However, are these not the same elements that we praise schoolmasters for? The best teachers are the ones who embrace their ability to relate to others: in short, their humanity, with all its constrictions and limitations. It shows the realization that mankind is not perfect and consciously denies the aspect of objectivity that is only a perpetually fleeting ideal. We must embrace what *is*; what is *here and now*; and that is subjectivity. Seeking objective truth in a subjective, relative existence is absurd.⁷ There is no higher,

⁷ Absurdism is a French movement that surfaced in the early to mid-twentieth century, primarily in the writings of Albert Camus, a novelist, playwright, philosopher, and political journalist. Absurdism essentially holds that mankind harbors and absurd desire to find objective truth in a world that inevitably changes. Its foundation is that the world has no particular and eternal meaning.

attainable principle; no notion of *the good*; no perfect logic; and no objective rationality. A truly inspiring teacher, inspires, partly, because he is human, and because he understands that imperfection is reality. He has the ability to make sense of the limited knowledge available to him, and to create legitimate views within the framework of bounded rationality. He can manipulate the manifold subjective elements of every given case and provide reasons for his decisions. A republican schoolmaster must also embody this aspect of humanity and subjectivity. Conclusively, the question, "Can the Supreme Court act as republican schoolmaster?" is answered; "Yes." Politically elected bodies of government cannot play this role, nor do we (*qua public*) want them to. The other branches of government are the servants of the people; they are to carry out the will of the people and heed the importunity of their constituency. Therefore, it seems that the only institution with the capability to instruct society in republicanism is the Supreme Court. There will be many times in the future when they fail to do so from society's perspective, but the Court will always redeem itself. At other times, it will simply swing with the nation on the ideological pendulum, in a historical recurrence of the same.

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